

House Bill 1002
Senate Appropriations Committee
Government Operation Division

Testimony Presented by the Honorable
Steven E. McCullough, Judge of the
East Central Judicial District Court
March 7, 2023

Good Morning, Chairman Wanzek and members of the Committee. For the record, my name is Steven E. McCullough and I am a District Court Judge for the East Central Judicial District (Steele, Traill and Cass Counties) of the State of North Dakota. I offer this testimony in favor of House Bill 1002, the judicial branch appropriations bill, specifically as to judicial compensation.

House Bill 1002, as originally introduced, would have increased the salaries of judges and justices by 20% and 15% in the next biennium. For various reasons, these amounts were recommended by the North Dakota Judges' Association, and supported by the North Dakota Supreme Court, Governor Burgum, and various Bar Associations and major newspapers throughout the State. I fully support this request. My testimony, however, is not intended to cover all of the reasons justifying such an increase. Instead, I will limit my testimony to only that part of the amended HB 1002 which the House referred to as "equity" raises.

The House amended HB 1002 to include 8% and 4% raises in the next biennium. The House used a base 4% and 4% raise (which it anticipated for all state employees), and then added a 4% increase in the first year of the next biennium for "equity". This additional 4% "equity" figure was intended to be similar to "equity" raises requested by the Governor for executive branch compensation.

The Governor's proposed "equity" raise is an increase in executive branch budgets which will allow the Governor discretion to target larger raises to specific positions. The specific positions or salaries to be targeted by the Governor are not set by statute. Thus, not every executive branch employee will get an equal share of the "equity" percentage. Of the total percentage for "equity" raises (whether that be 4% or some other figure) most executive branch

employees will receive nothing. However, a few will receive considerably larger raises. The Governor will have discretion to offer larger “equity” raises to targeted positions, so long as the cumulative increase in compensation remains within the overall budget provided by the legislature. This recognizes there are some positions (such as IT) in which similarly-situated persons in the private sector can and do earn much more than their state-employed compatriots. The “equity” raise is thus available to attract or retain private sector employees for those targeted positions.

The goal of executive “equity” raises is the same goal behind the House’s judicial “equity” raises: to address compensation inequality between public and private sector and, thus, to attract and retain more highly qualified private sector candidates/attorneys to public sector positions/judgeships. The structure of executive branch employee and judicial officer compensation is inherently different, however. Due to that difference, the House’s 4% “equity” raise proposal is unlikely to achieve the goal of attracting private attorneys to judicial positions.

Unlike the executive branch, salaries for judges and justices are written into statute. The House’s “equity” raise will, by statute, have to be split equally among all the judges and justices. Unlike judges and justices, a targeted executive branch employee who receives an “equity” raise does not have their salary written into statute. There is simply no mechanism to allow additional compensation only for specific, targeted judgeships (nor, in my opinion, should there ever be). Unlike the Governor, the Chief Justice (as head of the Judicial Branch) has no discretion to increase the compensation of a specific judge or justice. The two branches are simply too different to directly apply the Governor’s “equity” concept to judicial salaries.

The House’s recommendation for an additional 4% “equity” raise recognizes that private attorney interest in serving in the judiciary has waned in recent years and that something needs to be done to rectify this situation. In 2017-18, no raises were provided to judges and justices. Since 2016, judicial salaries have significantly decreased in real dollars. In real dollars judges’ and justices’ salaries will have lost over \$21,000 to inflation by 2023. Because judicial compensation has effectively lessened over time, it is harder to attract judicial candidates from the private sector. This short chart shows how a district judge’s salary has fared in relation to inflation since judges and justices received no raises in 2017-18:

<u>Year</u>	<u>% Raise</u>	<u>Actual Salary</u>	<u>Rate of Inflation</u>	<u>Inflation Adjusted Salary</u>
2016		\$143,869		\$143,869
2017	0.00%	\$143,869	1.61%	\$146,185
2018	0.00%	\$143,869	2.86%	\$150,366
2019	1.67%	\$146,269	1.65%	\$152,847
2020	2.50%	\$149,926	0.65%	\$153,844
2021	1.50%	\$152,176	5.28%	\$161,967
2022	2.00%	\$155,219	8.71%	\$176,074
2023	13.63%	\$176,373	0.17%	\$176,373

Thus, in order to fully catch up a district judge's salary to what a judge had been making since the judicial officer raises in 2016, an additional **13.63%** raise would be required in 2023, on top of the 4% and 4% (or whatever) raises state employees will be given in this session. This loss of earning power to inflation is a large factor in the recent trend of lessened interest from private attorneys for judicial positions. Most private attorneys make significantly more than their similarly experienced judicial brethren and when they see this gap is widening they are even less likely to seek judicial positions.

On this point, I can offer my personal experience. I first sought a judicial appointment in 2002. Twenty-two candidates applied for the position. I was first elected in 2004. In 2004, there were two open judgeship elections in the East Central Judicial District. For those two positions, 12 attorneys ran for election. In contrast, in the last few years only three to four lawyers have applied for appointed judge positions. During the same period, only two lawyers, or sometimes even a single lawyer, have run for open judge seats (ones with no incumbent). When I took the bench in 2004, I took a roughly one-third pay cut moving from private practice to the judgeship. Late last year I was discussing compensation with an attorney from my old law firm, and who is the same age and has same number of years in practice as me. Now that attorney makes not one-third more than me but twice as much. I believe these two data points directly correlate. As the gap in earning between a private attorney and a judge increases, fewer qualified private attorneys are seeking to join the bench. If the goal is to attract and retain highly qualified private attorneys to judicial positions, the 4% "equity" raise proposed by the House is simply insufficient.

Before concluding, I need to point out several features of the table above. In several recent sessions, a maximum dollar amount cap was set on the raise that any individual could receive. Thus, the raises for judges and justices in several of the years in the above table are actually less, by percentage, than those received by state employees. Justices, who have higher salaries than judges, lost slightly more to inflation than did judges. For purposes of simplification, and to use the most conservative numbers, I have chosen the percentage of raises given the judges rather than the justices in my comparisons to inflation.

Further, the State operates on a fiscal year and not a calendar year. The yearly rates of inflation listed above are from July 1 to June 30 (to be as accurate as possible). The monthly rates of inflation used to calculate the yearly rates are taken directly from the United States Bureau of Labor Statistics at https://inflationdata.com/Inflation/Inflation_Rate/Monthly_Inflation.aspx.

Finally, the rates of inflation for the last six months of the fiscal year ending in June, 2023, are not yet known. To be conservative my calculations assume no inflation for those months. However, since 2016, the average monthly rate of inflation has been .27%. If this figure had been used, a 15.4% (instead of a 13.63%) raise would be needed to catch up to inflation. I have attached a longer spreadsheet which includes the specific calculations and monthly rates of inflation so that you can see how the figures in the chart were calculated.

I agree with the House that it is desirable to attract both government and private attorneys to the bench. I also agree that an “equity” or inflationary catch-up raise is necessary to increase the attractiveness of judge and justice positions to similarly situated private lawyers, and that the loss of earning power since 2016 has resulted in fewer qualified private attorneys seeking judicial positions. However, to fully catch up to the adjusted-for-inflation earning power of judges and justices from 2016, the 4% equity raise in the House is simply not sufficient. An additional raise of between at least 13.63% and 15.4% in the first year of the next biennium (over and above the 4% and 4% “standard” raise) is more in line with what is needed to address the “equity” concerns and help attract qualified private attorneys to judicial positions.

Thank you for considering my testimony. Again, I recommend a Do Pass on HB 1002 as it was originally submitted.

