

LETTER OPINION
93-L-362

December 20, 1993

Dr. Jon R. Rice
State Health Officer
North Dakota State Department of
Health and Consolidated Laboratories
State Capitol, 2nd Floor
Bismarck, ND 58505-0200

Dear Dr. Rice:

Thank you for your October 25, 1993, letter regarding the prohibitions against ex parte communications contained in N.D.C.C. ?? 23-17.2-13 and 28-32-12.1 and their applicability to certificate of need proceedings.

The certificate of need (CON) process is governed by N.D.C.C. ch. 23-17.2. Under this chapter and the rules promulgated pursuant to it, the CON process is typically initiated by the filing of a notification of intent. See N.D.C.C. ? 23-17.2-09; N.D. Admin. Code ? 33-09-03-02. Once the State Department of Health and Consolidated Laboratories (Department), with the concurrence of the State Health Council, has determined purview, an application for a certificate of need is submitted. After the Department deems the application for a CON complete, written notice is provided to the applicant as well as published in one or more local newspapers of general circulation within the affected area. The notice includes the name and address of the applicant, a description of the proposal and its estimated costs, the proposed schedule for review, and the time and manner by which affected persons may request an informal local hearing to provide additional information concerning the application. N.D. Admin. Code ? 33-09-03-03. The Department then considers the application and from its findings makes recommendations on whether the application qualifies the applicant for a certificate of need. Id. Notice of the Department's recommendations is given to the applicant as well as any other person filing an appearance. N.D.C.C. ? 23-17.2-09. The Department's recommendations are then brought before the State Health Council which determines whether to grant or deny a CON based upon the established criteria or to defer an application for further information. See N.D.C.C. ? 23-17.2-11; N.D. Admin. Code ? 33-09-03-04 (State health plan - Criteria for review - Policy issues). Notice of the Health Council's determination is then given. See N.D.C.C. ? 23-17.2-11; N.D. Admin. Code ? 33-09-03-03(1)(f). Within 30 days of the Health Council's mailing the determination, any person may petition the Health Council for a public hearing for reconsideration of the determination to approve or deny a certificate. N.D.C.C. ? 23-17.2-11.¹ Such

¹N.D.C.C. ? 23-17.2-11 provides in relevant part:

Notice of determination by the health council granting, denying, or revoking the certification of need, or deferring the application for further information, must be communicated to the applicant, the health systems agency, and other persons who have filed an appearance.

Within thirty days from date of mailing the determination, the

Dr. Jon R. Rice
December 20, 1993
Page 3

public hearing is held before the Health Council in accordance with the provisions of N.D.C.C. ch. 28-32.

After the hearing, the Health Council renders an "order" denying or granting the application for a certificate which becomes final 30 days after notice of the decision is given unless an appeal is taken to the district court. Id.

applicant, any recognized health system agency, or any person may petition the health council for a public hearing for a reconsideration of the department's determination in the case of either a certification approval, denial, withdrawal, or revocation.

Although this provision refers to a reconsideration of the "department's" determination, it is the decision of the Health Council which is being reconsidered and not the Department's initial determination under N.D.C.C. ? 23-17.2-09. In this sense the reference to the department is to the State Department of Health and Consolidated Laboratories, including the State Health Council. See N.D.C.C. ? 23-17.2-02(6) and (8).

N.D.C.C. ? 23-17.2-13(1) provides that "[a]fter the commencement of a hearing before the council and before a decision is made, there may be no ex parte contacts between any person acting on behalf of the applicant or holder of a certificate of need, or any person opposed to the issuance or in favor of withdrawal of a certificate of need, and any person in the council who exercises any responsibility respecting the application or withdrawal."² N.D.C.C. ? 28-32-12.1 further restricts ex parte contacts between agency heads and hearing officers in "contested cases." In your letter you indicate that the Department has historically taken the position that the Health Council's initial decision on a CON application is an informal administrative procedure and that as such no restrictions on ex parte contacts are applicable. You further indicate that the Department has taken the position that the filing of a request for reconsideration of a CON determination by the Health Council initiates a formal administrative proceeding governed by N.D.C.C. ch. 28-32 and that it is at this point that ex parte communications are barred by N.D.C.C. ?? 28-32-12.1 and 23-17.2-13. You ask at what point ex parte communications are barred in CON application proceedings and what remedial measures can or must be taken by the Health Council or a hearing officer appointed to conduct a hearing for reconsideration of the Health Council's determination respecting a CON if ex parte communication has occurred.

The first issue is whether CON proceedings are contested case proceedings within the meaning of N.D.C.C. ch. 28-32 and if so what aspects and at what point they are contested. N.D.C.C. ? 28-32-01(4) defines a contested case as "a proceeding including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." The

²The only reference to a hearing in N.D.C.C. ch. 23-17.2 is the public hearing for reconsideration of the Health Council's decision to grant, deny, withdraw or revoke a certificate of need. Although any interested person is generally allowed to address the Health Council at its meetings regarding its consideration of a CON application, no statute or rule provides such a right. The Health Council's consideration of a CON application at its regular meetings is not a hearing within the meaning of N.D.C.C. ? 23-17.2-13.

contested case terminology was made part of the Administrative Agencies Practice Act as part of substantial changes to chapter 28-32 by the 1977 Legislature following a legislative council interim study. 1977 N.D. Sess. Laws ch. 284, ? 1. Although the legislative history is sparse, the term "contested case" apparently came from its use in the 1961 Uniform Law Commissioners' Model State Administrative Procedure Act. Many state APAs use and similarly define the term "contested case."

The commentaries to the model act as well as numerous cases construing similar provisions hold that the term "contested case" is synonymous with "adjudication." Application of Union Carbide Corp., 308 N.W.2d 753, 757 (S.D. 1981). Agency action is properly characterized as adjudicatory or quasi-judicial in nature where the agency acts upon particular facts immediately affecting the interests of the specific parties in the proceeding as opposed to the public in general. District of Columbia v. Douglass, 452 A.2d 329, 331 (D.C. App. 1982). The purpose of the hearing, for which an opportunity is required by law in contested cases, "is to determine [such] disputed facts of particular applicability known as adjudicative facts." Alegre v. Iowa State Board of Regents, 349 N.W.2d 112, 114 (Iowa 1984). A contested case proceeding is to be distinguished from rule making or broad policy making proceedings. However, certain agency proceedings or activities do not precisely fit into one category to the exclusion of another. See Matter of Issuance of Permit, 576 A.2d 784, 787 (N.J. 1990); New England Rehabilitation Hosp. v. CHHC, 627 A.2d 1257, 1278 (Conn. 1993).

A contested case or adjudicatory proceeding is an agency course of action by which the agency formally and authoritatively decides the legal rights and duties or privileges of the specific parties to the proceeding. See generally, Arthur Earl Bonfield, The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act, 63 Iowa L. Rev. 285, 291 (1977). In this sense a contested case does not generally include informal agency action such as investigating, publicizing, planning, supervising or the rendering of nonbinding advisory opinions or private rulings. In re Solid Waste Util. Cust. Lists, 524 A.2d 386, 392 (N.J. 1987).

Under the definition of contested case in N.D.C.C. ch. 28-32 a proceeding is contested where the "legal

rights, duties, or privileges of a party are required by law to be determined after an opportunity for hearing." N.D.C.C. ? 28-32-01(4) (emphasis supplied).

Under the statutory and regulatory provisions governing CON application proceedings, no opportunity for a hearing arises until after the Health Council has made its initial determination. Accordingly, it is my opinion that the Health Council's initial determination on a CON application is not a contested proceeding. However, it is my further opinion that once a petition for reconsideration has been filed, the matter becomes a contested case under N.D.C.C. ch. 28-32, since a hearing is then required. See J K & J, Inc. v. Nebraska Liquor Control Comm'n, 231 N.W.2d 694 (Neb. 1975); In re South Dakota Real Estate Comm'n, 484 N.W.2d 123 (S.D. 1992).

N.D.C.C. ? 28-32-12.1 generally prohibits ex parte contacts between agency heads and hearing officers and persons having an interest in the outcome of any contested case proceeding. N.D.C.C. ? 23-17.2-13 prohibits ex parte contacts between Health Council members and persons "acting on behalf of an applicant or holder of a certificate of need or any person opposed to the issuance or in favor of withdrawal of a certificate of need" after the commencement of a hearing before the Health Council. In my opinion the hearing before the Health Council under N.D.C.C. ? 23-17.2-13 is "commenced" upon the filing of a petition for reconsideration, the same moment the proceeding becomes a contested case under chapter 28-32.

The above conclusions are in line with the historical position of the Department and Health Council. In general, some weight should be given to the practical and contemporaneous construction placed upon statutes by an agency charged with its administration. Johnson v. Wells County Water Resource Bd., 410 N.W.2d 525, 529 (N.D. 1987). This is particularly true where such construction is long standing and where the Legislature has not sought to effectuate a change. Horst v. Guy, 219 N.W.2d 153, 159 (N.D. 1974).

Although neither N.D.C.C. ? 28-32-12.1 nor ? 23-17.2-13 prohibits ex parte communications in CON proceedings prior to the filing of the petition for reconsideration, agency heads and hearing officers have a duty under N.D.C.C. ? 28-32-12.1(4) to disclose and make part of the record certain ex parte communications they receive prior to presiding over a contested case. N.D.C.C. ? 28-32-12.1 provides in

relevant part:

4. If, before being assigned, designated, or appointed to preside in a contested case proceeding, a person receives an ex parte communication of a type that could not properly be received while presiding, the person, promptly after being assigned, designated or appointed, shall disclose the communication in the manner prescribed in subsection 5.

5. An agency head or hearing officer in a contested case proceeding who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, or a memorandum stating the substance of all oral communications received, all responses made, or the identity of each person from whom the person received an ex parte oral communication, and shall advise all parties, interested persons, and other persons allowed to participate that these matters have been placed on the record. Any person desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal. A request for rebuttal must be made within ten days after notice of the communication.

The plain intent of N.D.C.C. ? 28-32-12.1 is to discourage the prominence of ex parte communication and encourage the openness of debate based on the public record. See Raz Inland Navigation Co. v. I.C.C., 625 F.2d 258 (9th Cir. 1980) (provisions prohibiting ex parte communication were enacted to ensure that agency decisions required to be made on public record are not influenced by private, off-the-record communications from those personally interested in the outcome).

Thus, upon the filing of a petition for reconsideration, Health Council members must disclose and make part of the record all ex parte communications of a type that could not properly be received while presiding in the hearing which they received prior to the filing of a petition for reconsideration. Further, they must continue to disclose and make part of the record all such ex parte communications they receive during the pendency of the proceeding.³ For example, ex parte communications of a

³Although under N.D.C.C. ? 28-32-12.1 the duty to disclose and make part of the record all previous ex parte communications does not arise until the petition for reconsideration is filed, Health Council members as public officials have, at all times, a general obligation to disclose material information they receive in their capacity as public

Dr. Jon R. Rice
December 20, 1993
Page 8

procedural type would not have to be disclosed. However, ex parte communications concerning the substance of a proceeding have to be disclosed. See generally N.D.R. Jud. Cond. 3(4). A similar duty devolves upon a hearing officer once he or she is appointed.

In the scenario described in your letter, the Health Council members should immediately disclose and make part of the record all ex parte communications they have received of a type that could not properly be received while presiding. The opportunity to rebut such ex parte communications as provided for in N.D.C.C. ? 28-32-12.1(5) could most appropriately be handled before the hearing officer appointed to preside over the hearing for reconsideration.

In your letter you also ask what remedial measures may be taken by the Health Council or the hearing officer in response to prohibited ex parte communications. N.D.C.C. ? 28-32-12.1(7) provides that "an administrative agency may, by rule, provide for appropriate sanctions, including default, for any violations of this section." (Emphasis supplied.) However, neither the Health Council nor the Department has promulgated rules in this regard. Accordingly, it is my opinion that the Health Council or the hearing officer may not impose sanctions for prohibited ex parte communications not otherwise expressly provided for by statute.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

officials. See 63A Am. Jur. 2d Public Officers, ? 319 et seq. Thus, Health Council members must disclose and share with other Health Council members relevant ex parte communications they received prior to the council's making its initial determination. See Hettinger v. Dallas Co. Bd. of Adjustment, 375 N.W.2d 293, 295-96 (Iowa Ct. App. 1985) ("Persons serving on governmental bodies should be constantly aware that their activities are subject to public scrutiny and should avoid even the appearance of engaging in unauthorized closed sessions. The public is entitled to openness in the making of public policy by governmental bodies.")

Dr. Jon R. Rice
December 20, 1993
Page 9

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