

N.D.A.G. Letter to Rayl (Dec. 23, 1987)

December 23, 1987

Mr. Richard L. Rayl
Director
Office of Management and Budget
State Capitol
Bismarck, ND 58505

Dear Mr. Rayl:

Thank you for your letter of December 14, 1987, in which you request my opinion on several issues regarding the prepayment of premiums for the North Dakota Public Employees Retirement System's health insurance plan. I will answer your questions in the order presented.

Your first question is whether health insurance premiums can be paid in advance and if so, at whose discretion and under what conditions these prepayments can be made. N.D.C.C. § 54-52.1-06 states in relevant part as follows:

54-52.1-06. State contribution. Each department, board, or agency shall 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 for the full single rate monthly premium for each of its eligible employees enrolled in the uniform group insurance program and the full rate monthly premium, in an amount equal to that contributed under the alternate family contract, including major medical coverage, for hospital and medical benefits coverage for spouses and dependent children of its eligible employees enrolled in the uniform group insurance program pursuant to section 54-52.1-07.

The monthly premium payment schedule established by N.D.C.C. § 54-52.1-06 is obviously intended to require state agencies to make such payments at least monthly so that medical claims can be paid in a timely and orderly manner. Although N.D.C.C. § 54-52.1-06 establishes that such monthly premiums must be paid at least monthly, it does not prohibit the advance payment of monthly premiums when the circumstances so warrant. The premiums that would be advanced have already been appropriated by the Legislature for this purpose. It is only the timing of the payments that is at issue. In the absence of a statutory prohibition against prepaying premiums, it is my opinion that state departments, boards, and agencies may prepay monthly insurance premiums in light of the state's self-insurance plan's need for an immediate cash infusion to pay claims.

Having determined that the state's agencies may prepay monthly insurance premiums, the second aspect of question number one is at whose discretion and under what condi-

tions these prepayments may be made. It is appropriate that I respond to these particular issues after discussing your second inquiry.

Your second question concerns whether the director of the Office of Management and Budget (OMB) may require all state judicial, legislative, and executive agencies, including agencies under the control of the Board of Higher Education and all boards and commissions that are part of the state's central payroll system, to prepay all or a portion of their health insurance premiums.

The director of the budget is granted broad discretion in administering the state's fiscal affairs. N.D.C.C. §§ 54-44-01, 54-44-02, 54-44-04(12), 54-44-04(12.4), 54-44.1-03, and 54-44.1-12. The statutory authority of the director of the budget that is most directly relevant for purposes of the present issue is set forth in N.D.C.C. § 54-44.1-03(4) and (5).

N.D.C.C. § 54-44.103(4) provides that the director of the budget shall "coordinate the fiscal affairs and procedures of the state to assure the carrying out of the financial plans and policies approved by the legislative assembly." N.D.C.C. § 54-44.1-03(5) provides that the director of the budget shall

[e]xercise continual control over the execution of the budget affecting the departments, institutions, and the agencies of the executive branch of the state government including approval of all commitments for conformity with the program provided in the budget.

It is my opinion that the director of the budget's broad statutory authority over fiscal matters of the state's executive branch enables him to coordinate a premium prepayment plan on behalf of executive agencies when the circumstances so warrant.

Although the director of the budget's authority over the fiscal administration of the executive branch is unquestioned, his authority as extended to the judicial and legislative branches of state government is seemingly limited by N.D.C.C. § 54-44.1-13 which provides that

[t]he budget requests and expenditures for the legislative and judicial branches of the state shall not be subject to the provisions of this chapter.

As such, it does not appear that the judicial and legislative branches of state government are subject to the control of the director of the budget in implementing a premium prepayment plan.

I will briefly discuss whether the State Board of Higher Education is subject to a mandate by the director of the budget regarding a premium prepayment plan. In Nord v. Guy, 141 N.W.2d 395 (N.D. 1966), the supreme court went to great lengths to review the manner in which the State Board of Higher Education came about and the various constitutional provisions as to the authority of the Board. After analyzing all of the history and various constitutional provisions, the court concluded that the State Board of Higher Education was an agency of the executive branch of government, existing for the control and

administration of the state institutions of higher education. More importantly, the court concluded that the State Board of Higher Education was not an entity or sovereign unto itself so as to exist without regard for other provisions of law.

It is clear that these powers vested in the State Board of Higher Education are administrative. The constitutional provision does not create a 'miniature legislature.' The Board of Higher Education became a part of the executive branch of government.

141 N.W.2d at 402.

There is constitutional and statutory authority that arguably limits the ability of the director of the budget to impose the prepayment proposal on the Board of Higher Education. N.D. Const. art. VIII, 6(6)(e), states as follows:

said state board of higher education shall have the control of the expenditure of the funds belonging to, and allocated to such institutions and also those appropriated by the legislature, for the institutions of higher education in this state; provided, however, that funds appropriated by the legislature and specifically designated for any one or more of such institutions, shall not be used for any other institution.

N.D.C.C. § 15-10-16 basically mirrors N.D. Const. art. VIII, 6(6)(e) and states as follows:

The state board of higher education shall have the control of the expenditure of the funds belonging and allocated the institutions under its control and also of those appropriated by the legislative assembly for such institutions; but funds appropriated by the legislative assembly and specifically designated for any one or more of such institutions shall not be used for any other institution.

Thus, the issue is whether the general power of the director of the budget over matters of fiscal administration in the executive branch enables him to impose a premium prepayment plan on the State Board of Higher Education in light of the above-quoted constitutional and statutory Provisions.

After studying this issue, I believe that good arguments can be made on both sides. As a general matter, several of these arguments were made in the recent litigation initiated by the Board of Higher Education against the administration. However, this case was settled out of court and, as a result, there is no judicial precedent to apply in the present case. Due to the legal uncertainties surrounding this issue, I recommend that the director of budget attempt to gain the cooperation of the Board of Higher Education in the premium prepayment proposal. If the Board of Higher Education refuses to cooperate, the director of the budget may, depending on the circumstances, be forced to mandate the prepayment proposal upon the Board of Higher Education. However, it is possible that this

course of action may result in litigation that could delay the Board of Higher Education's participation in the prepayment proposal.

I will now respond to the unanswered portions of your first question. As indicated above, the director of the budget is responsible for coordinating the fiscal administration of the executive branch. This clearly encompasses the coordination of advance premium payments to PERS as it relates to the general fiscal condition of the group health insurance Plan.

Inasmuch as N.D.C.C. § 54-52.1-06 does not legally entitle PERS to premium prepayments, it is appropriate for the director of the budget to demand certain conditions from PERS relative to the administration of the program. I have reviewed your proposed Memorandum of Understanding setting forth various conditions and believe that such an arrangement could be entered into between OMB and PERS. Obviously, if the Memorandum of Understanding is not acceptable to PERS, it can forego the premium prepayment route and attempt to solve its financial difficulties in another manner.

Sincerely,

Nicholas J. Spaeth

dfm