

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-11

Date Issued: May 3, 1996

Requested by: William W. Binek, Public Service Commission

- QUESTIONS PRESENTED -

I.

Whether, under the facts presented, a Public Service Commissioner has a conflict of interest when the Commissioner's adult child works for a party in a contested proceeding before the Public Service Commission.

II.

Whether there is a procedure for appointing a person to serve in place of a Public Service Commissioner who has a conflict of interest in deciding a contested proceeding heard by the Public Service Commission.

III.

Whether the rule of necessity permits a Public Service Commissioner to participate in a contested hearing or proceeding despite the existence of a conflict of interest.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that, under the facts presented, a Public Service Commissioner does have a conflict of interest under the Commission's policies when that Commissioner's adult child is employed by a party to a contested hearing or proceeding before the Public Service Commission.

II.

It is my opinion that there is a procedure for appointment of a person to serve in place of a Public Service Commissioner who has a conflict of interest in deciding a contested proceeding heard by the Public Service Commission.

III.

It is my opinion that the rule of necessity does not require a Public Service Commissioner to participate in a contested hearing or proceeding where that Commissioner has a conflict of interest because there is a procedure to appoint a substitute.

- ANALYSES -

I.

The Public Service Commission adopted a policy in 1987 stating:

No Commissioner, commission employee, or agent, shall participate in a Commission decision if a conflict of interest, real or apparent, would be involved. A conflict would arise when the commissioner, the employee or agent, any member of his immediate family, his partner or an individual firm or organization which employs or is about to employ the commissioner, commission employee, his immediate family member, or partner has a financial or other interest directly and substantially affected by the Commission decision.

Memorandum to P.S.C. Staff, December 15, 1987.

For the purpose of this opinion, I will assume the following facts based on information provided this office: A telecommunications company filed a complaint with the Public Service Commission against another telecommunications company; a member of the Public Service Commission disclosed to all parties in the case that an adult child of the Commissioner and the spouse of that adult child are both employed by the plaintiff telecommunications company at an out-of-state location; the Commissioner's child has a 401K plan offered by the employer which includes ownership of company stock; and neither the Commissioner's child nor the child's spouse is employed in a position which directly involves the specific issue before the Public Service Commission.

State law governing the proceedings of the Public Service Commission provides that a majority of the Commission constitutes a quorum and may transact business, "but no commissioner shall participate in any hearing or proceeding in which he has any direct personal pecuniary interest." N.D.C.C. § 49-01-07. Under the facts which have been presented, the Commissioner involved does not have a direct personal

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pecuniary interest which would prohibit the Commissioner from participating in this proceeding. See generally 1995 N.D. Op. Att'y Gen. 21. Therefore, the Commissioner is not prohibited from participating in this proceeding unless the Commission's conflict of interest policy is binding upon the Commissioner and the Commissioner is prohibited from participation by that policy.

One canon of statutory construction is that the mention of one thing implies the exclusion of another, and it is presumed that the Legislature intended all that it said and that it said all it intended to say. Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993). Therefore, it may be argued that the legislative intent behind N.D.C.C. § 49-01-07 is to allow a Public Service Commissioner to participate in all proceedings except where the Commissioner has a direct personal pecuniary interest. However, the rule that the expression of one thing excludes all others should be applied only where it appears to point to legislative intent, and it does not apply if there is some special reason for mentioning one thing and none for mentioning the other. Juhl v. Well, 116 N.W.2d 625, 628 (N.D. 1962).

The same statute which prohibits a Commissioner from participating where the Commissioner has a direct personal pecuniary interest also provides that "[t]he commission in all cases may conduct its proceedings, when not otherwise particularly prescribed by law, in a manner most conducive to the proper dispatch of business and to the ends of justice." N.D.C.C. § 49-01-07. The Commission has authority to conduct its proceedings "to the ends of justice" but may not allow a Commissioner to participate if that Commissioner has a direct personal pecuniary interest. Therefore, N.D.C.C. § 49-01-07 can be interpreted to grant the Commission authority to define a conflict of interest more broadly than the statutory prohibition against a direct personal pecuniary interest.

Under the Public Service Commission's policy, a conflict arises if an immediate family member of a Commissioner is employed by an organization having a financial or other interest directly and substantially affected by the proceeding. Applying this policy to the facts which were presented, a conflict will arise if the Commissioner's child is an immediate family member and if the child's employer has a financial or other interest directly and substantially affected by the proceeding. The policy does not define the phrase "immediate family member."

The general connotation of a person's immediate family includes an adult child even when that child does not live in the same household with the person affected. The term "immediate family" generally refers to one's parents, spouse, children, and siblings. Black's Law Dictionary, 750 (6th ed. 1990). Courts interpreting whether immediate family members must live in the same household have produced different results based upon the circumstances of the cases. When renting residential property, a restriction to "immediate family" has been defined to include a tenant's married daughters and their children, even when the tenant is not occupying the same residence. 61 Jane Street Associates v. Krill, 476 N.Y.S.2d 887, 889 (A.D. 1 Dept. 1984). However, where a prospective juror made no affirmative response to questions whether any member of the juror's immediate family had any legal work done by the plaintiff's attorney or had been injured in an automobile accident, and it was discovered that the adult sister of the prospective juror living in a different household had been represented in an automobile accident case by that attorney, the court held that the juror did not give a false answer because an immediate family member is defined as living in the same household, although an immediate relative does not necessarily reside in the same household. Lewandowski v. Preferred Risk Mutual Insurance Co., 146 N.W.2d 505, 507 (Wis. 1966).

Courts have looked to the underlying purpose and context of the phrase "immediate family" and have used that purpose or context to determine whether the restrictive effect of the word "immediate" upon the word "family" should be interpreted narrowly to include only household members or broadly to include all immediate family without regard to residence in the same household. Bellows v. Delaware McDonald's Corp., 522 N.W.2d 707 (Mich. App. 1994). Where the purpose of the phrase "immediate family" in a contract excluding immediate family members of people employed by a contest sponsor from eligibility to participate in the contest was to bolster public confidence in the impartiality of the contest, a court adopted a broad definition and held that a parent residing in a different household than a child is an immediate family member of that child. Id. at 709-710. Cases interpreting the phrase "immediate family" broadly to include immediate family members who are not residents in the same household are a better reasoned line of cases in the context of a conflict of interest policy for government officials or employees because a broad definition would uphold the purpose behind the policy by including more persons with whom the official has strong personal ties which may affect or appear to affect the official's or employee's judgment. Therefore, the Commissioner's adult child is an immediate family member of the Commissioner despite residing in a different household than the Commissioner.

The child's employer is the plaintiff who filed the complaint before the Public Service Commission. This office has been informed that the plaintiff telecommunications company is seeking to prohibit the defendant telecommunications company from discontinuing a certain service required by the plaintiff and to prohibit the defendant from selling the equipment for providing this service to a third party who may increase charges to obtain the service. Under these circumstances, an "interest" is something more than curiosity or sympathy, but is instead a financial or other benefit. See 1995 N.D. Op. Att'y Gen. 21. Thus, this proceeding concerns a financial or other interest of the employer. Further, the interest is direct and substantial, that is, an important or significant interest, which affects the business of the employer. Id. Consequently, the Commissioner's child's employer has a financial or other interest directly and substantially affected by the proceeding.

Therefore, it is my opinion that under the facts presented, a Public Service Commissioner has a conflict of interest as defined under the policy governing conflicts of interest adopted by the Public Service Commission when that Commissioner's adult child is employed by a party to a contested hearing before the Commission. The Public Service Commission, having adopted the policy, can amend the policy at any time it desires. If the policy were rescinded, the only limitations on a Commissioner's participation in a matter would be the Public Service Commission's Code of Ethics and the prohibition quoted above in N.D.C.C. § 49-01-07, neither of which would prohibit the Commissioner from participating in decisions under the facts presented.

II.

Any person or association may make a complaint in writing to the Public Service Commission which charges any public utility with violating any provision of law or any order or rule of the Public Service Commission. N.D.C.C. § 49-05-01. The Commission is to hear the complaint, and "proceedings shall be conducted as provided by chapter 28-32." N.D.C.C. § 49-05-03. N.D.C.C. ch. 28-32 is the Administrative Agencies Practice Act. Under the Administrative Agencies Practice Act, a hearing officer is defined to include any agency head or one or more members of the agency head when presiding in an administrative proceeding. N.D.C.C. § 28-32-01(5). Further, "[a]ny person or persons presiding for the agency in an administrative proceeding must be referred to individually or collectively as hearing officer." N.D.C.C. § 28-32-08.1(1). Any hearing officer may be disqualified for good cause shown, and any

party may petition for the disqualification of any person presiding as a hearing officer. N.D.C.C. § 28-32-08.1(2) and (3). "A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination." N.D.C.C. § 28-32-08.1(4).

If the person whose disqualification is requested has determined to grant the petition for disqualification, then a substitute may be arranged. N.D.C.C. § 28-32-08.1(5). Where a disqualified person is a member of the agency head, the agency head may appoint a substitute for the disqualified person. N.D.C.C. § 28-32-08.1(5)(b). Any action taken by such a substitute is effective as the action of the disqualified person. N.D.C.C. § 28-32-08.1(6).

Therefore, it is my further opinion that North Dakota law provides a procedure for the appointment of a person to serve in place of a Public Service Commissioner in deciding a complaint heard by the Public Service Commission.

III.

An administrative agency acting in a quasi-judicial adjudicative manner must provide participants with the elements deemed essential to due process of law, although the participants need not be provided with all of the requirements of due process found in a court of law. First American Bank & Trust Company v. Ellwein, 221 N.W.2d 509, 514 (N.D. 1974). Where a statute does not provide for the disqualification and temporary replacement of board members or for a substitute tribunal, the court has adopted the "rule of necessity, to require otherwise disqualified officers to serve when no provision has been made for a substitute tribunal in order to prevent the lack of a forum from preventing the hearing from taking place." Id. at 514-515. The rule of necessity has been described:

"There is an exception, based upon necessity, to the rule of disqualification of an administrative officer. Disqualification will not be permitted to destroy the only tribunal with power in the premises. An officer, otherwise disqualified may still act, if his failure to act would necessarily result in a failure of justice. Thus, an officer exercising judicial or quasi-judicial functions may act in a proceeding wherein he is disqualified by interest, relationship or the like if his jurisdiction is exclusive and there is no legal provision for calling in a substitute so that his refusal to act

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would absolutely prevent a determination of the proceeding."

Danroth v. Mandaree Public School District No. 36, 320 N.W.2d 780, 783-784 (N.D. 1982) (quoting 1 Am. Jur.2d. Administrative Law, § 66, p.862). See also Larson v. Wells County Water Resource Bd., 385 N.W.2d 480, 484 (N.D. 1986). Further, it has been held that where a member of a city governing body passes his or her vote, it will be considered to be a vote with the majority based upon the members' duty to vote. Northwestern Bell Tel. Co. v. Board of Comm'rs of Fargo, 211 N.W.2d 399, 404 (N.D. 1973). The rule of necessity has been applied to school boards, Danroth, supra, water resource boards, Larson, supra, and city governing bodies, A&H Services v. City of Wahpeton, 514 N.W.2d 855, 859 (N.D. 1994), where there is no statute or other authority that would require or permit a member to abstain from voting for a conflict of interest.

However, where there is a procedure for providing a substitute for an administrative official who has a conflict of interest, the rule of necessity does not apply and that administrative officer may disqualify him or herself. Such a procedure is available to members of the Public Service Commission in hearing a complaint under N.D.C.C. ch. 49-05 by applying N.D.C.C. § 28-32-08.1 to proceedings under that chapter. N.D.C.C. § 49-05-03. There is also the possibility open to the Public Service Commission to appoint an administrative law judge from the Office of Administrative Hearings to preside over the case. N.D.C.C. § 54-57-03(5). The Public Service Commission may direct a hearing officer to make findings of fact, conclusions of law, and issue a final order. N.D.C.C. § 28-32-08.5(6).

Therefore, it is my further opinion that the rule of necessity does not require that a Public Service Commissioner with a conflict of interest participate in a proceeding heard by the Public Service Commission because there is a procedure available to appoint a substitute.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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