

## **N.D.A.G. Letter to Kuhn (April 11, 1991)**

April 11, 1991

Mr. Gerald A. Kuhn  
Logan County State's Attorney  
P.O. Drawer 50  
Napoleon, ND 58561

Dear Mr. Kuhn:

Thank you for your March 4, 1991, letter concerning the participation of the multi-county district judge in the Logan County retirement plan.

You ask whether the county judge has an absolute right to participate in the Logan County retirement plan. In addition to the information you provided, I received other information including some of the budget documents presented to the multi-county court committee, and various pieces of correspondence from Judge Grenz. Based upon the information provided, I conclude there is no federal requirement that allows the judge to automatically participate in any of the retirement plans provided by the respective counties. Federal law currently prohibits discrimination against employees of a plan provider only if the 70-30 threshold is not met. See generally 29 U.S.C. §§ 401 et seq. Under this threshold requirement, it is possible that an employer could discriminate against 30% of the employees if certain other requirements are met. None of those requirements are relevant in this situation. (e.g., this is not discrimination in favor of a highly compensated employee.) Consequently, I conclude that it is unlikely a court would determine that exclusion of the county judge from participation in the retirement plan violated federal law.

The requirement for participation under state law is another matter, however. N.D.C.C. § 54-52-01(3) defines an eligible employee as including elected officials who, at their discretion, elect to participate. Because Logan County participates in PERS, the judge must be allowed to participate if he elects to do so. See N.D.C.C. §§ 54-52-01 and 54-52-02.1. The judge must make his election in a manner and time which gives the county notice and an opportunity to budget for his participation. If he does, Logan County is responsible for contribution of the same percentage of salary on behalf of the judge as the county contributes on behalf of the other eligible county employees. N.D.C.C. § 54-52-06. Thus, Logan County and the other parties to the multi-county court agreement cannot unilaterally determine that the judge may not participate in PERS. I reach this conclusion despite paragraph 10 of the multi-county agreement which provides that the judge is to receive the fringe benefits allowed to Emmons County employees.

Whether the judge properly made the election in this case is a question of fact. In this case, the budget submitted for 1991 included an amount for retirement. This amount was reduced from \$3,870.90 to \$1,200.00. The reasons for the reduction are not set forth. Whether the reduction resulted from negotiations which ended in an election by the judge

not to receive PERS benefits I do not know. However, I point out that it is the judge, not the various counties, who determines whether he will participate. If the budget submitted included monies to fund retirement contributions to PERS, and negotiations with the judge resulted in a failure to change his election to participate, preference should have been given to the PERS retirement payments and other items in the budget should have been reduced accordingly.

If you determine the facts are that the judge made a timely election which was not withdrawn and that election was made known to the counties, the judge is entitled to participate in PERS.

This same rationale does not apply to require the counties which provide retirement benefits, other than PERS benefits, to allow the judge to participate. Those programs are subject to the federal requirements discussed previously, however.

Finally, you ask how the multi-county agreement should be affected if the judge is entitled to participate in PERS. The contract provides Logan County is required to pay 20% of the total expenses including salary and fringe benefits of the judge. The multi-county agreement does not set the judge's salary or fringe benefits. Rather, it provides total expenses for those items are to be shared by the counties. Whether the participation by the judge in PERS requires a reduction in salary depends upon the assumptions made in the underlying budget for 1991 and how those matters are shared among the various counties. I assume that all expenses are paid by Emmons County which is then reimbursed. If so, Logan County, pursuant to the terms of the multi-county agreement, is liable for 20% of the total cost of the program, however that total is reached.

I trust this answers your questions.

Sincerely,

Nicholas J. Spaeth

krb

cc: Sparb Collins, PERS