

## **N.D.A.G. Letter to Rolfson (March 29, 1985)**

March 29, 1985

Mr. Calvin N. Rolfson, Chairman  
North Dakota Deferred Compensation  
Committee  
State Capitol  
Bismarck, North Dakota 58505

Dear Mr. Rolfson:

Thank you for your letter of February 25, 1985, in which you ask whether you, as Chairman, or other members of the North Dakota Deferred Compensation Committee have the authority to endorse deferred compensation checks distributed to participating public employees where the providers make such checks payable to the State of North Dakota or to the State of North Dakota and the participating public employee as joint payees.

N.D.C.C. Ch. 54-52.2 created a Deferred Compensation Plan for state employees as well as for employees of political subdivisions. Also established was the North Dakota Deferred Compensation Committee (hereinafter "Committee") to administer the deferred compensation programs. See §§ 54-52.2-01 and 54-52.2-03.

The Committee consists of three persons initially appointed by the Governor. See N.D.C.C. § 54-52.2-03. In addition, the Committee is authorized to administer deferred compensation programs for employees of counties, cities, or other political subdivisions provided the Committee is appointed to do so. Id.

Members of state boards and commissions are generally regarded as public officers. See 63A Am. Jur.2d Public Officers and Employees § 21 (1984). Public officers have such authority as is expressly given to them by the Constitution and statutes together with those powers and duties which are necessarily implied from the express grants of authority. See American Federation of State, County, and Municipal Employees, Council No. 95 v. Olson, 338 N.W.2d 97 (N.D. 1983).

N.D.C.C. § 54-52.2-02 grants to the Committee, acting on behalf of each state agency or applicable political subdivisions, the authority "[to] enter into contractual agreements with [participating] employees . . .to defer any portion of that employee's compensation allowed under section 457 of the Internal Revenue Code [26 U.S.C. 457]."

Additionally, the Committee is authorized to fund a deferred compensation program for the employee (with the employee's consent) under N.D.C.C. § 54-52.2-01. That section provides, in part, as follows:

54-52.2-01. DEFERRED COMPENSATION PROGRAM FOR PUBLIC EMPLOYEES--CONTRACT. \* \* \*The deferred compensation program may consist of a contract, purchase, or investment in a fixed or variable life insurance or annuity contract from any life underwriter duly licensed by this state who represents an insurance company licensed to contract business in this state, a savings account at a federally insured financial institution or the Bank of North Dakota, an account with or managed by a dealer registered under chapter 10-04, or any combination of contracts or accounts authorized by this section, as specified by the employee.

Further, N.D.C.C. § 54-52.2-05 grants administrators of a participating employee's deferred compensation program the authority to make payments under the program:

54-52.2-05. ADMINISTRATORS AUTHORIZED TO MAKE PAYMENTS OR INVESTMENTS. Notwithstanding any other provision of law to the contrary, those persons designated to administer the deferred compensation program are hereby authorized to make payments or investments under the deferred compensation program as specified by the employee in accordance with section 54-52.2-01. The payments or investments shall not be construed to be a prohibited use of the general assets of the state, county, city, or other political subdivision.

Thus, the Committee when administering a participating employee's deferred compensation program is specifically authorized by N.D.C.C. § 54-52.2-05 "to make payments. . . under the deferred compensation program. . . ." Moreover, any payments made to the participating employee from the deferred compensation program "shall not be construed to be a prohibited use of the general assets of the state, county, city, or other political subdivision."

Currently, all participating employees' deferred compensation programs are funded by third parties, i.e., life insurance underwriters, federally insured financial institutions, the Bank of North Dakota, or a dealer registered under N.D.C.C. Ch. 10-04. The Committee does not directly fund the participating employees' deferred compensation programs. Therefore, any payments made to the participating employee will necessarily be made by such third party providers.

However, for a state deferred compensation plan to qualify for income tax deferment for the portion of the compensation deferred by the participating employee, the state plan must, among others, provide that:

\* \* \*

- A. All amounts of compensation deferred under the plan,
- B. All property and rights purchased with such amounts, and

C. All income attributable to such amounts, property, or rights,

shall remain (until made available to the participant or other beneficiary solely the property and rights of the state without being restricted to the provision of benefits under the plan) subject only to the claims of the state's general creditors. 26 U.S.C. § 457(b)(6).

Because of this restriction, the third party providers, rather than making payments directly to the participating employees, either make a check payable to the State of North Dakota or to the State of North Dakota and the participating employee jointly. While the Committee does not make payments to the participating employees directly from a state fund; nevertheless, when the check from the third party provider is properly endorsed by an authorized public official and delivered to the participating employee, this would constitute "payment" by the Committee under N.D.C.C. § 54-52.2-05.

Obviously, in order for the participating employee to validly negotiate the check issued by the third party provider, it is necessary that a state official on behalf of the State of North Dakota properly endorse the check. Since the members of the Committee are charged with the administration of public employees' deferred compensation plans, including making payments under these deferred compensation programs to participating employees, the members of the Committee on behalf of the State of North Dakota have the implicit authority under N.D.C.C. § 54-52.2-05 to endorse deferred compensation checks distributed to participating employees where a provider makes such checks payable to the State of North Dakota or the State of North Dakota and the participating employee jointly.

Sincerely,

Nicholas J. Spaeth

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