

Date Issued: January 26, 1982 (AGO 82-3)

Requested by: Alan Person, Executive Director, North  
Dakota Public Employees Retirement System

- QUESTION PRESENTED -

Whether employees of the mental health and retardation service units are eligible to obtain credit for service with such units prior to January 1, 1982, when the functions, powers, and duties of the units were assumed by the Department of Human Services and the employees of the units became state employees.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the employees of the mental health and retardation service units are not eligible to obtain service credit for retirement benefits unless the governmental unit which employed them was a participant in the Public Employees Retirement System.

- ANALYSIS -

Chapter 54-52 of the North Dakota Century Code and Article 71-02 of the North Dakota Administrative Code govern participation in and the calculation of credit toward retirement benefits in the Public Employees Retirement System (PERS). Participation in PERS is limited to governmental units. Sections 54-52-02 and 54-52-02.1, N.D.C.C. The term "governmental unit" is defined in section 54-51-01(6), N.D.C.C.:

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

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6. "Governmental unit" means the state of North Dakota or a county or city thereof, a school district, including the Fargo school district, or any combination thereof, a district health unit, and the Garrison Conservancy District.

The only governmental unit which must participate in PERS is the state. Section 54-52-02, N.D.C.C. Participation in PERS by governmental units other than the state is optional. In order to participate in PERS, governmental units other than the state must comply with the procedures set forth in sections 54-52-02.1 and 54-52-02.2, N.D.C.C., and enter an agreement with the State Retirement Board.

This office has described the mental health and retardation service units created pursuant to chapter 25-12, N.D.C.C., as "political subdivisions" and "administrative bodies" of the cities or counties which created them. Attorney General's Opinion dated March 22, 1979,

to Representative Tish Kelly and an undated letter to Representative Aloha Eagles. In accordance with the previous statements of this office, employees of the mental health and retardation service units are arguably employees of the counties or cities creating the units; they were not employees of the State of North Dakota prior to January 1, 1982, when the duties, powers, and functions of the service units were assumed by the Department of Human Services.

Section 54-52-17(1), N.D.C.C., states in part as follows:

54-52-17. FORMULATION OF PLAN....

1. Participating members shall receive credit for full-time employment or its equivalent from the date they attain eligibility until their normal retirement date or postponed retirement date, as defined in this section.... (Emphasis supplied).

Section 54-52-01(7), N.D.C.C., defines participating members as "all eligible employees who through payment into the plan have established a claim against the plan." Since only employees of governmental units participating in the plan make a payment into the plan in accordance with the provisions of chapter 54-52, N.D.C.C., only such employees are allowed to receive service credit toward retirement benefits.

There is no provision in state law or the regulations of the Retirement Board which authorizes the Board to allow new state employees who were previously employed by governmental units which did not elect to participate in PERS to obtain credit toward retirement benefits from PERS as a result of their previous employment with a nonparticipating governmental unit. For this reason employees of mental health and retardation service units which were political subdivisions or administrative bodies of counties which elected not to participate in PERS are not eligible to obtain credit for the period of their service with such units because the allowance of service credit for retirement benefits is conditioned upon participation in PERS as a result of service with a participating governmental unit and employee and employer contributions to the plan. Those employees, if any, who were employed by mental health and retardation service units which were political subdivisions or administrative bodies of governmental units which elected to participate in PERS may be eligible to repurchase credit for service to such units in accordance with section 54-52-02.6, N.D.C.C., if such employees withdrew from PERS at some point in time.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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