

MEMORANDUM

State of Alaska Department of Law

TO: Mark O'Brien
Chief Contracts Officer
Department of Transportation and Public
Facilities

DATE: April 26, 2006

FILE NO.: 661-06-0040

TEL. NO.: (907) 269-5169

SUBJECT: Ethics Act's
Restrictions on
Contacting Hearing
Decision Makers

FROM: David T. Jones
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You asked whether the Alaska Executive Branch Ethics Act's restrictions on contacting final decision makers in administrative hearings apply to appeals of right-of-way issues. Those restrictions apply only to the final stage of each right-of-way appeal process.

The Ethics Act's restrictions generally prohibit a public officer from attempting to influence the outcome of an administrative hearing by contacting the final decision maker unless the contact is made part of the administrative record:

Except for supplying information requested by the hearing officer or the entity with authority to make the final decision in the case, or when responding to contacts initiated by the hearing officer or the individual, board, or commission with authority to make the final decision in the case, a public officer may not attempt to influence the outcome of an administrative hearing by directly or indirectly contacting or attempting to contact the hearing officer or individual, board, or commission with authority to make the final decision in the case assigned to the hearing officer unless the

(1) contact is made in the presence of all parties to the hearing or the parties' representatives and the contact is made a part of the record; or

(2) fact and substance of the contact is promptly disclosed by the public officer to all parties to the hearing and the contact is made a part of the record.¹

¹ AS 39.52.120(e).

This provision's references to "hearing officer," "authority to make the final decision in the case," "administrative hearing," and "record" suggest that the legislature intended to apply the restrictions only to those stages of administrative appeals that are final and include formal hearings. That suggestion finds support in another statute that the legislature adopted at the same time.

The legislature adopted the Ethics Act's provision in 2004 as part of legislation changing administrative hearing procedures.² In that same legislation, the legislature adopted definitions of "administrative hearing" and "hearing officer," although the legislature did not expressly apply those definitions to the Ethics Act's provision restricting contacts with final decision makers. Rather, the provision containing these definitions states that it applies to the Alaska Statutes' chapter establishing the Office of Administrative Hearings (chapter 64 of title 44).³ Nonetheless, because the Ethics Act does not define "administrative hearing" or "hearing officer,"⁴ and the Ethics Act's provision on contacts with final decision makers was part of the same legislation adopting these definitions, the definitions are instructive in interpreting the Ethics Act's provision.⁵

The definitions that the legislature adopted in 2004 suggest that the legislature intended to address relatively formal administrative proceedings. The definition of "administrative hearing" excludes informal, preliminary stages of administrative review processes:

"administrative hearing" means a quasi-judicial hearing before an agency; it does not include an informal conference or review held by an agency before a final decision is issued or a rate-making proceeding or other nonadjudicative public hearing.⁶

² See Sec. 59, ch. 163, SLA 2004.

³ See AS 44.64.200.

⁴ See AS 39.52.960.

⁵ See *Bullock v. State, Dep't of Cmty. and Reg'l Affairs*, 19 P.3d 1209, 1214-15 (Alaska 2001) (statutes enacted at same time construed *in pari materia*); 2B Norman J. Singer, *Statutes and Statutory Construction* § 51.03 at 237-39 (6th ed. 2000) (same).

⁶ Sec. 3, ch. 163, SLA 2004; AS 44.64.200(1).

Likewise, the legislature defined “hearing officer” as “an individual who presides over the conduct of an administrative hearing and who is retained or employed by an agency for that purpose.”⁷ Although it may be inferred, this definition does not expressly require that a hearing officer be “retained or employed by an agency” solely or primarily for the purpose of presiding over administrative hearings. Nonetheless, the definition does suggest involvement in a relatively formal process.

These definitions – and the references in the Ethics Act’s provision to “authority to make the final decision in the case” and “record” – suggest that the restrictions on contacts do not apply to informal, nonfinal reviews. That conclusion is consistent with the purpose of the 2004 legislation, which was to “increase the separation between the adjudicatory functions of executive branch agencies and the agencies’ investigatory, prosecutory, and policy-making functions,”⁸ since the initial stages of administrative appeal processes commonly serve as opportunities for agencies to reconsider their own actions, whereas the final stages tend to be more formal adjudicatory hearings.

Based on this analysis, the restrictions on contacts do not apply to the preliminary stages of appeals regarding right-of-way issues; the restrictions apply only to the final stage of each appeal process.

The final stages of the right-of-way appeal processes differ according to the type of appeal involved. There are separate processes for appeals concerning relocation assistance services⁹ and for appeals concerning permits and privileges for signs, encroachments, driveways, highway usage, and similar matters.¹⁰ Both of these processes permit an aggrieved party to request review of a decision affecting that party.¹¹ Under both processes, upon receipt of a request for review, the appropriate regional director appoints an administrative review officer to consider the appeal and there is no requirement for a formal hearing at that stage.¹² Thereafter, however, the processes diverge.

⁷ Sec. 3, ch. 163, SLA 2004; AS 44.64.200(4).

⁸ Sec. 1, ch. 163, SLA 2004.

⁹ See 17 AAC 81.010 – 17 AAC 81.020.

¹⁰ See 17 AAC 85.010 – 17 AAC 85.990.

¹¹ 17 AAC 81.020(a) and 17 AAC 85.020.

¹² 17 AAC 81.020(a) and 17 AAC 85.030.

For relocation assistance matters, the administrative review officer issues a written decision, which the aggrieved party may appeal to a three-person relocation appeals board that the director of statewide design and engineering services impanels.¹³ The board conducts a formal hearing and issues a decision that constitutes the department's final decision on the matter.¹⁴

For right-of-way permits and privileges, the administrative review officer recommends a decision to the regional director, who makes a written decision that an aggrieved party may appeal to an administrative review panel that the chief engineer impanels.¹⁵ The panel may hear the appeal or the chief engineer may appoint a hearing officer to hear the appeal and recommend a decision to the panel.¹⁶ The panel or hearing officer conducts a formal hearing.¹⁷ Alternatively, if the chief engineer determines that the appeal may be decided as a matter of law or that the facts are not in dispute, the chief engineer may decide the appeal without a hearing.¹⁸ The decision of the panel or the chief engineer constitutes the department's final decision.¹⁹

Despite their differences, both right-of-way appeal processes are subject to the Ethics Act's restrictions on contacts only in their final stages – when an aggrieved party appeals an administrative review officer's relocation assistance decision to a relocation appeals board or appeals a regional director's decision to the chief engineer. The Ethics Act's restrictions on contacts do not apply to the administrative review officer's review under either appeal process or to the regional director's review under the permits and privileges appeal process.

cc: Chief Assistant Attorney General Jim Cantor

¹³ 17 AAC 81.020(a) and (b).

¹⁴ 17 AAC 81.020(b), (c), and (d).

¹⁵ 17 AAC 85.030 – 17 AAC 85.040.

¹⁶ 17 AAC 85.040(c).

¹⁷ 17 AAC 85.040(e).

¹⁸ 17 AAC 85.040(k).

¹⁹ 17 AAC 85.050.