

**N.D.A.G. Letter to Person (Nov. 23, 1988)**

November 23, 1988

Mr. Alan Person  
Executive Director  
North Dakota Public  
Employees Retirement System  
1930 Burnt Boat Drive  
P.O. Box 1214  
Bismarck, ND 58502

Dear Mr. Person:

Thank you for your letter of October 13, 1988, in which you request my opinion on whether an eligible employee may waive participation in the North Dakota Public Employees Retirement System (PERS) with the corresponding savings contributed to an alternative retirement system by the employer governmental unit.

It is my understanding that the individual in question was formerly employed by an institution of higher education in North Dakota and participated in TIAA-CREF, the national retirement plan available to certain employees of higher education institutions. The employee recently accepted employment in a nonteacher capacity with a North Dakota school district. The school district has executed a participation agreement with the State Retirement Board which requires its noncertified "eligible employees" to participate in PERS. The employee has requested to be excluded from PERS so that he may continue his participation in TIAA-CREF. The school district is willing to make the same contribution to TIAA-CREF that it would otherwise make to PERS on behalf of the employee.

Depending on the governmental unit involved, participation in PERS is either mandatory or voluntary. For "all departments, boards, institutions, commissions or agencies of the state of North Dakota, the Garrison Diversion Conservancy District, district health units, the supreme court, and the district courts," participation is mandatory. N.D.C.C. § 54-52-02.

Counties, cities, and school districts (noncertified employees only) may voluntarily participate in PERS. N.D.C.C. § 54-52-02.1. N.D.C.C. § 54-52-02.1 requires those governmental units that have decided to participate in PERS to execute a participation agreement that includes a provision obligating the political subdivision to "contribute on behalf of each eligible employee an amount equal to that provided in section 54-52-06." In accordance with this statutory mandate, the standard participation agreement drafted by PERS requires all future "eligible employees" of the political subdivision to participate in PERS. The agreement permits "eligible employees" of the governmental unit who are employed at the time the participation agreement is executed to elect not to participate in

PERS. The provision allowing current "eligible employees" to elect not to participate in PERS was apparently included to implement N.D.C.C. § 54-52-05.

At the time that PERS was established in 1965, the Legislative Assembly provided in N.D.C.C. § 54-52-05 that "every eligible permanent state, county, city, or noncertified school district employee concurring in the plan shall so state in writing." The Legislature further provided in section 54-02-05 that "all future eligible employees shall be participating members." Therefore, "eligible employees" employed by governmental units required to participate in PERS could have elected not to participate in the retirement system as of July 1, 1965 (the effective date of N.D.C.C. § 54-52-05), whereas all future "eligible employees" were required to participate. Similarly, "eligible employees" employed by governmental units that may voluntarily participate in PERS are authorized to elect not to participate as of the date the governmental unit executes the participation agreement. However, it is clear that future "eligible employees" of such governmental units are required to participate in PERS.

It should also be noted that N.D.C.C. § 54-52-02 contains the curious statement that "employees presently covered by a pension or a retirement plan to which the state is contributing, except Social Security, shall not be eligible for duplicate coverage." Arguably, this sentence implies that the state may contribute to alternative retirement systems for its eligible employees. The legislative history of N.D.C.C. ch. 54-52, however, indicates that at the time PERS was established in 1965 "North Dakota [had], of course, special retirement plans for a very limited group of state officers and employees." A Report on Retirement Program by Lester Kelley, Hearing on S.B. No. 164 Before the Industry, Business, and Labor Committee, 39th Leg. Session (February 4, 1965). Therefore, the clause in N.D.C.C. § 54-52-02 that refers to "employees presently covered by a pension plan" is applicable only to those arrangements existing in 1965 and would not be relevant in resolving the present issue.

As the foregoing discussion clearly illustrates, participation in the retirement program by state agencies and certain other governmental units is mandatory. Counties, cities, and school districts (noncertified employees only) are authorized to participate in PERS and may enter into agreements with the retirement board for that purpose. If a political subdivision exercises its option to do so, N.D.C.C. §§ 54-52-02.1 and 54-52-05 require that all future eligible employees must participate. It is my opinion, therefore, that neither the "eligible employee" nor the school district may waive participation in PERS so that the employee may participate in an alternative retirement system.

In reaching this conclusion, I have considered the general rule that "private statutory rights or benefits may be waived by a party entitled thereto unless such waiver would be against public policy or the statute declares or implies that they may not be waived." J.R. Watkins Company v. Vangen, 116 N.W.2d 641, 643 (N.D. 1962); N.D.C.C. § 1-02-28. As indicated above, however, N.D.C.C. ch. 54-52 creates a mandatory retirement system and does not permit participation to be waived.

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

Sincerely,  
Nicholas J. Spaeth

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