

**OPINION
67-186**

December 18, 1967 (OPINION)

Honorable M. F. Peterson

Superintendent

Public Instruction

RE: Teachers Insurance and Retirement Fund - Members - State Retirement

This is in reply to your letter of December 12, 1967, in which you set forth the following facts and questions:

"According to the interpretation of the Teachers' Insurance and Retirement Fund law, specifically chapter 15-39, the employees of Vocational Rehabilitation have been under the Teachers' Insurance and Retirement Fund and have been paying assessments to that fund.

"I understand that there are individuals in Rehabilitation who would rather be in the regular State Retirement plan than in the Teachers' Insurance and Retirement Fund.

"I would appreciate your opinion as to whether the Vocational Rehabilitation people are compulsory members of the Fund as are people in education according to section 15-36-01, which has been amended.

"I have a subsidiary question and that is if they are not compulsory members of the Fund, as you interpret the statutes, would it be lawful for some to contribute and others not according to their own volition?

"It is lawful and/or compulsory for an agency such as Vocational Rehabilitation to be under the state retirement system and teachers' retirement? Now speaking of the members of the Department of Public Instruction who are compulsory members of the Teachers' Insurance and Retirement Fund, may they be members of the State Retirement plan?"

We believe your reference to section 15-36-01 should be section 15-39-01. Subsection 1 of section 15-36-01, as amended, provides, insofar as is pertinent:

"DEFINITIONS. In this chapter, unless the context or subject matter otherwise requires:

1. 'Teacher' shall include:

* * *

d. The superintendent of public instruction and all county superintendents of schools and their assistants;

* * *

- k. All certified and qualified teachers employed by any state institution, school board, or governing body who are assigned to duties directly related to the public school program but who may not be directly engaged in teaching.

* * *."

There are not "optional" memberships in the Teachers' Insurance and Retirement Fund except with regard to time of service and age. All "teachers" as defined above are required to be members of the Fund. See section 15-39-10. Insofar as whether the employees of vocational rehabilitation should or should not have been considered "teachers" within the meaning of chapter 15-39 would, at this time, seem immaterial. The fact is they have been so considered and, by implication, such construction has been approved by the Legislature. It is a rule of statutory construction that the departmental construction of a statute is entitled to great weight. Therefore we believe we must assume that the employees of vocational rehabilitation are compulsory members of the Teachers' Retirement Fund. Even without the historical construction, the provisions of subdivision k of subsection 1 of section 15-39-01 would appear to include the employees of vocational rehabilitation in the Fund insofar as they meet the requirements of a certified and qualified teacher who is employed by a state governing body (vocational rehabilitation) which is directly concerned with the public school program even though not actually engaged in teaching. See chapter 15-20 of the North Dakota Century Code, particularly section 15-20-03.

With respect to the State Retirement Program, section 54-52-02 of the North Dakota Century Code, as amended, provides in part:

"FORMULATION OF PLAN - EXCLUSION OF EMPLOYEES COVERED BY PLANS IN EXISTENCE. * * * Employees presently covered by a pension plan or retirement plan to which the state has contributed, except social security, shall not be eligible for duplicate coverage."