

Date Issued: January 28, 1983 (AGO 83-6)

Requested by: Scott Engmann, Executive Secretary
North Dakota Teachers' Fund for Retirement

- QUESTION PRESENTED -

Whether retirement assessments, as provided for in section 15-39.1-09 of the North Dakota Century Code, should be deducted from a payment for accumulated annual leave made to a fund member after separation from covered employment, normal retirement date, or postponed retirement date.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that retirement assessments provided for in section 15-39.1-09, N.D.C.C., should not be deducted from a payment for accumulated annual leave.

- ANALYSIS -

Section 15-39.1-09, N.D.C.C., provides:

15-39.1-09. MEMBERSHIP IN FUND AND ASSESSMENTS. Every teacher shall be a member of the fund and shall be assessed upon his salary six and twenty-five hundredths percent per annum, which shall be deducted monthly and paid to the state treasurer by the disbursing official of the governmental body by which the teacher is employed. Every governmental body employing a teacher shall pay to the state treasurer a sum equal to six and twenty-five hundredths percent per annum of the salary of each teacher employed by it. All such sums shall be certified by the disbursing official and shall be paid quarterly to the state treasurer who shall set the same aside in the teachers' fund for retirement. (Emphasis supplied).

Section 15-39.1-09, N.D.C.C., provides for a retirement assessment upon salary. Clearly, payment for accumulated annual leave cannot be classified as salary for the month prior to the payment.

This payment is not made for compensation for work performed by the employee during that month, but is rather a payment in lieu of a fringe benefit which has accrued to the employee during his term of service as a teacher. Additionally, the payment of accumulated annual leave cannot be considered a payment of salary for the month following the payment.

Section 15-39.1-14, N.D.C.C., provides:

15-39.1-14. RETIREMENT NOT MANDATORY - WHEN RETIREMENT OCCURS. Nothing in this chapter shall be construed as requiring retirement at any specific age. If the teacher elects to teach beyond age sixty-five and is permitted to do so by the body for whom he works, he shall continue to earn credits at the same rate as prior to the age of sixty-five. Retirement shall be deemed to have occurred and benefits shall be payable from the date of last teaching prior to the filing of a written application for retirement benefits, except in the case of a teacher whose rights in the fund have become vested but who chooses not to retire prior to age sixty-five, in which case the benefits shall be paid from the date such teacher attains the age of sixty-five. (Emphasis supplied).

Therefore, a teacher should not be assessed for a period during which teaching was not performed.

Finally, it appears that if the teacher had taken annual leave as it accrued, that teacher would not be subject to further assessments upon termination or retirement. Simply, the assessments had already been made for those months of service during which annual leave was accrued. This is true regardless of whether the annual leave was taken or accumulated. Therefore, whether annual leave is used as it accrues, or is accrued and taken in a single period upon termination, or is converted to cash upon termination, that annual leave has presumably been previously assessed and is not subject to further assessment. Likewise, no additional service credit should be granted for that annual leave.

- 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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