

**OPINION
71-354**

November 23, 1971 (OPINION)

Mr. Victor Abraham

Bank Examiner

Department of Banking and

Financial Institutions

RE: State - Retirement System - Officer of Employee

This is in response to your request for an opinion whether or not you are to be considered an employee or an appointive official under the North Dakota Employees Retirement Act. The specific provision and the retirement act which has application in this instance is section 54-52-01(2) and it provides as follows:

'Eligible employee' shall mean all permanent employees who meet all of the eligibility requirements set by this chapter and who are twenty-one years or more of age, and shall include appointive and elective officials at their sole election;"

You have been designated and hold the position of bank examiner. Section 6-01-13 provides that the state examiner may appoint, remove and assign appropriate titles to such deputy examiners and such other employees as in his judgment may be necessary for the proper discharge of the business of the banking department. This section continues by providing that the examiner may select and designate one of the deputy examiners as the chief deputy examiner.

We would note that the term "such" appears twice in the opening sentence in section 6-01-13. The first "such" refers to deputy examiners and the other "such" refers to employees. The context in which the term "such" is used clearly indicates that "such" in this instance is modified by the phrase "as in his judgment may be necessary." The purpose of making this comment is to point out that the statute recognizes deputy examiners and other employees which would indicate that the deputy examiners and other employees which would indicate that the deputy examiners are considered separately from employees.

It is also noted that under section 6-01-12 the deputy examiners are to be bonded by a certain sum.

Section 6-01-14 provides that the deputy examiner shall be under the direct orders and instructions of the state examiner. It is further noted that the deputy examiners under section 6-01-01-16 may not have a financial interest in any of the corporations coming under the jurisdiction of the banking department.

In the case of State ex rel. Langer v. Lofthus, 45 N.D. 357, 177 N.W. 755, which pertains to an action involving a deputy examiner, it is noted that the court in a number of instances refers to the office of

deputy examiner. The question was raised whether or not the Writ of Quo Warranto and actions in place of Scire Facias were available to test the position held by a deputy examiner. The court did not specifically resolve this question, but held that public offices are created for the benefit of the public and these benefits can only be secured when the offices are occupied and the duties thereof discharged. The court in effect recognized that the position of a deputy examiner was that of an official.

The North Dakota Supreme Court in *Youmans v. Hanna*, 35 N.D. 479; 160 N.W. 705, had under consideration involving to some degree the state examiner. The court among other things held that the state examiner was not an independent public officer but in so saying it did not imply that he was not an officer, but rather that he was an agent of the state banking board and was responsible to the banking board. The court also said "though an employee entrusted with responsible duties, the statute does not in any sense make him (chief examiner) an independent public officer, but rather an agent of the banking board and subject of its direction and control."

You have submitted along with your request a copy of your appointment and a copy of the oath of office which are filed with the Secretary of State.

On June 13, 1966, in an opinion to Wallace Warner, the Securities Commissioner, we discussed some of the basic differences between an officer and an employee and mentioned some of the tests and criteria which are used in establishing the position as being either an employee or an officer. We said there that:

The functions, duties and services to be performed together with the power granted and wielded, are determinated factors in clarifying the position as an 'officer' or 'employee'."

We then recognized the following tests as being persuasive:

1. Official designation by the legislature;
2. Delegation and possession of sovereign power;
3. Tenure and permanency of duties;
4. Creation and designation of powers and duties by law;
5. Oath or bond; and
6. Importance, dignity and independence."

In applying these tests, we find that the office of deputy examiner is designated by the legislature. The powers and duties of a deputy examiner are set out by law. The tenure and the permanency of the position are basically set forth by statute even though the examiner has supervision and control of the deputy examiners. The deputy examiner has been appointed as distinguished from being hired and has filed an oath of office. The deputy examiner is also required to have a bond covering his duties and responsibilities.

Taking these factors into account, it is our opinion that a deputy examiner is an appointed official as such term is used in section 54-52-01(2).

HELGI JOHANNESON

Attorney General