

**OPINION
70-333**

January 22, 1970 (OPINION)

Mr. Tor A. Hegland
Executive Director
North Dakota Public Employees Retirement System

RE: State - Employees Retirement System - Prior Service Credits

This is in response to your letter in which you state the following:

At its meeting on Thursday, January eighth, the Retirement Board discussed the prior service benefit payable to older, longtime employees. The Administrative Expense and Benefit Fund has been increasing faster than anticipated and actually contains a divisible surplus at the present.

The 1969 Legislature changed the Retirement Law to the effect that money not needed for prior service benefit may be credited to the individual members' accounts in proportion to their contribution to the fund. Some of the surplus will be credited to the individual members' accounts in accordance with the Law. But in discussing this issue, the question was brought up whether the Board has authority to change the value of one prior service credit for state employees."

To resolve the questions submitted, it becomes necessary to examine several provisions of the State Employees Retirement Program.

Sections 54-52-10, as initially enacted and entitled "Allocation of Funds", contained the following language:

For the purpose of internal accounting records of the board, and not for the purpose of the segregation of moneys on deposit, or investment, there shall be created:

3. An 'administrative expense and benefit fund', consisting of one of each four dollars of agency contribution.

* * *From the latter fund the board shall have the authority to provide prior service benefits and (such other benefits as the board may determine, provided the board provides such benefits as a part of sound retirement planning, and that portion of such fund not needed for administrative expense shall be used to provide for such benefits)* * *."

The term "latter fund" refers to the administrative expense and benefit fund as set out in Subsection 3 above, which has not been amended. The language in this section within parenthesis was deleted by the adoption of Chapter 457 of the 1969 Session Laws, which amended the above section. The amended provision of Section 54-52-10, as is pertinent to the matter under consideration, reads as follows:

* * *the board shall have the authority to provide prior

service benefits and that portion not needed for the payment of prior service benefits and administrative expenses may be credited annually to individual employee accounts in proportion to the member's contribution to the fund. * * *."
(Underscoring denotes new language.)

We also find that certain terms are defined in Section 54-52-01 of the North Dakota Century Code. "Prior Service" was initially defined in Subsection 7 thereof as follows:

7. 'Prior service' shall mean state service or employment prior to January 1, 1965."

Said term, as amended by Chapters 456 and 457 of the 1969 Session Laws, now provides as follows:

7. 'Prior service' shall mean state service or employment prior to January 1, 1965, or county, city, or school district service or employment prior to January 1, 1969; * * *

The amended version of Subsection 7 obviously employed language to cover the inclusion of county, city or school district employees and provides a different date. For example, for the new employees brought within the retirement program the date is January 1, 1969, whereas prior service for State employees was set as of January 1, 1965.

"Prior service credit" is defined in Subsection 8 to provide as follows:

- "8. 'Prior service credit' shall mean such credit or a retirement benefit as the retirement board may determine under the provisions of this act; * * *."

It is noted that no reference is made to the value of the prior service credit or that once established, must so remain. Section 54-52-19 of the North Dakota Century Code sets forth the Board's responsibility as pertaining to prior service. This section provides as follows:

PRIOR SERVICE. The retirement board shall from any funds committed to the administrative expense and benefit fund not needed for administrative expense provide prior service minimum benefits to long term employees. As of January 1, 1965, a prior service credit shall be computed for all employees who have been employed continuously since December 31, 1959. Prior service credit shall be given for years of state employment while the employee was age fifty but not over age sixty-four, provided that five years of service will not count. The five years not to be counted may be before, after or during the period between age fifty through age sixty-four."
(Underscoring ours)

It is significant to note that the Legislature in Section 54-52-19 directed the Board to provide for "prior service minimum benefits." Section 54-52-20 also makes reference to "minimum benefits" in the

following sentence: "Prior service minimum benefits shall be determined by the retirement board, but it shall not provide benefits to other than the employee member and then only at time of retirement."

We are assuming that the Board, by using actuarial data, has determined prior service benefits by establishing the credits to which each employee will be entitled and the dollar value of each such credit. In examining the pertinent provisions of law, it does appear that the credits, once determined, are fixed. Such credits must be determined as of January 1, 1965. However, the language, "prior service minimum benefits" seems to imply that the value of the credit as initially set by the Board constitutes the "minimum value." By using the term "minimum" it leaves a strong implication that the value of the credit can be modified upwards if the occasion arises.

By examining Section 54-52-10, as it initially provided and under the amended version, we come to the inescapable conclusion that any surpluses resulting in the administrative expense and benefit fund may be distributed to the individual employee's account in proportion to the contribution made by the employee to the fund. The term "minimum benefit" gives rise to a strong suggestion and implication that the prior service benefits may be modified upon the happening of certain events, but under no condition will prior service benefits be less than the minimum established. We cannot, as a matter of law, state that the Board must allocate a certain amount of surplus revenue to the prior benefit fund, but under the principles of equity and specifically under the amended version of Section 54-52-10, it would appear that an equitable distribution of the surplus funds requires that percentages be employed to allocate surplus funds to both prior service and to the individual employee's account. The amount to be distributed to the employee's account is in direct proportion to the amount he has contributed.

Unfortunately, we do not have a similar measure which may be employed for the prior service fund, because the prior service is basically a gratuity and does not rest upon any financial contribution made by the employee. However, if a percentage is determined, and if the percentage is applied to both the employees' account and to the prior service benefit so as to increase the value of the prior service credit by the same percentage, it would appear to be equitable and justifiable. Such a conclusion would necessarily require that the prior service credit value be determined on a year to year basis, except the prior service minimum benefit or value may not be reduced below the minimum value.

It is our assumption that the current value of a prior service credit is set at four dollars. On the presumption that the Board acted in accordance with the provisions of law, such value would have to be considered as the minimum value. As surplus funds become available, the value of the prior service credit may be increased in direct percentage proportion as the employee's account is increased. Such increase would only be for the ensuing year, or until the surplus funds have ceased to exist. It would not mean that once the prior service credits are increased in value that such benefits may never be reduced to the original minimum value at a later date. The increase in value of prior service credit would only apply and be

available to prior service employees if the surplus money in the administrative expense and benefit fund warrants and supports an increase in the value of prior service credit and permits a similar allocation to the employee's account.

The present law contemplates that surpluses, if any, accruing in the year 1969, be distributed to the employee's account covering the same period of time. Equitably, it would follow that the allocation or increase of prior service credit value also cover the same period of time. The distribution to the employee's account is on a lump sum basis, which suggests that the increase in the prior service credit value or allocation thereto also be on a lump sum basis.

Based on the foregoing, it is our opinion that the Board has the authority to annually allocate surplus funds to both the prior service benefit and to the employee's individual account, and that the provisions of Sections 54-52-10, 54-52-19 and 54-52-20 of the North Dakota Century Code constitute authority for the Board to make annually a single transfer from such surplus equitably and proportionately to the benefit of all current employees, and to those retired and receiving prior service benefits, by increasing the value of prior service benefits accordingly for the period involved. Assuming, for purpose of illustration only, that sufficient funds are available to allow a 12 percent allocation to the individual employee's account as of December thirty-first, 1969, we would see no reason why a 12 percent allocation could not be made to all retired prior service beneficiaries as of December thirty-first, 1969. Thus, a person who, on December thirty-first, 1969, was retired and was receiving \$60.00 per month, or \$7200.00 per year, such person would be entitled to a lump sum payment of \$86.40 as his equitable share of the surplus that was accumulated that year. Likewise, the current employee would be entitled to 12 percent of the total amount contributed by such employee, which would be credited to the employee's individual account.

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Attorney General