STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MEDIMPACT HEALTHCARE SYSTEMS, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 00-3553RU
DEPARTMENT OF MANAGEMENT SERVICES,	)	
Respondent,	)	
and	)	
MERCK-MEDCO MANAGED CARE, L.L.C. and CAREMARK INC.,	)	
Intervenors.	)	
MEDIMPACT HEALTHCARE SYSTEMS, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 00-3900BID
DEPARTMENT OF MANAGEMENT SERVICES,	)	
Respondent,	)	
and	)	
MERCK-MEDCO MANAGED CARE, L.L.C. and CAREMARK INC.,	)	
Intervenors.	)	

FINAL ORDER

These consolidated cases were heard on October 3, 2000, before David M. Maloney, Administrative Law Judge, in Tallahassee, Florida. This Final Order covers the issues in Case No. 00-3553RU. A separate Recommended Order is being issued simultaneously in Case No. 00-3900BID.

APPEARANCES

For Petitioner: Robert P. Smith, Esquire
Timothy G. Schoenwalder, Esquire
Shannon L. Novey, Esquire
Hopping, Green, Sams & Smith, P.A.
123 South Calhoun Street
Post Office Box 6526
Tallahassee, Florida 32302-6526

For Respondent: Julia P. Forrester, Esquire
Department of Management Services
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399-0950

For Intervenor Caremark Inc:

Thomas J. Maida, Esquire
Austin B. Neal, Esquire
Foley & Lardner
300 East Park Avenue
Tallahassee, Florida 32301

Donna H. Stinson, Esquire
Broad & Cassell
215 South Monroe Street, Suite 400
Tallahassee, Florida 32301

For Intervenor Merck-Medco Managed Care, L.L.C.:

Fred McCormack, Esquire
Landers & Parson, P.A.
310 West College Avenue
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

Whether the Department of Management Services ("DMS") or the ("Department") has an unpromulgated rule which states, in effect, that the Department will select the solicitation procurement method known as an Invitation to Negotiate when it is in the Department's best interests to do so even if rule requirements for the selection have not been met? Whether the statement contained in the Invitation to Negotiate (ITN Number-DSGI 00-001) issued in April 2000 by the Division of State Group Insurance ("DSGI") for the purchase of pharmacy benefits management services to the effect that "a late-submitted offer to negotiate will be returned unopened" is an unpromulgated rule? Whether, although not pled, the Petitioner proved at final hearing the existence of other unpromulgated rules?

PRELIMINARY STATEMENT

On August 28, 2000, MedImpact Healthcare Systems, Inc. ("MedImpact"), filed a petition with the Division of Administrative Hearings ("DOAH"). Denominated "MedImpact Healthcare Systems, Inc's Petition to Determine Violations of s.120.54(1)(a) by Department Statements Constituting Unadopted Rules," the petition invokes DOAH's authority under Section 120.56(4)(a), Florida Statutes. It requests DOAH

> (1) to determine that the Department of Management Services ("DMS") has violated s.120.54(1)(a) by failing to adopt as rules

> one or both of the two statements of general applicability hereinafter described, and (2) to order, in accordance with s.120.56(4)(d), that DMS must discontinue all reliance on such statement(s) and, as remedy to Petitioner, must rescind all action taken adverse to Petitioner's interest in reliance on such statements, as also hereinafter described.

The petition further alleges the following with regard to the first of the two statements it declares to be of general applicability:

> DMS . . . proceeded to effectuate an agency statement of general applicability which [w]as described in sworn deposition testimony . . . in terms or effect, that "We [DMS] will use the Invitation to Negotiate [("ITN")]whenever it is to the agency's best interests to do so."

Petition, p. 3. As for the second statement of which the petition complains, the petition cites to Section 3.1 of the Invitation to Negotiate where the petition alleges it is stated unequivocally "PROPOSALS RECEIVED AFTER THE SPECIFIED DATE AND TIME WILL BE RETURNED UNOPENED." Petition, p. 5. The petition further alleges that the quoted sentence from Section 3.1 of the ITN is in conflict with the statement in Section 2.19 of the ITN that "Proposals may be rejected" for reasons including when "received after the submission deadline."

On September 1, 2000, the Bureau of Administrative Code at the Department of State was notified of the existence of the petition and provided with a copy. One week later, following

assignment of Case No. 00-3553RU to the petition, the undersigned was designated as the administrative law judge to conduct the proceedings.

An Order was rendered September 11, 2000, following a telephone conference call with the parties, requiring the Division of State Group Insurance ("DSGI") in DMS to notify all respondents to the ITN of the existence of the proceeding. On the same day, the case was set for hearing to commence October 3, 2000, at DOAH.

A hearing was conducted on September 21, 2000, on DSGI's motion to dismiss. At the hearing, discussion occurred with regard to a related case pending at DOAH, Case No. 00-3900BID. Following the hearing, an Order of Consolidation was rendered consolidating the two proceedings for all purposes except that the DOAH proceedings would culminate in separate orders: in the instance of Case No. 00-3553RU, a final order; in the instance of Case No. 00-3900BID, a recommended order.

The motion to dismiss was denied on September 26, 2000. By the same order denying the motion to dismiss, petitions to intervene filed by Merck-Medco Managed Care, L.L.C. ("MMMC") and Caremark, Inc., were granted subject to proof of standing. After further motion practice, including a motion which resulted in an order excluding consideration of the scoring process by which Caremark's response was ranked higher than MMMC's, the

consolidated cases proceeded to hearing as scheduled originally in Case No. 3553RU. A description of the hearing is contained in the Recommended Order rendered in Case No.00-3900BID simultaneously with the rendition of this Order.

Proposed final orders were received in a timely fashion from all parties. This final order follows.

FINDINGS OF FACT

1. The findings of fact in the Recommended Order in Case No. 00-3900BID are hereby incorporated into this Final Order.

2. In the ITN there is the statement that "**PROPOSALS RECEIVED AFTER THE SPECIFIED TIME AND DATE WILL BE RETURNED UNOPENED.**"

3. It was not proven that Dr. Phillips on behalf of DSGI made the statement to the effect that "DMS will use the Invitation to Negotiate whenever it is in the agency's best interest to do so."

4. Other statements made by DSGI in the context of selection of the ITN as the solicitation method in this case were statements that demonstrated DSGI was not in compliance with an existing DMS Rule, Rule 60A-1.001(2), Florida Administrative Code.

CONCLUSIONS OF LAW

5. The Division of Administrative Hearing has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.56(4), Florida Statutes.

6. The term "rule" is defined in the Administrative Procedure Act, Chapter 120, Florida Statutes, to mean

> each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes [certain forms] . . .

Section 120.52(15), Florida Statutes.

7. "Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable." Section 120.54(1), Florida Statutes.

8. Under Section 120.56(4)(a), Florida Statutes, "a substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule."

9. The statement in the ITN that late proposals will be returned unopened does not meet the definition of a rule. It is not a statement of "general" applicability. It is a statement that is specific to the ITN. It has no applicability other than to the specific organizations or persons who submit an offer to negotiate pursuant to the agency's invitation to negotiate.

10. The statement alleged to have been made by Dr. Phillips in deposition to the effect that DSGI will use ITNs when in the agency's interest was not proven to have been made.

11. The other statements not pled but proven to have been made by Dr. Phillips that she chose the ITN as most "appropriate" when the ITN Rule, whether she was aware of its existence or not, required a finding that ITBs and RFPs were not practicable and then required documentation of the finding, are not rules. They are statements evincing the Agency's failure to comply with DMS rules or interpretations of rules that significantly deviate from the plain reading of the ITN Rule. See Best Western Tivoli Inn et al. v. Department of Transportation, 448 So. 2d 1052 (Fla. 1st DCA 1984).

12. In the final analysis, an agency must follow its own rules. Marrero v. Department of Professional Regulation, 622 So. 2d 1109, 1112 (Fla. 1st DCA 1993). Statements confirming the failure to do so do not constitute unpromulgated rules. The statements are not ones of general applicability. They are statements with no applicability.

ORDER

Based on the foregoing, it is hereby

ORDERED that MedImpact Healthcare Systems, Inc.'s Petition to Determine Violations of Section 120.54(1)(a) by Department Statements Constituting Unadopted Rules is DENIED.

DONE AND ORDERED this 21st day of November, 2000, in Tallahassee, Leon County, Florida.

DAVID M. MALONEY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of November, 2000.

COPIES FURNISHED:

Thomas D. McGurk, Secretary
Department of Management Services
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399-0950

Bruce Hoffmann, General Counsel
Department of Management Services
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399-0950

Julia P. Forrester, Esquire
Department of Management Services
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399-0950

Robert P. Smith, Esquire
Timothy G. Schoenwalder, Esquire
Hopping, Green, Sams & Smith, P.A.
123 South Calhoun Street
Post Office Box 6526
Tallahassee, Florida 32302-6526

Fred McCormack, Esquire
Landers & Parson, P.A.
310 West College Avenue
Tallahassee, Florida 32301

Thomas J. Maida, Esquire
Austin B. Neal, Esquire
Foley & Lardner
300 East Park Avenue
Tallahassee, Florida 32301

Donna H. Stinson, Esquire
Broad & Cassel
215 South Monroe Street, Suite 400
Tallahassee, Florida 32301

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.