

N.D.A.G. Letter to Engmann (June 4, 1990)

June 4, 1990

Mr. Scott Engmann
Executive Director
North Dakota Retirement
Investment Office
P.O. Box 7100
Bismarck, ND 58502

Dear Mr. Engmann:

Thank you for your March 26, 1990, letter. You raise a question as to whether a fraud has been committed against the Teachers' Fund for Retirement (the "Fund").

Whether fraud has actually been committed against the Fund is a question of fact. While I cannot answer that question, I can refer you to the applicable law. In the particular case you describe, both N.D.C.C. §§ 15-39.1-04 and 15-39.1-29 have applicability. N.D.C.C. § 15-39.1-04 provides:

"Salary" means a member's earnings in eligible employment under this chapter for teaching, supervisory, and administrative services during a school year as reported on the member's federal income tax withholding statements plus the value of any fringe benefits selected at the member's option in lieu of monetary remuneration. "Salary" does not include fringe benefits such as payments for unused sick leave or vacation leave, housing allowances, transportation expenses, early retirement incentive pay, severance pay, or medical insurance premiums paid by the employer in addition to salary.

(Emphasis supplied.)

N.D.C.C. § 15-39.1-29 provides:

Any person who shall knowingly make a false statement, or shall falsify or permit to be falsified any record or records of this retirement fund in any attempt to defraud such fund as a result of such act, shall be guilty of theft, and shall be punishable therefor under the laws of the state of North Dakota. Should any change or error in records result in any person receiving from the fund more or less than that person would have been entitled to receive had the records been correct, then, on the discovery of any such error, the board shall correct such error, and, as far as practicable, shall adjust the payment in such a manner that the actuarial equivalent of the benefit to which such person was correctly entitled shall be paid.

(Emphasis supplied.) Thus, to obtain a conviction it must be shown that the person involved knew that the statement made was false or the record in question was falsified.

Your letter also raises an issue concerning what is included in an individual's salary. N.D.C.C. § 15-39.1-04 was enacted to prohibit manipulation of amounts to be included in "salary" and the effect of such manipulation on the calculation of the retirement benefit in order to protect the fund's integrity. Allowing a participant in the fund to increase the last few years of the participant's salary by merely shifting fringe benefits to cash, thereby increasing the participant's retirement by a disproportionate amount, could seriously underfund the Fund because certain actuarial assumptions are based on the teacher's historical salary and related contributions. Consequently, N.D.C.C. § 15-39.1-04 should be read to define "salary" as including payments in lieu of the monetary value of fringe benefits except "fringe benefits such as payments for unused sick leave or vacation leave, housing allowances, transportation expenses, early retirement incentive pay, severance pay, or medical insurance premiums paid by the employer in addition to salary." To read this section otherwise would defeat the purpose of detailing those fringe benefits which are not to be considered as "salary".

I understand that Troy Lorenz of my staff has spoken with you and explained your options in light of the above discussion. If you have further questions, please feel free to contact Troy directly. He will keep me up to date on this matter if it is pursued.

Sincerely,

Nicholas J. Spaeth

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