



STATE OF WISCONSIN

00-117

Department of Employee Trust Funds

Eric O. Stanchfield

Secretary

801 West Badger Road

P.O. Box 79

Madison, WI 53707-79

January 9, 2001

State Representative Terry Musser
Chair, Special Committee on State-Tribal Relations
11 West State Capitol
Madison, WI 53702

Dear Representative Musser:

Thank you for your letter to Secretary Eric Stanchfield concerning the issues involved in coverage of the Lac du Flambeau Tribal Police Department under the Wisconsin Retirement System (WRS). In your letter you asked for a response to several questions of the impact on a "technical level" if legislation to permit the Lac du Flambeau Police Department coverage under the WRS were proposed. Secretary Stanchfield has asked that I respond directly to you.

I have listed your questions below and provided a response to each.

1. I have been advised that the integrity of the Wisconsin Retirement System depends on the ability of the department to collect all required contributions. If the system were expanded to include American Indian tribes, what requirements might be necessary to ensure this? Even if there were a waiver of sovereign immunity by a tribal government, allowing the state to obtain a judgement in state court against a tribe for contributions that are owed to the system, are there effective means to enforce such a judgement?

In order to assure that an employer meets the obligation to fund the benefits promised to its employees, the WRS needs to have required contributions paid timely and in the amounts specified to fund the benefit. Current state and local governments who do not pay their required contributions are subject to having the Department of Employee Trust Funds levy their state aids in amounts sufficient to pay the obligation. With tribal government such aids do not come from the state, but from the Federal government. It would appear that the state legislature could not direct levy of federal funds received by a tribal government for unpaid WRS contributions. There might be other mechanisms the tribe could establish such as a surety bond that would guarantee payment of contributions in the event of default by the tribal government. However, it would be difficult to estimate the value of such a bond given the long-term nature of the commitment and the ultimate unknown value of future contributions. I believe a legal opinion from the Attorney General would be necessary to determine if a State agency, such as ETF, could seek judgement in a state court against a tribe for contributions owed.

A second option would be to establish a special statutory provision for tribal employees that limits their benefits to only that amount for which contributions have been paid. This would give the Department the right to terminate tribal employee participation in the WRS if required contributions were not paid by the tribal government. This option may be legally problematic because of contractual rights claims that exist for all WRS covered employees. In addition, a

complex formula of how to determine the benefit of a tribal employee where contributions are not fully paid would certainly raise legal and funding issues.

The legislature could also choose to guarantee the contribution payment so that if the tribal government defaulted on its required contributions the state would make the contribution payment and seek recovery from the tribe in legal action.

In addition, please keep in mind that tribal employees would be eligible for other benefits by virtue of their WRS eligibility. This includes the duty disability plan for protective occupation participants under s.40.65, Stats. This program requires further employer contributions to be paid to the Department to fund this program. The tribal government would also be eligible to participate in the local government health, disability and life insurance programs if it so elected this coverage.

There are certainly many other legal issues involved in this question that would need to be thoroughly researched to assure that whatever enforcement mechanism was adopted could be successfully enforced.

2. I understand that there are a number of provisions of the statutes that control the treatment of benefits in court proceedings. Some are designed to protect the interests of annuitants, such as the provision in s.40.08(1), Stats., that prevents the attachment or garnishment of benefits. Others implement other state policies, such as the treatment of benefits in qualified domestic relations orders under s.40.08 (1m), Stats. Are there any special concerns regarding these provisions and the ability of the state to apply them to employees of an employer with a court system that is entirely independent of the Wisconsin court system?

I believe that certain statutory changes would be necessary to assure that orders of the tribal court dividing pension assets in the case of a divorce could apply. However, it is not clear if the current state statute on Qualified Domestic Relations Orders and division of WRS benefits would apply to a tribal court order.

There are other WRS statutory provisions about restoration of participant accounts by court ordered settlements, or arbitration awards involving employees that are reinstated to employment after discharge that may create some legal questions with respect to actions of a tribal court.

In addition, under s.40.08 (12), Stats., appeals of decisions by the Employee Trust Funds (ETF), Wisconsin Retirement (WR) and Teacher Retirement (TR) Boards are certiorari proceedings and must go to the Dane County Circuit Court. If a tribal government appealed a decision of one of the Boards of trustees, the tribal government would be subject to the jurisdiction of a state court.

These are a few examples of the legal issues that would need to be clarified or resolved with respect to the extent of autonomy of tribal governments participating in the WRS. There may very likely be others that would arise.

3. If the option to enroll only a subset of employees were made available to all eligible employers, either for protective service employees specifically or for any subset of employees, what response would you anticipate from participating employers and what impact might this have on the system?

Some employers that were previously forced to covered all employees when they only wanted a subset covered may want to prospectively cover only a subset of the newly hired employees. I would anticipate that participating employers would want to be treated equally.

In addition, the problem for the WRS of covering only a subset of employees is primarily one of adverse selection against the fund. Allowing employers to limit participation in the WRS to various subsets of employees creates greater risk of employers covering only higher risk employees in the WRS either in terms of age or type of employment. For example, an employer could cover a subset of employees that were older and closer to retirement resulting in a higher cost of coverage than their total workforce. In the WRS, the average contribution rate charged to all employers is based on the experience of a large diversified pool of ages and occupations. Covering higher cost and higher risk employees in the WRS could result in shifting higher costs to all other employers and employees and potentially drive up the contribution cost for all employers.

A second problem occurs when employees internally transfer (voluntarily or involuntarily) from a covered position to an uncovered position while still employed by the same employer. Thus, an employee could have coverage in one subset and lose coverage by moving to a non-covered subset. This would certainly create individual hardships for employees and significant confusion. This would also affect an employee's coverage in any other benefit plan administered by ETF where WRS participation is a required to obtain and maintain eligibility for coverage in that benefit plan (such as health insurance).

In addition, research is needed to determine if allowing a subset of employees to be covered by the WRS conflicts with any federal laws governing qualified public pension systems. Specifically, there are minimum participation standards under federal law that would need to be reviewed for applicability to public pension plans.

4. What would be the administrative impact of these policy options on your department? How might that impact differ if the option to enroll a subset of its employees were only given to American Indian tribes or to all participating employers.

This question is difficult to answer and would depend on the manner in which State statutes are revised to allow participation of tribal governments in the WRS. However, if tribal governments are to be treated the same as current local government employers, the administrative impact would be no different than for any other local government employer joining the WRS. On the other hand, if special statutory provisions are made such as giving the Department the right to terminate tribal employee participation in the WRS if required contributions were not paid by the tribal government, administrative costs may be substantial in maintaining member account balances and in calculating final benefits.

In addition, if statutes were revised to allow employers to cover subsets of employees, significant administrative costs may be incurred in order to ensure that the employer is enrolling and paying contributions for all subset employees and no other employees; especially as employees move from one position to another with the same employer and/or move from one local government employer to another.

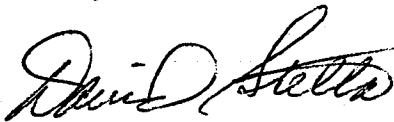
State Representative Terry Musser
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I hope the responses to your questions have been helpful. It is important to note again that these questions and my responses deal only with "technical issues" and not some very substantive policy issues that exist when tribal governmental units are included in employee benefit programs that traditionally have exclusively covered state and local government employees.

I am sure that if coverage of tribal governmental units under the WRS is proposed in legislation, the Legislature's Joint Survey Committee on Retirement Systems will need to thoroughly review both the policy and technical issues resulting from such a proposal.

If you need clarification of any of the responses that I have provided or other issues related to this matter please contact me at (608) 267-9038.

Sincerely,

A handwritten signature in cursive script, appearing to read "David Stella".

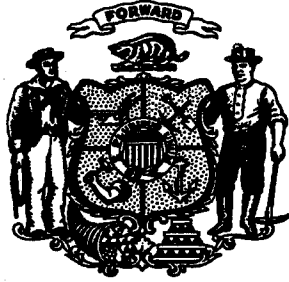
David Stella, Administrator
Division of Retirement Services
(608) 267-9038

cc: Jean Gilding, Administrator, Division of Employer Services ✓
Eric Stanchfield, Secretary

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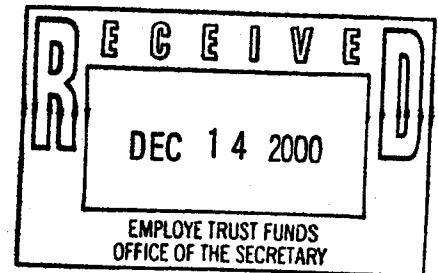


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December 11, 2000

Mr. Eric Stanchfield, Secretary
Department of Employee Trust Funds
801 East Badger Road
Madison, WI 53713



Dear Secretary Stanchfield:

As you may be aware, some years ago, the Lac du Flambeau Tribal Police Department applied to your department to participate in the Wisconsin Retirement System. That application was turned down on the grounds that American Indian tribes are not eligible employers. It was also observed that the statutes do not allow a participating employer to enroll some, but not all, employees in the system, in this case only law enforcement officers. Earlier this year, the Tribal Police Department made a similar application. Although your department has not yet acted on the current application, the Tribal Police Department has approached me in my capacity as Chair of the Joint Legislative Council's Special Committee on State-Tribal Relations to request my assistance in achieving their goal of enrolling in the system.

The assistance that I could provide the Tribal Police Department would be to develop legislation, either through the committee that I chair or individually, to allow their participation in the system. The clearest way to do this, it appears, would be to add American Indian tribal governments to the definition of "employer" under s. 40.02 (28), Stats. In addition, legislation could amend s. 40.22 (1), Stats., to allow a participating employer to enroll some, but not all employees in the system. There are a number of options for drafting such an amendment. It could apply to all participating employers, to all employers who begin participation after the legislation takes effect or only to participating tribal governments. Similarly, it could be limited to protective service employees. In the narrowest form, this treatment could be limited to law enforcement officers who are employed by an American Indian tribe or band and who are either deputized by a county sheriff or exercising law enforcement powers under s. 165.92, Stats.

The purpose of this letter is to request the professional advice of your department regarding these options. There are good policy arguments for allowing tribal police officers to participate in the system, which the Lac du Flambeau officers have shared with me. I can also anticipate good policy arguments in opposition. I would like to ask you to set aside the policy

arguments for and against this idea and help me understand, on a *technical* level, what such legislation would mean for the system and your department. The following are specific questions that I would appreciate receiving responses to. In addition, I expect that you may want to address other questions that I have not anticipated.

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4. What would be the administrative impact of these policy options on your department? How might that impact differ if the option to enroll a subset of its employees were given only to American Indian tribes or to all participating employers?

I thank you in advance for your assistance in evaluating this issue and look forward to your response. If you would like to clarify this request or discuss the issues prior to preparing your response, please contact me.

Sincerely,



Representative Terry Musser
Chair, Special Committee on
State-Tribal Relations