

# TESTIMONY OF SCOTT MILLER

## House Bill 1321 – NDPERS Board Makeup and Health Insurance Plan Contract Decision-Making

Good Afternoon, my name is Scott Miller. I am the Executive Director of the North Dakota Public Employees Retirement System, or NDPERS. I am here to testify in opposition to House Bill 1321.

If passed, HB 1321 would make two changes to NDPERS statutes that are problematic under the Separation of Powers provisions of the North Dakota Constitution.

1. Removes two members of the NDPERS Board and replaces them with four additional legislators, bringing the number of legislators on the NDPERS Board to a total of six, on an eleven-person Board.
2. Inserts the Legislative Assembly into the decision-making process for the State's health plan.

The North Dakota Supreme Court most recently analyzed the separation of powers doctrine in N.D. Legislative Assembly, et al. v. Burgum, 2018 ND 189 ("Legislature v. Burgum"). Paragraph 40 of that decision provides the following succinct description of the separation of powers doctrine:

The North Dakota Constitution creates three branches of government and vests each branch with a distinct type of power. N.D. Const. art. III, § 1 ("[T]he legislative power of this state shall be vested in a legislative assembly . . . ."); N.D. Const. art. V, § 1 ("The executive power is vested in the governor . . . ."); N.D. Const. art. VI, § 1 ("The judicial power of the state is vested in a unified judicial system . . . ."). By vesting each branch with a distinct form of power, the Constitution keeps those powers separate. The three branches are "coequal," N.D. Const. art. XI, § 26, each "supreme in its own sphere." *State ex rel. Spaeth v. Meiers*, 403 N.W.2d 392, 394 (N.D. 1987). Long before the express formalization of separation of powers in Article XI, § 26, this Court recognized that the Constitution's apportionment of power among three branches implicitly excluded each branch from exercising the powers of the others. *State v. Hanson*, 558 N.W.2d 611, 614 (N.D. 1996) (citing *Glaspell v. City of Jamestown*, 11 N.D. 86, 88 N.W. 1023 (1902)); see also *Miller v. French*, 530 U.S. 327, 341 (2000) (explaining that separation of powers doctrine "prohibits one branch from encroaching on the central prerogatives of another").

The NDPERS Board is, of course, an executive branch entity. The NDPERS Board controls and oversees the operations of the NDPERS agency. Adding legislators to the Board, particularly adding a number of legislators that would constitute a majority of the Board members, appears to be a legislative attempt to control an executive branch entity and the exercise of that entity's explicit, legislatively-given powers. As such, HB 1321 is most likely a violation of the separation of powers doctrine.

During the 2011 Legislative Assembly, the Legislature considered SB 2302, which would have added legislators to the State Investment Board. Then Lt. Governor Drew Wrigley testified in front of the Senate Appropriations Committee. He stated, "I've spoken to Attorney General [Stenehjem] about this matter as well and we think it is a clean constitutional principle that you cannot place legislators on the state investment board. It is an Executive Board, an executive function." Similarly, adding four additional, voting legislative members to the NDPERS Board is likely a violation of established Constitutional principles.

The second part of HB 1321 would insert the Legislature into the decision-making process for the State's health plan, including both medical and pharmacy providers. Currently, the NDPERS Board – an Executive Branch entity – has the responsibility to execute the requirements in NDCC chapter 54-52.1, our group insurance plan statutes. That includes the responsibility to select the State's medical and pharmacy providers. The Legislative Assembly, of course, promulgated chapter 54-52.1. In doing so, the Legislative Assembly provided the NDPERS Board with a significant amount of policy guidance and requirements the Board must follow in making that selection.

For instance, the Legislature has set as the policy of state government that because it is important to "promote the economy and efficiency of employment in the state's service, reduce personnel turnover, and offer an incentive to high-grade individuals to enter and remain in the service of state employment, there is created a uniform group insurance program." NDCC section 54-52.1-02. Part of that uniform group insurance program is, of course, our health plan. The Legislature has provided a great deal of policy guidance to the NDPERS Board as the Board fulfills its administrative and executive function of awarding a bid to a carrier for the State's health plan. NDCC section 54-52.1-04 provides the following specific guidelines for awarding an initial contract, among others:

In determining which bid, if any, will best serve the interests of eligible employees and the state, the board shall give adequate consideration to the following factors:

- a. The economy to be effected.
- b. The ease of administration.
- c. The adequacy of the coverages.
- d. The financial position of the carrier, with special emphasis on the solvency of the carrier.

e. The reputation of the carrier and any other information available tending to show past experience with the carrier in matters of claim settlement, underwriting, and services.

Section 4 of House Bill 1321 creates a new section to NDCC chapter 54-52.1. That new section prohibits the Board from entering a new or renewal contract for hospital, medical, or prescription drug benefits coverage “unless this board action has been authorized by the legislative assembly.” The new section then requires the Board to “introduce legislation seeking legislative authorization for the board’s proposed action relating to the contract.” Thus, HB 1321 removes the decision-making from the NDPERS Board, an Executive Branch agency, and gives it to the Legislature. Transferring the executive function of executing those statutory provisions to the Legislative Assembly is also arguably a violation of the North Dakota Constitution’s Separation of Powers doctrine.

The Legislative Assembly, of course, has the power to make or create a law. However, after a law has been enacted, the execution of that law – including “further fact finding and discretionary decision-making” – is an executive function: “The power to make a law is legislative,’ but the power to administer or execute the law ‘under the provisions of the law itself, as enacted by the Legislature,’ is executive.” Legislature v. Burgum, at 22 (quoting Ralston Purina Co. v. Hagemeister, 188 N.W.2d 405, 410-411 (N.D. 1971)). The court went on to state, “[t]he Legislative Assembly violates separation of powers when it retains discretion after enactment for itself or its agent . . . .” Id. at 26.

The application of Legislature v. Burgum to HB 1321 is straightforward. NDCC chapter 54-52.1 already contains a clear grant of power to the NDPERS Board in regard to issuing RFPs for our health plan. That grant of power provides clear and specific guidelines that the Board must use in evaluating proposals and making a final decision that, in the Board’s view, “will best serve the interests of eligible employees and the state.” NDCC section 54-52.1-04.

House Bill 1321 removes that executive decision-making process from an executive entity, the NDPERS Board, and gives it to the Legislative Assembly. As the North Dakota Supreme Court stated in Legislature v. Burgum, “[t]he Legislative Assembly violates separation of powers when it retains discretion after enactment for itself or its agent . . . .” Id. at 26.

One argument that was made last session in opposition to this conclusion is that the current statutory scheme actually violates the separation of powers doctrine because the statutes give the Board the authority to appropriate monies for the payment of health insurance premiums, and appropriations are solely within the authority of the Legislative Assembly. We agree that it is the Legislative Assembly’s responsibility and authority to

appropriate money. However, we disagree that the statutory scheme in NDCC chapter 54-52.1 violates that principle.

A clear example of how this process works is from the health plan renewal process in 2016-17. For that renewal, as required by statute, the Board retained a consultant, Deloitte Consulting, to concurrently and independently prepare a renewal estimate. SHP proposed a 17.4% premium increase to purchase a plan with the same benefit structure as existed at that time. Deloitte determined that the proposed increase was reasonable. Based on the guidance provided in statute, Deloitte’s assessment, and its own review, the Board approved a renewal with SHP.

However, the Board also realized that the State would have difficulty with such a significant increase given the budget problems the State was facing. The Board worked with SHP to determine what benefit and cost-sharing changes could be made to reduce that premium increase but still maintain the Plan’s grandfathered status under the ACA. NDPERS gave the renewal information and the possible benefit change information to OMB and the Governor for their consideration as they created the Executive Budget. NDPERS also provided information on the health insurance reserves in the event the Governor and the Legislature decided to use reserves to buy-down the premium. You can see this information provided in the legislative fiscal staff’s Analysis of 2017-2019 Executive Budget below.

**STATE EMPLOYEES - SUMMARY OF KEY RECOMMENDATIONS**

**SALARY INCREASES**

The 2017-19 executive budget recommendation provides funding for state employee salary increases of 1 percent, effective July 1, 2018. The cost of the salary increase is \$11,858,530, of which \$5,447,422 is from the general fund. Specific language regarding the salary increases is included in Section 11 of 2017 House Bill No. 1075—the appropriation bill for the Office of Management and Budget (OMB).

**SALARY UNDERFUNDING**

The 2017-19 executive budget recommendation underfunds general fund salary budgets for 10 agencies totaling \$7.9 million. Agencies with underfunded salary budgets include:

| Agency  | Amount      |
|---|-------------|
| State Auditor                                   | \$117,118   |
| Tax Commissioner                                | 637,100     |
| North Dakota University System office           | 578,097     |
| Department of Human Services                    | 5,278,396   |
| Industrial Commission                           | 900,000     |
| Public Service Commission                       | 60,170      |
| Branch research centers                         | 28,620      |
| North Dakota State University Extension Service | 37,206      |
| Main Research Center                            | 71,550      |
| Parks and Recreation Department                 | 239,959     |
| Total   | \$7,948,216 |

**UNFUNDED POSITIONS**

The 2017-19 executive budget recommendation provides for a total of nine positions to be unfunded in three agencies. The total amount of funding related to the unfunded positions is \$1.3 million, of which \$1.2 million is from the general fund. Agencies with positions unfunded include the Highway Patrol (five positions), State Auditor (two positions), and State Historical Society (two positions).

**ACCRUED LEAVE PAYOUTS**

The 2017-19 executive budget recommendation provides funding for accrued leave payouts totaling \$2.3 million, of which \$1 million is from the general fund and \$1.3 million is from other funds. This funding is available for accrued leave payouts to eligible employees upon retirement or termination of employment.

**HIGHER EDUCATION**

Prior to the 2017-19 biennium, higher education full-time equivalent (FTE) positions supported from special funds were not reflected in the budget, as the State Board of Higher Education and institutions under its control have continuing appropriation authority for special funds. The 2015 Legislative Assembly amended North Dakota Century Code Section 54-44.1-04 to require higher education entities to enter all budget data in the state’s budget system in the same manner as other agencies. This increased the total FTE position count by 4,336.41. The 2017-19 executive recommendation provides for a decrease of general fund supported FTE positions of 315.27. Higher education FTE positions supported from all funds is 6,766.76.

**EXECUTIVE BRANCH ELECTED OFFICIALS**

The executive budget recommendation provides funding for executive branch elected officials’ salary increases equal to 1 percent of salaries, effective July 1, 2018. Statutory changes necessary to adjust elected officials’ salaries are included in the respective elected officials’ appropriation bills recommended by the Governor.

**JUDICIAL BRANCH**

The judicial branch budget request includes funding to provide district court judges’ salary increases of 1 percent of salaries, effective July 1, 2018. Salary increases for Supreme Court justices are also 1 percent of salaries, effective July 1, 2018. Salary increases for other employees of the judicial branch are included at the same level as provided for other state employees, or 1 percent of salaries, effective July 1, 2018. Additional increases may be provided to other employees of the judicial branch pursuant to the judicial branch salary schedule as requested by the judicial branch.

**HEALTH INSURANCE**

The executive budget recommendation continues funding for the cost of health insurance premiums for state employees. The executive budget provides \$1,249.47 per month for employee health insurance, an increase of \$119.25, or 10.6 percent, compared to the 2015-17 biennium premium rate of \$1,130.22 per month. A recent history of monthly health insurance premiums provided for each employee is listed below.

| Biennium                         | Monthly Premium | Percentage Change from Previous Biennium |
|----------------------------------|-----------------|--|
| 2001-03                          | \$409           | 16.9%                                    |
| 2003-05                          | \$489           | 19.6%                                    |
| 2005-07                          | \$554           | 13.3%                                    |
| 2007-09                          | \$658           | 18.8%                                    |
| 2009-11                          | \$826           | 25.5%                                    |
| 2011-13                          | \$887           | 7.4%                                     |
| 2013-15                          | \$982           | 10.7%                                    |
| 2015-17                          | \$1,130         | 15.1%                                    |
| 2017-19 executive recommendation | \$1,249         | 10.6%                                    |

The percentage increase to maintain the existing health insurance plan benefits is 17.4 percent for the 2017-19 biennium. To reduce this percentage increase, the Governor is recommending increasing member out-of-pocket expenses to reduce plan costs by \$49.61 per contract, per month, which would reduce the overall increase by 4.4 percent.

The Governor is also recommending using Public Employees Retirement System (PERS) health insurance reserves to pay an additional \$27.31 of premiums per contract, per month, which would reduce the overall increase by 2.45 percent. The Governor is using approximately \$18.0 million of the estimated \$35.0 million in health insurance reserve funds to reduce the premium rate increase. Of the \$18.0 million utilized, \$10.5 million relates to state employee health insurance plans, \$4.4 million relates to political subdivisions, and \$3.1 million relates to retiree health plans.

#### EMPLOYEE ASSISTANCE PROGRAM

The monthly rate for the employee assistance program remains at \$1.54 per month, or \$18.48 annually.

#### LIFE INSURANCE

The monthly rate for life insurance provided to state employees remains at \$0.28 per month, or \$3.36 annually.

#### UNEMPLOYMENT INSURANCE

Funding is included for unemployment insurance for state employees at a rate of 1 percent of the first \$6,000 of an employee's annual salary (\$60 per year or \$120 per biennium maximum). No unemployment insurance was collected on state employee salaries during the 2013-15 and 2015-17 bienniums.

#### TOTAL COMPENSATION CHANGES COST

The schedule below provides the total cost of major compensation changes recommended in the 2017-19 executive budget.

|  | General Fund        | Special Funds       | Total               |
|--|---------------------|---------------------|---------------------|
| Salary increase of 1 percent, effective July 1, 2018 | \$5,447,422         | \$6,411,108         | \$11,858,530        |
| Health insurance premium increases                   | 20,924,659          | 24,626,376          | 45,551,035          |
| <b>Total</b>   | <b>\$26,372,081</b> | <b>\$31,037,484</b> | <b>\$57,409,565</b> |

#### FULL-TIME EQUIVALENT POSITIONS

The 2017-19 executive budget includes a total of 15,937.69 FTE positions, an increase of 4,100.12 FTE positions from the 2015-17 authorized level of 11,837.57 FTE positions. The total number of FTE positions for the 2017-19 biennium now reflects certain higher education positions that were previously not reflected in the budget.

The 2017-19 executive budget recommended FTE level of 15,937.69 is an overall decrease of 551.56 FTE positions compared to the adjusted 2015-17 biennium total, including a decrease of 315.27 FTE positions in higher education and a decrease of 215.61 FTE positions in all other state agencies.

The reduction of 215.61 FTE positions resulted in a decrease of \$29.0 million, of which \$15.9 million is from the general fund.

Major changes in FTE positions, excluding higher education, are as follows:

| Agency Increases                                   | 2015-17 Authorized FTE Positions | 2017-19 Executive Budget | Increase |
|--|----------------------------------|--------------------------|----------|
| 301 - State Department of Health                   | 365.00                           | 381.00                   | 16.00    |
| 530 - Department of Corrections and Rehabilitation | 836.29                           | 846.29                   | 10.00    |
| 475 - Mill and Elevator Association                | 147.00                           | 153.00                   | 6.00     |

| Agency Decreases                                      | 2015-17 Authorized FTE Positions | 2017-19 Executive Budget | (Decrease) |
|---|----------------------------------|--------------------------|------------|
| 380 - Job Service North Dakota                        | 237.76                           | 181.61                   | (56.15)    |
| 180 - Judicial branch                                 | 391.00                           | 354.50                   | (36.50)    |
| 640 - Main Research Center                            | 361.12                           | 336.12                   | (25.00)    |
| 405 - Industrial Commission                           | 121.75                           | 105.25                   | (16.50)    |
| 125 - Attorney General                                | 250.00                           | 234.00                   | (16.00)    |
| 630 - North Dakota State University Extension Service | 265.98                           | 252.98                   | (13.00)    |
| 627 - Upper Great Plains Transportation Institute     | 54.98                            | 43.88                    | (11.10)    |
| 628 - Branch research centers                         | 120.29                           | 110.29                   | (10.00)    |

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Over the course of the Legislative Assembly's review and analysis of the NDPERS Budget, the Legislative Assembly eventually approved the final premium amount, benefit structure, and use of reserves, as you can see in the below excerpts from Legislative Council's 65th Legislative Assembly State Budget Actions for the 2017-2019 Biennium.

**HIGHER EDUCATION**

Prior to the 2017-19 biennium, higher education FTE positions supported from special funds were not reflected in the budget, as the State Board of Higher Education and institutions under its control have continuing appropriation authority for special funds. The 2015 Legislative Assembly amended North Dakota Century Code Section 54-44.1-04 to require higher education entities to enter all budget data in the state's budget system in the same manner as other agencies. This increased the total FTE position count by 4,337.41. The 2017 Legislative Assembly approved a reduction of general fund supported FTE positions of 313.27 for the 2017-19 biennium, to provide a total of 2,117.08 higher education FTE positions supported by the general fund. Higher education FTE positions supported from all funds is 6,767.76 for the 2017-19 biennium.

**EXECUTIVE BRANCH ELECTED OFFICIALS**

The 2017 Legislative Assembly did not provide funding for state employee salary increases for the 2017-19 biennium. Salaries for executive branch elected officials will remain at the amounts approved by the 2015 Legislative Assembly.

**JUDICIAL BRANCH**

The 2017 Legislative Assembly did not provide funding for state employee salary increases for the 2017-19 biennium. Salaries for district court judges and Supreme Court justices will remain at the amounts approved by the 2015 Legislative Assembly.

**HEALTH INSURANCE**

The Legislative Assembly continued to provide funding for the cost of health insurance premiums for state employees. The appropriations provide \$1,240.83 per month for employee health insurance, an increase of \$110.61, or 9.8 percent, compared to the 2015-17 biennium premium rate of \$1,130.22 per month. A recent history of monthly health insurance premiums provided for each employee is listed below.

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June 2017

| Biennium | Monthly Premium | Percentage Change from Previous Biennium |
|----------|-----------------|--|
| 2001-03  | \$409           | 16.9%                                    |
| 2003-05  | \$489           | 19.6%                                    |
| 2005-07  | \$554           | 13.3%                                    |
| 2007-09  | \$658           | 18.8%                                    |
| 2009-11  | \$826           | 25.5%                                    |
| 2011-13  | \$887           | 7.4%                                     |
| 2013-15  | \$982           | 10.7%                                    |
| 2015-17  | \$1,130         | 15.1%                                    |
| 2017-19  | \$1,241         | 9.8%                                     |

The percentage increase to maintain the existing health insurance plan benefits is 17.4 percent for the 2017-19 biennium. To reduce this percentage increase, the Legislative Assembly approved the Governor's recommendation to increase member out-of-pocket expenses to reduce plan costs by \$58.25 per contract, per month, which would reduce the overall increase by 5.2 percent.

The Legislative Assembly also approved using Public Employees Retirement System (PERS) health insurance reserves to pay an additional \$27.31 of premiums per contract, per month, which would reduce the overall increase by 2.4 percent, resulting in a total increase of 9.8 percent for the 2017-19 biennium. The Legislative Assembly approved using approximately \$15.1 million of the estimated \$35.0 million in health insurance reserve funds to reduce the premium rate increase. Of the \$15.1 million utilized, \$10.5 million relates to state employee health insurance plans, \$3.7 million relates to political subdivisions, and \$700,000 relates to retiree health plans.

Clearly, the NDPERS Board did not set the final premium for the health plan. The NDPERS Board followed the statutory guidelines for the renewal process, and decided to renew. The Board provided significant information to the Governor, who made a budget recommendation to the Legislative Assembly. The Legislative Assembly considered that budget recommendation regarding the health plan structure, premiums,

and buy-down amount, and the Legislative Assembly determined what the State would pay, for what benefits, and how it would be paid. Once the Legislative Assembly approved those items, we finalized the renewal with SHP. That is the same process that has been used since NDPERS has been responsible for the group health plan.

Aside from the clear constitutional issues, we are also concerned with the timing if HB 1321 were to become law. The timeline for the last RFP we issued for the health plan is below.

| <b>Activity</b>                                 | <b>Date/Time</b>                           |
|---|--|
| NDPERS publishes Request for Proposal (RFP)*    | June 1, 2020                               |
| Bidder Conference**                             | June 16, 2020 (9am – 11am CST)             |
| Bidder questions (in writing) due               | June 18, 2020 (5pm CST)                    |
| <b>Proposals due</b>                            | <b>Wednesday, July 15, 2020 (5 pm CST)</b> |
| Finalist presentations (if requested)           | September 2020                             |
| NDPERS notifies finalist of intent to negotiate | November 2020                              |
| Bidder and NDPERS begin implementation          | January 2021                               |
| Bidder begins providing services                | July 1, 2021                               |

The only possible legislative actions regarding the health plan contract that could be implemented after a bill goes through the legislative process and is signed by the Governor is a renewal with the current carrier or the re-award of the contract to the current carrier. If the Legislative Assembly refused to approve the NDPERS Board’s proposed action, there is clearly not enough time to go out to bid for the health plan and get a new bill with a different result before the same Legislative Assembly.

If the Board instead proposes to change carriers, there would not be enough time to transition to that new carrier absent legislative action within the first few weeks of the Assembly. There is just not enough time to involve the Legislative Assembly in the award of a new contract and insure that state and political subdivision participants continue to have health insurance coverage.

In summary, the constitutional and timing issues with HB 1321 weigh heavily against House Bill 1321. The Legislative Assembly already clearly has control of the purse strings on the health plan. This bill will introduce uncertainty, potential litigation, and almost certain delays where it is most harmful. We encourage a “do not pass” on House Bill 1321.