

N.D.A.G. Letter to Person (Sep. 22, 1987)

September 22, 1987

Mr. Alan Person
Executive Director
North Dakota Public Employees
Retirement System
1930 Burnt Boat Drive
Box 1214
Bismarck, ND 58502

Dear Mr. Person:

Thank you for your letter of August 10, 1987, inquiring as to the eligibility of retired members of the Public Employees Retirement System to vote for and to serve as Retirement System board members.

N.D.C.C. § 54-52-03 provides for the governing authority of the Public Employees Retirement System. The governing authority of the system consists of a board of five persons known as the retirement board. Subsection 3 of this statute contains the following sentences:

Three board members shall be elected from among the active participating members. . . . Notice of board elections shall be given to all active participating members.

These sentences tell us two things. First, the persons voting for board members are active participating members of the Retirement System. Second, the use of the term "among" indicates that the board members themselves must be active Participating members of the Retirement System.

The term "participating member" is defined to mean all eligible employees who through payment into the retirement plan have established a claim against the plan. N.D.C.C. § 54-52-01(8). The term "eligible employee" is defined to mean all permanent employees who are 18 years of age or more, including appointive and elected officials. N.D.C.C. § 54-52-01(3). The term "permanent employee" is defined as a governmental unit employee whose services are not limited in duration, who is filling an approved and regularly funded position in an eligible governmental unit, and who is employed 20 hours or more per week and more than 5 months each year. N.D.C.C. § 54-52-01(9).

Reading together all of the various definitions as they incorporate one another, it is my conclusion that the term "active participating members" as used in N.D.C.C. § 54-52-03(3) refers to eligible employees paying into the retirement plan who are 18 years of age or older, who meet all the eligibility requirements set forth by the chapter, and who are filling

an approved and regularly funded position, being employed 20 hours or more per week and more than 5 months each year. By this very definition, those who have retired from public employment and are no longer employed by their public governmental employer are not considered as active participating members. As such, those persons who have retired from public employment may not vote for the retirement board members and may not serve as retirement board members.

This conclusion is supported by reviewing the applicable legislative history should the argument be advanced that there is ambiguity in the statute. Prior to 1985, the important sentence found in N.D.C.C. § 54-52-03(3) did not include the word "active." The 1985 Legislative Assembly added the word "active" to the first sentence of N.D.C.C. § 54-52-03(3). 1985 N.D. Sess. Laws ch. 580. As part of the same legislation, a sentence was added to the statute indicating that employees who have terminated their employment for whatever reason are not eligible to serve as elected members of the board.

In reviewing the legislative history surrounding the enactment of this change to N.D.C.C. § 54-52-03(3), one discovers your appearance before the Senate State and Federal Government Committee concerning this bill on February 18, 1985. You indicated to the Committee that the purpose of the bill was to eliminate non-active employees from being elected to the Public Employees Retirement System board. Hearing on H. 1178 Before the Senate Committee on State and Federal Government, 49th Leg., (February 18, 1985) (statement of Alan Person).

Senator Vosper asked if retirees were ineligible from serving upon the Public Employees Retirement System board. The minutes concerning the Committee hearing do not indicate an outright affirmative or negative response from the witness to whom the question was addressed. Instead, the witness testified that retirees were forming their own particular association and would probably be asking for future representation upon the board. Hearing on H. 1178, supra, (statement of Tom Tupa). From the nature of the response, one can only assume that the Committee was told that retirees were not eligible to serve on the retirement board.

The words of the statute and their definitions, as reinforced by the term "active" in the legislative history surrounding the 1985 revision of the statute, leads me to conclude that those who have retired from public employment and who have previously participated in the Public Employees Retirement System are not eligible to vote for board members of the Retirement System. Furthermore, such persons are ineligible to serve as board members.

I hope this information is helpful to you.

Sincerely,

Nicholas J. Spaeth

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