**LETTER OPINION**
**97-L-34**

April 2, 1997

Mr. Sparb Collins
PERS
Box 1214
Bismarck, ND 58502

Dear Mr. Collins:

Thank you for your letter concerning a health maintenance organization's request to provide eligible employees the option of membership in its organization under North Dakota Century Code (N.D.C.C.) § 54-52.1-04.1. Pursuant to this request, two issues are raised: (1) whether a health maintenance organization (HMO) is a carrier under N.D.C.C. ch. 54-52.1 and (2) whether the Public Employees Retirement System Board (PERS Board) has the authority to accept or reject a request for participation from an HMO.

N.D.C.C. § 54-52.1-04.1 provides:

> Notwithstanding the provisions of section 54-52.1-04, the board may contract with one or more health maintenance organizations to provide eligible employees the option of membership in a health maintenance organization. If it makes such a contract, the board may not require that the health maintenance organization be federally qualified if the health maintenance organization has a certificate of authority issued by the North Dakota commissioner of insurance. The contract or contracts must be included in the uniform group insurance program.

Several statutory definitions are relevant to the question of whether an HMO is also considered to be a carrier. N.D.C.C. § 54-52.1-01(5) defines a health maintenance organization as "an organization certified to establish and operate a health maintenance organization in compliance with chapter 26.1-18." N.D.C.C. ch. 26.1-18 was replaced in l993 with N.D.C.C. ch. 26.1-18.1. See 1993 N.D. Sess. Laws ch. 292. N.D.C.C. § 26.1-18.1-01(12) defines an HMO as "any person that undertakes to provide or arrange for the delivery of basic health care services to enrollees on a prepaid basis, except for enrollee responsibility for copayments or deductibles or both." (Emphasis added). N.D.C.C. § 54-52.1-01(2) defines carrier as:

a. For the hospital benefits coverage, an insurance company authorized to do business in the state, or a nonprofit hospital service association, or a prepaid group practice hospital care plan authorized to do business in the state, or the state if a self-insurance plan is used for providing hospital benefits coverage.
b. For the medical benefits coverage, an insurance company authorized to do business in the state, or a nonprofit medical service association, or a prepaid group practice medical care plan authorized to do business in the state, or the state if a self-insurance plan is used for providing medical benefits coverage.
c. For the life insurance benefits coverage, an insurance company authorized to do business in the state.

(Emphasis added).

It is interesting to note that carrier, as defined under N.D.C.C. § 26.1-18.1-01(3), "means a health maintenance organization, an insurer, a nonprofit hospital and medical service corporation, or other entity responsible for the payment of benefits or provision of services under a group contract."

Because the definition of carrier under N.D.C.C. § 54-52.1-01(2) includes prepaid group practice hospital and medical care plans, it is my opinion that the term "carrier" under N.D.C.C. § 54-52.1-01(2) includes HMOs. This interpretation is reinforced by the requirement under N.D.C.C. § 54-52.1-04.1 that if any HMO contract is to be awarded it must "be included in the uniform group insurance program." To further the goal of integrity and HMO contracts with the uniform group insurance program, the administrative rules implementing N.D.C.C. § 54-52.1-04.1 are designed to create an integral contractual relationship for HMO entry into the uniform group insurance program with that program's contract bidding requirements under N.D.C.C. § 54-52.1-04. See N.D. Admin. Code ch. 71-03-02. Thus, even if an HMO were not considered to be a carrier for the purposes of N.D.C.C. ch. 54-52.1, it is my further opinion that the requirements of N.D.C.C. § 54-52.1-04.1 and the administrative rules promulgated by the PERS Board would dictate that the entry of an HMO into the uniform group insurance program be coordinated and integrated with the bidding requirements under N.D.C.C. § 54-52.1-04.

The second issue is whether the PERS Board has the authority to accept or reject a request for participation from an HMO meeting all

the requirements of N.D. Admin. Code ch. 71-03-02. N.D.C.C. § 54-52.1-04.1 provides that "the Board may contract with one or more health maintenance organizations to provide eligible employees the option of membership in a health maintenance organization." (Emphasis added). N.D. Admin. Code § 71-03-02-01 provides in part that: "The board may offer any federally qualified health maintenance organization as an alternative coverage to the group medical plan subject to the following qualifications . . . ." (Emphasis added).

N.D. Admin. Code § 71-03-02-02 provides, in part, that "[t]he board will award a contract to the health maintenance organizations meeting all the requirements by March thirty-first of the year in which the biennium ends." (Emphasis added).

An argument that the PERS Board had discretion under N.D.C.C. § 54-52.1-04.1, but it removed that discretion when it promulgated N.D. Admin. Code § 71-03-02-02, is without merit. First, N.D. Admin. Code § 71-03-02-01 provides that the board may offer any health maintenance organization as an alternative coverage to the group medical plan. The word "may" ordinarily creates a directory, non-mandatory duty. Comm'n on Medical Competency v. Racek, 527 N.W.2d 262, 268 (N.D. 1995). Thus, the Board has retained discretion under its administrative rules to follow the process outlined in N.D. Admin. Code ch. 71-03-02. A careful reading of N.D. Admin. Code § 71-03-02-02 within the context of N.D. Admin. Code ch. 71-03-02 indicates that section constitutes a timing requirement that the PERS Board imposes if the Board decides to exercise its discretion to award a contract to an HMO. See Madler v. McKenzie County, 496 N.W.2d l7, 20 (N.D. l993) ("Statutes, rules and regulations must be construed as a whole to determine their intent, deriving that intent by comparing every section as part of a whole.")

Further, in a conflict between a statute and an administrative rule, the statute prevails. See Steele v. North Dakota Workmen's Comp. Bur., 273 N.W.2d 692, 701 (N.D. l979) ("A rule may not exceed statutory authority or supersede a statute."). Indeed, after the l989 legislative change to N.D.C.C. § 54-52.1-04.l removing the requirement that an HMO be federally qualified, see 1989 N.D. Sess. Laws ch. 676, the PERS Board has not used the administrative rulemaking process to implement that change.

For the reasons above, it is my opinion that the PERS Board is not required to contract with a health maintenance organization even if the organization meets all the qualification requirements of N.D. Admin. Code § 71-03-02-01.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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