LETTER OPINION
93-L-6

January 25, 1993

Representative Richard Kunkel
North Dakota Legislative Assembly
House Chamber
State Capitol
600 E Boulevard Avenue
Bismarck, ND 58505

Dear Representative Kunkel:

Thank you for your December 12, 1992, letter concerning the eligibility of surviving spouses of members of the Public Employees Retirement System (PERS) to receive credit for hospital and medical benefits under North Dakota Century Code (N.D.C.C.) ? 54-52.1-03.3. In essence, you challenge the authority of the PERS Board in promulgating North Dakota Administrative Code (N.D. Admin. Code) ? 71-06-01-02 which provides that the prefunded health insurance credit is only available to a surviving spouse who participates in the uniform group insurance plan and receives a monthly retirement benefit for as long as the spouse receives a monthly benefit. N.D. Admin. Code ch. 71-06-01 was determined to be legally valid by this office on January 8, 1992. Specifically, your two-part question asks:

1. Whether the position taken by the PERS Board is legally valid; and

2. Whether a surviving spouse of a member who elects to receive the ten-year certain option should be entitled to receive the prefunded health insurance credit for life.

Both parts of this question are answered if it is determined that the administrative rule is legally valid.

N.D.C.C. ? 54-52.1-03.3(1) provides:

1. The following persons are entitled to receive credit for hospital and medical benefits coverage under subsection 2:

   a. A member of the highway patrolmen's retirement system receiving retirementbenefits, or the surviving spouse of a member of the highway patrolmen's retirement system who was eligible to receive or was receiving retirement benefits, under section 39-03.1-11.

   b. A member of the public employees retirement system receiving retirement benefits, or the surviving spouse of a member of the public employees retirement system who was eligible to receive or was receiving retirement benefits, under section 54-52-17.

   c. A member of the retirement program established by job service North Dakota under section 52-11-01 receiving retirement benefits, or the surviving spouse of a member of that retirement program who was eligible to receive or was receiving retirement benefits, under the plan provisions of that retirement program.

   d. A retired judge receiving retirement benefits under the retirement program established under chapter 27-17, or the surviving spouse of a retired judge who was eligible to receive or was receiving retirement benefits, under section 27-17-

01.

N.D. Admin. Code ch. 71-06-01 was promulgated to implement N.D.C.C. ? 54-52.1-03.3. Specifically, N.D. Admin. Code ? 71-06-01-02 sets the procedure to calculate the prefunded health insurance credit. The relevant subsections of that section provide:

> 3. A surviving spouse eligible to receive benefits under subdivisions b and c of subsection 6 of North Dakota Century Code section 54-52-17, subdivisions b and c of subsection 6 of North Dakota Century Code section 39-03.1-11, or North Dakota Century Code section 52-11-01 will receive prefunded health insurance credit based on the deceased member's years of service without any age reduction applied.
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> 4. A surviving spouse receiving benefits under the provisions of subdivision a or c of subsection 9 of North Dakota Century Code section 54-52-17; subdivisions a, b, and c of subsection 5 of North Dakota Century Code section 27-17-01; subsection 9 of North Dakota Century Code section 39-03.1-14; of North Dakota Century Code section 52-11-01 will receive prefunded health insurance credit for the duration benefits are paid, based upon the original annuitant's retirement age.

Under the statutory scheme as implemented by the administrative rule, the prefunded health insurance credit is only available to a surviving spouse who participates in the plan and receives a monthly retirement benefit for as long as the surviving spouse receives a monthly benefit. Central to your concern is whether the PERS Board has the authority to promulgate N.D. Admin. Code ? 71-06-01-02 and to prescribe by that rule what constitutes a "surviving spouse . . . under section 54-52-17" for the purposes of administering the prefunded health insurance credit.

N.D.C.C. ? 54-52.1-03.2(b) is listed as the general authority used by the PERS Board to promulgate N.D. Admin. Code ? 71-06-01-02. N.D.C.C. ? 54-52.1-03.2(b)

provides that the PERS Board shall "[a]dopt rules necessary for the proper administration of the retiree health benefits fund, including [and therefore not limited to] enrollment procedures." Additionally, N.D.C.C. ? 54-52.1-08 authorizes the PERS Board to "promulgate such rules and regulations as may be necessary to carry out the provisions of [chapter 54-52.1]." Because N.D.C.C. ? 54-52.1-03.3 relates back to N.D.C.C. ? 54-52-17 for the purpose of determining eligibility for the prefunded health insurance credit, N.D.C.C. ? 54-52-04 also provides a basis for the board's rulemaking authority. N.D.C.C. ? 54-52-04 authorizes the PERS Board to "adopt rules necessary to implement [chapter 54-52]." Thus, it cannot be said that the PERS Board exceeded its statutory rulemaking authority in promulgating N.D. Admin. Code ? 71-06-01-02.

Once it has been determined that the agency has proper rulemaking authority, the question of whether the rule is consistent with statutory authority remains.

A basic rule of administrative law is that "an administrative regulation may not exceed statutory authority or supersede a statute, and that a regulation which goes beyond what the Legislature has authorized is void." Moore v. North Dakota Workmen's Comp. Bureau, 374 N.W.2d 71, 74 (N.D. 1985). However, "there is a presumption of validity of a rule or regulation of an administrative agency, comparable to the presumption of validity of a statute." Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741, 750 (N.D. 1978). An administrative "rule need not be the only reasonable interpretation of a statute to survive scrutiny." Swenson v. Emerson Elec. Co., 374 N.W.2d 690, 702 (Minn. 1985).

"[T]he cardinal rule of statutory interpretation is that the interpretation must be consistent with legislative intent and done in a manner which will accomplish the policy goals and objectives of the statutes." O'Fallon v. Pollard, 427 N.W.2d 809, 811 (N.D. 1988). Courts generally defer to the interpretation given to a statute by the agency which is responsible for enforcing the statute especially when an agency interprets and implements a law that is complex and technical. Holtz v. Workers Compensation Bureau, 479 N.W.2d 469, 470 (N.D. 1992). In

determining legislative intent, one considers the objects sought to be obtained, the statute's connection to other related statutes, and the consequences of a particular construction. Id. The meaning of a given word in a statute can be affected by the context in which it is used. Westman v. North Dakota Workers Compensation Bureau, 459 N.W.2d 540 (N.D. 1990).

In 1989, our Legislative Assembly established the prefunded health insurance credit. See 1989 N.D. Sess. Laws ch. 445, ? 5 [Senate Bill No. 2068]. The intent of Senate Bill No. 2068 was to alleviate the problems fixed income retirees were having in coping with the mounting costs of health insurance. At that time, the average public employee's pension benefit was approximately $317 per month and a significant portion of that benefit was being spent on the monthly medical insurance premium. One option was to increase the monthly pension benefit to compensate for rising medical premiums. This option was determined to be less than satisfactory because the benefit increase would be taxable whereas providing a nontaxable prefunded health insurance credit would not be taxable. Hearing on S. 2068 Before the Senate State and Federal Government Comm., 51st N.D. Leg. (January 9, 1989) (Statement of Alan Person). Thus, monies were diverted from the pension fund to the retiree health benefits fund to assist the retiree and encourage participation in the uniform group insurance program. In this fashion, the three programs, although technically independent and separate, are designed through the prefunded health insurance credit to work in harmony.

The legislative history supports a conclusion that N.D. Admin. Code ? 71-06-01-02 properly interprets and implements the legislative intent. Participation in the retirement plan was a necessary prerequisite in receiving the prefunded health insurance credit. Hearing on S.2068 Before the House State and Federal Government Comm., 51st N.D. Leg. (February 13, 1989) (Statement of Alan Person). Additionally, the Legislature was presented with actuarial information based upon the number of eligible employees which continued participation in the retirement plan. The amount of credit was increased from $3 to $4 times the number of years of credited service based upon these

actuarial figures. Hearing on S. 2507 Before the Senate State and Federal Government Comm., 52nd N.D. Leg. (February 14, 1991) (Statements of Senator Joe Satrom and Sparb Collins). Adopting the interpretation suggested by some of your constituents - that a surviving spouse could withdraw from the program and continue to participate - would increase the actuarial impact and reduce the margin to .04 percent. Employee Benefits Program Interim Committee Minutes on Bill No. 117, Leg. Council (October 26, 1992) (Statement of Sparb Collins). Accordingly, the legislative history of N.D.C.C. ? 54-52.1-03.3 supports the interpretation of "surviving spouse . . . under section 54-52-17" adopted in N.D. Admin. Code ? 71-06-01-02.

It should be noted that it is not solely the administrative rule which limits the prefunded health insurance credit to a participant's spouse. Only upon the selected election of the participating member under N.D.C.C. ? 54-52-17 does a participant's spouse become eligible or ineligible to receive the prefunded health insurance credit. Stated differently, if the participant elects a lump sum payment under N.D.C.C. ? 54-52-17(6)(a) or level social security option under N.D.C.C. ? 54-52-17(9)(b), there is no "surviving spouse" in the context of N.D.C.C. ? 54-52-17. Viewed in this manner, it is the participant's election that determines whether there is a "surviving spouse" for the purpose of awarding the prefunded health insurance credit. I believe that this election provides fair and equitable treatment for all participants.

In my opinion, the PERS Board's interpretation of "surviving spouse . . . under section 54-52-17" as set forth in N.D. Admin. Code ? 71-06-01-02 is reasonable and consistent with the policy goals and objectives of N.D.C.C. ? 54-52.1-03.3 and other related statutes. This is especially true when one considers the deference that is granted to an administrative agency when it interprets a statute that regulates a technical and complex area. This is not to say that the agency's interpretation is the only reasonable one possible; but as long as it is reasonable, the agency's interpretation will survive scrutiny. Swenson, 374 N.W.2d at 702.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

dec/krb