

LETTER OPINION  
95-L-189

August 14, 1995

Mr. Sparb Collins  
Public Employees Retirement System  
Box 1214  
Bismarck, ND 58502

Dear Mr. Collins:

Thank you for your letter asking two questions regarding the participation of temporary employees in the North Dakota Public Employees Retirement System. You first ask whether a temporary employee may purchase additional service credit under N.D.C.C. § 54-52-02.9 for temporary employment occurring before the time the employee enrolled in the state retirement program, if the employee was not previously notified of the employee's eligibility to participate and therefore did not enroll at an earlier time.

The participation of temporary employees in the state retirement program is governed by N.D.C.C. § 54-52-02.9. That section provides that "[a] temporary employee may elect, within one hundred eighty days of beginning employment, to participate in the public employees retirement system and receive credit for service after enrollment." Id. Full payment for this participation is made by the temporary employee. However, N.D.C.C. § 54-52-02.9 provides that "[a] temporary employee may not purchase additional credit under section 54-52-17.4." N.D.C.C. § 54-52-17.4 authorizes the purchase of additional credit by a participating member under specified circumstances. It does not, however, authorize a participating member to purchase additional credit for prior employment as a temporary employee.

"Where the language of a statute is plain and unambiguous, the 'court cannot indulge in speculation as to the probable or possible qualifications which might have been in mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it.'" City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940) (citation omitted). See also Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993) ("[T]he law is what the Legislature says, not what is unsaid.")

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Here, the plain language of N.D.C.C. § 54-52-02.9 authorizes a temporary employee to receive credit only for service after enrollment in the state retirement program, and prohibits a temporary employee from purchasing past service credit under N.D.C.C. § 54-52-17.4. This prohibition cannot be avoided by describing the purchase as a "retroactive" election to participate in the program. It is therefore my opinion that a temporary employee has no statutory authority to purchase past service credit for temporary employment occurring before the employee elected to participate in the state retirement program. Because there is no statutory basis to permit a temporary employee to purchase past service credit for temporary employment, it becomes necessary to examine whether there is an equitable basis to permit such a purchase.

"[E]stoppel against the government is not absolutely barred as a matter of law, . . . [however] the doctrine is not one which should be applied freely against the government." Blocker Drilling Canada, Ltd. v. Conrad, 354 N.W.2d 912, 920 (N.D. 1984). The doctrine "must be applied on a case-by-case basis with a careful weighing of the inequities that would result if the doctrine is not applied versus the public interest at stake and the resulting harm to that interest if the doctrine is applied." Id. (emphasis in original). However, "it is well settled that administrative officers of the state cannot estop the state through mistaken statements of the law." Amerada Hess Corp. v. Conrad, 410 N.W.2d 124, 133 (N.D. 1987).

Under the circumstances addressed in your letter, it cannot be said that the prohibition against a temporary employee from purchasing past service credit for temporary employment under N.D.C.C. § 54-52-02.9 creates such an inequity to warrant application of the doctrine of equitable estoppel. There is no affirmative statutory duty of employers to inform temporary employees of their eligibility to participate in the state retirement program, and it is an established equitable principle that silence alone when not accompanied by a duty to speak will not suffice to justify the application of the doctrine of equitable estoppel. See Ray Co., Inc. v Johnson, 325 N.W.2d 250, 254 (N.D. 1982). In an analogous situation involving workers' compensation, the North Dakota Supreme Court concluded that "claimants do not have a clear legal right to require the bureau to notify them of the availability of impairment benefits." Tooley v. Alm, 515 N.W.2d 137, 141 (N.D. 1994). The court reached a similar conclusion regarding AFDC eligibility in Brunner v. Ward County Social Service Bd., 520 N.W.2d 228 (N.D. 1994) See also Scannell v. Michigan Pub. Sch. Employees Sys., 351 N.W.2d 285 (Mich. Ct.App. 1984) (wife not entitled to purchase additional credit in school

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retirement system on husband's behalf after his death). It is therefore my opinion that a temporary employee would not have an equitable basis to permit the purchase of service credit for past temporary employment merely because the employee was not notified earlier of the employee's eligibility to participate in the state retirement program, where the law does not direct that such notice be provided.

You also ask whether a temporary employee who was not notified within 180 days of beginning employment of the employee's eligibility to participate in the state retirement program, and therefore did not enroll in the program during that period, would be precluded from electing to participate after that period had expired.

There are a number of similar election periods established under the state retirement program. For example, under N.D.C.C. § 54-52-17.3, legislative credit "must be purchased within one year after the adjournment of that legislative session." N.D.C.C. § 54-52-17.2 provides that an employee who terminates eligible employment must make an election within 90 days after beginning eligible employment in other state plans to remain an active member of the Public Employees Retirement System. Under N.D.C.C. § 54-52-17(3)(e)(2), a member who is disabled must apply for disability retirement benefits "within 12 months of the date the member terminates employment." N.D. Admin. Code § 71-02-02-01(6) provides that "[a]n elected official must enroll or waive participation in writing within six months of taking office."

To permit a temporary employee to participate in the state retirement program after the employee's 180-day election period expired would be contrary to the plain language of N.D.C.C. § 54-52-02.9. It must be presumed that the Legislature said what it meant and meant what it said. See Little v. Tracy, 497 N.W.2d at 705. The obvious purpose in establishing certain election periods is to promote the efficient operation of the retirement system. In light of this purpose and the plain language of N.D.C.C. § 54-52-02.3, it is my opinion that a temporary employee may not participate in the Public Employees Retirement System if the employee does not elect to participate within the first 180 days of temporary employment. For many of the reasons given above for the absence of an equitable basis to permit a temporary employee to purchase past service credit for temporary employment, it is my opinion that there is no equitable basis to permit a temporary employee to enroll in the state retirement program after the 180-day election period has expired. See generally Tooley v. Alm, 515 N.W.2d at 141.

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This is consistent with the "time-honored principle that all persons are presumed to know the law." Id. quoting State v. Carpenter, 301 N.W.2d 106, 110 (N.D. 1980).

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

dec/jfl