

**LETTER OPINION**  
**94-L-292**

November 1, 1994

Mr. Sparb Collins  
Public Employees Retirement System  
400 E Broadway Suite 505  
PO Box 1213  
Bismarck, ND 58502

Dear Mr. Collins:

Thank you for your letter inquiring about the proposed policy of the Public Employees Retirement System Board (the Board) concerning the coordination of multiple plan membership under North Dakota Century Code (N.D.C.C.) ? 54-52-17.2(1)(a). The proposed policy provides as follows:

Upon providing proper documentation of retirement plan participation, a member who meets the following criteria may use service credit in TIRF for the purpose of meeting the Rule of 88 and for vesting purposes under the North Dakota Public Employees Retirement System. The member:

1. Must have participated in both TIRF and TIAA-CREF.
2. Must have elected to transfer the member's TIRF account balance to TIAA-CREF in connection with the administrative coordination of the various state retirement plans as the result of the enactment of SB 2086, 1973 ND Session Laws; ch. 133.
3. Did not have a cashout since the time of the transfer of funds.
4. Did not relinquish such service in writing.

In 1971, the Legislature repealed N.D.C.C. ch. 15-39.1 and replaced the Teachers' Insurance Retirement Fund (TIRF) with the Teachers' Fund for Retirement (TFFR). See 1971 N.D. Sess. Laws ch. 184; N.D.C.C. ch. 15-

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39.1. In 1973, the State Board of Higher Education established the Teachers' Insurance and Annuity Association of America - College Retirement Equities Fund (TIAA-CREF) as an alternate retirement plan to TFFR for nonvested college teachers. See 1973 N.D. Sess. Laws ch. 133 [S. Bill 2086]. S. Bill 2086 authorized this alternate retirement plan by amending the authority of the State Board of Higher Education under N.D.C.C. ? 15-10-17. The newly created subsection of N.D.C.C. ? 15-10-17 provided:

13. To establish a retirement program as an alternative to chapter 15-39.1 for employees of institutions under its control who are not vested members of the teachers' fund for retirement subject to the following guidelines:

(a) Benefits under the program shall be provided through annuity contracts purchased by the board but which shall become the property of the participants;

(b) The cost of the annuity contracts shall be defrayed by equal contributions of the participant and employer institution;

(c) Eligible employees appointed before July 1, 1973, shall participate in the alternate retirement program only by their individual election. When the electing eligible employee is a member of the teachers' fund for retirement, he may withdraw assessments with interest therefrom as contemplated by section 15-39.1-20 to deposit for his account in the alternate program.

The board shall provide for the administration of the alternate retirement program and establish rules and regulations therefor consistent with the foregoing guidelines. Nothing in this subsection shall be construed in derogation of any existing retirement programs approved by the board.

Under S. Bill 2086, nonvested members of TFFR had the option of withdrawing their assessments with interest and transferring that amount to the alternate retirement program consistent with N.D.C.C. ? 15-39.1-20. At that time, N.D.C.C. ? 15-39.1-20 provided:

When a member of the fund ceases to be eligible under the terms of this chapter to participate in the fund, he may withdraw from the fund and shall be then entitled to receive a refund of assessments accumulated with interest credited for each year as determined at the current rate for one-year certificates then being paid by the Bank of North Dakota. Such refund shall be in lieu of any other benefits to which the member may be entitled under the terms of this chapter.

1971 N.D. Sess. Laws ch. 184, ? 1. Thus, a transfer from TFFR to TIAA-CREF had the effect of terminating further retirement obligations of TFFR to those teachers who made that election. See Hearings on S. 2086 Before the Senate Education Comm. (Dr. W.E. Koenker, Feb. 6, 1973, letter to Rep. Kenneth Knutson). The form that was used to effect this election, which was approved by this office, indicated that years of credited service, teacher assessments, and interest would be transferred to TIAA-CREF. See Letter from Assistant Attorney General Gerald VandeWalle to Margaret Gillen (April 25, 1973).

The issue of transferred service credit lay dormant until 1989, when the Legislature added TIAA-CREF to the coordination of multiple plan membership under N.D.C.C. ? 54-52-17.2. See 1989 N.D. Sess. Laws ch. 671, ? 1. N.D.C.C. ? 54-52-17.2(1)(a) provides:

For the purpose of determining eligibility for benefits under this chapter, an employee's years of service employment is the total of the years of service employment earned in the public employees retirement system and the years of service credit earned in any number of the following:

- (1) The teachers' fund for retirement.
- (2) The highway patrolmen's retirement system.
- (3) The teachers' insurance and annuity association of America--college retirement equities fund (TIAA-CREF), for service credit earned while employed by North Dakota institutions of higher education.

(Emphasis added.)

The question facing the Board under this statute is

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how to calculate the service credit of members who elected to transfer their TFFR accounts to TIAA-CREF when it was established as an alternate retirement plan in 1973. Specifically, the Board must decide whether to count the member's pre-1973 TFFR service credit as service credit earned in TIAA-CREF. The coordination of multiple plan membership under TFFR does not include service credit in TIAA-CREF, but rather only coordinates service credit earned in the Public Employees Retirement System (PERS) and the Highway Patrolmen's Retirement System. See N.D.C.C. ? 15-39.1-10.3. Therefore, this issue only arises when a member who had elected to make this transfer is later employed by a participating employer under PERS.

You ask whether the policy proposed by the Board to answer this question complies with N.D.C.C. ? 54-52-17.2. When the terms of a statute are clear, the letter of the law is not to be disregarded under the pretext of pursuing its spirit. N.D.C.C. ? 1-02-05; Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993). However, even "statutes that are clear and unambiguous when read separately may contain a latent ambiguity when read together and applied to a particular set of facts." Kroh v. American Family Ins., 487 N.W.2d 306, 308 (N.D. 1992). "A statute is ambiguous when it is subject to different, but rational, meanings." Id. at 307.

I believe that the interpretation of "service credit earned" under N.D.C.C. ? 54-52-17.2 is subject to different but rational meanings when read together with N.D.C.C. ? 15-39.1-20 and examined in the context of a pre-1973 service credit transfer from TFFR to TIAA-CREF. It is my opinion that the proposed policy is a reasonable and legally supportable interpretation of the statute.

N.D.C.C. ? 54-52-17.2 does not define the phrase "service credit earned." If a term in a statute is not defined, it should be given its ordinary meaning.

N.D.C.C. ? 1-02-02. Technical words and phrases that have a particular meaning in law should be construed according to that meaning and the context in which they are used. N.D.C.C. ? 1-02-03.

The technical phrase "service credit earned" in N.D.C.C. ? 54-52-17.2 is subject to several different

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but rational interpretations. First, the plain meaning of "earned" is not "earned but not waived." Members who transferred from TFFR to TIAA-CREF have still "earned" a service credit in TFFR that could be counted under N.D.C.C. ? 54-52-17.2(1)(a)(1). Yet, these same members lost all rights to benefits in TFFR after transferring to TIAA-CREF. 1971 N.D. Sess. Laws ch. 184, ? 1. These statutes do not indicate how to treat service credits that were earned but waived. Thus, the fairly clear language of N.D.C.C. ? 54-52-17.2 becomes ambiguous when construed with N.D.C.C. ? 15-39.1-20.

Second, at the time members transferred to TIAA-CREF, the only benefit of a service credit was an increase in contributions after ten years of service. According to the legislative history of S. Bill 2086, "when faculty members' years of coverage under North Dakota Teachers plus their years under . . . TIAA-CREF amounts to ten years, they will be shifted to a 6 and 6 percent plan under TIAA-CREF." Hearings, supra (Dr. W.E. Koenker, Feb. 6, 1973, letter to Rep. Kenneth Knutson) (emphasis added). In other words, faculty members who elected to transfer from TFFR to TIAA-CREF not only transferred their equity and interest in TFFR, but also their years of service credit.

An employee's years of service employment includes "service credit earned in" TIAA-CREF. N.D.C.C. ? 54-52-17.2(1)(a)(3). This statute could reasonably be interpreted to mean service credit as computed under TIAA-CREF. Although some employees earned part of their service credit while members of TFFR, their years of service in TFFR have been included as service credit earned in TIAA-CREF. Thus, when this fairly clear statute is applied to pre-1973 service credit transfers from TFFR to TIAA-CREF, it again becomes ambiguous.

Several extrinsic aids may be used to interpret an ambiguous statute, including the legislative history and "administrative construction of the statute." N.D.C.C. ? 1-02-39. "The administrative construction of a statute by the agency administering the law is entitled to deference if that interpretation does not contradict clear and unambiguous statutory language." Western Gas Resources, Inc. v. Heitkamp, 489 N.W.2d 869, 872 (N.D. 1992). Further, "[a]dministrative deference is an important consideration when an agency

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interprets and implements a law that is complex and technical." Id.

I understand that the proposed policy reflects the decision of a majority of the PERS Board that a member's pre-1973 TFFR or TIRF service credit was transferred to TIAA-CREF when the member elected to make that transfer under S. Bill 2086, 1973 N.D. Sess. Laws ch. 133. Because the coordination of multiple plan membership constitutes a complex and technical area, I believe that the Board's interpretation of "service credit earned" is entitled to some deference.

The legislative history of the 1989 amendments to N.D.C.C. ? 54-52-17.2 shows that the Legislature added TIAA-CREF to the coordination of multiple plan membership to "simply allow [members] to count the 'service' while in the employment of Department of Higher Education for purposes of vesting in the right to benefits under PERS." Hearing on S. 2127 Before the Senate State and Federal Government Comm., (January 11, 1989) (Testimony of Alan Person). The proposed policy is consistent with this purpose, which would apply regardless of whether the employee participated in TFFR or TIAA-CREF.

The Board's proposed policy does not contradict clear and unambiguous statutory language, but rather clarifies and explains the meaning of a technical phrase that is not defined by statute and is ambiguous as applied. Giving appropriate deference to the Board's expertise and interpretation of the statute, it is my opinion that the proposed policy is a reasonable interpretation of N.D.C.C. ? 54-52-17.2 and is legally supportable.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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