

**LETTER OPINION
2001-L-44**

October 22, 2001

Mr. Sparb Collins
Executive Director
Public Employees Retirement System
400 East Broadway, Suite 505
PO Box 1657
Bismarck, ND 58502-1657

RE: Defined Contribution Transfer Amount

Dear Mr. Collins:

Thank you for your letter regarding recent legislative changes to N.D.C.C. § 54-52.6-03(1) regarding the defined contribution retirement plan.

You indicate that a bill to authorize an additional enrollment period for the defined contribution retirement plan, 2001 House Bill 1216, was amended during the legislative process. The original bill changed a number of date references in N.D.C.C. §§ 54-52.6-02 and 54-52.6-03. One of those date references was in N.D.C.C. § 54-52.6-03(1), which the bill as introduced changed from "January 1, 2000," to "January 1, 2002." 2001 House Bill 1216. This date is important for determining the appropriate account transfer balance for employees transferring to the defined contribution plan. See N.D.C.C. § 54-52.6-03.

In order to avoid the difficult situations PERS faced in initially implementing the defined contribution program in early 2000, PERS submitted a number of amendments to House Bill 1216, several of which made numerous changes to dates. The PERS amendments to the bill, among other things, changed the above reference from "January 1, 2002," to "January 1, 2001." You indicate this particular change was inadvertent and erroneous.

You state the interest calculation was intended to reimburse the transferees for the delay between January 1, 2002, which is the date the transferees become members of the defined contribution plan, and the date the monies are actually transferred. The

portion of the statute in question, which provides one method for the Board to calculate the transfer amount, reads as follows:

The actuarial present value of the individual's accumulated benefit obligation under the public employees retirement system based on the assumption that the individual will retire under the earliest applicable normal retirement age, plus interest from January 1, 2001, to the date of transfer, at the rate of one-half of one percent less than the actuarial interest assumption at the time of the election;

N.D.C.C. § 54-52.6-03(1). The way the statute is now written, interest would be given to the transferees for the entire 2001 year, in addition to the time between January 1, 2002, and the transfer date. You question whether PERS is required to comply with this possibly unintended result, or whether PERS may instead comply with the intent of the legislation and only pay interest from January 1, 2002, to the date of transfer.

If the statute read "January 1, 2002," instead of "January 1, 2001," PERS could appropriately implement the Legislature's intent. Section 1-02-06, N.D.C.C., states that "[c]lerical and typographical errors shall be disregarded when the meaning of the legislative assembly is clear." Given that the Legislature clearly intended the interest to be paid from the date the transferees become members of the defined contribution plan until the date the monies are transferred,¹ it is reasonable to conclude that N.D.C.C. § 1-02-06 allows PERS to disregard the date provided in the statute.² As such, it is my opinion that the reference to the year "2001" in N.D.C.C. § 54-52.6-03(1) is an error and should be disregarded under N.D.C.C. § 1-02-06 in favor of the original reference in 2001 House Bill 1216 to the year "2002."

This conclusion is strengthened when one considers the effect of attempting to comply with the January 1, 2001, date. Paying transferees interest for all of 2001 when their present values are calculated as of December 31, 2001, would be tantamount to giving

¹ While the legislative history of the latest amendment to N.D.C.C. §54-52.6-03 is unhelpful, testimony regarding the bill for the original language does clarify the Legislature's intent. A member of the Legislative Council clarified in testimony that the Legislature intended the interest to be paid from the date the transferees became members of the defined contribution plan until the date the monies are actually transferred. Hearing on H. 1257 Before the Senate Government and Veterans Affairs Comm., 57th N.D. Leg. (March 5, 1999) (Recorded testimony of Jeff Nelson).

² See Treiber v. Citizens State Bank, 598 N.W.2d 96 (N.D. 1999) (disregarding a typographical or clerical error and interpreting the statute in a manner the Supreme Court believed the Legislature intended).

them a gift of the interest for 2001. However, article X, section 18 of the North Dakota Constitution prohibits the state from giving gifts other than for a "public purpose," pursuant to an "industry, enterprise or business," or for "internal improvements." 2000 N.D. Op. Att'y Gen. L-153. None of those exceptions applies in this case. Thus, PERS is constitutionally prohibited from paying interest to the transferees for the entire year of 2001. Since N.D.C.C. § 1-02-38 requires that we presume the Legislature acted in a constitutional manner in enacting the amendments to N.D.C.C. § 54-52.6-03, we must presume the Legislature did not intend to make a gift to the transferees.

The only other construction of the statute as it is currently written is to infer that the Legislature intended PERS to make the present value calculation as of December 31, 2000, and pay the members interest from January 1, 2001, until the date of the transfer, which will be sometime in 2002. However, this construction does not account for the monthly contributions made on behalf of the transferees during 2001, potential transferees who were not even employed by the state as of December 31, 2000, or whether the transferees should enjoy the multiplier increase passed by the 2001 Legislature. Thus, this construction would lead to an absurd and unreasonable result that we must also presume the Legislature did not intend. See N.D.C.C. § 1-02-38.

In summary, the only two reasonable constructions of N.D.C.C. § 54-52.6-03(1) lead to an unconstitutional result or an absurd result, neither of which can be concluded was intended. We also know the Legislature intended interest to be paid from the date the transferees become members of the defined contribution system until the date the monies are transferred. Further, the section itself refers to an "accumulated benefit obligation," which does not suggest any intent to enhance the benefit an employee had accumulated. N.D.C.C. § 54-52.6-03(1). Accordingly, we can reasonably conclude that the date itself must be incorrect.

Sincerely,

Wayne Stenehjem
Attorney General

sam/pg