**N.D.A.G. Letter to Collins (May 16, 1990)**

May 16, 1990
Mr. Sparb Collins
Executive Director
North Dakota Public Employees
Retirement System
Box 1214
Bismarck, ND 58502

Dear Mr. Collins:

Thank you for your April 10, 1990, letter in which you requested my opinion on two questions concerning the flexible spending account.

Your first question concerns whether it would be a donation in violation of N.D. Const. art. X, § 18, if PERS reimbursed an employee for medical expenses incurred in excess of the amount contributed by the employee to his or her Flexible Spending Account ("FLS") if the amount was not recovered by subsequent contributions by the employee to his or her account. You also ask whether the difference between the employee's contribution to the FSA and the amount reimbursed to the employee for medical expenses would be considered an expense of administrating the pretax benefits program pursuant to N.D.C.C. ch. 54-52.3.

N.D. Const. art. X, § 18, provides:

> SECTION 18. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

(Emphasis supplied)

The dispositive issue in determining whether an appropriation of public funds is an unconstitutional donation is whether the funds are to be used for a public or private purpose. If a public purpose justifies or serves as a basis for an expenditure, it will be constitutional. Stutsman v. Arthur, 16 N.W. 2d 449, 454 (N.D. 1944). It is not determinative that the appropriation is made to private persons or that the private persons receive a special benefit. Marks v. City of Mandan, 296 N.W. 39, 44 (N.D. 1941); Stanley v. Jeffries, 284 P. 134, 138 (Mont. 1929). In Peters and Co. v. Nelson County, 281 N.W. 61, 65 (N.D. 1938), the court stated that an unconstitutional donation is a gratuity "unsupported by any consideration, legal, equitable or moral."

N.D.C.C. § 54-52.3-01 provides, in part, "[t]he public employees retirement system board may establish a pretax benefits program for all state employees under which a state employee may reduce the employee's salary and elect benefits to the extent of the reduction. . ." (Emphasis supplied.) Section 54-52.3-02 provides, "[t]he board shall determine benefits to be offered under the pretax benefits program, except proposals from qualified providers, retain consultants and do all things necessary to administer the pretax benefits program and preserve its tax exempt status." (Emphasis supplied.) Pursuant to §§ 54-52.3-01 and 54-52.3-02, the PERS board, in its discretion, may establish a pretax benefits program. If the PERS board elects to provide the program, the board is statutorily bound to preserve the program's tax-exempt status. This duty and resulting authority would include compliance with the proposed Internal Revenue Service regulations if they are adjusted.

In authorizing PERS to establish the program, the legislature recognized there would be a savings to the state in FICA taxes. N.D.C.C. § 54-52.3-03. Thus, the board's expenditure of funds to cover the difference is offset by savings in other areas and does not constitute a donation or gift in violation of N.D. Const. art. X, § 18.

Further supporting this conclusion is the risk that both the PERS board and the employee run that money might be forfeited to the pretax benefit program. The risk to the employee is that his or her estimated medical expenses for the program year and resulting monthly contributions to the FSA will be forfeited if medical expenses are not incurred by the expiration of the program year. The risk to the PERS board is that reimbursements made for medical expenses incurred by the employee may exceed the employee's contributions to his or her FSA at the expiration of the plan year. Consequently, the reimbursement procedure outlined in the proposed Internal Revenue Service regulations is more likened to insurance than a gift or donation.

As to your second question, § 54-52.3-03 provides, in part:

. . . The office of management and budget shall transfer funds from the savings accruing to the agencies' salaries and wages line item to a payroll clearing account. The office of management and budget shall transfer funds from the payroll clearing account to the board as necessary to defray the reasonable expenses of administering the program under this chapter. . . . The amount necessary to pay the consultants retained by the board are hereby appropriated from the savings and revenue generated by the program. All other expenses of administering the program must be paid in accordance with the agency's appropriation authority as established by the legislature.

(Emphasis supplied)

At first glance, it may appear that § 54-52.3-03 provides a standing and continuing appropriation of any savings and revenue derived from the program to the PERS board for defraying all reasonable expenses of administering the program. Arguably, this would include any moneys required to cover the difference between the employee's contribution

to his or her FSA and reimbursements made by the PERS board to cover medical expenses. However, the last sentence indicates otherwise.

Section 54-52.3-03 only authorizes transfers by the Office of Management and Budget from the payroll clearing account for expenditures made for reasonable consulting fees. All other expenses incurred in administering the program must be made in accordance with and subject to each agency's appropriation. Consequently, the reimbursements cannot be made from the payroll clearing account.

Please do not hesitate to call me if you have any further questions regarding this matter.

Sincerely,

Nicholas J. Spaeth

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