

LETTER OPINION
95-L-126

May 24, 1995

William W. Binek, Chief Counsel
Public Service Commission
600 East Boulevard Avenue
Bismarck, ND 58505-0480

Dear Mr. Binek:

Thank you for your April 27, 1995, letter requesting my opinion regarding the applicability of the ex parte prohibitions contained in N.D.C.C. ? 28-32-12.1 to the Public Service Commission's staff counsel and other staff personnel who take an advocacy position in cases before the Commission.

In response to your letter, a member of my staff contacted your office in order to determine the role and responsibilities of the Commission's staff counsel and staff personnel who take an advocacy position in cases before the Commission. Based on that conversation, it is my understanding that the advocacy attorney and personnel represent the interests of consumers. In doing so, the staff attorney represents the consumers in the traditional role as an attorney, introducing evidence, cross-examining witnesses, and making arguments.

N.D.C.C. ? 28-32-12.1 provides in pertinent part:

1. Except as provided in subsection 2 or unless required for the disposition of ex parte matters specifically authorized by another statute, an agency head or hearing officer in a contested case proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding, with any other person allowed to participate in the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for

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all parties to participate in the communication.

2. When more than one person is the hearing officer in a contested case proceeding, those persons may communicate with each other regarding a matter pending before the panel. An agency head or hearing officer may communicate with or receive aid from staff assistants if the assistants do not furnish, augment, diminish, or modify the evidence in the record.
3. Unless required for the disposition of ex parte matters specifically authorized by statute, no party to a contested case proceeding, no person who has a direct or indirect interest in the outcome of the proceeding, no person allowed to participate in the proceeding, and no person who presided at a previous stage in the proceeding may communicate directly or indirectly in connection with any issue in that proceeding, while the proceeding is pending, with any agency head or hearing officer in the proceeding without notice and opportunity for all parties to participate in the communication.

The plain intent of this section is to discourage the prominence of ex parte communication and encourage the openness of debate based on the public record. See Letter from Heidi Heitkamp to Dr. Jon R. Rice (December 20, 1993).

Subsection 1 of section 28-32-12.1 prohibits an agency head or hearing officer in a contested case proceeding from communicating, directly or indirectly, with a party or any other person allowed to participate in the proceeding without notice and opportunity for all parties to participate in the communication. Subsection 3 prohibits a party to a contested case proceeding from communicating regarding any issue in the proceeding with any agency head or hearing officer without notice and opportunity for all parties to participate in the communication. The staff attorney and other personnel who take an advocacy position in cases before the Commission act on behalf of a party and are therefore deemed to be a party to

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the proceeding. Furthermore, they are allowed to participate in the proceeding in the capacity as advocates for consumers.

It would be a violation of N.D.C.C. ? 28-32-12.1, therefore, for the Commission members and staff attorney or other staff personnel assigned to represent the interest of a party to discuss any issue in a contested case, unless unauthorized by another statute or the other parties have notice and an opportunity to participate in that discussion.

Subsection 2 of section 28-32-12.1 provides that an agency head "may communicate with or receive aid from staff assistants if the assistants do not furnish, augment, diminish, or modify the evidence in the record." The staff attorney and other personnel assigned to represent the interests of a party in a contested case are not assistants to the Commission with regard to that particular case. Other Commission counsel and staff are assigned to assist the Commission in an advisory capacity. This subsection therefore does not exempt staff counsel and personnel acting in an adversary role from the ex parte prohibition found in subsection 1. Furthermore, staff counsel and personnel advocating the position of a party are not permitted to communicate with the Commission under subsection 2 because they will be furnishing evidence at the hearing which will become part of the record.

In conclusion, it is my opinion that the ex parte prohibitions contained in N.D.C.C. ? 28-32-12.1 apply to staff counsel and other staff personnel assigned by the Commission to advocate the position of a party in a contested case.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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