

**LETTER OPINION**  
**80-79**

January 24, 1980 (OPINION)

Mr. Howard J. Snortland  
Superintendent of Public Instruction  
State Capitol  
Bismarck, North Dakota 58505

Dear Mr. Snortland:

This letter is in response to your request of January 2, 1980, to this office in which you request our opinion on the following question:

May a school district levy for social security and teacher retirement funds for the school district's contracted share of teachers' salaries to the multidistrict special education centers?

You indicate that the multidistrict special education boards, created by the 1979 Legislature, have no taxing authority and that the cost for the employment of teachers who can be employed by the boards will be borne by the school district.

Section 15-59.2-01 of the North Dakota Century Code authorizes school districts to be organized into multidistrict special education programs. That section provides as follows:

15-59.2-01. MULTIDISTRICT SPECIAL EDUCATION PLAN. School districts may be organized into multidistrict special education programs for purposes of planning and coordinating special education and related services. The multidistrict program board shall submit a plan for implementation by July 1, 1980, for such organization to the superintendent of public instruction, who shall approve or disapprove any plan submitted. Such plan and any amendments shall meet the regulations and guidelines as established by the superintendent of public instruction. School districts not participating in a multidistrict special education program shall submit a plan for providing special education and related services. The school board of any school district which has been excluded from a multidistrict special education program and which wishes to have its school district included in such program may petition the superintendent of public instruction, who shall consider such petition prior to approving any plan submitted pursuant to this section or section 15-59.2-05. Appeals may be made to the state board of public school education.

Section 15-59.2-02 provides that representatives on the boards are to be appointed by the school boards and states in full as follows:

15-59.2-02. ORGANIZATIONAL PLAN - CONTENTS. The organizational plan to be submitted to the superintendent of public instruction shall include the number of members on the

multidistrict special education board, how each district will be represented, selection of officers, terms of office, meeting times, requirements for a quorum, and such other items as may be required by regulation of the superintendent of public instruction. Representatives on the multidistrict board shall be appointed by the school boards of the participating districts. Compensation for board members shall be the same as that allowed school board members pursuant to section 15-29-05.

The powers and duties of the multidistrict board are set out in section 15-59.2-05 which states as follows:

15-59.2-05. POWERS AND DUTIES OF THE MULTIDISTRICT BOARD. The powers and duties of a multidistrict special education board shall be as follows:

1. To prepare, on behalf of the participating school districts, an annual plan for providing special education and related services, such plan to be submitted to the superintendent of public instruction for approval.
2. To receive state and federal funds and distribute them to each of the participating school districts.
3. To employ personnel to carry out administrative, itinerant instruction, coordinative, and related services, who shall have the same statutory rights as school district employees. Rights which teachers shall have during the transition as set forth herein shall include, but not be limited to, those rights available under sections 15-47-27 and 15-47-38.
4. To receive and expend any private, local, state, or federal funds for the payment of personnel and for expenses of the multidistrict board.
5. To contract with school districts within and without the multidistrict area to provide special education and related services.

Additionally, the regulations of the Department of Public Instruction provide in the August 1979, Supplement at Section 1, part (B)(II), that the organizational plan submitted shall include:

1. The specific method of apportioning all administrative and program costs between local districts participating in the multidistrict plan.

We initially note that we have searched the legislative committee minutes for Senate Bill 2056, which included chapter 15-59.2, and find nothing to indicate that this question was ever considered.

The first part of your question deals with the authorization for a school district to levy for social security payments when the teacher will not be employed by the district. Sections 52-09-08(c) and 52-09-27 together with chapter 52-10 provide the authority for a political subdivision to levy a maximum of forty mills to meet its

obligations under chapters 52-09 and 52-10 of the North Dakota Century Code for federal social security. Subdivision c of 52-09-08 provides as follows:

- c. The political subdivision is hereby authorized and directed to levy a tax sufficient to meet its obligations under the provisions of this chapter, up to a maximum levy of forty mills on each dollar of the net assessed taxable valuation of the political subdivision, over and above any levy limitations now prescribed by law for such political subdivisions. Any obligations under this chapter over and above the amount raised by the maximum levy permitted in this section shall be paid out of the general fund of the political subdivision. (Emphasis added).

Section 52-09-27 and chapter 52-10 provide for a political subdivision to meet its obligation under chapter 52-10 for federal social security. (It should be noted that the current social security obligations of "political subdivisions" for new employees will be under chapter 52-10 which "federalized" the old state system under chapter 52-09.

An employer has obligations where there is an "employment" relationship. "Employment" is defined in section 52-10-02(b)(2) as meaning "any service performed by an employee in the employ of . . . any political subdivision." The answer to the first part of your question then depends on whether there is an employer-employee relationship where the multidistrict board employs the teacher but the school district pays the salary via contracts with the multidistrict board.

Generally, the legal relationship of an employer and employee must exist for social security acts to apply. 81 C.J.S. Social Security and Public Welfare, Section 19, p. 45. The courts will look to the usual common law rules and the overall fact situation in any specific case to determine if such relationship exists. Id. at Section 20, p. 47. "Control" over the employee is the single most important factor. Id. at Section 21, p. 49. An absence of the power to discharge an employee is often fatal to the existence of the relationship. Id.

This question, that is, the existence of the common-law relationship of employer-employee, is often a question in North Dakota workmen's compensation cases. The Workmen's Compensation statutes define an employee as one under a "contract of hire." Section 65-01-02(5). "Control" is one of the most important tests to determine such status. Burkhardt v. State, 78 N.D. 18, 53 N.W.2d. 394 (1952). Other factors to be considered are the right to hire and discharge, the manner of payment, attitude and intention of the parties, the furnishing of supplies and materials, and whether the work is part of the regular business of the employer. Id.

In the situation you describe, the multidistrict board would apparently hire and fire the teachers. You do not further explain what might be the supervision situation where such a teacher was out in one of the school districts performing duties. Although the money to pay the teacher's salary may come from the districts, this is not

necessarily the case as section 15-59.2-05(4) empowers the multidistrict board to receive "any private, local, state, or federal funds." Possibly, members of the multidistrict board might not even be members of the board of the school district. In fact, we understand that many of the plans which you have already received have superintendents as the board members. Under these factors, where the teacher would be employed by the multidistrict board directly, it would seem that the lack of the power in the school districts to hire and fire would be a serious impediment to finding the necessary control and therefore an existence of the "employer-employee relationship" necessary under sections 52-09-20(b) and 52-09-08(c), "employment" under section 52-10-02(b)(2) insofar as the legal relationship between the school districts and teachers is concerned. We recognize that this is a close question in that, as a practical matter, a special education teacher would probably not be hired unless acceptable to the participating school district. The school district would not, then, have the authority to use the forty-mill levy for payment of that teacher's social security unless the teacher was employed directly by the school district. This is not to say that the contract with the school district for its share of the cost of the teacher could not include a total value which would be enough to cover these amounts. The school district would have to fund from other sources, such as the five-mill levy under section 15-59-08.

In our opinion of January 16, 1969, to the executive director of the Old Age and Survivor Insurance System, we found that teachers employed by the "Civil Defense Adult Education Agency," who were selected with the assistance of local superintendents, were under the control of that agency and wages paid to them were wages paid to an employee. The situation at issue here is analogous in that the teacher is employed by the multidistrict board even though hired with the assistance of local superintendents and teaching in various districts.

The answer to your first question creates a second two-part question which is whether, since the school district cannot levy for social security payments to the teachers employed by the multidistrict, the multidistrict board may make such a levy, or if it may not, may it still contribute to the social security system? The answer to this question depends in the first instance upon whether the multidistrict is a "political subdivision" under chapters 52-09 and 52-10. Section 52-10-02(f) defines "political subdivision" as including:

an instrumentality of a state, of one or more of its political subdivisions, or of a state and one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the state or subdivisions;

In our letter of May 3, 1978, to the executive director of the North Dakota Employment Security Bureau, we found that multidistrict vocational education centers created pursuant to chapter 15-20.2 of the North Dakota Century Code were "political subdivisions," for the purposes of chapters 52-09 and 52-10. Additionally, our opinion of

October 27, 1961, dealing with soil conservation districts found these units to be "political subdivisions." The same reasoning is applicable in this case, and therefore the multispecial education districts are "political subdivisions" under those chapters. Copies of the aforementioned letter and opinion are enclosed.

Although you state in your letter that the multidistrict boards have no levy authority, one would have to ask whether, since the district is a "political subdivision," the board could not levy forty mills pursuant to section 52-09-08(c). The North Dakota Supreme Court has decided, in *Vallely v. Board of Park Com'rs*, 16 N.D. 25, 111 N.W. 615 (1907), that an appointed board cannot without the consent of the people levy a tax as such authorization would be an unconstitutional delegation of power. Since the multidistrict board is appointed it can, therefore, not levy the forty-mill tax for social security purposes. It may, however, participate in the system and submit a plan for payment pursuant to section 52-10-05.

The second part of your question concerns the teachers' retirement fund. section 15-39.1-28 of the North Dakota Century Code sets out authorization for a forty-mill levy and provides as follows:

15-39.1-28. MILL LEVY FOR TEACHERS' RETIREMENT. Any school district by a resolution of its school board may levy a tax of not to exceed forty mills on the assessed taxable valuation within the district, the proceeds to be used for the purposes of meeting the district's contribution to the fund arising under this chapter. The mill levy permitted by this section shall be in addition to any tax levy limitations now prescribed by law.

Those obligations for contributions will exist where a teacher is employed by the school district. section 15-39.1-09. Section 15-39.1-04(1)(a) defines a teacher as follows:

- a. All persons who are certified to teach in this state who are employed either in teaching or as a teacher's aide for more than ten days in any one school year in any state institution or by any school board or other governing body of any school district of this state, including superintendents, assistant superintendents, business managers, principals, assistant principals, and special teachers employed in any state institution or in the school system of any school district in this state, except that the superintendent and assistant superintendent of the Grafton state school may be brought within this definition at their option.  
(Emphasis added).

Is such a teacher, who is hired by the multidistrict board, "employed" by the school district? We think not. We have previously stated in a May 7, 1971, letter to the Barnes County State's Attorney that:

While the Legislature may intend the county to be able to levy the mills for teachers employed by county boards of special education, we cannot find that intent expressed in section

15-39.1-28 and cannot construe that section to permit the counties to make such a levy.

Although this letter dealt with counties and county boards of special education under chapter 15-59.1 of the North Dakota Century Code, the same reasoning would be applicable to the school districts and multidistrict boards. We also do not think the language "special teachers employed. . .in the school system" could be construed to create any exception to this result.

In conclusion, where control over the teacher is vested in the multidistrict board by the facts of a given situation, such as the right to hire and fire, etc., the school district would not be authorized to use the forty mill levy authority of section 52-09-08(c) or the forty mill levy of section 15-39.1-28 to meet their contracted share of the multischool district teacher's social security or fund contributions.

We hope the foregoing has been sufficient for your purposes.

Sincerely,

ALLEN I. OLSON

Attorney General