

LETTER OPINION
98-L-148

September 16, 1998

Honorable RaeAnn Kelsch
State Representative
611 Craig Drive
Mandan, ND 58554

Dear Representative Kelsch:

Thank you for your letter requesting my opinion on related organizations under N.D. Admin. Code § 75-04-05-01(24). You specifically inquire whether the presence of certain characteristics in a not-for-profit corporation would indicate it was a related organization to a separate not-for-profit corporation.

N.D. Admin. Code § 75-04-05-01(24) defines "related organization" to mean

an organization which a provider is, to a significant extent, associated with, affiliated with, able to control, or controlled by, and which furnishes services, facilities, or supplies to the provider. Control exists where an individual or an organization has the power, directly or indirectly, significantly to influence or direct the action or policies of an organization or institution.

If the Department of Human Services (Department) finds that organizations are related, certain costs may not be allowed to the provider or the related organization. See N.D. Admin. Code § 75-04-05-17(1) (service, facility, and supply costs); N.D. Admin. Code § 75-04-05-18(1) (rental expenses).

Interpretation and application of administrative regulations is generally a question of law. Americana Healthcare Center v. North Dakota Dept. of Human Services, 540 N.W.2d 151, 153 (N.D. 1995). However, determining whether certain facts fall within an administrative regulation is a question of fact. See Hom v. State, 459 N.W.2d 823, 825 (N.D. 1990). While I may issue an opinion on a question of law, I cannot issue an opinion on a question of fact. See, e.g., 1997 N.D. Op. Att'y Gen. 13.

The question you ask involves whether certain characteristics invoke the related organization provisions of N.D. Admin. Code ch. 75-04-05. That question depends on the resolution of fact questions on which I

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may not give an opinion. See Dickinson Nursing Center v. N.D. Dept. of Human Services, 353 N.W.2d 754, 757-760 (N.D. 1984) (standard of review of the Department's decision pursuant to a substantially similar administrative rule relates to findings of fact by the Department, which findings are entitled to deference). The resolution of those questions must be made by the Department of Human Services on a case-by-case basis.

In the Department's review of any given situation, it would most likely take into account each of the characteristics you listed in your letter:

1. commonality of directors between the corporations;
2. one corporation contracting with the other for administrative services, or both corporations contracting with a third entity for administrative services;
3. an administrator or other employee of one corporation serving on the board of the other;
4. a requirement that a board member of one corporation be a former board member of the other;
5. common membership interests between the corporations.

Several of the cases cited by the North Dakota Supreme Court in Dickinson Nursing Center considered one or more of these circumstances. See, e.g., Medical Center of Independence v. Harris, 628 F.2d 1113, 1118 (8th Cir. 1980) (common directors, administrator of one on board of the other); Goleta Valley Community Hospital v. Schweiker, 647 F.2d 894, 897 (9th Cir. 1981) (common directors). Thus, depending on the facts, the Department may or may not deem a single one of these characteristics to be sufficient to show the corporations are related organizations. Indeed, depending on the specific facts, the presence of all of these characteristics may not be sufficient. However, as I previously stated, that is a fact question to be made by the Department.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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