

**STATE OF NORTH DAKOTA**  
**INSURANCE DEPARTMENT**

IN THE MATTER OF:	)	<b>RECOMMENDED</b>
	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
	)	<b>AND ORDER</b>
	)	
Benefits Management Group, Inc.	)	<b>OAH File No. 20150250</b>
	)	<b>Case No. AG 15-540</b>

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**PROCEDURAL BACKGROUND**

On April 28, 2015, the North Dakota Insurance Commissioner (“Commissioner”) issued a Cease and Desist Order (“Order”) to Respondent Benefits Management Group, Inc. (“BMG”) ordering BMG to immediately cease and desist from acting as an administrator or otherwise engaging in the business of insurance in the State of North Dakota. The Order notified Respondent of its right to ask for a hearing. On May 28, 2015, Respondent, through counsel, made a timely request for hearing and requested a delay on the 10 day hearing time frame. On May 29, 2015, the North Dakota Insurance Department (“the Department”) made a request to the Office of Administrative Hearings (“OAH”) for designation of an administrative law judge to conduct an administrative hearing and issue recommended findings of fact, conclusions of law, and a recommended order in the matter of BMG's appeal. The same day, Administrative Law Judge Jeanne M. Steiner (“ALJ Steiner”) was so designated. BMG’s counsel withdrew as attorney on June 18, 2015. On July 2, 2015, a Notice of Prehearing Conference setting a telephonic conference for July 14, 2015, was sent to the parties. However, it was rescheduled to accommodate BMG’s change in counsel and held on August 13, 2015.

On September 15, 2015, a Notice of Hearing, Specification of Issue and Prehearing Order was sent to the parties, setting hearing for January 26, 2016. Parties engaged in discovery and several motions were filed, including cross motions for summary judgment. The ALJ's recommended decision to deny the summary judgment motions was accepted by the Insurance Commissioner, who signed the Order on January 7, 2016. Another Prehearing Conference was held on January 8, 2016. The issue specified for hearing was:

Whether Benefits Management Group, Inc. acted as described in the April 28, 2015, Cease and Desist Order and thus, whether the Order should be vacated or made permanent.

The hearing was held as scheduled on January 26, 2016, at OAH in Bismarck, North Dakota. The hearing was held in accordance with N.D.C.C. §§ 28-32 and 26.1-01-03.1, and N.D. Admin. Code § 45-02-02-15 and it was transcribed by a court reporter. Special Assistant Attorney General Sara Behrens represented the Department. Attorney Quinn Fylling represented BMG. The Department called the following witnesses: Kelvin Zimmer ("Zimmer"), Director of Agent Licensing Division, North Dakota Insurance Department; Chrystal Bartuska, ("Bartuska"), Division Director, North Dakota Insurance Department Product Filing Group; David Deitz ("Dietz") of Preference Personnel, Scott Fleckenstein ("Fleckenstein"), Managing Director of Staffing Benefits Group, and James Gallery ("Gallery"), President of BMG.

Department's Exhibits 1-4, 6, 7, 9, 11-24, 26-29 and 31 were admitted with no objection; Department's Exhibit 5, 8, and 10 were admitted over objection. Department's Exhibits 25 and 30 were not offered. BMG submitted proposed exhibits A-F but offered no exhibits.

After the hearing, the parties requested simultaneous briefing and proposed a briefing schedule. The transcript of the hearing was received on March 21, 2016. On March 28, 2016, the Department submitted its Closing Brief and Proposed Findings of Fact, Conclusions of Law

and Recommended Order and BMG submitted a Post Hearing Brief. On April 4, 2016, the Department submitted a Rebuttal to Respondent's Post-Hearing Brief, requesting judicial notice regarding North Dakota residency, and BMG submitted a Post-Hearing Reply Brief. On April 7, 2016, BMG filed an Objection to the Department's request for judicial notice regarding residency. No judicial notice is taken regarding residency. On April 8, 2016, an Order Taking Official Notice was sent to the parties advising official notice was being taken of the April 28, 2015, Cease and Desist Order, giving the parties until April 15, 2016, to respond. The April 28, 2015, Cease and Desist Order was officially noticed and admitted as Exhibit 32 with no response from the parties and the record closed on April 15, 2016.

Having thoroughly considered the evidence of record, the undersigned ALJ makes the following recommended Findings of Fact, Conclusions of Law and Recommended Order for consideration of the Insurance Commissioner.

### **RECOMMENDED FINDINGS OF FACT**

1. Benefits Management Group, Inc. (BMG) of Illinois, is the third party administrator of the health plan at issue in this case that has not obtained a certificate of authority from the Insurance Commissioner to act as an administrator in the state of North Dakota.

2. Analytic Alternative, LLC (AAI) was the fiduciary that maintained the trust accounts for the health products involved in this matter and the stop loss carrier for the health plan at issue in this case.

3. Health Insurance & HR, Inc. d.b.a. Staffing Benefits Group (SBG) contracted with AAI to be AAI's service provider and received a commission for all insurance products offered by AAI through SBG according to the Analytic Alternative, LLC Services Agreement.

4. BMG contracted with AAI to be AAI's agent when acting on behalf of AAI, to provide third party administrative services for AAI, and to receive compensation according to the terms of the BMGI Administrative Services Agreement.

5. BMG's duties as the third-party administrator for AAI included maintenance of eligibility for claim payments, payment of claims, record keeping and expense payments, preparation of financial statements and HIPAA compliance, drafting enrollment forms, providing schedules of benefits and sending COBRA notifications to brokers who would provide them to employers who enrolled. Payments for COBRA coverage were to be sent directly to BMG.

6. David Dietz ("Dietz") is the President and CEO of Preference Personnel, a staffing agency located in Fargo, North Dakota.

7. Preference Personnel employs people who reside across the country. Some of the Preference Personnel employees have North Dakota mailing addresses and may or may not reside in this state.

8. In December 2014, Dietz contacted Scott Fleckenstein ("Fleckenstein") of SBG in Arizona regarding Affordable Care Act compliant health insurance plans for Preference Personnel employees.

9. Fleckenstein drafted a health insurance proposal, using the rate information obtained from AAI and the schedule of benefits provided by BMG, and provided the proposal to Dietz.

10. The health insurance proposal indicated BMG was the third party administrator that would provide health claims administration, provide tracking and enrollment, would provide necessary reporting and was touted as combining "20+ years of experience to bring together the

most cost-effective technology and experienced staff to efficiently process cash collection, pay claims and share information in real time.” Ex. 2.

11. The health insurance proposal Fleckenstein sent to Dietz provided several plan options-the MEC Plan, the MEC+ Plan, and the MVP Bronze Plan.

12. The proposal indicated the plans were self-funded but premiums included stop loss insurance and the participation minimum for each plan was 10% of Census or at least 10 employees.

13. Fleckenstein provided to Dietz the MEC and MVP Enrollment Forms provided by BMG that included a list of covered services.

14. The MEC Plan benefits included the minimum essential healthcare benefits outlined under the Affordable Care Act that every health insurance plan is required to include to help employees meet the mandate and avoid the penalty for not having health insurance; however, according to the proposal, the SBG MEC was enhanced to include Telemedicine and a Prescription Drug Plan.

15. The MEC+ Plan included the same benefits as the MEC Plan but also included two in-network doctor visits per year with lab and X-ray benefits.

16. The MVP plan, in addition to the benefits provided by both MEC Plans, also provided primary care and specialist office visits, emergency room services, hospital services, diagnostic testing and urgent care, and was designed to be a low enrollment plan, customized to each staffing firm’s requirements and state mandates.

17. On December 30, 2014, Dietz accepted the health insurance proposal on behalf of Preference Personnel by signing the Letter of Understanding and Intent.

18. Fleckenstein also provided to Dietz the financial agreement (Premium Agreement) provided by AAI and reiterated that by signing the Premium Agreement, there was zero risk because the premiums included stop-loss insurance coverage.

19. Although the BMG enrollment forms indicated the effective date of coverage was the first day of the month following the date of the first payroll deduction, Fleckenstein advised Dietz that AAI agreed the effective date of the Analytic Plan for Preference Personnel employees would be January 1, 2015, as long as the premiums were paid by January 9, 2015.

20. On January 1, 2015, Dietz entered into a Premium Agreement with AAI wherein AAI offered a "Health Program" to Preference Personnel and Preference Personnel accepted the proposal and the effective date was January 1, 2015.

21. The Premium Agreement provided the premium amounts for each of the plans and instructions for the premiums to be wired to Trust Fund/Great Bank Trust and deposited in a trust account at the First American Bank.

22. Several Preference Personnel employees enrolled in the MEC plan, MEC+ plan and MVP plans.

23. At least ten Preference Personnel employees enrolled in the MVP plan for the month of January 2015, and the premiums for the plan were paid by January 9, 2015.

24. The ID cards for the health plan at issue in this case that were provided to Preference Personnel identified the Group Plan Name as AAI – Analytic Alternative ("Analytic Plan").

25. Multiple employers, in addition to Preference Personnel, signed up for the Analytic Plan.

26. The trust account information and wiring instructions was the same for each employer that joined the Analytic Plan.

27. Preference Personnel had no access to the trust account set up by AAI at First American Bank.

28. Preference Personnel received no accountings from the trust account.

29. On February 6, 2015, Fleckenstein emailed a letter to Dietz indicating that AAI changed the minimum participation rate for the MVP plan from 10 enrolled employees to 25 enrolled employees and those currently enrolled in the MVP plan would be converted to the MEC+ plan as of February 1, 2015.

30. On March 27, 2015, Dietz received an email from Lynn Shanovich of BMG, attaching a letter from AAI indicating additional plan changes: the Telemedicine hotline was underutilized, and due to low participation and lack of consistent service, that benefit was being discontinued. However, the MEC plan would be enhanced to include one doctor visit, and the preventive only limitation was removed from the MEC+ plan as it relates to the two primary care doctor visits.

31. Multiple Preference Personnel employees submitted claims on the Analytic Plan, including claims for prescription drugs, and some of the claims were paid.

32. BMG provided third party administrative services for the Analytic Plan: BMG established and maintained eligibility of Preference Personnel employees, received the claims of Preference Personnel employees, processed the claims, and determined which claims were covered and to be paid under the Analytic Plan. BMG advised AAI of these determinations and AAI made the payments.

33. On April 28, 2015, the Insurance Commissioner ordered BMG to cease and desist from acting as an administrator or otherwise engaging in the business of insurance in the State of North Dakota.

34. The greater weight of the evidence established BMG has engaged in, or was about to engage in, an act or practice which violated or may lead to a violation of the North Dakota insurance laws by providing third party administrative services for the Analytic Plan without a certificate of authority.

### **RECOMMENDED CONCLUSIONS OF LAW**

1. The administration of health insurance in North Dakota is subject to the control and regulation of the state under the provisions of N.D.C.C. chapter 26.1-27 and any rules adopted by the Department pursuant to that chapter.

2. The Commissioner is statutorily responsible to authorize and regulate health insurance administrators under N.D.C.C. chapter 26.1-27.

3. In this context, an administrator means any person who collects charges or premiums from, or who adjusts or settles claims on, residents of this state in connection with life or health insurance coverage or annuities. N.D.C.C. § 26.1-27-01.

4. A person, including a person who directly or indirectly underwrites, collects charges or premiums from, or adjusts or settles claims on residents of this state in connection with life, annuity, or health coverage provided by a self-funded plan, may not act as or hold oneself out to be an administrator in this state, for the kinds of business for which the person is acting as an administrator, without a certificate of authority issued by the commissioner. N.D.C.C. § 26.1-27-03.



5. N.D.C.C. § 26.1-27-03.1 requires that an administrator that administers or will administer self-insured plans in this state to maintain a surety bond or proof of insurance satisfactory to the commissioner for the use and benefit of the commissioner for covered persons who have remitted premiums or insurance charges or other moneys to the administrator in the course of the administrator's business in an amount of one hundred thousand dollars or ten percent of the aggregate total amount of administered coverage under the plans handled in this state, whichever is greater.

6. N.D.C.C. § 26.1-01-03.1 authorizes the Commissioner to issue a cease and desist order and notice of opportunity for hearing when it appears that any person is engaged in an act or practice which violates or may lead to a violation of Title 26.1 of the North Dakota Century Code.

7. The provisions of N.D.C.C. § 26.1-01-03.1 bestow authority to enjoin past, present, and threatened future conduct. An agency cease and desist order may be warranted even assuming the offending entity has improved its practices, where the cease and desist order would prevent future abuses. *See Hecht Co. v. Bowles*, 321 U.S. 321, 327, (1944), cited in *First State Bank of Wayne County v. Federal Deposit Insurance Corporation*, 770 F.2d 81, 83 (6th Cir. 1985).

8. BMG asserts the facts do not support upholding the April 28, 2015, Cease and Desist Order because BMG did not adjust or settle health insurance claims. “Adjust” means to “determine the amount that an insurer will pay an insured to cover a loss.” *Black's Law Dictionary*, 50 (10<sup>th</sup> ed. 2014). A preponderance of the evidence established that BMG determined which claims were covered and were to be paid, then advised AAI and AAI made the payment. Thus, BMG adjusted or settled the Analytic Plan claims; therefore, BMG was required

to obtain a certificate of authority under N.D.C.C. § 26.1-27.

9. BMG asserts the facts do not support upholding the April 28, 2015, Cease and Desist Order because the Department failed to establish claims were administered on North Dakota residents. The preponderance of the evidence presented at the hearing established that Preference Personnel is a North Dakota business operating out of Fargo, North Dakota, that some Preference Personnel employees who enrolled in the Analytic Plan had mailing addresses in North Dakota and BMG administered Analytic Plan claims. This evidence validates the Commissioner's belief that BMG has engaged in, is engaging in, or was about to engage in, an act or practice that violates Title 26.1. The Commissioner need not wait until a North Dakota resident's claim is administered before ordering BMG to cease and desist. As stated, the Cease and Desist Order can be issued before any violation occurs to deter and prevent future violations.

10. BMG argues it needed no certificate of authority under N.D.C.C. § 26.1-27-03(1) because the MVP plan was not effective. The MVP Plan included a provision for stop loss insurance. A policy that contains stop loss involves the business of insurance, as it shifts the risk of loss from the self-insured to another entity. N.D.C.C. § 26.1-02.1-01. The MVP Plan was offered, several employees paid the premiums and BMG would have been the third party administrator of the claims under the MVP Plan. The Cease and Desist Order is appropriate to deter and prevent violations of North Dakota law in the future.

11. BMG also argues it needed no certificate of authority under N.D.C.C. § 26.1-27-03(1) because the MEC Plan was self-funded and only involved preventative services and thus was not insurance. Administrators of self-funded plans are required to obtain a certificate of authority. N.D.C.C. § 26.1-27-03(1). The Affordable Care Act (ACA) "generally requires employers with 50 or more full-time employees to offer 'a group health plan or group health

insurance coverage' that provides 'minimum essential coverage.' 26 U.S.C. § 5000A(f)(2); §§ 4980H(a), (c)(2). Any covered employer that does not provide such coverage must pay a substantial price." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014). The MEC Plan was designed to and promoted as satisfying the minimal essential health insurance coverage required under the Affordable Care Act. The benefits provided under the MEC Plan, which included prescription drugs benefits, are designed to screen, counsel or prevent sickness, disease, injury, or disability and thus, are products related to health matters. N.D. Admin. Code § 45-13-01-02(2). BMG's argument the services provided under the MEC plan are preventative only and thus, are not health insurance, is not persuasive. The MEC Plan provides health coverage and is health insurance.

12. BMG claims the state law in this matter is preempted by federal law. Although this argument has been raised previously and was the subject of the Cross Motions for Summary Judgment, upon further research of the issue, the ALJ has no authority to analyze and reach a decision on preemption. Preemption is the principle, derived from the Supremacy Clause of the United States Constitution, that a federal law can supersede or supplant any inconsistent state law (statute) or regulation (rule). *See Black's Law Dictionary*, 1369 (10<sup>th</sup> ed. 2014); *see also* United States Constitution, Article VI. Preemption issues are constitutional issues. *See e.g. Stenehjem v. FreeEats.com, Inc.*, 2006 N.D. 84, ¶ 19, 712 N.W.2d 828. The law disfavors preemption. *FreeEats.com*, at ¶ 20. Cases regarding preemption often present complex issues, and involve complex statutory construction issues. *See e.g. State v. Liberty National Bank and Trust Co.*, 427 N.W. 2d 307 (N.D. 1988). State statutes are presumed to be constitutional. *North Dakota Council of School Administrators v. Sinner*, 458 N.W.2d 280, 285 (N.D.1990); *FreeEats.com*, at ¶ 21. A statute is presumed valid until determined otherwise by an appropriate

court. N.D.C.C. § 1-02-06.1. Thus, the validity and constitutionality of N.D.C.C. § 26.1-27 must be assumed by the ALJ. *See Ash v. Traynor*, 1998 BD 112 ¶ 3, 579 N.W.2d 180; *Service Oil, Inc. v. State*, 479 N.W.2d 815, 826 (N.D. 1992). Administrative agencies do not determine constitutional issues and the law provides no authority to decide the constitutionality of the statutes under which they operate. *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 585 (N.D. 1984); *Johnson v. Elkin*, 263 N.W.2d 123, 126 (N.D. 1978). The Commissioner followed the statute in N.D.C.C. § 26.1-01-03.1 in issuing the Cease and Desist Order. This ALJ has no authority to rule on constitutional issues, including whether federal law preempts state law in this case.

13. The greater weight of the evidence established Preference Personnel accepted a proposal for health care benefits, which included MEC and MVP Plans, and several Preference Personnel employees enrolled in both the MEC and MVP versions of the Analytic Plan. AAI contracted with BMG to fulfill administrative services on behalf of AAI and BMG is the third party administrator of the Analytic Plan.

14. The greater weight of the evidence established that BMG engaged in or was about to engage in practices in the capacity of an insurance administrator and performed or was about to perform, the functions, duties, or powers prescribed for an administrator under N.D.C.C. ch. 26.1-27 without a certificate of authority. The Commissioner has a duty to protect consumers from such acts.

15. BMG engaged in or was about to engage in practices that violate multiple provisions of law found in Title 26.1 of the North Dakota Century Code. The Commissioner's Cease and Desist Order is authorized by N.D.C.C. § 26.1-01-03.1 and justified in fact. Therefore, Commissioner Hamm's April 28, 2015, Cease and Desist Order should be made

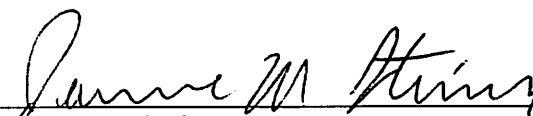
permanent.

**RECOMMENDED ORDER**

The facts require that the Commissioner's Cease and Desist Order dated April 28, 2015, be made permanent, as established by a preponderance of the evidence and by application of law.

Dated at Bismarck, North Dakota, this 25<sup>th</sup> day of April 2016.

State of North Dakota  
Insurance Department

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