File Ref 1620

MEMORANDUM FROM
HENRY G. WILLIAMS, Commissioner

New York State
Department of Environmental Conservation

March 22, 1984

TO Executive Staff, Division and Regional Directors

FROM. Hank Williams

RE· ORGANIZATION AND DELEGATION MEMORANDUM #84-10
Adjudicatory Hearings - Avoiding Ex Parte Communications within the Department

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This memorandum addresses the question of when Department Staff should not send memoranda to me regarding matters which are the subject of pending adjudicatory hearings. Its purpose is to establish clear guidelines to avoid compromising my role as a judge and the integrity of the Department's decisional process.

I. Ex Parte Communications

The State Administrative Procedures Act (SAPA) §307, the ex parte rule, forbids direct or indirect communication concerning any issue that is the subject of an adjudicatory hearing between members of an agency assigned to render a decision and any person or party without notice and opportunity for all parties to the proceeding to participate. An adjudicatory proceeding is similar to a court trial where evidence is heard and a record taken; the Commissioner acts as the judge and decides whether a person is entitled to receive a permit or other approval from DEC or whether a person has violated the ECL or DEC's regulations Rulemaking or legislative hearings are not adjudicatory proceedings and the ex parte rule does not apply to them.

The purpose of the ex parte rule is to prevent unfair influence of the decision maker by any one person or party which could lead to the detriment of the rights of the other parties. The substantive value of the decision itself could also be adversely affected by reliance on advice which has not been subject to cross-examination because there has been no opportunity to show the decision maker that the advice is flawed. When a court finds that ex parte communications with the decision maker have taken place, the judicial remedy applied is simple--but severe--it will annul the decision.

The Department conducts over 200 hearings each year. Approximately 100 of these hearings are adjudicatory or trial type hearings to which the ex parte rule applies. These are usually permit or administrative enforcement hearings. Most hearings are conducted by the Office of Hearings but some (as in hunting license revocations) may be held by other hearing officers such as ECO Captains. In these cases the ex parte rule

equally applies to all communications with either the Commissioner or the individual Administrative Law Judge (ALJ) or hearing officer assigned to the particular hearing

Once an adjudicatory proceeding is formally commenced by service or publication of a notice of hearing, all communications regarding the subject matter of the case between both the Commissioner and the ALJ presiding over the hearing and Department staff assigned directly or indirectly to present the Department's case (including those staff assigned to develop the strategy for the case) must cease until the case has been decided by the Commissioner. Staff may have to deal with the Commissioner on other matters and they may do so as their duties require, so long as they do not discuss or deal with the case pending before the ALJ or before the Commissioner.

Staff for a program usually are the client asserting a position in the hearing; they are usually represented by a DEC staff attorney through whom their position is conveyed to the decision makers. Department staff who will normally be proscribed in their communications with the Commissioner and ALJ include: the assigned staff attorney; program staff who will serve as project coordinators and witnesses; and Regional Directors. In some cases Division Directors or Bureau Chiefs may also participate in developing the staff's "trial strategy" and thus must avoid communications with the decision makers concerning the particular case under adjudication.

In view of the ethical considerations which apply to the Commissioner's quasi-judicial role and the draconian consequences of a court's finding of a violation of the ex parte rule (annulment of the decision and waste of staff's and other parties' efforts), caution should be exercised when communicating with the Commissioner and the Administrative Law Judge concerning a pending adjudicatory hearing.

While the ex parte rule does not strictly bar a staff person from giving information to the Commissioner concerning a case's procedural status or a delineation of the issues being adjudicated, the flow of information to the Commissioner should be routed through the DEC attorney representing the DEC staff position. Monthly status reports should avoid reciting the merits of the staff position in pending cases.

Occasionally despite our best efforts, ex parte communications inadvertently occur Status reports or briefing documents for the Commissioner may contain too much information on a pending case. The Commissioner may be copied on a letter or memo when he shouldn't be. In such cases, the fact and substance of such communications will be made known to the parties and an opportunity provided to them to express opposing views. While such steps may be considered embarrassing, the integrity of our decisional process is our primary concern. The Hearings Counsel and the General Counsel in addition to the staff attorneys are

always available for consultation concerning the propriety of a particular communication, when in doubt, please contact any of these persons.

II Consultation with Department Staff for Decision Making

Under SAPA and the regulations governing hearing procedures, the ALJ and Commissioner are permitted to seek advice from the Department staff (other than individuals who personally are directly or indirectly involved in presenting DEC's case) to assist them in reaching a decision in an adjudicated matter. Consultation between the ALJ or Commissioner and technical and legal experts from within the Department is appropriate and to be encouraged to assure that the Department's decision-making is consistent and environmentally sound. However, once particular staff are tapped to serve as advisors to the decision makers they are bound by the same ex parte considerations applicable to the Commissioner and ALJ. For their part, they must refrain from discussing the subject matter of the case with other staff or parties participating in the case. By the same token, if staff learns that the Commissioner or the ALJ has sought advice of other staff they must avoid discussing the case with those staff aiding the decision makers.

In order to facilitate the availability of technical and legal advice to the Commissioner and the Office of Hearings and at the same time protect against the potential for ex parte communications, the Hearings Counsel will serve as the liaison to the Program Divisions for the Commissioner and the Administrative Law Judges. The Hearings Counsel will communicate directly with the Division Directors concerning the selection of a Department staff person to provide technical advice to the Administrative Law Judges and the Commissioner. This practice has worked well in the past and assures that the person selected by the Division will be available and that Division Directors will be kept informed of the outcome of such discussions unless precluded by ex parte considerations. Division Directors are responsible for ensuring that persons selected to assist the Commissioner and ALJ understand the significance of their responsibility to maintain the integrity of the process.

III Education of Department Staff

Regional and Division Directors are responsible for reviewing and explaining the substance of this memorandum to their respective staff members The Hearings Counsel and attorneys from the Office of General Counsel are available to assist you in your educational efforts.