

## **N.D.A.G. Letter to Person (Feb. 2, 1989)**

February 2, 1989

Mr. Alan Person  
Executive Director  
North Dakota Public Employees  
Retirement System  
P.O. Box 1214  
Bismarck, ND 58502

Dear Mr. Person:

Thank you for your November 28, 1988, letter requesting my opinion on several issues regarding participation of district health units in the North Dakota Public Employees Retirement System (PERS) and the North Dakota Uniform Group Insurance Program (Group Insurance Program). I apologize for the delay in responding to you. I will answer your questions in the order Presented .

Your first question is whether the term "district health unit," as used in N.D.C.C. § 54-52-01(7), refers to county health departments, as well as health districts created pursuant to N.D.C.C. ch. 23-14. The term "district health unit" is not defined in N.D.C.C. ch. 54-52; however, an examination of other statutory provisions indicates that the term "district health unit" is a technical term referring to specific governmental units.

N.D.C.C. ch. 23-14 contains extensive provisions regarding the formation and operation of health districts. Within N.D.C.C. ch. 23-14 the term "district health unit" or "health district" refers to two specific types of governmental health units: a single-county or multi-county governmental unit organized pursuant to N.D.C.C. § 23-14-01 and a county-city health district organized pursuant to N.D.C.C. § 23-14-01.1. Although numerous other governmental units, including county health departments, also provide health care services to political subdivisions, the statute refers only to single-county, multi-county, and county-city health districts by the technical term "district health unit." Accordingly, it is my opinion that the term "district health unit," as used in N.D.C.C. § 54-52-01, includes only single-county, multi-county, and county-city health districts and does not include county health departments.

Your second question is whether N.D.C.C. § 54-52-02, which requires district health units to participate in "a retirement system," specifically mandates participation in PERS. As stated in my November 23, 1988, letter to you, N.D.C.C. ch. 54-52 creates a mandatory retirement system and does not permit governmental units to make contributions to alternative retirement systems on behalf of "eligible employees." Consequently, it is my opinion that district health units are statutorily required to participate in PERS.

Part (b) of your second question asks whether an agency that was not aware of its requirement to participate in PERS and has provided an alternative retirement system to its employees, must discontinue the alternative system and begin immediate participation in PERS.

In my November 23, 1988, letter to you, the issue concerned an employee who was hired by a school district and who desired to continue participation in his previous retirement program. It was my conclusion that neither the employee nor the employer could waive participation in PERS in favor of the alternative retirement plan.

The hypothetical situation posed in your most recent letter contemplates an arrangement in which the employee and employer have agreed to participate in a retirement program other than PERS and this participation has ensued for a period of time. Under this situation, the employee might have a contractual or estoppel right to continue to participate in the alternative retirement plan. Accordingly, my opinion set forth in the November 23, 1988, letter does not necessarily apply to the hypothetical fact situation described in your most recent letter. Whether an employee might be able to claim estoppel or a contract right would depend upon the particular facts of each case. Because my office renders only legal opinions and cannot resolve factual questions, I cannot answer part (b) of your second question in an opinion.

Part (c) of your second question asks what recourse PERS has against agencies that have failed to enroll eligible employees in the retirement system. If a governmental unit should fail to comply voluntarily with its statutory obligations, PERS could seek a writ of mandamus compelling the governmental unit to participate in the retirement system. See N.D.C.C. § 32-34-01. Furthermore, a governmental unit failing to pay the required contributions to PERS is "subject to a civil penalty of fifty dollars and, as interest, one percent of the amount due for each month of delay or fraction thereof after such payment became due." N.D.C.C. § 54-52-06.

Your third question is whether an agency may require its eligible employees to pay a portion of their salaries toward the employer's statutory contribution for employee health and life insurance benefits. N.D.C.C. § 54-52.1-06 provides that each state department, board, or agency must contribute a required amount toward the Group Insurance Program on behalf of its eligible employees. There is no statutory authorization for a state agency to require contributions by its employees.

N.D.C.C. § 54-52.1-03.1 provides that governmental units whose participation in PERS is voluntary (that is, counties, cities, or school districts) "may determine the amount of the governing bodies' monthly contribution towards the total monthly premium amount required of each eligible participating employee." Accordingly, these governmental units may require employee contributions toward the cost of participating in the Group Insurance Program. However, the provisions of N.D.C.C. § 54-52.1-03.1 do not apply to governmental units other than counties, cities, and school districts.

Your third question is phrased generically but seemingly presupposes that district health units must participate in the Group Insurance Program. N.D.C.C. ch. 54-52.1 creates a group insurance program for "eligible employees." N.D.C.C. §§ 54-52.1-02, 54-52.1-03. "Eligible employee" is defined in N.D.C.C. § 54-52.1-01(4) as "every permanent employee who is employed by a governmental unit, as that term is defined in section 54-52-01." N.D.C.C. § 54-52-01(7) defines "governmental unit" as "the state of North Dakota or a county or city thereof, a school district, including the Fargo school district, or any combination thereof, a district health unit, and the Garrison Diversion Conservancy District."

Two conclusions can clearly be drawn from N.D.C.C. ch. 54-52.1. First, "eligible employees" of the State are entitled to insurance coverage and the employer agency must make the necessary contribution. Second, counties, cities, and school districts that participate in the retirement system under N.D.C.C. ch. 54-52 may elect to participate in the Group Insurance Program. N.D.C.C. § 54-52.1-03.1. There is no provision within the North Dakota Century Code covering "eligible employees" of district health units or the Garrison Diversion Conservancy District. Either their participation in the Group Insurance Program is mandatory or it is not legally authorized; there is no provision allowing the district health units to participate voluntarily.

The definition of "eligible employee" was amended in 1987 to include employees of a "governmental unit, as that term is defined in section 54-52-01." 1987 N.D. Sess. Laws ch. 658, § 1; see also N.D.C.C. § 54-52.1-01(4). Only because of this amendment is it possible to argue that district health units are required to participate in the Group Insurance Program. Prior to this amendment, the term "eligible employee" was defined as "every permanent employee who is employed by the state, county, city, school district, or any combination thereof." See 1983 N.D. Sess. Laws ch. 580, § 1. The legislative history of the 1987 amendment does not suggest an intent to bring the health districts or the Garrison Diversion Conservancy District within the Group Insurance Program. Indeed, that portion of the amendment to section 54-52.1-01(4) was not discussed.

Throughout N.D.C.C. ch. 54-52.1, the employer unit is referred to as "department, board, or agency." See N.D.C.C. §§ 54-52.1-03, 54-52.1-06. "Department, board, or agency" is defined in N.D.C.C. § 54-52.1-01(3) as "the departments, boards, agencies, or associations of this state, and includes the state's charitable, penal, and higher educational institutions; the Bank of North Dakota; the state mill and elevator association; and counties, cities, and school districts participating under chapter 54-52." There is no reference to district health units or the Garrison Diversion Conservancy District. In the absence of clear legislative intent to either mandate or authorize the participation of district health units and the Garrison Diversion Conservancy District in the Group Insurance Program, it is my opinion that those governmental units are not required, nor authorized, to participate in the Group Insurance Program.

Your fourth question is whether a governmental unit, which has elected to participate in the Group Insurance Program pursuant to N.D.C.C. § 54-52.1-03.1, may differentiate the level of employer contribution toward the Group Insurance Program based on full-time

equivalency. N.D.C.C. § 54-52.1-03.1 provides that "[t]he boards of county commissioners of participating counties and the governing bodies of participating cities, school districts, or any combination thereof may determine the amount of the governing bodies' monthly contribution towards the total monthly premium amount required of each eligible participating employee." It is my opinion that N.D.C.C. § 54-52.1-03.1 does afford the governing bodies of participating cities, counties, and school districts the authority to vary the contribution for each employee in accordance with that employee's employment status. However, the local governing bodies are responsible for determining whether such a contribution structure would violate section 89 of the Internal Revenue Code which prohibits discrimination in favor of highly compensated employees.

Your fifth question is whether an agency may compensate an employee in an amount equivalent to that agency's existing premium contribution level if the eligible employee elects not to enroll in the Group Insurance Program. As stated in a 1972 Attorney General's opinion, the employer's contribution to the cost of the group insurance program is not intended as additional compensation. See March 29, 1972, letter from Attorney General Helgi Johannesson to Tor Hegland. Accordingly, absent appropriate statutory authority, there is no basis for a governmental unit to offer as additional compensation the required premium payment to an employee who does not enroll in the program.

If you have any further questions on this matter, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

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cc: Keith Johnson  
Custer District Health Unit