

N.D.A.G. Letter to Engmann (Nov. 5, 1990)

November 5, 1990

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

Dear Mr. Engmann:

Thank you for your May 8, 1990, letter. You ask whether a retired superintendent of schools employed by a third party that contracts with a school district for the superintendent's services is subject to having retirement benefits discontinued under North Dakota Century Code (N.D.C.C.) § 15-39.1-19.1.

You advise that the North Dakota School Board's Association (hereafter NDSBA) employs retired member superintendents and contracts with school districts to provide the services of a superintendent on an interim basis. You specifically inquire whether this employment arrangement exempts the retired superintendents involved in this program from the loss of retirement benefits payable from the Teachers' Fund for Retirement (TFFR) pursuant to N.D.C.C. § 15-39.1-19.1, which provides:

[t]he benefits payable to any retired person who has retired from teaching. . . and who again returns to teaching in a public school or state institution in this state shall be discontinued when the retired person's earnings during the fund's fiscal year exceed the maximum earnings allowed by the federal Social Security Act.

I earlier advised you that based on the statutory definition of teacher that a retired teacher has "return[ed] to teaching" under N.D.C.C. § 15-39.1-19.1 if the teacher is both "certified to teach in this state" and "contractually employed in teaching in any state institution or by any school board or other governing body of any school district in this state". I further advised that the fact that a retired TFFR member is designated as an "independent consultant" should not control in determining whether the member has "return[ed] to teaching." Letter from Nicholas J. Spaeth to Scott Engmann April 23, 1990).

The question, therefore, is whether the retired superintendent has "return[ed] to teaching" by virtue of the third party contractual relationship between the superintendent, NDSBA, and the school district using the services of the retired superintendent.

You furnished examples of a description of NDSBA's interim superintendent program, a letter agreement between NDSBA and a school district and a letter agreement between

NDSBA and a superintendent. The description of the program states that the compensation is agreed upon between the school district and the superintendent, but the compensation is paid to NDSBA who pays the superintendent and contracts with the school district to provide the services of the superintendent.

The description of the NDSBA program further states that while the superintendent is employed by NDSBA, "the local board will have complete supervisory authority and the relationship will be in all other ways identical to that of any board and superintendent."

Pursuant to the letter agreement between NDSBA and the school district, NDSBA pays the superintendent a specified daily amount and bills the school district for the amount paid monthly. The letter agreement between NDSBA and the superintendent also requires NDSBA to pay the superintendent a daily stipend monthly; the superintendent agrees to provide administrative services to the district as directed by its board; and NDSBA also agrees to furnish the superintendent a Form 1099.

That N.D.C.C. § 15-39.1-19.1 applies to a retired superintendent as well as a retired teacher follows from the definition of teacher in N.D.C.C. § 15-39.1-04(11) which provides in relevant part:

"Teacher" includes:

- a. All persons who are certified to teach in this state who are contractually employed in teaching in any state institution or by any school board or other governing body of any school district of this state, including superintendents, assistant superintendents, business managers, principals, assistant principals, and special teachers employed in any state institution or in the school system of any school district in this state, except that the superintendent and assistant superintendent of the developmental center at Grafton may be brought within this definition at their option.

(Emphasis supplied.) my earlier opinion concerning whether a retired TFFR member had "return[ed] to teaching" was premised on the statutory definition of teacher as an individual who is both "certified to teach" and "contractually employed in teaching in any state institution or by any school board" A contract is defined by N.D.C.C. § 15-39.1-04(4) as "a written agreement with any school board . . . or a letter of appointment by a state institution." (emphasis supplied). It is a legally significant distinction that a teacher may either be "contractually employed" in any institution or "contractually employed" by any school board, but a superintendent need only "be employed in" a school system of any school district or a state institution. Thus it is not necessary to find that a superintendent is contractually employed by a school board but only that the superintendent is employed within a state institution or school system.

Under the scheme you outlined, the retired superintendent contracts with NDSBA to provide services as a superintendent to a school district designated in the contract

between the superintendent and NDSBA. NDSBA in turn contracts with the school district to provide services of the superintendent on an interim basis. Regardless of the party contracting with the superintendent for services, under the arrangement you describe, the retired superintendent is "employed . . . in the school system of [the] school district" that is using his services.

Based on the statutory definition of "teacher", which includes superintendents, it is my opinion that a retired TFFR member superintendent has "return[ed] to teaching" within the meaning of N.D.C.C. § 15-39.1-19.1 if that person is "employed in . . . the school system of any school district in this state."

Sincerely,

Nicholas J. Spaeth

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