

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-08

Date Issued: March 30, 1998

Requested by: Carol K. Olson, Executive Director, North Dakota
Department of Human Services

- QUESTION PRESENTED -

Whether a nursing facility may require a pharmacist who was chosen by a facility resident to provide drugs using a drug distribution system chosen by the nursing facility.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a nursing facility may not require a pharmacist chosen by a facility resident to provide drugs using a drug distribution system chosen by the facility.

- ANALYSIS -

Each resident of a skilled nursing care facility, intermediate care facility, basic care facility, boarding house, or swing bed hospital approved to furnish long-term care services must be provided with the "right to a pharmacist of the resident's choice irrespective of the type of medication distribution system used by the facility." N.D.C.C. § 50-10.2-02(1)(q). This right may not be waived as a condition of admission to the facility. N.D.C.C. § 50-10.2-02(2).

There is a similar provision specifically regarding basic care facilities:

Irrespective of the type of distribution system used, no person may refuse to allow a resident of a basic care facility to choose a pharmacist of the resident's choice for the compounding and dispensing of drugs pursuant to chapter 43-15.

N.D.C.C. § 23-09.3-03. There is a specific provision which governs nursing homes:

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Irrespective of the type of distribution system used, no person may refuse to allow a resident of a nursing home, as defined in subsection 3 of section 43-34-01, to choose a pharmacist of the resident's choice for the compounding and dispensing of drugs pursuant to chapter 43-15.

N.D.C.C. § 23-16-08.1. The internal reference in N.D.C.C. § 23-16-08.1 to N.D.C.C. § 43-34-01(3) refers to the definition of nursing home in the chapter devoted to the licensure of nursing home administrators.

These three statutes each bear as a common element the requirement that no person may refuse to allow a resident to use the pharmacist of that resident's choice "irrespective of" the type of distribution system used by the facility. The meaning of statute must be sought initially from the statute's language. County of Stutsman v. State Historical Soc., 371 N.W.2d 321, 325 (N.D. 1985). Words in a statute are to be understood in their ordinary sense unless a contrary intention plainly appears. N.D.C.C. §§ 1-02-02, 1-02-03, Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990). The prepositional phrase used in the above-mentioned statutes, "irrespective of" is defined as meaning "[w]ithout consideration of; regardless of." American Heritage Dictionary, 678 (2d. coll. ed. 1991). Therefore, the plain meaning of these statutes is that a facility must allow a resident to choose the pharmacist of that resident's choice without consideration of or regardless of the type of distribution system used at that facility. Therefore, by giving the words in this statute their plain, ordinary, and commonly understood meaning, the resident's right to select the pharmacist of the resident's choice may not be limited or affected by whether the pharmacist complies with any distribution system used by the resident's nursing facility.

Although the meaning of these statutes appears plain, you stated in your letter that some nursing facilities believe these statutes are ambiguous. You stated that they believe a facility may require the resident's pharmacist of choice to follow the facility's drug distribution system. However, even if one assumes these statutes to be ambiguous, the conclusion remains the same.

The cardinal rule of statutory construction is that the interpretation must be consistent with legislative intent and done in the manner which will accomplish the policy goals and objectives of the statutes. In re K. G., 551 N.W.2d 554, 556 (N.D. 1996). If the language of a statute is ambiguous or of doubtful meaning, extrinsic aids may be used to interpret the statute. Kim-Go, 460 N.W.2d at

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696. Extrinsic aids which may be used to determine legislative intent include the object sought to be attained and the legislative history. N.D.C.C. § 1-02-39(1), (3). Interpretation of statutes is also guided by the "Mischief Rule." Northern X-Ray Co., Inc. v. State, 542 N.W.2d 733, 736 (N.D. 1996). Under this rule, a court considers what the common law was before the statute was enacted, what mischief or defect for which the previous law did not provide, what remedy the Legislature decided would cure this defect, and what the true reason was for the remedy when interpreting the intent behind the statute. Id.

This issue was discussed extensively by the Legislature when N.D.C.C. § 23-16-08.1 was enacted. See 1983 N.D. Sess. Laws ch. 297. House Bill 1069 was the result of an interim study where the committee heard conflicting testimony concerning medication in nursing homes. 1983 Report of the North Dakota Legislative Council, p. 126. The report stated:

The Committee heard testimony relating to the bidding requirements for unit dose programs in nursing homes. The unit dose system of dispensing drugs to nursing home patients requires the local pharmacy to individually wrap and dispense each patient's prescribed drugs. This system is in contrast to the conventional system of dispensing drugs where nursing home staff administer drugs to patients from gross allotments from the local pharmacy.

It was reported to the committee that at least one nursing home in the state using the unit dose system did not allow its patients to purchase their drugs from any other pharmacy. The unit dose system of dispensing drugs was criticized because it does not allow the patient to shop around for the least expensive drugs.

The committee heard testimony that indicated drugs were more expensive under the unit dose programs but that these programs were more efficient than having nursing home staff administer individual patient's drugs.

Federal law presently provides that patients cannot be denied the right to choose their pharmacist.

RECOMMENDATION

The committee recommends a bill permitting nursing home residents to choose their pharmacists regardless of the

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type of drug distribution system used by the nursing home. The bill requires notice of these rights and provides for local enforcement of these rights.

Id. The legislative history demonstrates that the Legislature weighed concerns about the patient's right to choose the pharmacist of his or her choice against facilities' concerns that they should be able to limit this choice to pharmacists who will follow a facility's drug distribution system. Hearing on H. 1069 before the House Social Services and Veteran's Affairs Committee, 48th N.D. Leg. (January 13, 1983), Hearing on H. 1069 before the Senate Social Services and Veteran's Affairs Committee, 48th N.D. Leg. (February 3, 1983). Although testimony presented at these hearings asserted that the unit dose system is extremely valuable in reducing or eliminating medication errors, the Legislature's decision to enact this law shows its intent that the practice of limiting a nursing home resident's choice of pharmacists to those pharmacists who participate in a facility's drug distribution system was a part of the mischief the Legislature sought to remedy.

Therefore, it is my opinion that a nursing facility may not require a pharmacist chosen by a resident to provide drugs using a drug distribution system chosen by that facility. Although each resident has a right to choose a pharmacist, including a pharmacist who does not comply with the facility's medication distribution system, this right does not prevent a facility from requesting that the resident's chosen pharmacist voluntarily cooperate by using the medication distribution system selected by the facility.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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