

## **N.D.A.G. Letter to Thompson (Nov. 6, 1990)**

November 6, 1990

Rep. Kenneth N. Thompson  
District 39  
P.O. Box 595  
Beach, ND 58621

Dear Rep. Thompson:

Thank you for your October 22, 1990, letter requesting clarification of apparently conflicting directives from the Teachers Fund for Retirement and the State Department of Public Instruction.

In your letter you explain that the Teachers Fund for Retirement has required that all certified teachers working in the school district must contribute to the teacher's retirement fund, although they may not be technically employed as a school teacher. The Department of Public Instruction, on the other hand, has stated that a teacher's aide may not work as the primary teacher in a classroom, although the teacher's aide holds a current teacher's certificate.

North Dakota Century Code § 15-39.1-04(11) defines a teacher as including persons who are certified to teach in North Dakota and who are contractually employed in teaching. N.D.C.C. § 54-52-02.1 allows "permanent non-certified employees" of school districts to participate in the Public Employees Retirement System. Thus, the combined effect of N.D.C.C. ch. 15-39.1 (TFFR) and N.D.C.C. ch. 54-52 (PERS) is that all employees might be covered by a retirement system.

N.D.C.C. § 15-39.1-09(1) provides that every teacher must be a member and must be assessed for their contribution to the retirement fund unless the employer pays the contribution under N.D.C.C. § 15-39.1-09(2). These sections alone are not sufficient to require a teacher's membership in the fund, however. The teacher must also be "contractually employed in teaching." Thus, it is my opinion a teacher's aide, although certified and able to accept employment as a teacher, if not actually "contractually employed in teaching" is not required to participate in the teachers fund for retirement.

A member of my staff has spoken with Mr. Scott Engmann, Executive Director of the North Dakota Retirement Investment Office and clarified this issue with that department. Mr. Engmann stated that in fact the matter has been resolved with the school district in a manner consistent with the opinion expressed in the proceeding paragraph.

Your second question concerns whether the State Department of Public Instruction may prohibit a teacher's aide from working in the classroom as a teacher when the teacher's aide has a current teacher's certificate.

N.D.C.C. § 15-47-46 requires that all teachers must hold a teaching certificate. In addition to a teaching certificate other requirements, specific to certain grade levels, must also be met. Essentially, however, the basic requirement to be a teacher in North Dakota is that one must hold a current teacher's certificate. N.D.C.C. § 15-36-11. See Hennessey v. Grand Forks School Dist. No. 1, 206 N.W.2d 876 (ND 1973) (standard for re-employment requires teacher to hold teacher's certificate). A teacher's certificate is valid only if it has been recorded in the county where the teacher is teaching, however. N.D.C.C. § 15-36-10. Consequently, it is my opinion that a teacher's aide who holds a valid teacher's certificate and meets the requirements for the particular grade level in which the aide is working, may teach in the classroom.

It is also my opinion, however, that if the aide does teach in the classroom, both the aide and the employer must contribute to the teacher's fund for retirement unless the employer contributes the aide's required portion. Additionally the aide is entitled to other rights, and subject to those responsibilities required, of teachers including the provisions of N.D.C.C. §§ 15-47-26, 15-47-27, 15-47-27.1, 15-47-28 (contract renewal) and N.D.C.C. ch. 15-38.1 (representation and negotiation).

I trust this answers your question.

Sincerely,

Nicholas J. Spaeth

krb

Enclosures

cc: Scott Engmann  
Dr. Wayne Sanstead