

LETTER OPINION
93-L-58

February 24, 1993

Mr. Sparb Collins
Director
North Dakota Public Employees
Retirement System
P.O. Box 1214
Bismarck, ND 58502-1214

Dear Mr. Collins:

Thank you for your letter requesting my opinion as to whether North Dakota Century Code (N.D.C.C.) ? 54-52.1-06 allows the Public Employees Retirement System Board to determine the level of premiums for health insurance under the state group health insurance program and your subsequent memo providing further information on that issue. I apologize for the delay in responding to your letter; however, I am informed that members of my staff and you have consulted on this issue several times in the interim.

Your first question concerns the bidding process for a fully insured arrangement. Specifically, you ask whether PERS is precluded from accepting the bid which will best serve the interests of eligible employees and the state when all bids received for a fully insured arrangement are higher than the cost estimate provided in the Governor's executive budget for this expense. I understand that PERS solicits bids to be submitted by December 31.

N.D.C.C. ? 54-52.1-04 authorizes the Public Employees Retirement Board to contract for a fully-insured arrangement. That section provides:

The board shall receive bids for the providing of hospital benefits coverage, medical benefits coverage, and life insurance benefits coverage for a specified term, and shall accept the bid of and contract with the carrier that in the judgment of the board shall best serve the interests

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of the state and its eligible employees. A solicitation for bids must be made within ninety days of July 1, 1971. Subsequent solicitations must be made not later than ninety days prior to the expiration of an existing uniform group insurance contract. Bids must be solicited by advertisement in such manner as selected by the board that will provide reasonable notice to prospective bidders. In preparing bid proposals and evaluating bids, the board may utilize the services of consultants on a contract basis in order that the bids received can be uniformly compared and properly evaluated. 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:

1. The economy to be effected.
2. The ease of administration.
3. The adequacy of the coverages.
4. The financial position of the carrier, with special emphasis as to its solvency.
5. The reputation of the carrier and such other information as is available tending to show past experience with the carrier in matters of claim settlement, underwriting, and services.

The board may reject any or all bids and, in the event it does so, shall again solicit bids as provided in this section. The board may establish a plan of self-insurance for providing health insurance benefits coverage only under an administrative services only (ASO) contract or a third party administrator (TPA) contract.

The Governor's executive budget does not have the force and effect of law and would not preclude PERS from accepting the bid which will best serve the interests of eligible employees and the state consistent with the criteria outlined in N.D.C.C. ? 54-52.1-04. However, if that bid is higher than the

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estimate which was provided to the Governor in preparation of his executive budget, it is incumbent upon PERS to notify the Governor's office so that changes to the requested corresponding legislative agency appropriations may be made. I believe that this interpretation is consistent with the practice of soliciting bids to be submitted by December 31 so that the actual cost of the plan is available before the beginning of the legislative session. I believe that our legislators are fully aware that the Governor's executive budget provides only an estimated cost of the plan and that adjustments may have to be made when the actual cost is known.

Your second question concerns PERS' authority to provide insurance benefits for PERS members under a self-insured arrangement. There are two parts to this question. The first is whether the PERS Board as the "primary carrier" is authorized by N.D.C.C. ? 54-52.1-06 to set the level of premium required from employers. The second is what limits are placed upon the PERS Board as the "primary carrier" in setting premium limits.

N.D.C.C. ? 54-52.1-06 requires departments, boards, and agencies "to pay to the board each month from its funds appropriated for payroll and salary amounts a state contribution in the amount as determined by the primary carrier of the group contract." "Carrier" means one of several private entities if the plan is not self-insured and the "state if a self-insurance plan." N.D.C.C. ? 54-52.1-01(2). Although the term "state" is not defined under N.D.C.C. ch. 54-52.1, both the principles of statutory construction and the legislative history indicate that the Legislature intended to allow the PERS Board to act to adjust premiums when the plan is self-insured.

It is my opinion the Legislature used the phrase "primary carrier" to refer to the Board when the plan is a self-insured plan. It is my further opinion that the phrase in N.D.C.C. ? 54-52.1-06, "as determined by the primary carrier," authorizes the Board to set the amount of premium payments required from employers under a self-insured plan.

The Board's ability to set the premium rate may not be unlimited, however. The North Dakota Supreme Court

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has concluded that it will follow the more modern view concerning legislative delegation. Trinity Medical Center v. North Dakota Board of Nursing, 399 N.W.2d 835 (N.D. 1987). Under the modern view, the Legislature may make broad delegations of authority if it provides sufficient guidelines for the agency to implement the Legislature's policy. What guidelines apply to a given situation concerning the Board's ability to set the premium rate is a question of fact that must be resolved on a case-by-case basis.

I trust this answers your questions.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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