

**OPINION
73-582**

July 27, 1973 (OPINION)

Miss Margaret L. Gillen
Executive Secretary
Teachers' Fund for Retirement
P.O. Box 486
Mandan, ND 58554

Dear Miss Gillen:

This is in reply to your letter of July 25, 1973, relative to Senate Bill 2086 enacted by the 1973 Legislative Assembly. You state the following facts and questions:

"May we have an opinion as to what date would be the effective date to determine whether or not college instructors are vested members, see Chapter 133, 1973 S.L., Senate Bill 2086, Alternate Retirement Program for Higher Education Section 1, Subsection 13(a)(b)(c), of the Teachers' Fund for Retirement.

"What date would be the effective date to determine whether or not college instructors would have ten years of service as a 'teacher' under the Teachers' Fund for Retirement?

"May we explain that on April 18, 1973, we had requested an interpretation on this question and that on April 25, 1973, we had received an interpretation. Please see attached interpretation dated April 25, 1973."

Senate Bill 2086, Chapter 133 of the 1973 Session Laws, was codified as Section 13 of Section 15-10-17 of the North Dakota Century Code. This section provides as follows:

"The state board of higher education shall have all the powers and perform all the duties necessary to the control and management of the institutions described in this chapter, including the following:

* * *

13. To establish a retirement program as an alternative to Chapter 15-39.1 for employees of institutions under its control who are not vested members of the teachers' fund for retirement subject to the following guidelines:
 - a. Benefits under the program shall be provided through annuity contracts purchased by the board but which shall become the property of the participants;
 - b. The cost of the annuity contracts shall be defrayed by equal contributions of the participant and the employer institution; and
 - c. Eligible employees appointed before July 1, 1973, shall

participate in the alternate retirement program only by their individual election. When the electing eligible employee is a member of the teachers' fund for retirement, he may withdraw assessments with interest therefrom as contemplated by section 15-39.1-20 to deposit for his account in the alternate program.

"The board shall provide for the administration of the alternate retirement program and establish rules and regulations therefor consistent with the foregoing guidelines. Nothing in this subsection shall be construed in derogation of any existing retirement programs approved by the board."

Senate Bill 2086 was not an emergency measure. It therefore became effective on July 1, 1973. While the bill does grant the Board of Higher Education the right to adopt the program and establish rules and regulations therefor such rules and regulations must be consistent with the guidelines of the bill. One of the guidelines is that "eligible" employees appointed before July 1, 1973, participate in the alternate retirement program only by their individual election. The authority for the Board to establish the program is only for those members who are not vested members of the Teachers' Fund for Retirement. Since this is the only authority provided by the bill, the board may not establish a program for those persons who are vested members of the Teachers' Fund for Retirement. While the Board, in adopting a program, may adopt a retroactive date prior to July 1, 1973, for those members who are not vested as of July 1, 1973, we do not believe they may adopt a retroactive date for those members who are vested as of July 1, 1973. Since the bill did not become effective until July 1, 1973, we believe the term "vested" must be determined as of that date also.

Section 15-39.1-11 of the North Dakota Century Code provides:

"RIGHTS VESTED WHEN. When any teacher has paid assessments for a period of ten years, he shall have a vested right to a retirement annuity but he shall receive no payments hereunder until he attains the age of sixty-five years unless he shall elect to claim an early retirement as hereinafter set forth."

Section 15-39.1-25 of the North Dakota Century Code provides, with respect to college teachers, that their rights under the Fund are frozen as of July 1, 1967. However, we note that the Legislature in 1965 (Chapter 142, 1965 S.L.) adopted subsection 4 of Section 15-39-27 to provide:

"Any teacher who is employed as such in a public school or state institution and who has complied with the provisions of this chapter may retire and receive the annuity provided for in section 15-39-28 in the following cases:

* * *

4. After a period aggregating ten years of service as a teacher in the public or nonpublic schools or state institutions of this state, a teacher who has attained the age of fifty-five years shall be eligible to receive an

annuity ratably reduced in proportion to the number of years thereof.

* * *"

Thus, even prior to the 1967 legislation freezing the college teachers' right in the fund as they existed as of July 1967, the college teachers who taught for ten years were vested. These same provisions were carried over into the new law contained in Chapter 15-39.1.

In direct reply to your question, the effective date for determining whether college teachers are vested in the Teachers' Fund for Retirement would be July 1, 1973. This is consistent with the letter addressed to you on April 25, 1973. However, for those teachers who are not vested as of July 1, 1973, the board of higher education may adopt a retroactive date for determining eligibility for the alternate retirement program established by the board.

Sincerely yours,

ALLEN I. OLSON

Attorney General