

MEMORANDUM

TO: Sparb Collins, Public Employees Retirement System

FROM: Janilyn K. Murtha, Assistant Attorney General

RE: Hartford Provider Administrative Agreement

DATE: May 10, 2012

In a recent press release, Hartford, the second largest provider in the 457 plan administered by NDPERS, announced its intent to sell its retirement business. Hartford has not as of yet communicated to the NDPERS Board (hereinafter "Board") or membership its intent to proceed with this action or how such an action would specifically affect the applicable members. I was requested to review the contract that NDPERS has with Hartford related to its provider status and provide the Board with information regarding available options under contract. In response to this request I have reviewed the current provider contract between NDPER's and Hartford executed in 1999, and the two subsequent amendments to that contract, executed in 2001 and 2005, respectively (hereinafter the contract and subsequent amendments shall be referred to collectively as the "Agreement").¹ The following memorandum is intended to summarize relevant statutory sections, administrative rules, and Agreement provisions that speak to options available to the Board under the Agreement in the event the provider fails to meet various responsibilities.

Statutory Sections:

N.D.C.C. § 54-52.2-03.2 sets forth the Boards authority to administer the plan. Subsection 1 of this statute grants the Board the authority to adopt rules to manage the plan; subsection 3 requires that each provider report annually information related to products, fees, contract charges, penalties, "and such other information the board may require"; subsection 5 grants the Board authority to suspend participation of any provider that does not meet the requirements of N.D.C.C. ch. 54-52.2 or rules of the board.

The option of provider suspension is the most often repeated remedy available to the Board under statute, rule and the Agreement.

¹ The Agreement term began August 1, 1998, effective for a one year term that has and will automatically renew unless terminated by either party.

Administrative Rules:

The Agreement states that the provider shall abide by the Rules established by the Board. N.D.A.C. ch 71-04-06 sets forth various provider responsibilities and while there are many, this summary will be limited to reporting and disclosure responsibilities and provider suspension.

N.D.A.C. § 71-04-06-06 requires the provider deliver quarterly reports detailing the activity of each participant's account. The list of information required by the rules does not contain language encompassing other information the Board may require. Per section 71-04-06-11, failure to deliver the report within 30 days of being noticed results in the provider losing active provider status under section 71-04-04-09(1); failure to deliver the report within 90 days results in loss of provider status under section 71-04-04-09(2).

N.D.A.C. § 71-04-06-14 requires the provider report annually to the Board such information the board may require regarding the provider's investment products. Failure to deliver the report within 60 days of a request constitutes a violation of the administrative agreement and subjects the provider to action under section 71-04-04-09.

N.D.A.C. § 71-04-04-09 provides two forms of suspension for a provider should the provider fail to meet the requirements of article 71-04 or N.D.C.C. ch. 54-52.2: loss of active provider status and loss of provider status. Loss of active provider status allows the provider to receive contributions from existing members but new members may not enroll. Loss of provider status doesn't allow either new members to enroll or existing members to make additional contributions.

Agreement Provisions:

The Agreement requires the provider to deliver semi-annual reports detailing the activity of each participant's account, including any information not specifically listed but required by the Board. Failure to submit the report within 30 days of being noticed results in the provider being unable to enroll new members; failure to submit the report within 90 days after the end of the reporting period constitutes a material breach of the Agreement and the provider may not accept contributions from existing members. The Agreement indicates that in the event of a material breach of the Agreement the Board will commence termination of the Agreement.

Additional provider responsibilities include notifying members whenever an existing investment option is being discontinued, responding to the Board's request for information regarding investment products, and complying in a timely manner with all reasonable direction that the Board may provide regarding administration of the program.

In the event the Agreement is terminated by the Board for cause, or terminated by the provider for any reason, the provider will transfer all participant accounts to another provider “free from all transfer charges and penalties whatsoever, regardless of any provision to the contrary in the investment contract”. Further the Agreement requires the provider to indemnify and hold harmless the Board for any loss, damage, claim, or expense arising in connection with any actions taken or omitted by the provider.

If Hartford fails to respond to the recent inquiry submitted by NDPERS, there appear to be provisions in statute, rule, and the Agreement that allow the Board to pursue a formal course of inquiry with Hartford and a possible suspension of provider status if Hartford fails to respond. This summary does not comment on all options available to the Board under law.