

## **N.D.A.G. Letter to Malberg (May 17, 1990)**

May 17, 1990

Mr. John A. Malmberg  
Executive Vice President  
Bank of North Dakota  
Box 5509  
Bismarck, ND 58502-5509

Dear Mr. Malmberg:

Thank you for your December 28, 1989, letter which requests my opinion as to whether certain employees may receive annual and sick leave benefits.

Five full-time temporary positions have been hired to service PLUS/SLS loans. The Bank will eventually put an automated system into place to service these loans. Until then, these full-time temporary positions will be required. In an effort to avoid the high percentage of turnover associated with temporary positions, the Bank is considering offering annual and sick leave benefits to these employees.

You inquire whether the Bank of North Dakota is precluded from offering annual and sick leave benefits pursuant to N.D.C.C. § 54-06-14. N.D.C.C. § 54-06-14 provides, in part:

Annual leave and sick leave must be provided for all persons in the permanent employment of this state who are not employed under a written contract of hire setting forth the terms and conditions of their employment, within the limitations, terms, and provisions of this section.

(Emphasis supplied.)

The dispositive issues in answering your question are: (1) whether the employees in question are "permanent," and (2) whether they are employed under a written contract of employment. The contract terms regarding annual and sick leave would prevail for persons employed, either permanently or temporarily, pursuant to a written contract.

"Permanent" employees who are not employed under a written contract are entitled to receive annual and sick leave benefits; however, ch. 54-06 does not define "permanent" employee. To determine the meaning of "permanent" as used in N.D.C.C. § 54-06-14, it is proper to refer to other related legislation. N.D.C.C. § 1-01-09; Grabow v. Bergeth, 229 N.W. 282, 286 (1930).

N.D.C.C. chs. 54-52 and 54-52.1 both define "permanent employee" and "temporary employee." N.D.C.C. § 54-52-01(10) defines "permanent employee" as "a governmental unit employee whose services are not limited in duration and who is filling an approved

and regularly funded position in an eligible governmental unit, and is employed twenty hours or more per week and at least five months each year." (Emphasis supplied.) N.D.C.C. § 54-52.1-01(4) defines "permanent employee" as "one whose services are not limited in duration, who is filling an approved and regularly funded position in a governmental unit, and who is employed at least seventeen and one-half hours per week and at least five months each year." (Emphasis supplied.)

N.D.C.C. §§ 54-52-01(18) and 54-52.1-01(9) define "temporary employee" as "a governmental unit employee who is not filling an approved and regularly funded position in an eligible governmental unit and whose services may or may not be limited in duration."

Both definitions of "permanent employee" are identical except for the required number of hours per week. The type of benefit provided by each chapter is helpful in determining which definition should govern. N.D.C.C. ch. 54-52.1 provides for the uniform group insurance program. N.D.C.C. 54-52 provides for the public employees retirement system. While both chapters are intended to provide benefits to state employees, N.D.C.C. ch. 54-52 is primarily intended to reward and encourage the length of service of an employee. The pension benefit is primarily a function of two variables, length of service and salary. Alternatively, health insurance is usually provided to employees on a relatively uniform basis, regardless of length of service or salary. Though falling somewhere between the two, annual and sick leave benefits are more likened to health insurance benefits. Annual and sick leave benefits are made available on a relatively uniform basis, without regard to salary.

In addition, the general rule relating to state employee benefits requires that laws be liberally construed to effectuate the end which the benefit aims to provide: to encourage and reward employment with the state. City of Marietta v. Holland, 314 S.E.2d 97 (Ga. 1984); Wheeler v. Board of Administration of Public Employees' Retirement System, 159 Cal. Rptr. 125, 601 P.2d 568, 570 (1979); Jacobs v. New Jersey State Highway Authority, 101 N.J. 393, 255 A.2d 266, 271 (1969). Consequently, the less stringent hours per week requirement of N.D.C.C. § 54-52.1-01(4) should govern whether an employee is "permanent" for purposes of N.D.C.C. § 54-06-14.

Regardless of whether the employees in question are "permanent" or "temporary," pursuant to N.D.C.C. §§ 6-09-02 and 6-09-04, the Bank is permitted "under a written contract of hire setting forth the terms and conditions of their employment" to provide for annual and sick leave benefits. See, N.D.C.C. § 54-06-14. N.D.C.C. § 6-09-02 provides that the Bank may do "anything that any bank or bank holding company lawfully may do" unless restricted by statute.

N.D.C.C. § 6-09-04 authorizes the Industrial Commission to "appoint and employ such subordinate officers, employees, and agents as it may judge expedient and in the interests of the state, and shall define the duties, designate the titles, and fix the compensation of all such persons." The amount of compensation paid must remain within the "appropriation, revenues, or capital lawfully available for such purposes." N.D.C.C. § 6-09-04. Thus, N.D.C.C. §§ 6-09-02 and 6-09-04 grant of authority to the Industrial

Commission or its designee to hire employees under contract is limited only by the "appropriation, revenues, or capital lawfully available for such purposes."

I trust that this answers your questions. Please do not hesitate to call me if I can be of further assistance to you.

Sincerely,

Nicholas J. Spaeth

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