

LETTER OPINION
97-L-50

May 19, 1997

Mr. Sparb Collins
Executive Director, PERS
Box 1214
Bismarck, ND 58502-1214

Dear Mr. Collins:

Thank you for your letter asking whether the Public Employees Retirement System's Board (PERS Board) has the authority to lend money to its members in a manner that would be consistent with Internal Revenue Service (IRS) requirements.

North Dakota Century Code (N.D.C.C.) § 54-52-03 establishes the PERS Board as the governing authority of the state retirement system. The Board's authority is outlined under N.D.C.C. § 54-52-04. Specifically, N.D.C.C. § 54-52-04(1) provides that "[t]he board has the powers and privileges of a corporation, including the right to sue or be sued in its own name as the board." See Letter from Attorney General Nicholas Spaeth to Alan Person (August 11, 1987). The PERS Board has the additional authority to administer "other optional employee benefit programs as the board deems appropriate." N.D.C.C. § 54-52-04(7).

A corporation's general powers are outlined under N.D.C.C. § 10-19.1-26. N.D.C.C. § 10-19.1-26(20) provides that "[a] corporation may lend money to, guarantee an obligation of, become a surety for, or otherwise financially assist persons as provided in section 10-19.1-89." N.D.C.C. § 10-19.1-89(1) (emphasis added) provides:

A corporation may lend money to, guarantee an obligation of, become a surety for, or otherwise financially assist any person, if the transaction, or a class of transactions to which the transaction belongs, is approved by the affirmative vote of a majority of the directors present and:

- a. Is in the usual and regular course of business of the corporation;
- b. Is with, or for the benefit of, a related organization, an organization in which the corporation has a financial interest, all organizations with which the corporation has a business relationship, or an organization to

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which the corporation has the power to make donations, any of which relationships constitute consideration sufficient to make the loan, guarantee, suretyship, or other financial assistance so approved enforceable against the corporation;

- c. Is with, or for the benefit of, an officer or other employee of the corporation or a subsidiary, including an officer or employee who is a director of the corporation or a subsidiary, and may reasonably be expected, in the judgment of the board, to benefit the corporation; or
- d. Whether or not any separate consideration has been paid or promised to the corporation has been approved by:
 - (1) The holders of two-thirds of the voting power of the shares entitled to vote which are owned by persons other than the interested person or persons; or
 - (2) The unanimous affirmative vote of the holders of all outstanding shares, whether or not entitled to vote.

Because the PERS Board has the powers and privileges of a corporation, including the authority to lend money as authorized under N.D.C.C. §§ 10-19.1-26(20) and 10-19.1-89(1), it is my opinion that the PERS Board has the authority to make loans from the retirement system of a portion of the accrued benefit that the member has earned.

You note that such a program would have to be consistent with IRS requirements. Those requirements are outlined generally at 26 U.S.C. §§ 72(p) and 4975(d). 26 U.S.C. § 72(p)(1) provides "[i]f during any taxable year a participant or beneficiary receives (directly or indirectly) any amount as a loan from a qualified employer plan, such amount shall be treated as having been received by such individual as a distribution under such plan." However, 26 U.S.C. §§ 72(p)(2)(A) provides an exemption for certain loans if the loan does not exceed \$50,000 or a formula amount as set forth in that section. 26 U.S.C. § 72(p)(B) generally provides that the loan be repayable in five years. 26 U.S.C. § 4975(d)(1) exempts the loan from constituting a prohibited transaction if the loan

- (A) is available to all such participants or beneficiaries on a reasonably equivalent basis,

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- (B) is not made available to highly compensated employees (within the meaning of section 414(q)) in an amount greater than the amount made available to other employees,
- (C) is made in accordance with specific provisions regarding such loans set forth in the plan,
- (D) bears a reasonable rate of interest, and
- (E) is adequately secured.

Adherence to the general IRS requirements is not inconsistent with the general provisions of N.D.C.C. § 10-19.1-89. However, a question might arise whether the PERS Board has the authority to provide contractual security for the loan by actuarially reducing the member's retirement benefit if the loan was not repaid. N.D.C.C. § 28-22-19(1) provides that "[a]ll pensions . . . or other benefits paid or payable by, or amounts received as a return of contributions and interest from, a retirement system established pursuant to state law" are not subject to seizure upon execution or other process. Nonetheless, the PERS Board is authorized to "adjust service and make any correction of member, retiree, or beneficiary records and benefits after an error or inequity has been determined." N.D.C.C. § 54-52-04(12). In this regard, it would be inequitable not to actuarially reduce a member's retirement benefit if the member were to default on repaying the portion of the accrued benefit that the member had borrowed. It is, therefore, my further opinion that the PERS Board has the authority to lend money to its members consistent with IRS requirements concerning that activity.

Because Article X, section 18 of the North Dakota Constitution provides that "neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual . . . except for [the] reasonable support of the poor" a question may arise whether the proposed lending program would violate this constitution limitation. However, it has long been held that the establishment of a state pension fund "is for a public purpose and enterprise and within the power of the state Legislature." State ex rel. Haig v. Hauge, 164 N.W. 289, 290 (N.D. 1917). The proposed security for the loan attaches to the member's account balance which is held in trust by the PERS Board for the benefit of the member. It would not, therefore, be the state that would be making a loan or extending its credit, but rather the PERS Board would administer the proposed loan program as an optional employee benefit program.

Sincerely,

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ATTORNEY GENERAL

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