

**OPINION
68-331**

September 17, 1968 (OPINION)

Mr. Tor A. Hegland

Executive Director

North Dakota State Employees Retirement Board

RE: State - Employees Retirement System - Definition of Employee

This is in response to your letter in which you ask for an opinion on the following situation:

Certain employees of the Memorial Mental Health and Retardation Center requested to be included in the North Dakota State Employees Retirement Program. Apparently this request was granted and the employees did participate in such program. Now the employees have requested to have the relationship with the State Employees Retirement Program terminated. You then ask if such relationship can be terminated at the will of the employees concerned.

As pertaining to the Retirement Program, Section 54-52-01(3) of the North Dakota Century Code defines an employee to mean: "'Employee' shall mean any person employed by the state of North Dakota whose compensation is paid out of state funds or funds controlled or administered by the state department, or paid by the federal government through any of its executive or administrative officials; * * *." The controlling condition is that the person be employed by this State. It makes little difference who pays the salary - whether it be State or Federal funds - but the person must be employed by this State to qualify under the program.

The Memorial Mental Health and Retardation Center was organized pursuant to the provisions of Chapter 25-12 of the North Dakota Century Code. The Center, as such, may be a city, county or combination thereof, which can be likened to a district. It has its own board and is a political entity to operate and function within the authority granted under Chapter 25-12 of the North Dakota Century Code. The Center, as such, may be created by following the procedures outlined in Chapter 25-12, but it was not created by the State of North Dakota. In this respect we make a distinction between a legal body which may be established by following certain procedures and a legal body which was created specifically by the State Legislature.

We do not believe that the employees of the Memorial Mental Health and Retardation Center service units can be considered employees of the State. They are employees of the service units. Because such employees are not "State employees", it would appear that they should not have been permitted to participate in the State Employees Retirement Program.

On the basis that they were not entitled to participate in the State Retirement Program, it is our opinion that such affiliation may be

terminated and, in fact, it should be terminated.

HELGI JOHANNESON

Attorney General