

LETTER OPINION
94-L-5

January 11, 1994

Mr. Glenn Pomeroy
Commissioner of Insurance
Chairman, State Personnel Board
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Commissioner Pomeroy:

Thank you for your November 16, 1993, letter asking six questions concerning teachers employed at the North Dakota Industrial School (NDIS), the North Dakota School for the Deaf (School for the Deaf), and the North Dakota School for the Blind (School for the Blind), and the ramifications of their potential exclusion from the North Dakota State Employees Personnel Classification System under N.D.C.C. ch. 54-44.3.

Your first question asks whether teachers employed by the three state institutions have the right to organize and bargain under N.D.C.C. ch. 15-38.1. For the reasons stated below, it is my opinion that N.D.C.C. ch. 15-38.1 does not grant teachers employed by the three state institutions the right to organize and bargain.

N.D.C.C. ? 15-38.1-01 states the purpose of N.D.C.C. ch. 15-38.1 as promoting personnel management and relations between "school boards of public school districts and their certificated employees." The rest of the chapter concerns "school boards," and negotiating with teachers or administrators employed by those boards. The three institutions in question are not operated by school boards. Accordingly, it cannot be said that the Legislature intended to include state employees within the statutory requirements of negotiation and representation when N.D.C.C. ch. 15-38.1 was enacted.

The three institutions involved in your query are created as entities of state government. See N.D.C.C. ?? 15-39.1-04(10) and 54-14-03.2(1). As state agencies these institutions are set apart from public schools under the control of local school boards. The School for the Blind and the School for the Deaf are specifically distinguished from public schools and therefore should be excluded

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from the representation and negotiation provisions of N.D.C.C. ? 15-38.1. The object of the School for the Blind is to educate blind and partially blind children "who, because of this handicap, are not able to receive their education in the public schools of this state." N.D.C.C. ? 25-06-02. Similarly, the qualifications for admission to the School for the Deaf include children "who, because of hearing impairment, [are] unable to receive an education in the public schools." N.D.C.C. ? 25-07-04.

Furthermore, nothing in N.D.C.C. ch. 12-46 providing for NDIS suggests that that institution is the kind of public school controlled by a local school board which should be subject to N.D.C.C. ch. 15-38.1. Provisions like N.D.C.C. ? 12-46-06, where the superintendent of NDIS is authorized to set salaries for employees of the institution, as approved by the director of the Division of Juvenile Services, would conflict with the responsibility to negotiate that aspect of employment under N.D.C.C. ? 15-38.1-12. I recognize that the education function of NDIS has been given approved school status by the Superintendent of Public Instruction, but that does not change the basic status of NDIS as a state institution.

Requiring the state of North Dakota to negotiate with its employees via representative organizations would divest the state of its rights and privileges in the control and management of its employees. Absent are any express words in N.D.C.C. ch. 15-38.1 that indicate it should or was intended to apply to state employees. That being the case, I believe the following rule stated long ago by the United States Supreme Court applies in the interpretation of N.D.C.C. ch. 15-38.1:

There is an old and well-known rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect.

United States v. United Mine Workers of America, 330 U.S. 258, 272 (1947).

I am aware of the cases of Barnes County Ed. Ass'n v. Barnes County Special Ed. Bd., 276 N.W.2d 247 (N.D. 1979), and Loney v. Grass Lake Public School District No. 3, 322 N.W.2d 470 (N.D. 1982), which make rather sweeping generalizations concerning the intent of N.D.C.C. ch. 15-38.1 and representation and negotiation by teachers. However, both of those cases involved negotiation with entities of local

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government, and not the sovereign state of North Dakota and are therefore distinguishable from the issue you present.

Your second question asks whether teachers employed at the three state institutions are included within the provisions of N.D.C.C. ? 15-47-27. N.D.C.C. ? 15-47-26 specifically provides that "the term 'teacher,' as used in sections 15-47-27 and 15-47-38, includes . . . all persons employed in teaching in any state institution except institutions of higher education." 1993 N.D. Sess. Laws ch. 203, ? 1. Further, N.D.C.C. ? 15-47-27 specifically states that this section applies to any teacher who has been employed by the Department of Corrections and Rehabilitation or the Superintendent of Public Instruction in this state. The director of the Department of Corrections and Rehabilitation with the approval of the Governor appoints the director of the Division of Juvenile Services, and the two in turn appoint the NDIS superintendent. N.D.C.C. ?? 54-23.3-05 and 12-46-04. The salaries of the officers and employees other than the superintendent of NDIS are determined by the superintendent and approved by the director of the Division of Juvenile Services. N.D.C.C. ? 12-46-06. The Superintendent of Public Instruction appoints both the Superintendent of the School for the Blind and the Superintendent of the School for the Deaf. N.D.C.C. ?? 25-06-02.1 and 25-07-01.1. Teachers of these schools are therefore included under the provisions of N.D.C.C. ? 15-47-27.

Your third question asks whether teachers at the three institutions are included under the provisions of N.D.C.C. ? 15-47-38. As noted above, N.D.C.C. ? 15-47-26 provides that the term "teacher" as used in 15-47-38 includes "all persons employed in teaching in any state institution, except institutions of higher education." Since NDIS, the School for the Blind, and the School for the Deaf are all state institutions, it is my opinion that N.D.C.C. ? 15-47-38 applies to teachers employed at these three institutions. There appears, however, to be some built-in clumsiness in applying N.D.C.C. ? 15-47-38 to state employed teachers at these three institutions because the provisions of N.D.C.C. ? 15-47-38 relate to responsibilities and actions by "the school board of any school district" or "school board," neither of which exist for the three institutions. Nevertheless, the Legislature has specified that this section applies to the three state institutions.

Your fourth question asks whether teachers at the three institutions may participate in the Teachers' Fund for Retirement. The Teachers' Fund for Retirement is provided for under N.D.C.C. ch. 15-39.1. N.D.C.C. ? 15-39.1-09(1) states that every teacher is a member of the fund. N.D.C.C. ? 15-39.1-04(11)(a) defines "teacher" to include "[a]ll persons who are certified to teach in this state who are contractually employed in teaching in any state institution." As noted above, state institution includes the three institutions about which you inquire. It is therefore my opinion that every teacher

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contractually employed in teaching at those three institutions must participate in the Teachers' Fund for Retirement. See Letter from Attorney General Nicholas J. Spaeth to Representative Kenneth N. Thompson (November 6, 1990).

Your fifth question asks whether the teachers employed at the three institutions in question may participate in either the Teachers' Fund for Retirement or the Public Employees Retirement System. Teachers contractually employed in teaching at state institutions are required to be members of the Teachers' Fund for Retirement as noted above. Conversely, any eligible employee at one of these institutions who is not contractually employed in teaching must participate in the Public Employees Retirement System under N.D.C.C. ch. 54-52. See N.D.C.C. ? 54-52-02. At the time of determining eligibility for actual retirement and receipt of benefits or for the purposes of dual employment, the applicable retirement system is determined pursuant to N.D.C.C. ? 15-39.1-10.3(2) or ? 54-52-17.2(2). However, I understand that presently all persons employed in teaching at the three institutions in question are participating members in the Teachers' Fund for Retirement. It is therefore my opinion that state employees are members of the Teachers' Fund for Retirement or the Public Employees Retirement System as their current employment status requires and do not have a right to elect to participate in the retirement plan of their choice.

Your sixth question asks whether teachers at the three institutions in question would be "guaranteed" no less in fringe benefits if they were removed from the classified system of public employees under N.D.C.C. ch. 54-44.3. Although you do not state specifically what benefits are to be included as "fringe benefits," it can be stated that if the teachers at the three institutions are removed from the classified system, the benefits of state employment for those teachers will be the same as other state employees who are not members of the classified service. Thus, there would be no guarantee to those individuals upon the event of their declassification that they would not lose any "fringe benefits" of classification.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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