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LETTER OPINION
2024-L-02

Ms. Sally A. Holewa, State Court Administrator
Office of the State Court Administrator
Supreme Court
Judicial Wing, 1st Floor
600 E Boulevard Ave
Bismarck, ND 58505-0530

Dear Ms. Holewa:

Thank you for requesting my opinion on North Dakota Public Employees Retirement System (NDPERS) benefits available to sitting state district court judges who hold accounts in the NDPERS main plan and the NDPERS judges plan. You ask whether a sitting district court judge, who has reached his or her rule of 85, may collect retirement benefits from the NDPERS main plan without first retiring from his or her current position as a judge. You also ask whether, to collect from the NDPERS main plan, there must be an actual break in service between employment with an NDPERS participating employer and beginning service as a state judge or is it sufficient that the new judge is statutorily required to move from the NDPERS main plan to the NDPERS judges plan. Finally, you ask whether employment as a judge, after having retired from an NDPERS participating employer, is considered a return to service that may disrupt current collection of retirement benefits under an existing NDPERS main plan.

It is my opinion that a sitting district court judge, who has reached their rule of 85, may not collect retirement benefits from the NDPERS main plan without first terminating his or her current position. It is further my opinion that, the reason a state judge cannot collect from the NDPERS main plan while being a sitting judge is not related to a shortened break in service, but rather, because there is no dual coverage exemption for district court judges, so they are not eligible for duplicate coverage in a retirement plan to which the state is contributing. Finally, it is my opinion that if an individual becomes a district court judge, after having retired from an NDPERS participating employer, it is considered a return to service that may disrupt current collection of retirement benefits under an existing NDPERS main plan.

ANALYSIS

The North Dakota Century Code, in N.D.C.C. § 54-52-02 establishes a retirement system, known as the “public employees retirement system which mandates that, among other entities, ‘the supreme court, and the district courts . . . shall participate in [the] retirement system.’”¹ NDPERS is comprised

¹ N.D.C.C. § 54-52-02.

of participating members² from numerous employers,³ the largest of which is the State of North Dakota.⁴ Various groups of participating members, depending on their occupation, contribute to and benefit from the retirement plan at different rates.⁵ For instance, participating members who are supreme court and district court judges have unique contribution amounts and benefit calculations set out in N.D.C.C. §§ 54-52-06.1 and 54-52-17(4)(b).⁶ Individuals often refer to these contribution and benefit provisions as the “judges plan.” Regardless of the nomenclature of a plan under N.D.C.C. ch. 54-52, however, all participating NDPERS members are ultimately part of one retirement plan under N.D.C.C. ch. 54-52. Throughout this opinion we refer to the NDPERS “main plan” and the “judges plan” because those terms are used as shorthand for the different contribution and benefit amounts available to different categories of employees, but they are both funded by the same trust and are not separate retirement plans.

There are two methods for reaching a “normal retirement”⁷ date by which a member of a NDPERS plan may begin receiving retirement payments. First, under N.D.C.C. ch. 54-52, a NDPERS member may satisfy the “rule of 85” which means the sum of the participating member’s years of service credit and the participating member’s age is at least 85.^{8,9} Second, a supreme court justice or district court judge may begin receiving retirement payments on “[t]he first day of the month next following the month in which the member attains the age of sixty-five years.”¹⁰ In either case, however, benefits are payable only when the participating member is retired, and retirement is defined as “either a termination of employment or termination of participation in the retirement plan.”¹¹ Thus, a district court judge who meets the criteria for either normal retirement date may collect from the NDPERS retirement plan only when employment is ended or participation in the plan is complete.

² N.D.C.C. § 54-52-01(11).

³ N.D.C.C. § 54-52-01(6).

⁴ N.D.C.C. § 54-52-01(09).

⁵ N.D.C.C. § 54-52-06 (contribution amount for participating employees); N.D.C.C. § 54-52-06.1 (contribution amount for supreme court and district court judges); N.D.C.C. § 54-52-06.2 (contribution amount for national guard security officers or firefighters); N.D.C.C. § 54-52-06.3 (contribution amount for peace officers, firefighters, or correctional officers employed by political subdivisions).

⁶ Even though it is commonly referred to as the “Judges Plan,” the supreme court and the district courts participate in the NDPERS main plan. It is just the contribution amounts that are different by statute.

⁷ N.D.C.C. § 54-52-17(3)(a).

⁸ N.D.C.C. § 54-52-17(4)(b); *See also* N.D. Pub. Emps. Ret. Sys. *Judges Retirement Plan (2023-2025)*, p. 26, <https://www.ndpers.nd.gov/active-members/retirement-plans-active-members/judges-retirement-plan> (click “Plan Handbook Overview”).

⁹ N.D.C.C. § 54-52-17(3)(a)(2) (“Normal retirement date” occurs “[w]hen the member has a combined total of years of service credit and years of age equal to eighty-five and has not received a retirement benefit under this chapter”).

¹⁰ N.D.C.C. § 54-52-17(3)(a)(1).

¹¹ N.D.C.C. § 54-52-01(17).

N.D.C.C. ch. 54-52 states that, unless an employee falls under the state’s specific dual coverage exceptions,¹² they are not eligible for duplicate coverage in a retirement plan to which the state is contributing.¹³ Specifically, N.D.C.C. § 54-52-02 states “[e]mployees presently covered by a pension plan or retirement plan to which the state is contributing, except social security, are not eligible for duplicate coverage except as provided under sections 39-03.1-14.1 and 54-2-17.2.” The prohibition on duplicate coverage was previously examined by this office when a question was presented as to whether an employee with concurrent employment relationships with the state could participate in both NDPERS and another state retirement plan.¹⁴ In that opinion, this office clarified that duplicate coverage “refers to coverage in PERS that is a copy or repeat of the employee’s original coverage in a pension or retirement plan ‘to which the state is contributing.’”¹⁵ In other words, duplicate coverage would be prohibited if the state would be paying “twice or double for the same coverage.”¹⁶

In the situation you describe, the individual elected to a district court judgeship was previously a public or state employee already participating in NDPERS. Upon appointment or election to their judicial office, the individual, who previously participated in the NDPERS main plan, will again participate in NDPERS as a judge.¹⁷ At that time, the state will again make contributions to the NDPERS plan – because the NDPERS main plan and the judges plan are the same trust, the judge is prohibited from both contributing and receiving benefits from the same plan.

Upon obtaining employment as a supreme court justice or district court judge, the employee’s participation in the judges plan and the consequent calculation of benefits would fall under N.D.C.C. § 54-52-17(4)(b). To simultaneously collect and earn retirement under the NDPERS system, under these respective plans, would run afoul of the state’s prohibition of duplicate coverage. While the Legislature has carved out dual coverage exceptions for certain plans under N.D.C.C. § 39-03.1-14.1 and N.D.C.C. § 54-52-17.2, it has not done so for the supreme court and district courts. As a result,

¹² N.D.C.C. § 39-03.1-14.1 (relating to Highway Patrol Troopers’ retirement); N.D.C.C. § 54-52-17.2 (relating to Teachers’ Fund retirement, Highway Patrol Troopers’ retirement, and Teachers’ Insurance and Annuity Association of America – College Retirement Equities Fund (TIAA-CREF)).

¹³ N.D.C.C. § 54-52-02. *See also* N.D.A.G. 96-F-02, p.1, *citing* 1973 N.D. Sess. Laws, ch. 246, 1989 N.D. Sess. Laws, ch. 665 (the “prohibition of duplicate coverage has remained essentially the same since the 1965 adoption of the PERS plan”); N.D.A.G. 66-304, p. 306 (“[T]he Legislature intended to prohibit state funds from being used to simultaneously make payments toward more than one retirement plan . . . or that an employee or officer earn benefits simultaneously in more than one plan even though the state’s contribution may be delayed under any such plan until retirement.”).

¹⁴ *See* N.D.A.G. 96-F-02.

¹⁵ N.D.A.G. 96-F-02.

¹⁶ N.D.A.G. 96-F-02.

¹⁷ N.D.C.C. § 54-52-02.3. *See also* N.D.C.C. § 54-52-02 (“Employees presently covered by a pension plan or retirement plan to which the state is contributing, except social security, are not eligible for duplicate coverage.”).

these sections taken together indicate that benefits may not be collected or earned in duplicate and cannot be collected unless the employee has terminated their employment or plan membership.¹⁸

This analysis also addresses your question regarding whether a break in service - between employment with a NDPERS participating employer and beginning service as a judge - is necessary to collect from the NDPERS main plan or is it sufficient that a new district court judge is statutorily required to move from the NDPERS main plan to the NDPERS judges plan. State district court judges must be “participating member[s] of the public employees retirement system.”¹⁹ The NDPERS judges plan, however, comprises unique contribution rates, vesting schedules, and benefit calculations.²⁰ As such, when a participating member of the NDPERS main plan becomes a new district court judge, participation in the NDPERS plan is adjusted to reflect the calculation of benefits required under the NDPERS judges plan.²¹ A new judge may work their last day for a former employer participating in the NDPERS main plan on a Tuesday and begin their duties as a judge in the NDPERS judges plan on a Wednesday. There is no statutory requirement for a break *in between* the positions. A “severance of employment,” which means “not being on the payroll of a covered employer for a minimum of one month,” is required, however, prior to collecting retirement benefit payments from the retirement plan *after* “termination of employment” as a judge.²²

There are instances where there is a severance of employment of 30 or more days. Typically, this is when an individual retires from a NDPERS participating employer, starts collecting retirement benefits, and later becomes employed as a judge. This scenario is the basis of your final question of whether employment as a judge, after having previously retired from a NDPERS participating employer, is considered a return to service that may disrupt collecting current retirement benefits under NDPERS.

Employment as a district court judge, after having previously retired from a NDPERS participating employer, is considered a return to service that disrupts collecting current retirement benefits under NDPERS.²³ “The benefits of a retired member who returns to *permanent* employment shall be suspended without interest accruing on the suspended account, except as provided in subsection 1

¹⁸ See also N.D. Pub. Emps. Ret. Sys. *Judges Retirement Plan (2023-2024)*, pg. 30, <https://www.ndpers.nd.gov/active-members/retirement-plans-active-members/judges-retirement-plan> (click “Plan Handbook Overview”) (“To be eligible for benefits, you must terminate employment or terminate membership.”).

¹⁹ N.D.C.C. § 54-52-02.3.

²⁰ N.D.C.C. §§ 54-52-06.1, 54-52-17(4)(b), 54-52-17(5).

²¹ N.D.C.C. § 54-52-02 (“Employees presently covered by a pension plan or retirement plan to which the state is contributing, except social security, are not eligible for duplicate coverage.”).

²² N.D. Admin. Code § 71-02-01-01(29).

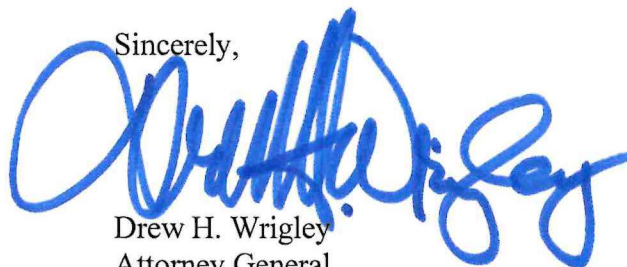
²³ This presumes the judge’s return to service is to a permanent employment position and not a temporary position. See N.D.C.C. § 54-52-01(22) (A “[t]emporary employee” is “a governmental unit employee who is not eligible to participate as a permanent employee.”).

of North Dakota Century Code section 54-52-05.”²⁴ The NDPERS Judges Retirement Plan Handbook provides additional insight:

As a retiree meeting Normal Retirement provisions, if you return to **any permanent eligible employment with a NDPERS participating employer, your hours of employment must be restricted** if you wish to continue receiving your pension payment. As an eligible employee, your permanent employment must be limited to less than 20 hours per week so eligibility for any NDPERS retirement plan (including all plans under NDCC 54-52) is not obtained.²⁵

Therefore, a return to service as a judge, who is a permanent employee,²⁶ interrupts collecting retirement benefits under NDPERS.

Sincerely,



Drew H. Wrigley
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²⁷

²⁴ N.D. Admin. Code § 71-02-07-02 (Emphasis added).

²⁵ N.D. Pub. Emps. Ret. Sys. *Judges Retirement Plan (2023-2025)*, p. 31, <https://www.ndpers.nd.gov/active-members/retirement-plans-active-members/judges-retirement-plan> (click “Plan Handbook Overview”) (Emphasis in original).

²⁶ N.D.C.C. § 54-52-01(4) (“‘Eligible employee’ means all permanent employees . . . includ[ing] employees of the judicial branch . . .”); N.D.C.C. § 54-52-01(13) (“‘Permanent employee’ means 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 twenty weeks each year of employment.”); N.D. Admin. Code § 71-02-01-01(24) (“‘Regularly funded’ means a legislatively authorized full-time equivalent (FTE) position for state agencies. For all governmental units other than state agencies, regularly funded means a similar designation by the unit’s governing board which is created through the regular budgeting process and receives traditional employee benefits such as sick leave and annual leave.”); N.D.C.C. § 54-52-01(9) (“‘Governmental unit’ means the state of North Dakota, except the highway patrol for members of the retirement plan created under chapter 39-03.1, or a participating political subdivision thereof.”).

²⁷ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).