

**N.D.A.G. Letter to Collins (Jan. 9, 1990)**

January 9, 1990

Mr. Sparb Collins  
Executive Director  
NDPERS  
400 East Broadway  
Suite 505  
Box 1214  
Bismarck, ND 58502

Dear Mr. Collins:

Thank you for your September 15, 1989, letter requesting my opinion on whether the PERS Board can lawfully pay the costs of a dorsal rhizotomy surgical procedure performed for the dependent of a state employee. I apologize for the delay in responding.

During the 1987-89 biennium, state employees had the option of enrolling with the PERS self-funded health insurance program (PERS Plan) or various HMOs that had been approved by the PERS Board. The state employee, who is the subject of your letter, elected to enroll in the Care Plan HMO during the 1987-89 biennium. The state employee's son was diagnosed as needing a dorsal rhizotomy surgery; however, Care Plan considered the procedure experimental and denied authorization for the surgery. The state employee in question unsuccessfully requested Care Plan to modify its position.

In May 1989, the PERS Appeals Committee approved coverage for a dorsal rhizotomy which, up to that time, had been considered an experimental medical procedure and, therefore, not covered under the PERS Plan. The PERS Appeals Committee's action was in response to an appeal of a state employee, who was enrolled in the PERS Plan.

PERS' May 1989 decision to cover the PERS Plan subscriber's dorsal rhizotomy surgery was communicated to a Minnesota hospital that would perform the surgery. After receiving notification of PERS' new policy, the hospital called the PERS' insurance specialist and asked whether the May 1989 approval was limited to the one employee (i.e. the PERS Plan subscriber who appealed to the committee) or whether PERS had established a precedent to pay for all dorsal rhizotomy surgeries. The hospital was inquiring on behalf of another patient (i.e., the dependent of the state employee enrolled in Care Plan and identified in your letter) who was also diagnosed as needing a dorsal rhizotomy surgery. The PERS' insurance specialist consulted with the individual committee members and responded to the hospital that the committee's decision was a general change in PERS' policy applicable to all subscribers.

The hospital advised the state employee's family that PERS had changed its policy regarding dorsal rhizotomy surgeries. The state employee's spouse then called the PERS' insurance specialist to verify that the dorsal rhizotomy procedure for her son would be covered. The PERS' insurance specialist responded affirmatively and sent a letter

dated June 9, 1989, to Blue Cross Blue Shield (PERS' third party administrator) authorizing payment for the dorsal rhizotomy surgery (see attached copy of letter). A copy of the June 9, 1989, letter was sent to the state employee's spouse and the hospital performing the surgery.

During this process, the PERS' insurance specialist assumed that the state employee was enrolled in the PERS Plan. As indicated above, however, the state employee was actually enrolled in Care Plan HMO. After Blue Cross Blue Shield received the June 9, 1989, letter, it discovered that the state employee in question was not a PERS Plan subscriber. By that time, however, the dorsal rhizotomy surgery had already been performed.

Based on the foregoing facts, you ask whether PERS is legally authorized to pay the provider's claim related to the dorsal rhizotomy surgery.

Because the state employee was not enrolled in the PERS Plan, it could be argued that any payment would constitute a "donation" in violation of N.D. Const. art. X, § 18. This provision provides:

Section 18. The state, any county or city may make internal improvements and may engage in any industry, enterprise, or business, not prohibited by article XX of the constitution, but neither the state or any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

The North Dakota Supreme Court has had several opportunities to review N.D. Const. art. X, § 18 (previously known as N.D. Const. § 185). See Patterson v. City of Bismarck, 212 N.W.2d 374 (N.D. 1973); Kelly v. Guy, 133 N.W.2d 853 (N.D. 1965); Gripentrog v. City of Wahpeton, 126 N.W.2d 230 (N.D. 1964); Ferch v. Housing Authority of Cass County, 59 N.W.2d 849 (N.D. 1953); Stutsman v. Arthur, 16 N.W.2d 449 (N.D. 1944); Marks v. City of Mandan, 296 N.W. 39 (N.D. 1941); State ex rel. Kaufman v. Davis, 229 N.W. 105 (1930).

In Gripentrog, the North Dakota Supreme Court interpreted N.D. Const. art. X, § 18 (section 185) and stated:

Section 185 does not prohibit the making of loans or giving of credit or making donations in connection with a city's engaging in any industry, enterprise, or business except engaging in liquor traffic. What it does prohibit is for a city "otherwise" to makes loans or give its credit or make donations. In other words, making loans or giving credit may be done in connection with the city's engaging in any permissible industry, enterprise, or business, but not otherwise.

126 N.W.2d at 237-38. Therefore, N.D. Const. art. X, § 18, as interpreted by the North Dakota Supreme Court in Gripentrog, does not restrict a state agency's authority to make

a donation so long as the donation is made in connection with a statutorily authorized industry, enterprise, or business.

Based on the facts available to me, it appears that any payment made by PERS for the dorsal rhizotomy procedure would be made in connection with the state engaging in a statutorily authorized business or enterprise (i.e., PERS' group health insurance program). Nevertheless, this conclusion is not free from doubt. Accordingly, I recommend that PERS not approach this issue based upon whether a "donation" is appropriate but, rather, upon whether the payee has a legal, equitable, or moral claim to the payment. See Petters & Co. v. Nelson County, 281 N.W. 61, 65 (N.D. 1938) (a payment "unsupported by any consideration, legal, equitable, or moral" violates N.D. Const. art. X, § 18) ; 1987 N.D. Op. Att'y Gen. 87-2 (if "reimbursement serves a public purpose or is supported by consideration, moral or otherwise, then reimbursement would be proper"). Following the analysis of the Petters case, therefore, it is my opinion that PERS may pay the costs of the dorsal rhizotomy procedure if the payment is supported by "any consideration, legal, equitable, or moral," Petters, 281 N.W. at 65.

The Board, when considering this issue, will need to know whether the state employee or provider has an enforceable legal or equitable claim against PERS arising from their reliance on the approval given by the PERS' insurance specialist for the dorsal rhizotomy surgery. My staff has thoroughly researched this issue and considered all possible legal and equitable theories that could be asserted by the state employee or provider against PERS. Although it is not free from doubt, our research indicates that the state employee or provider does not have a successful legal or equitable cause of action against PERS. I do not believe that it would be prudent or productive to discuss these legal theories at this time.

Whether the payment would be supported by moral consideration is strictly a question of fact on which I cannot assist you. As indicated above, if the PERS Board determines that there is moral consideration supporting the payment, N.D. Const. art. X, § 18 does not prevent PERS from paying the medical claim in question.

I hope that this discussion has been useful to you. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

cv

Enclosure