

**OPINION
71-456**

May 14, 1971 (OPINION)

Miss Margaret L. Gillen

Executive Secretary

Teachers' Insurance and Retirement Fund

RE: Teachers' Fund for Retirement - Assessments - Payment

This is in reply to your letter of April 26, 1971, in which you set forth facts and questions involving the Fund as affected by 1971 legislation. Your questions are considered in the order presented in your letter.

1. May a college instructor move from a college into the employ of a public school district this September 1971 and receive benefits as calculated under the formula for the 1971 law? This teacher has not yet retired.

"Will he have to pay any added assessments to be eligible to receive benefits under the 1971 law?"

"May I explain that we, in our office, are now preparing to calculate benefits under the 1971 law (when it becomes effective) for many teachers who have not paid assessments of 4 percent (only 3 percent as stipulated under the 1969 law) which will now be required under the 1971 law. In other words these teachers will gain in increased benefits even though they have not paid increased assessments."

House Bill 1517 becomes effective July 1, 1971. Section 15-39.1-25 of the bill contains the same provision as presently found in section 15-39-42 of the 1969 Supplement to the North Dakota Century Code. However if the teacher in question does, in fact, teach in a public school covered by the Fund after July 1, 1971, and then retires we believe he would be entitled to have his benefits calculated under section 15-39.1-10 of the new law. We can find no other basis for apportioning the benefits. If a person teaches in a public school, he and the district must pay the assessments required by the new law after July 1, 1971. Section 15-39.1-25 of the new bill appears to apply only to those teachers who are teaching in colleges, etc., at the time of retirement. If the teacher does, in fact, teach in a public school other than a college after July 1, 1971, we believe he is entitled to the benefits of the new bill. He would not be required to pay any added assessments for the past years in order to be eligible to receive benefits under the 1971 law. By the same token a public school district teacher retiring July 1, 1971, of this year is not required to pay added assessments to receive the new benefits. The college teacher teaching in a public school district must, of course, pay the assessment required by law for teachers in public school districts at that time.

2. Contributions to Teachers' Insurance and Retirement Fund.

- a. Section 15-39.1-09 of House Bill 1517 states: 'All such sums shall be paid to the state treasurer who shall set the same aside in the teachers' fund for retirement.'
- b. Section 15-39.17-1 of House Bill 1119 states: 'Following payment . . . less than one hundred dollars.'
- c. Section 15-39-21 of Senate Bill 2347 states: 'Between July 15 and August 1 of each year . . . transmitted to state treasurer.'

"Are these three sections in conflict as to the officials and offices receiving the assessments and contributions?"

* * *

"If public school districts and institutions report assessments and contribution payments on a quarterly basis, are such payments to be received in this office as of September 30, 1971, or would units be given possibly 30 days 'grace'?"

House Bill 1119 amends and reenacts certain sections of chapter 15-39 and creates a new section thereof. The bill was approved by the governor on March 29, 1971. Senate Bill 2347 also amends and reenacts certain sections of chapter 15-39 and creates a new section thereof. This bill was also approved March 29, 1971. House Bill 1517 specifically repealed chapter 15-39 of the North Dakota Century Code and created a new chapter, chapter 15-39.1, in lieu thereof. This bill was approved by the governor on March 27, 1971. House Bill 1119 and Senate Bill 2347 were finally enacted by the Legislative Assembly before House Bill 1517 was finally enacted by the Assembly. We note the provisions of section 1-02-09 of the North Dakota Century Code which provides:

"IRRECONCILABLE STATUTES DURING THE SAME SESSION. Whenever the provisions of two or more statutes passed during the same session of the legislative assembly are irreconcilable, the statute latest in date of final passage by the legislative assembly, irrespective of its effective date, shall prevail from the time it becomes effective."

Section 1-02-09.1 of the 1969 Supplement to the North Dakota Century Code provides:

"MULTIPLE AMENDMENTS TO THE SAME PROVISION, ONE WITHOUT REFERENCE TO ANOTHER. If amendments to the same statute are enacted at the same or different sessions of the legislature, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment prevails."

The provisions which you cite in your question are irreconcilable, i.e., they deal with exactly the same subject matter. In view of

this fact, we believe, with regard to public school teachers, that the provisions of House Bill 1517 must control with respect to the time and method of remitting the assessments. However, assessments for lay teachers in private schools would be remitted in accordance with Senate Bill 2347.

3. Retirement Coverage of Nonpublic 'Lay' Teachers

"Senate Bill 2347 effective July 1, 1971, provides for coverage under the Teachers' Fund for Retirement. We have had several questions from lay teachers in private schools regarding the procedure as to coverage under our Fund.

- a. Would these lay teachers enter into a written agreement with the private school board regarding the payment of assessments and contributions?
- b. Would such contracts have to be drawn up prior to the beginning of the school term of 1971-72?
- c. Would lay teachers (they have already earned years of credit by teaching in the public schools of the state and have never retired) be eligible, at the time of retirement, to benefit under either the 1969 law or the 1971 law?"

Before we consider the specific questions presented, we must consider whether, in view of the history of the bills considered, Senate Bill 2347 is effective. Senate Bill 2347 was finally enacted by the Legislature on March 11, 1971. It amended portions of chapter 15-39. House Bill 1517 was finally enacted by the Legislature on the last day of the Legislative Assembly. It completely repealed chapter 15-39. House Bill 1517 was signed by the governor on March 27, 1971, whereas Senate Bill 2347 was signed by the governor on March 29, 1971. Senate Bill 2347 amends and reenacts portions of chapter 15-39 which were repealed by House Bill 1517. While House Bill 1517, which repealed chapter 15-39, was the last bill finally enacted by the Legislative Assembly, it was not the last bill finally enacted since the governor's signature is considered to be a part of the legislative process. In addition we cannot construe the enactment of Senate Bill 2347 to be a completely idle act on the part of the Legislature or the governor. Since Senate Bill 2347 amends and reenacts portions of chapter 15-39, we believe they must be given effect. Therefore we believe lay teachers in private schools may become members of the Fund as provided in Senate Bill 2347. If they do so, however, they are obligated to pay assessments and are entitled to benefits only under the provisions of chapter 15-39 and not under the provisions of the new retirement act as contained in House Bill 1517.

With respect to your specific questions in question number 3:

- a. "Senate Bill 2347 enacts section 15-39-14.1 which provides that the nonpublic school teacher may elect to become a member of the Fund and must notify the nonpublic school in writing of his decision and authorize the school to deduct from each payment of

salary due such teacher the assessments due monthly to the Fund. The nonpublic school must then notify the teacher of its decision to either pay the employer assessments or not to pay such assessments. If the nonpublic school declines to pay the assessments, it is to be paid by the teacher in addition to the assessment deducted from his salary. In other words the teacher, if the nonpublic school refuses to pay the employer assessment, must pay both the employer and the teacher assessments. The form of the notice by the teacher to the nonpublic school is a matter for the nonpublic school and the teacher to determine. The statute only requires that it be in writing and that it authorize the school to deduct the assessments from the salary of the teacher."

- b. "It would certainly appear that the determination of this matter should be made before the school year begins."
- c. "If the teacher had taught a portion of the time in the public schools, thus becoming a member of the Fund, the teacher would be entitled to retire under either the provisions of the current law or the new law effective July 1, 1971. See section 15-39.1-03 of House Bill 1517. However, the years of teaching in nonpublic schools prior to July 1, 1971, would not be included for purposes of computing the formula prescribed in section 15-39.1-10 of House Bill 1517 if the teacher determines to retire under the new act."

4. Disability Status

"We have a teacher who was determined to be disabled. May 30, 1970, at age 39. Reason for disability determination - Loss of voice - because medication and shots to counteract attack of 'flu.' This teacher has been receiving a disability annuity since May 30, 1970. She now wishes to render services as a teacher of a 'homebound' child and earn less than \$1680."

- a. "My question is as follows: If she is able to teach one child, is she also able to render services in a regular classroom?"

Since the person in question obviously is receiving a disability annuity under the present law rather than the new law, this matter would be governed by section 15-39-27(2) of the North Dakota Century Code. This section provides that the total disability is to be determined by the board after an examination of such teacher has been made by two physicians appointed by the board. The section further provides that payment of the annuity shall continue for and during such period of disability and terminate with the month following recovery from such disability. The statute further provides that the board shall ascertain by inspections manually or as often as necessary to determine the disability status of an annuitant. The question of whether the person is totally disabled thus appears to be more of a medical question or a question of fact than it is a legal

question. As such we do not believe it proper to comment on same.

- b. "Is this a determination to again be made by two physicians upon reexamination?"

The statute does not require the reexamination to be made by two physicians (as opposed to the original finding of disability) but provides for annual inspections by the board. The board could determine to use the finding of the physicians upon reexamination and this would seem to be the most logical practice to follow since if the findings of the board are challenged it would appear the opinion of physicians would be of prime importance.

- c. "Is she at the present time determined to have recovered from her disability?"

See answer to question 4(a) above. While it might be argued with considerable logic that a person able to work part-time is not "totally disabled" within the meaning of the statute, this is a matter which must be determined by the board and the physicians appointed by the board.

5. Reinstatement of years of teaching upon repayment of a refund.
 - a. "May a teacher, who has never retired under the Fund, withdraw all assessments plus interest, later repay all assessments plus interest to the Fund and then apply for benefits (teacher has enough years to qualify) under the Fund without teaching again in the state? In other words does repayment reinstate all prior years and render teachers eligible for benefits immediately?"

Section 15-39-40 of the 1969 Supplement to the North Dakota Century Code permits a teacher who has received no benefits from the Fund to withdraw assessments and if "such teacher after having withdrawn from the Fund . . . shall again become a teacher in the public schools or state institutions of this state, he may, prior to or at the time of retirement . . ." elect to repay the assessments and claim credit for the prior years of teaching. In view of this provision it would appear the teacher must again teach in this state before being permitted to return the assessments and claim retirement benefits under the Fund.

Section 15-39.1-15 of House Bill 1517 provides:

"WITHDRAWAL FROM FUND - RETURN TO TEACHING. Any teacher who has withdrawn from the fund as set forth in this chapter may, upon returning to teaching in this state, regain credit for prior teaching by repaying to the fund, with interest, at a rate to be set by the board, the amount which was returned to him on withdrawal."

Thus both the current law and the new law require the teacher to have resumed teaching in this state before being able to repay the assessments and regaining credit for prior teaching.

I trust this will adequately set forth our views on the matters presented.

HELGI JOHANNESON

Attorney General