

**OPINION
69-251**

July 25, 1969 (OPINION)

Mr. Ralph Dewing, Director

Department of Accounts and Purchases

RE: Officers - Judges - Retirement salary

This pertains to the matter of the application of Harvey J. Miller, a retired judge, for additional retirement salary based on an increase in salary or compensation of District and Supreme Court judges.

The North Dakota Legislature in 1969 enacted Chapter 276, which is now Section 27-02-02.1, and which provides as follows:

"ADDITIONAL COMPENSATION - SUPREME AND DISTRICT COURT JUDGES. In addition to the judicial salaries provided by Sections 27-02-02 and 27-05-03 of this code, each judge of the supreme court and each district court judge serving in such capacity on and after the effective date of this section shall receive compensation in the sum of two thousand dollars annually paid in equal monthly payments. This section shall not be construed to increase the benefits to which retired judges of the supreme court and district courts are entitled."

The judge in question retired and applied for judicial retirement on January 4, 1965. The provision of law under which he retired is Chapter 27-17. Section 27-17-01, as is material here, in part, provides as follows:

"RETIREMENT OF SUPREME COURT JUDGES AND DISTRICT COURT JUDGES. 1. Every judge of the supreme court or of the district court, including one who has served or shall have served in either or both capacities, shall, at the time he ceases to be such judge and regardless of his age at that time and without further payment by him into the judicial retirement fund, acquire a vested right to the judicial retirement salary herein provided for, payable upon application therefor at any time after he has attained any of the retirement ages with years of service, as follows:

65 and 20 years of service, or

66 and 18 years of service, or

67 and 16 years of service, or

68 and 14 years of service, or

69 and 12 years of service, or

70 and 10 years of service; provided however that any judge of the supreme court or district court who is appointed or elected to such court from and after July 1, 1960, who has

become eligible for retirement hereunder but fails to make application therefor prior to his attaining the age of seventy-three years, shall automatically waive all retirement benefits hereunder and shall receive a return of only such moneys as have been retained by the State of North Dakota as a judicial retirement assessment, upon the salary of such judge.

"2. * * *

"3. The amount of judicial retirement salary payable to a retired judge under subsection 1 of this section shall be equal to fifty per cent of the annual salary payable from time to time to judges of the classification the retired judge last had prior to making his application for judicial retirement salary, but in no event shall his judicial retirement salary be computed upon a judicial salary less than the one he last received while in office.

"4. The judicial retirement salary payable under this section shall be paid to the retired judge during the remainder of his natural life and shall be paid by the director of accounts and purchases, within thirty days after receiving application therefor, in the same manner as salaries are paid to judges of the district court and judges of the supreme court, except that judicial retirement salaries shall not be subject to judicial retirement assessment." (Underscoring ours.)

Under the statutory provisions, the judge in question acquired a vested right when he retired and applied for judicial retirement and received same. Once he met all of the requirements, his right to retirement benefits became vested. In this respect, Section 16 of the North Dakota Constitution provides that:

"No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." (Underscoring ours.)

Similarly Section 10 of Article I of the U.S. Constitution prohibits the passage of any law impairing the obligations of contract.

The North Dakota Supreme Court has not had an opportunity to pass on the judicial retirement act, but the Court has construed other pension and retirement acts. In the case of *Payne v. Board of Trustees*, 35 N.W.2d. 553, the Court said:

"* * *When he has taught the required number of years, made his payments, attained the stated age, fully complied with the law his interest becomes fixed." * * *."

The same case was again mentioned and referred to in *La Pire v. Workmen's Compensation Bureau*, 111 N.W.2d. 355, where the Court said:

"In other words, in the *Payne* case this court held, in effect, that if a teacher's rights ever are to vest, they vest when he has completed every condition required of him to make him eligible to receive his pension. * * *."

The judge in question obviously must have met all of the requirements at the time he made his application on January 4, 1965, because he was receiving the judicial retirement salary from and after such date. Consequently, the right he had acquired became vested at that time. This right, amongst other things, included a judicial retirement salary equal to fifty per cent of the annual salary payable from time to time to judges of the classification from which the judge retired.

Section 27-02-02.1 provides for additional salary in the sum of \$2,000.00 annually to be paid in equal monthly installments. Such increase clearly comes within the provision, " * * * salary payable from time to time to judges of the classification * * *." The last sentence of Section 27-02-02.1 leaves some question as to what is meant by its provisions. This sentence states as follows:

"* * * This section shall not be construed to increase the benefits to which retired judges of the supreme court and district courts are entitled."

We have doubt as to what this provision is to accomplish. We are also aware that all laws are to operate prospectively, unless the language clearly indicates that they are to operate retroactively. For that matter it is doubtful that a law on this subject matter can ever operate retroactively, if it will be so doing impair a vested right.

All laws enacted by the Legislature are presumed to be valid and constitutional. The position of the Attorney General's Office is to support the validity of the laws passed by the Legislature. Under the Constitution a law can be declared unconstitutional only by four members of the North Dakota Supreme Court (see Section 89, North Dakota Constitution).

The members of this office, as well as members of the Legislature, have taken an oath to support both the Constitution of the State of North Dakota and the Constitution of the United States.

We are also aware that a law will be held invalid or unconstitutional only if none of the constructions, if more than one is available, will be invalid.

We are also mindful of the rule of law that if possible a statute should not be construed in such a manner so as to make it invalid.

In keeping with the foregoing concepts and the decisions of the Supreme Court and the principles of law involved, we are compelled to the conclusion that the last sentence in Section 27-02-02.1 cannot be construed to mean that the increase in compensation or salary will not apply to those judges who have retired and have met all of the provisions and requirements entitling them to a retirement salary prior to the enactment of that portion of Chapter 276, which is now Section 27-02-02.1, which provides:

"* * * This section shall not be construed to increase the benefits to which retired judges of the supreme court and

district courts are entitled."

If the statutes were construed to mean that it does deprive retired, qualified judges from an increase in benefits, it would be patently unconstitutional and invalid. If this were the only construction which can be placed upon this provision we would be required to state that it violates the Constitution. But upon the possibility that another construction, which is not being urged at the present time, we believe it is better to avoid such determination at this time and leave the question open for further consideration should the need arise.

It is, therefore, our opinion that those judges who have met all of the qualifications and requirements for pensions and are receiving judicial retirement benefits prior to the enactment of the last sentence in Section 27-02-02.1 are entitled to additional judicial retirement benefits equalling fifty per cent of the increase in compensation or salary to district and supreme court judges, respectively. The fifty per cent would apply to the additional increase in compensation of salary of \$2,000.00.

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