

Date Issued: March 2, 1982 (AGO 82-14)

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

- QUESTION PRESENTED -

Whether the public employee's retirement assessment as provided for in section 54-52-05 of the North Dakota Century Code may be deducted from a payment for accumulated annual leave made to a public employee after that employee's normal retirement date or postponed retirement date.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the public employee's retirement assessment as provided for in section 54-52-05, N.D.C.C., may not be deducted from a payment for accumulated annual leave made to a public employee after that employee's normal retirement date or postponed retirement date.

- ANALYSIS -

Section 54-52-05, N.D.C.C., provides:

54-52-05. MEMBERSHIP AND ASSESSMENTS. 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. An eligible employee shall be a permanent employee whose services are not limited in duration and who is filling an approved and regularly funded position, who is employed by the state, county, city, or school district, has reached age eighteen, and is employed for more than twenty hours per week for more than five months each year. Each member shall be assessed and required to pay monthly four percent of the monthly salary or wage paid to him, and such assessment shall be deducted and retained out of such salary in equal monthly installments commencing with the first month of employment. (Emphasis supplied).

Section 54-52-06, N.D.C.C., requires each governmental unit to contribute to the public employees' retirement system "an amount equal to five and twelve-hundredths percent of the monthly salary or wage of a participating member. . . ." Section 54-52-01(16), N.D.C.C., states that "'Wages' and 'salaries' means the actual dollar compensation excluding overtime paid to or for an employee for his services."

Accumulated annual leave which is not used prior to a participating member's normal retirement date or postponed retirement date is not included when calculating that member's retirement benefits under the program as the employment period for which credit may be received is specifically set out by statute. Subsections 54-52-17(1) and (3),

N.D.C.C., provide in pertinent part:

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).

* * *

3. Retirement dates shall be defined as follows:
 - a. Normal retirement date is the first day of the month next following the month in which the member attains the age of sixty-five years.
 - b. Postponed retirement date is the first day of the month next following the month in which the member, on or after July 1, 1977, actually severs or has severed his employment after attaining the age of sixty-five years.

* * *

Because accumulated annual leave is not included in calculating the retirement benefits of a participating member retiring under the public employees' retirement system and thus no credit is received by the member nor is an assessment deducted from the payment, it is my opinion that payment for accumulated annual leave made to a public employee after that employee has terminated employment shall be treated in like manner.

Further, section 71-02-03-01 of the North Dakota Administrative Code states that "A member shall receive a month of service credit during each month in which the member works at least twenty hours per week." Because the individual will not receive service credit after the termination date, there should be no retirement assessment deducted.

- 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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