

**OPINION  
73-362**

May 29, 1973 (OPINION)

Mr. Tor A. Hegland  
Executive Director  
North Dakota Employees  
Retirement System  
Box 1214  
Bismarck, ND 58501

Dear Mr. Hegland:

This is in reply to your letter of May 22, 1973, relative to Senate Bill 2282 enacted by the 1971 Legislature. You state the following facts and questions:

"The 1971 Legislature passed Senate Bill No. 2282 allowing membership in the State Retirement System for employees of the Garrison Conservancy District and the district health units.

"The Garrison Conservancy District applied for membership effective July 1, 1971, but we never heard anything from the district health units and assumed they were not interested in membership.

"I have now been told that the First District Health Unit in Minot plans to apply for membership effective July 1 of this year and the question of prior service benefit for eligible employees has come up. Section 3 of Senate Bill No. 2282 reads as follows:

'LEGISLATIVE INTENT. It is the intent of the Legislative Assembly that employees coming into the plan by virtue of this Act shall be granted the same prior service benefits which they would have received, had they enrolled under the original State Employee Retirement Act, provided that it is actuarially possible.'

"Since the First District Health Unit delayed application for membership in our Retirement System by two years, are otherwise eligible employees of the health unit entitled to prior service benefits?"

Senate Bill 2282 of the 1971 Legislative Assembly is found in Chapter 515 of the 1971 Session laws. It amends subsections 3 and 6 of Section 54-52-01 and Section 54-52-02 of the North Dakota Century Code. In addition to enactment of Section 3 of the bill as quoted above, the bill amended the named Sections. The provisions, as amended, follow with the additional language underlined:

"54-52-01. DEFINITION OF TERMS. As used in this chapter, unless the context otherwise requires:

\* \* \*

3. 'Employee' shall mean any person employed by the state of North Dakota, or by a county or city thereof, or the Garrison conservancy district, or district health units, or any noncertified employee of any school district, including all public school districts and the Fargo school district, whose compensation is paid out of state, county, city, or school district funds, or funds controlled or administered by a state department, county, city, or school district, or paid by the federal government through any of its executive or administrative officials; noncertified employees of a school district shall mean those employees not eligible to participate in the teachers' insurance and retirement fund;

\* \* \*

6. 'Permanent employee' shall mean a state, county, city, Garrison conservancy district, district health units, or noncertified school district employee who has been employed by the state, county, city, or school district for five continuous months, and is employed for more than twenty hours per week and more than five months each year;

\* \* \* " (underlining ours)

"54-52-02. FORMULATION OF PLAN - EXCLUSION OF EMPLOYEES COVERED BY PLANS IN EXISTENCE. All departments, boards, institutions, commissions, or agencies of the state of North Dakota, the Garrison conservancy district, and the district health units, hereinafter referred to as agency, shall participate in a retirement system which will provide for the payment of benefits to state employees or to their beneficiaries thereby enabling the employees to care for themselves and their dependents and which by its provisions will improve state employment, reduce excessive personnel turnover and offer career employment to high grade men and women. Employees presently covered by a pension plan or retirement plan to which the state has contributed, except social security, shall not be eligible for duplicate coverage." (underlining ours)

Before we reach the precise question raised in your letter, we believe it is necessary to note that coverage for the Garrison Conservancy District employees and District Health Unit employees is not optional. Thus, the legislature included them within the provisions of Section 54-52-02 of the North Dakota Century Code which makes it mandatory for employees to be members of the retirement system. This is not similar to the situation in which the individual counties, school districts, and cities could elect whether to become members of the retirement system. Thus, the legislature did not include the Garrison Conservancy District and the health units within the provisions of Sections 54-52-02.1 through 54-52-02.2 which governs the counties, cities, and school districts. Whether the health units were interested in membership or not is immaterial from the legal standpoint. The enactment of Senate Bill 2282 required

them to become members of the retirement system just as state employees are required to become members after the necessary requirements as to length of employment, etc., have been met.

While not specifically stated, we assume the legislature intended to give the Garrison Conservancy District and the district health unit employees who were employed as of the effective date of the act, July 1, 1971, the same option the state employees had when the retirement system was initially established. Thus, Section 54-52-05 of the North Dakota Century Code provides in part:

"Every eligible permanent state, county, city, or noncertified school district employee concurring in the plan shall so state in writing and all future eligible employees shall be participating members." (underlining ours)

Thus, we would conclude that any Garrison Conservancy District employee or any district health unit employee who was employed as of July 1, 1971, had the opportunity to accept or reject membership within the retirement system. However, any person employed since that time and who meets the definition of an "eligible permanent employee" as set forth in subsections 2, 3, and 6 of Section 54-52-01 must, in our opinion, become a member of the retirement program. While we have no specific knowledge of the fact, we assume there have been persons employed by one or more of the district health units since July 1, 1971, who have met that criteria and who should have become members of the fund. This applies to all health districts, not only the First District Health Unit.

With regard to your specific question, we believe the employees of the Garrison Conservancy District and the district health units are, if actuarially possible, entitled to the same prior service credits as provided other state employees pursuant to Section 54-52-19 of the North Dakota Century Code. However, we are also aware that, pursuant to the provisions of Section 54-52-10, a distribution from the Administrative Expense and Benefit Fund was made to holders of prior service credits and to individual accounts. It is obvious that it is now actuarially impossible for the employees of the Garrison Conservancy District and the district health units to share in such distribution. However, if it is actuarially possible for those employees to receive the same prior service benefits as other state employees receive pursuant to Section 54-52-19, they are entitled to same prospectively. In this respect we note the distributions made pursuant to Section 54-52-10 are not considered prior service benefits as provided for in Section 54-52-19.

Sincerely yours,

Allen I. Olson

Attorney General