

LETTER OPINION
2000-L-1

January 7, 2000

Mr. David E. Reich
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P.O. Box 400
Bismarck, ND 58502-0400

Dear Mr. Reich:

Thank you for your letter regarding the scope of immunity provided by N.D.C.C. § 44-23-08.3. You ask whether N.D.C.C. § 43-23-08.3 precludes the State Real Estate Commission from disciplining individuals licensed by the Commission for disclosure or failure to disclose information about registered sexual offenders.

N.D.C.C. § 43-23-08.3 provides "[a] licensee is not liable for any action resulting from any disclosure or nondisclosure relating to the registration of sexual offenders under section 12.1-32-15." The State Legislature added this protection in 1999. See 1999 N.D. Sess. Laws ch. 383.

The answer to your question turns on the meaning the Legislature intended for "action." It is necessary to look first to the language of the statute to discover the Legislature's intent. See Northern X-Ray Co., Inc. v. State, 542 N.W.2d 733, 735 (N.D. 1996). If the language is clear and unambiguous, the legislative intent is presumed to be clear from the face of the statute. See id.; N.D.C.C. § 1-02-05. "Words used in any statute are to be understood in their ordinary sense." N.D.C.C. § 1-02-02; see Northern, 542 N.W.2d at 735. If a statute is ambiguous, "extrinsic aids" can be used to construe it. See Northern, 542 N.W.2d at 735. It would be necessary "to look to the Code itself in determining the meaning of statutory terms." Id. "When the meaning of a word or phrase is defined in a section of our Code, that definition applies to any use of the word or phrase in other sections of the Code, except when a contrary intent plainly appears.'" Id. at 735-36 (quoting Adams County Record v. GNDA, 529 N.W.2d 830, 834 (N.D. 1995)); see N.D.C.C. § 1-01-09; see also N.D.C.C. § 1-02-02 ("any words explained in this code are to be understood as thus explained"); N.D.C.C. § 1-02-03 ("Technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or as are defined by statute, must be

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construed according to such peculiar and appropriate meaning or definition.").

<PAGE NAME="p.L-2">The term "action" is defined in the Code. N.D.C.C. § 32-01-02 defines "action" as "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." A disciplinary proceeding under N.D.C.C. § 43-23-11.1 is not "an ordinary proceeding in a court of justice." It is an administrative proceeding conducted before the Commission or, more specifically, an "adjudicative proceeding." See N.D.C.C. § 28-32-01(1). An administrative proceeding is not an "action." See Guthmiller v. Dept. of Human Services, 421 N.W.2d 469, 471 (N.D. 1988). Thus, the statute is not ambiguous: N.D.C.C. § 43-23-08.3 precludes liability for lawsuits.

The legislative history supports this construction of N.D.C.C. § 43-23-08.3. The bill enacting this section, as originally introduced, simply provided that licensees have no duty to disclose information about sexual offenders. However, this language did not protect licensees who voluntarily disclose information about registered sexual offenders. There are repeated references in the verbal and written testimony on the bill that its purpose was to protect licensees from "liability" and "liability issues regarding lawsuits," including liability from disclosures of information which turn out to be inaccurate. See Hearings on S. 2064 Before the Senate Industry, Business, and Labor Comm. and House Industry, Business, and Labor Comm. 56th N.D. Leg. (1999) (minutes and testimony). Thus, the bill was changed to its current form, which preserves the possibility that a licensee may be required to disclose under certain circumstances the fact that a person is a registered sexual offender, but removes any liability of the licensee for damages.

Applying the definition of "action" in N.D.C.C. § 32-01-02 to N.D.C.C. § 43-23-08.3 also is consistent with the plain meaning of that term. See The American Heritage Dictionary 77 (2d coll. ed. 1991) ("action" defined as "[a] judicial process; lawsuit"). See also 1998 N.D. Op. Att'y Gen. 63, 65.

As a result, N.D.C.C. § 43-23-08.3 may immunize individuals licensed by the commission from liability in civil actions. It is my opinion, however, that N.D.C.C. § 43-23-08.3 does not preclude the Real Estate Commission from disciplining licensees for disclosure or failing to disclose information about registered sexual offenders.

It should be noted that N.D.C.C. § 12.1-32-15(12) requires disclosure in certain circumstances by "a law enforcement agency." That law does not impose a duty on the Commission's licensees to disclose or not

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disclose the existence of a registered sexual offender in a community. My opinion does not address whether disclosure of or failure to <PAGE NAME="p.L-3">disclose the existence of a registered sexual offender in a community is a violation of N.D.C.C. § 43-23-11.1(1)(b) or N.D. Admin. Code § 70-02-03-15.1(7)(d), or whether any other law imposes such a duty on the Commission's licensees.

Sincerely,

Heidi Heitkamp
Attorney General

jcf/vkk