

**LETTER OPINION**  
**93-L-336**

November 18, 1993

Mr. Stephen J. Rice  
Walsh County State's Attorney  
Courthouse  
Grafton, ND 58237

Dear Mr. Rice:

Thank you for your October 4, 1993, letter requesting my opinion on whether Walsh County may pay the employee contribution to the Public Employees Retirement System (PERS) for non-social service board employees in lieu of a raise while denying that particular benefit to county social service board (CSSB) employees, who instead will receive a 3% salary increase.

You indicated that CSSB employees are considered by the county commission to be "covered by the North Dakota Department of Human Services Manual regarding personnel policies, procedures and employee benefits."

You also indicated that the CSSB employees have received raises identical to those granted state employees but that such raises have not been granted to non-CSSB employees of Walsh County. Presumably, the county is picking up the PERS employee contribution to provide some equity to those non-CSSB employees who have not received certain pay raises granted to CSSB employees.

CSSB employees are subject to some unique personnel administration requirements. Although they are employees of the individual counties, they are covered by the state merit system of personnel administration and are subject to state merit system rules, now found at North Dakota Administrative Code (N.D. Admin. Code) art. 4-07, including those pertaining to benefits such as annual and sick leave. See 1981 N.D. Op. Att'y Gen. 413. Further, the authority to set personnel

Stephen J. Rice  
November 18, 1993  
Page 2

policies and make personnel decisions regarding such employees is shared by the state Central Personnel Division, the county social service board, and the board of county commissioners, although the latter retains a large measure of control because of its budgetary authority and authority to make appointments to the county social service board. 1981 N.D. Op. Att'y Gen. 323.

There is no legal requirement for a county to utilize the Department of Human Services' personnel policy manual for county social service board employees, although the county commission is free to do so to the extent it does not conflict with state merit system rules. Neither is the county required to grant raises to CSSB employees that apply only to state employees. See Letter from Attorney General Nicholas J. Spaeth to Brian McClure (January 15, 1992). However, CSSB employee salaries must be within the salary ranges for the applicable state classifications. 1981 Op. Att'y Gen. 361. This may, in some instances, necessitate that some salary increases be given to CSSB employees to keep them within the applicable classification pay ranges.

County employees are authorized to join the Public Employees Retirement System in certain instances. North Dakota Century Code (N.D.C.C.) ? 54-52-02.1. Employers participating in PERS have the option to pick up the contribution in lieu of a salary increase. N.D.C.C. ? 54-52-05(3) provides:

Each employer, at its option, may pay the employee contributions required by subsection 2 of section 54-52-06.1 for all compensation earned after June 30, 1983, and may pay the employee contributions required by section 54-52-06.2 for all compensation earned after June 30, 1991. The amount paid must be paid by the employer in lieu of contributions by the employee. If the state decides not to pay the contributions, the amount that would have been paid will continue to be deducted from the employee's compensation. If contributions are paid by the employee, they must be treated as employee contributions in determining tax treatment under this code and the federal Internal

Stephen J. Rice  
November 18, 1993  
Page 3

Revenue Code. If contributions are paid by the employer, they shall not be included as gross income of the employee in determining tax treatment under this code and the Internal Revenue Code until they are distributed or made available. The employer shall pay these employee contributions from the same source of funds used in paying compensation to the employee. The employer shall pay these contributions by effecting an equal cash reduction in the gross salary of the employee or by an offset against future salary increases or by a contribution of a reduction in gross salary and offset against future salary increases. If employee contributions are paid by the employer, they must be treated for the purposes of this chapter in the same manner and to the same extent as employee contributions made prior to the date on which employee contributions were assumed by the employer. An employer shall exercise its option under this subsection by July 15, 1983, and shall report its choice to the board in writing. The option chosen may not be revoked for the remainder of the biennium. Thereafter, the option choice must be forwarded to the board, in writing, by June fifteenth of each odd-numbered year.

The statute is silent as to whether the employer may elect to provide this contribution for less than all of its employees.

However, if a county does participate in PERS, it must enter into a participation agreement with the North Dakota Retirement Board. That agreement must state that the county will contribute on behalf of each eligible employee in an amount equal to that provided in N.D.C.C. ? 54-52-06. N.D.C.C. ? 54-52-02.1(1)(a).

N.D.C.C. ? 54-52-06 requires a 4.12 percent of salary contribution by the employer and authorizes the employer to pay the employee contribution required under N.D.C.C. ? 54-52-05(3). If the county is paying the employee portion of the retirement contributions (which is its option under N.D.C.C. ? 54-52-05(3)), N.D.C.C. ? 54-52-06 requires the county to pay "an amount equal to the required employee's contribution."

The "required employee's contribution" is provided in N.D.C.C. ? 54-52-05(2) where it states:

Each member must be assessed and required to pay monthly four percent of the monthly salary or wage

Stephen J. Rice  
November 18, 1993  
Page 4

paid to him, and such assessment must be deducted and retained out of such salary in equal monthly installments commencing with the first month of employment. (Emphasis supplied.)

Based on the above statutes, it is my opinion that a county's exercise of its option to pay the employee portion of the Public Employee Retirement System contributions must be made uniformly for each member eligible to participate in the plan. The county may not choose only a portion of its eligible employee members for whom to pay the employee

Stephen J. Rice  
November 18, 1993  
Page 5

contribution. This interpretation is consistent with the State Retirement Board's "Guidelines for Employer Payment of Member Contributions to the Plan." NDPERS Employers Handbook (1993) p. 73.

Although I have concluded that the county must treat all of its employees uniformly with regard to payment of the PERS employee contribution, this is based on my construction of the particular PERS statutes involved which I believe mandate such uniformity. Other than this instance, however, I adhere to the position taken by former Attorney General Nicholas J. Spaeth in a March 31, 1992, letter to Stutsman County State's Attorney Wendy Sulewski, in which he stated:

[A] county may adopt personnel policies and wage increase measures which are different for merit system county employees and non-merit system county employees, provided that Central Personnel Division policies and rules are applied with respect to merit system county employees.

However, I am also mindful of the potential problems such differential treatment can make. As Attorney General Spaeth observed:

Operating under separate pay administration rules has the potential for causing discord between county merit system and nonmerit system employees performing comparable work. The potential for actual or alleged inequity is likely to increase under separate pay administrative rules. The separate pay administration rules must be developed and operated with great care in order to avoid these problems.

Id.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

jjf\jfl

Stephen J. Rice  
November 18, 1993  
Page 6

Mr. Stephen J. Rice  
Walsh County State's Attorney  
Courthouse  
Grafton, ND 58237