

TESTIMONY OF SCOTT MILLER

House Bill 1245 – Health Insurance Plan Contract Decision-Making

Good Morning, my name is Scott Miller. I am the Executive Director of the North Dakota Public Employees Retirement System, or NDPERS. I am here to testify in opposition to House Bill 1245.

HB 1245 would insert the Legislature's Budget Section into the decision-making process for the State's health plan, including both medical and pharmacy providers. Currently, the NDPERS Board – an Executive Branch entity – has the responsibility to execute the requirements in NDCC chapter 54-52.1, our group insurance plan statutes. That includes the responsibility to select the State's medical and pharmacy providers. The Legislative Assembly, of course, promulgated chapter 54-52.1. In doing so, the Legislative Assembly provided the NDPERS Board with a significant amount of policy guidance and requirements the Board must follow in making that selection.

For instance, the Legislature has set as the policy of state government that because it is important to "promote the economy and efficiency of employment in the state's service, reduce personnel turnover, and offer an incentive to high-grade individuals to enter and remain in the service of state employment, there is created a uniform group insurance program." NDCC section 54-52.1-02. Part of that uniform group insurance program is, of course, our health plan. The Legislature has provided a great deal of policy guidance to the NDPERS Board as the Board fulfills its administrative and executive function of awarding a bid to a carrier for the State's health plan. NDCC section 54-52.1-04 provides the following specific guidelines, among others, for awarding an initial contract:

In determining which bid, if any, will best serve the interests of eligible employees and the state, the board shall give adequate consideration to the following factors:

- a. The economy to be effected.
- b. The ease of administration.
- c. The adequacy of the coverages.
- d. The financial position of the carrier, with special emphasis on the solvency of the carrier.
- e. The reputation of the carrier and any other information available tending to show past experience with the carrier in matters of claim settlement, underwriting, and services.

House Bill 1245 amends the RFP statutes to provide, "the board may not accept one or more bids of a contract with the carriers unless the budget section has approved the bids"; and, "[u]pon receipt of the board's recommendation, the budget section shall

determine which bid, if any, will best serve the interests of eligible employees and the state.” Thus, HB 1245 removes the decision-making from the NDPERS Board and gives it to the Legislature’s Budget Section.

Transferring the executive function of executing those statutory provisions to a Legislative committee is arguably a violation of the North Dakota Constitution, specifically the Separation of Powers doctrine and potentially the Anti-Delegation doctrine. In N.D. Legislative Assembly, et al. v. Burgum, 2018 ND 189 (“Legislature v. Burgum”), the North Dakota Supreme Court examined a delegation very similar to that which is proposed in HB 1245.

In that case, the Supreme Court considered the Governor’s veto of a provision found within House Bill 1020, passed during the 2017 Legislative Session. House Bill 1020 was the Water Commission’s budget, and contained a grant of authority to the Water Commission that was similarly subject to Budget Section approval: “The funding designated in this section is for the specific purposes identified; however, the state water commission may transfer funding among these items, subject to budget section approval and upon notification to the legislative management’s water topics overview committee.” Id. at 15 (emphasis added). The Governor vetoed the “subject to” phrase underlined in the quote.

The North Dakota Supreme Court held that the veto of that phrase was ineffective. However, the Court went on to state that the phrase itself was unconstitutional for two different reasons.

The Court first looked at whether the legislative delegation of responsibility to the Budget Section was a violation of the anti-delegation doctrine. That doctrine states that “[t]he Legislative Assembly may not delegate to another body the power to make law—to legislate—but it may bestow authority to execute the laws it enacts.” Id. at 20 (citing Ralston Purina Co. v. Hagemeister, 188 N.W.2d 405, 411 (N.D. 1971)). The Supreme Court determined that the Legislative Assembly attempted to do so in granting the Budget Section the above authority, and declared the provision unconstitutional. Id. at 22-23.

The Supreme Court went on to examine whether the delegation was also a violation of the separation of powers doctrine. The separation of powers doctrine recognizes the three separate but equal branches of government – the legislative, the executive, and the judicial. Id. at 17-18. Each of those branches is “supreme in its own sphere”. Id. (citing State ex rel. Spaeth v. Meiers, 403 N.W.2d 392, 394 (N.D. 1987)).

The Legislative Assembly, of course, has the power to make or create a law. However, after a law has been enacted, the execution of that law – including “further fact finding and discretionary decision-making” – is an executive function: “The power to make a

law is legislative,’ but the power to administer or execute the law ‘under the provisions of the law itself, as enacted by the Legislature,’ is executive.” Id. at 22 (quoting Ralston Purina Co. v. Hagemeister, 188 N.W.2d 405, 410-411 (N.D. 1971)). The court went on to state, “[t]he Legislative Assembly violates separation of powers when it retains discretion after enactment for itself or its agent, the budget section.” Id. at 26.

The application of Legislature v. Burgum to HB 1245 is straightforward. NDCC chapter 54-52.1 already contains a clear grant of power to the NDPERS Board in regard to issuing RFPs for our health plan. That grant of power provides clear and specific guidelines that the Board must use in evaluating proposals and making a final decision that, in the Board’s view, “will best serve the interests of eligible employees and the state.” NDCC section 54-52.1-04.

House Bill 1245 removes that executive decision-making process from an executive entity, the NDPERS Board, and gives it to a subset of the Legislative Assembly, the Budget Section: “the board may not accept one or more bids of a contract with the carriers unless the budget section has approved the bids”; and, “[u]pon receipt of the board’s recommendation, the budget section shall determine which bid, if any, will best serve the interests of eligible employees and the state.” That language is nearly identical to the language held unconstitutional in Legislature v. Burgum: “the state water commission may transfer funding among these items, subject to budget section approval”. As the North Dakota Supreme Court stated in Legislature v. Burgum, “[t]he Legislative Assembly violates separation of powers when it retains discretion after enactment for itself or its agent, the budget section.” Id. at 26.

One argument that has been made in opposition to this conclusion is that the current statutory scheme actually violates the separation of powers doctrine because the statutes give the Board the authority to appropriate monies for the payment of health insurance premiums, and appropriations are solely within the authority of the Legislative Assembly. We agree that it is the Legislative Assembly’s responsibility and authority to appropriate money. However, we disagree that the statutory scheme in NDCC chapter 54-52.1 violates that principle.

Take our most recent health plan RFP as an example. Just last year the Board went through the incredibly complex process of issuing an RFP, evaluating the proposals, and making an appropriate decision. In fulfilling its administrative function of executing the provisions of NDCC chapter 54-52.1, the Board followed all the statutory requirements for the RFP process. The end result of that Legislatively-created process was that the Board determined that awarding the contract to Sanford Health Plan (SHP) on a modified fully-insured basis was in the best interests of the state and our participants.

Once that decision was made, we provided the Governor's office with not only the proposed premium increase, but a number of benefit improvement possibilities that would bring the plan benefits closer to a non-grandfathered plan, and their cost. The Governor provided the premium information to the Legislative Assembly in his budget recommendation for each agency. The Legislative Assembly is now making the final determination regarding the plan premium as it considers each agency's budget. Only after the Legislative Assembly has made that final premium determination through each agency's appropriated budget will we finalize the plan structure and the resulting premium with SHP. Importantly, it is the Legislative Assembly, and not the NDPERS Board, that is making that final appropriation decision.

An even more clear example is from the health plan renewal process in 2016-17. For that renewal, as required by statute, the Board retained a consultant, Deloitte Consulting, to concurrently and independently prepare a renewal estimate. SHP proposed a 17.4% premium increase to purchase a plan with the same benefit structure as existed at that time. Deloitte determined that the proposed increase was reasonable. Based on the guidance provided in statute, Deloitte's assessment, and its own review, the Board approved a renewal with SHP.

However, the Board also realized that the State would have difficulty with such a significant increase given the budget problems the State was facing. The Board worked with SHP to determine what benefit and cost-sharing changes could be made to reduce that premium increase but still maintain the Plan's grandfathered status under the ACA. NDPERS gave the renewal information and the possible benefit change information to OMB and the Governor for their consideration as they created the Executive Budget. NDPERS also provided information on the health insurance reserves in the event the Governor and Legislature decided to use reserves to buy-down the premium. You can see this information provided in the legislative fiscal staff's Analysis of 2017-2019 Executive Budget below.

STATE EMPLOYEES - SUMMARY OF KEY RECOMMENDATIONS

SALARY INCREASES

The 2017-19 executive budget recommendation provides funding for state employee salary increases of 1 percent, effective July 1, 2018. The cost of the salary increase is \$11,858,530, of which \$5,447,422 is from the general fund. Specific language regarding the salary increases is included in Section 11 of 2017 House Bill No. 1075--the appropriation bill for the Office of Management and Budget (OMB).

SALARY UNDERFUNDING

The 2017-19 executive budget recommendation underfunds general fund salary budgets for 10 agencies totaling \$7.9 million. Agencies with underfunded salary budgets include:

| Agency | Amount |
|---|-------------|
| State Auditor | \$117,118 |
| Tax Commissioner | 637,100 |
| North Dakota University System office | 578,097 |
| Department of Human Services | 5,278,396 |
| Industrial Commission | 900,000 |
| Public Service Commission | 60,170 |
| Branch research centers | 28,620 |
| North Dakota State University Extension Service | 37,206 |
| Main Research Center | 71,550 |
| Parks and Recreation Department | 239,959 |
| Total | \$7,948,216 |

UNFUNDED POSITIONS

The 2017-19 executive budget recommendation provides for a total of nine positions to be unfunded in three agencies. The total amount of funding related to the unfunded positions is \$1.3 million, of which \$1.2 million is from the general fund. Agencies with positions unfunded include the Highway Patrol (five positions), State Auditor (two positions), and State Historical Society (two positions).

ACCRUED LEAVE PAYOUTS

The 2017-19 executive budget recommendation provides funding for accrued leave payouts totaling \$2.3 million, of which \$1 million is from the general fund and \$1.3 million is from other funds. This funding is available for accrued leave payouts to eligible employees upon retirement or termination of employment.

HIGHER EDUCATION

Prior to the 2017-19 biennium, higher education full-time equivalent (FTE) positions supported from special funds were not reflected in the budget, as the State Board of Higher Education and institutions under its control have continuing appropriation authority for special funds. The 2015 Legislative Assembly amended North Dakota Century Code Section 54-44.1-04 to require higher education entities to enter all budget data in the state's budget system in the same manner as other agencies. This increased the total FTE position count by 4,336.41. The 2017-19 executive recommendation provides for a decrease of general fund supported FTE positions of 315.27. Higher education FTE positions supported from all funds is 6,766.76.

EXECUTIVE BRANCH ELECTED OFFICIALS

The executive budget recommendation provides funding for executive branch elected officials' salary increases equal to 1 percent of salaries, effective July 1, 2018. Statutory changes necessary to adjust elected officials' salaries are included in the respective elected officials' appropriation bills recommended by the Governor.

JUDICIAL BRANCH

The judicial branch budget request includes funding to provide district court judges' salary increases of 1 percent of salaries, effective July 1, 2018. Salary increases for Supreme Court justices are also 1 percent of salaries, effective July 1, 2018. Salary increases for other employees of the judicial branch are included at the same level as provided for other state employees, or 1 percent of salaries, effective July 1, 2018. Additional increases may be provided to other employees of the judicial branch pursuant to the judicial branch salary schedule as requested by the judicial branch.

HEALTH INSURANCE

The executive budget recommendation continues funding for the cost of health insurance premiums for state employees. The executive budget provides \$1,249.47 per month for employee health insurance, an increase of \$119.25, or 10.6 percent, compared to the 2015-17 biennium premium rate of \$1,130.22 per month. A recent history of monthly health insurance premiums provided for each employee is listed below.

| Biennium | Monthly Premium | Percentage Change from Previous Biennium |
|----------------------------------|-----------------|--|
| 2001-03 | \$409 | 16.9% |
| 2003-05 | \$489 | 19.6% |
| 2005-07 | \$554 | 13.3% |
| 2007-09 | \$658 | 18.8% |
| 2009-11 | \$826 | 25.5% |
| 2011-13 | \$887 | 7.4% |
| 2013-15 | \$982 | 10.7% |
| 2015-17 | \$1,130 | 15.1% |
| 2017-19 executive recommendation | \$1,249 | 10.6% |

The percentage increase to maintain the existing health insurance plan benefits is 17.4 percent for the 2017-19 biennium. To reduce this percentage increase, the Governor is recommending increasing member out-of-pocket expenses to reduce plan costs by \$49.61 per contract, per month, which would reduce the overall increase by 4.4 percent.

The Governor is also recommending using Public Employees Retirement System (PERS) health insurance reserves to pay an additional \$27.31 of premiums per contract, per month, which would reduce the overall increase by 2.45 percent. The Governor is using approximately \$18.0 million of the estimated \$35.0 million in health insurance reserve funds to reduce the premium rate increase. Of the \$18.0 million utilized, \$10.5 million relates to state employee health insurance plans, \$4.4 million relates to political subdivisions, and \$3.1 million relates to retiree health plans.

EMPLOYEE ASSISTANCE PROGRAM

The monthly rate for the employee assistance program remains at \$1.54 per month, or \$18.48 annually.

LIFE INSURANCE

The monthly rate for life insurance provided to state employees remains at \$0.28 per month, or \$3.36 annually.

UNEMPLOYMENT INSURANCE

Funding is included for unemployment insurance for state employees at a rate of 1 percent of the first \$6,000 of an employee's annual salary (\$60 per year or \$120 per biennium maximum). No unemployment insurance was collected on state employee salaries during the 2013-15 and 2015-17 bienniums.

TOTAL COMPENSATION CHANGES COST

The schedule below provides the total cost of major compensation changes recommended in the 2017-19 executive budget.

| | General Fund | Special Funds | Total |
|--|--------------|---------------|--------------|
| Salary increase of 1 percent, effective July 1, 2018 | \$5,447,422 | \$6,411,108 | \$11,858,530 |
| Health insurance premium increases | 20,924,659 | 24,626,376 | 45,551,035 |
| Total | \$26,372,081 | \$31,037,484 | \$57,409,565 |

FULL-TIME EQUIVALENT POSITIONS

The 2017-19 executive budget includes a total of 15,937.69 FTE positions, an increase of 4,100.12 FTE positions from the 2015-17 authorized level of 11,837.57 FTE positions. The total number of FTE positions for the 2017-19 biennium now reflects certain higher education positions that were previously not reflected in the budget.

The 2017-19 executive budget recommended FTE level of 15,937.69 is an overall decrease of 551.56 FTE positions compared to the adjusted 2015-17 biennium total, including a decrease of 315.27 FTE positions in higher education and a decrease of 215.61 FTE positions in all other state agencies.

The reduction of 215.61 FTE positions resulted in a decrease of \$29.0 million, of which \$15.9 million is from the general fund.

Major changes in FTE positions, excluding higher education, are as follows:

| Agency Increases | 2015-17 Authorized FTE Positions | 2017-19 Executive Budget | Increase |
|--|----------------------------------|--------------------------|----------|
| 301 - State Department of Health | 365.00 | 381.00 | 16.00 |
| 530 - Department of Corrections and Rehabilitation | 836.29 | 846.29 | 10.00 |
| 475 - Mill and Elevator Association | 147.00 | 153.00 | 6.00 |

| Agency Decreases | 2015-17 Authorized FTE Positions | 2017-19 Executive Budget | (Decrease) |
|---|----------------------------------|--------------------------|------------|
| 380 - Job Service North Dakota | 237.76 | 181.61 | (56.15) |
| 180 - Judicial branch | 391.00 | 354.50 | (36.50) |
| 640 - Main Research Center | 361.12 | 336.12 | (25.00) |
| 605 - Industrial Commission | 121.75 | 105.25 | (16.50) |
| 125 - Attorney General | 250.00 | 234.00 | (16.00) |
| 630 - North Dakota State University Extension Service | 265.98 | 252.98 | (13.00) |
| 627 - Upper Great Plains Transportation Institute | 54.98 | 43.88 | (11.10) |
| 628 - Branch research centers | 120.29 | 110.29 | (10.00) |

Over the course of the Legislative Assembly's review and analysis of the NDPERS Budget, the Legislative Assembly eventually approved the final premium amount, benefit structure, and use of reserves, as you can see in the below excerpts from Legislative Council's 65th Legislative Assembly State Budget Actions for the 2017-2019 Biennium.

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| | | | |
|--------------------------------|-------------|-------------|-------------|
| Aeronautics Commission | | 20,000 | 20,000 |
| Workforce Safety and Insurance | | 30,000 | 30,000 |
| Department of Commerce | 26,625 | | 26,625 |
| Game and Fish Department | | 340,000 | 340,000 |
| Total | \$1,040,017 | \$1,250,814 | \$2,290,831 |

| Amount |
|-------------|
| \$187,000 |
| 21,768 |
| 929,297 |
| 300,000 |
| 100,000 |
| 578,097 |
| 5,278,396 |
| 250,000 |
| 185,196 |
| 100,000 |
| 28,620 |
| 37,206 |
| 71,550 |
| 243,714 |
| 239,959 |
| \$8,550,803 |

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HIGHER EDUCATION

Prior to the 2017-19 biennium, higher education FTE positions supported from special funds were not reflected in the budget, as the State Board of Higher Education and institutions under its control have continuing appropriation authority for special funds. The 2015 Legislative Assembly amended North Dakota Century Code Section 54-44.1-04 to require higher education entities to enter all budget data in the state's budget system in the same manner as other agencies. This increased the total FTE position count by 4,337.41. The 2017 Legislative Assembly approved a reduction of general fund supported FTE positions of 313.27 for the 2017-19 biennium, to provide a total of 2,117.08 higher education FTE positions supported by the general fund. Higher education FTE positions supported from all funds is 6,767.76 for the 2017-19 biennium.

EXECUTIVE BRANCH ELECTED OFFICIALS

The 2017 Legislative Assembly did not provide funding for state employee salary increases for the 2017-19 biennium. Salaries for executive branch elected officials will remain at the amounts approved by the 2015 Legislative Assembly.

JUDICIAL BRANCH

The 2017 Legislative Assembly did not provide funding for state employee salary increases for the 2017-19 biennium. Salaries for district court judges and Supreme Court justices will remain at the amounts approved by the 2015 Legislative Assembly.

HEALTH INSURANCE

The Legislative Assembly continued to provide funding for the cost of health insurance premiums for state employees. The appropriations provide \$1,240.83 per month for employee health insurance, an increase of \$110.61, or 9.8 percent, compared to the 2015-17 biennium premium rate of \$1,130.22 per month. A recent history of monthly health insurance premiums provided for each employee is listed below.

| Biennium | Monthly Premium | Percentage Change from Previous Biennium |
|----------|-----------------|--|
| 2001-03 | \$409 | 16.9% |
| 2003-05 | \$489 | 19.6% |
| 2005-07 | \$554 | 13.3% |
| 2007-09 | \$658 | 18.8% |
| 2009-11 | \$826 | 25.5% |
| 2011-13 | \$887 | 7.4% |
| 2013-15 | \$982 | 10.7% |
| 2015-17 | \$1,130 | 15.1% |
| 2017-19 | \$1,241 | 9.8% |

The percentage increase to maintain the existing health insurance plan benefits is 17.4 percent for the 2017-19 biennium. To reduce this percentage increase, the Legislative Assembly approved the Governor's recommendation to increase member out-of-pocket expenses to reduce plan costs by \$58.25 per contract, per month, which would reduce the overall increase by 5.2 percent.

The Legislative Assembly also approved using Public Employees Retirement System (PERS) health insurance reserves to pay an additional \$27.31 of premiums per contract, per month, which would reduce the overall increase by 2.4 percent, resulting in a total increase of 9.8 percent for the 2017-19 biennium. The Legislative Assembly approved using approximately \$15.1 million of the estimated \$35.0 million in health insurance reserve funds to reduce the premium rate increase. Of the \$15.1 million utilized, \$10.5 million relates to state employee health insurance plans, \$3.7 million relates to political subdivisions, and \$700,000 relates to retiree health plans.

EMPLOYEE ASSISTANCE PROGRAM

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As you can see, the NDPERS Board did not set the final premium for the health plan. The NDPERS Board followed the statutory guidelines for the renewal process, and decided to renew. The Board provided significant information to the Governor, who made a budget recommendation to the Legislative Assembly. The Legislative Assembly considered that budget recommendation regarding the health plan structure, premiums, and buy-down amount, and the Legislative Assembly determined what the State would pay, for what benefits, and how it would be paid. Once the Legislative Assembly approved those items, we finalized the renewal with SHP. That is the same process that has been used since NDPERS has been responsible for the group health plan.

In addition to the significant constitutional issues I have addressed, we are also seriously concerned about how this bill would affect our Part D plan, which is the pharmacy benefit plan for our Medicare retiree participants. The premium for the Part D plan is heavily dependent on the subsidy information provided by the federal Centers for Medicare and Medicaid Services (CMS). CMS typically does not publish the subsidy information until the end of July each year. Under our contract, our Part D provider must notify us of its proposed premium for the next year's renewal within two weeks of that publishing date. If the premium is acceptable, then under this bill we would have to forward that information on to the Budget Section for approval. That's not a problem, aside from the constitutional issues, unless the Budget Section does not approve the renewal.

If we did not renew with the provider, we would have a very narrow timeline in order to complete an RFP process. Federal law requires us to provide our Part D participants with notice regarding a change in the Part D vendor for the next year by October 15th. If the Budget Section notified us on August 15th – which is an exceedingly quick turnaround – that it was not accepting the renewal, we'd have two months to initiate and complete the RFP process, make a recommendation, and then take it back to the Budget Section to review that decision and affirm or decline to follow the recommendation. We are concerned that may be too ambitious. If we are not able to complete that work in time, our retirees would most likely lose their Part D coverage. And, of course, if the Budget Section did not approve that decision, our retirees would certainly lose their Part D coverage.

The original version of HB 1245 included every contract under chapter 54-52.1, including dental, vision, life, and our consultants, which the Sponsor has amended out. Because of the significant issues we may face with our Part D plan, if HB 1245 proceeds, we would request that the Part D plan also be amended out of the Budget Section approval requirements. There is just too much risk to our retirees.

In summary, the constitutional issues with HB 1245 and the very real possibility of the bill seriously harming our retirees' access to pharmacy benefits weigh heavily against House Bill 1245. The Legislative Assembly already clearly has control of the purse strings on the health plan. This bill will introduce uncertainty and potential litigation where it is most harmful. We encourage a "do not pass" on House Bill 1245.