

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-12

Date Issued: May 7, 1998

Requested by: Representative Bill Oban

- QUESTION PRESENTED -

Whether attorneys representing the North Dakota Workers Compensation Bureau in administrative proceedings may meet, without notice and opportunity for all parties to the proceeding to participate, with the Director or designated decision maker to discuss the recommended findings of fact, conclusions of law, and order of the administrative law judge in the particular case in which the legal counsel represented the Bureau without being in violation of N.D.C.C. § 28-32-12.1.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that N.D.C.C. § 65-01-16(8) authorizes attorneys representing the North Dakota Workers Compensation Bureau in administrative proceedings to meet, without notice and opportunity for all parties to the proceeding to participate, with the Director or designated decision maker to discuss the recommended findings of fact, conclusions of law, and order of the administrative law judge in the particular case in which the legal counsel represented the Bureau.

- ANALYSIS -

The North Dakota Worker's Compensation Bureau is an administrative agency subject to the requirements of the North Dakota Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. Foss v. North Dakota Workmen's Compensation Bureau, 214 N.W.2d 519, 521 (N.D. 1974). Litigation attorneys of the Bureau represent the Bureau's interests in administrative proceedings. In doing so, the attorneys represent the Bureau in the traditional role of an attorney, introducing evidence and cross-examining witnesses. However, the Bureau, and thus its attorney, must not place itself in a position fully adversary to the claimant. Frohlich v. North Dakota Workers Compensation Bureau, 556 N.W.2d 297, 301 (N.D. 1996). "The adversarial concept has only limited application in a worker's

compensation claim." McDaniel v. North Dakota Workers Compensation Bureau, 567 N.W.2d 833, 838 (N.D. 1997). See also S&S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80 (N.D. 1995). This is because the Bureau acts as both a fact finder and an advocate in considering a worker's claim. Fuhrman v. North Dakota Workers Compensation Bureau, 569 N.W.2d 269, 272 (N.D. 1997); Blanchard v. North Dakota Workers Compensation Bureau, 565 N.W.2d 485, 489 (N.D. 1997). Accordingly, the primary goal of attorneys representing the Bureau in administrative proceedings should be to attempt to obtain relevant information so the Bureau can make an informed decision, not to take an adversarial position to the claimant.

N.D.C.C. § 28-32-12.1 addresses communications between an agency head or hearing officer and a party to an administrative proceeding or any other person allowed to participate in the proceeding. Subsection 1 of N.D.C.C. § 28-32-12.1 prohibits an agency head or hearing officer in an adjudicative 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 an adjudicative proceeding or a person allowed to participate in the 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 a communication. The above prohibitions do not apply when "required for the disposition of ex parte matters specifically authorized by another statute." N.D.C.C. § 28-32-12.1(1),(3). Furthermore, when a general statute conflicts with a specific statute, the specific statute controls and is construed as an exception to the general provision. N.D.C.C. § 1-02-07.

The North Dakota Legislative Assembly has adopted a specific statute addressing communications between the Bureau (Director) and the Bureau's litigation attorneys. In 1997 the Legislature enacted N.D.C.C. § 65-01-16. 1997 N.D. Sess. Laws ch. 532, § 1. Subsection 8 of that section specifically provides that the Bureau "may consult with its legal counsel representing it in the proceeding" "in reviewing recommended findings, conclusions, and orders." This language plainly authorizes the Bureau, including its Director or designated decision maker, to consult with the Bureau's litigation attorneys when reviewing recommended findings, conclusions, and orders of an administrative law judge. N.D.C.C. § 65-01-16(8) is a special provision that provides an exception to N.D.C.C. § 28-32-12.1. Accordingly, attorneys who represent the Worker's Compensation

Bureau in administrative proceedings may communicate with the Director or designated decision maker regarding recommended findings, conclusions, and orders issued by the administrative law judge in the proceeding.

That the Legislature intended N.D.C.C. § 65-01-16(8) to authorize attorneys that represent the Bureau in administrative proceedings to consult with the Bureau regarding recommended findings, conclusions, and orders in that proceeding is suggested in the testimony presented and questions posed regarding 1997 House Bill 1270. With regarding to what is now subsection 8 of N.D.C.C. § 65-01-16, Reagan Pufall, an attorney for the Worker's Compensation Bureau, explained:

This paragraph also provides that the Bureau can consult with the attorney who represented it in the hearing when it reviews the hearing officer's [sic] recommendation. After the hearing officer issues the recommendation, the attorney who appeared at the hearing advises the Bureau on whether the recommendation should be reviewed more closely before being adopted, and if so explains the concerns regarding the recommendation.

. . . .

Some claimants' [sic] lawyers have argued that it is improper for the Bureau to consult with its own attorneys in this way, arguing that this is an ex parte communication under section 28-32-12.1. The Bureau believes this argument is incorrect, but this Bill will resolve the matter with clarity and put the issue to rest.

Hearing on H. 1270 Before the House Comm. on Industry, Business and Labor 55th N.D. Leg. (February 3, 1997) (Testimony of Reagan R. Pufall at 7). The testimony of Mr. Pufall also suggests the Bill did not intend other parties to be present during the communication between the Bureau's litigation attorney and the Director. Mr. Pufall explained: "[I]f the Bureau had to schedule a time and date for representatives of the worker and the employer to participate and present arguments just so the Bureau could speak to its own attorney, this would in effect create an entire new stage of litigation, and again would result in substantial delays." Id. at 8. The legislative history of 1997 House Bill 1270 also indicates that legislators asked questions regarding this specific portion of the bill. See, e.g., Committee Minutes of Hearing on H. 1270 Before the House Comm. on Industry, Business and Labor 55th N.D. Leg. (February

3, 1997); Committee Minutes of Hearing on H. 1270, Before the Senate Comm. on Industry, Business and Labor 55th N.D. Leg. (March 17, 1997).

You question whether a meeting between the Director or designated decision maker and the Bureau's attorneys would violate N.D.C.C. § 44-04-19, commonly referred to as the open meetings law. N.D.C.C. § 44-04-19 provides that all meetings of a public entity must be open to the public except as otherwise specifically provided by law. N.D.C.C. § 44-04-17.1(8) defines "meeting" to mean a formal or informal gathering of a "quorum of the members of the governing body of a public entity regarding public business," or "[l]ess than a quorum of the members of a governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19." "Governing body" is defined as "the multimember body responsible for making a collective decision on behalf of a public entity." N.D.C.C. § 44-04-17.1(6).

A director of a state administrative agency, as a single individual, does not constitute a "governing body." Accordingly, the review of recommended findings of fact, conclusions of law, and order by the Director or designated decision maker is not a "meeting" for purposes of N.D.C.C. § 44-04-19. Furthermore, communications between the Director or designated decision maker and the Bureau's attorneys regarding the recommendations are not a "meeting" under N.D.C.C. § 44-04-19.

It is my opinion that attorneys representing the Worker's Compensation Bureau in administrative proceedings may meet with the Director or designated decision maker to discuss the recommended findings of fact, conclusions of law, and order in the particular case in which the legal counsel represented the Bureau without being in violation of N.D.C.C. § 28-32-12.1 or N.D.C.C. § 44-04-19.

- 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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