

## **N.D.A.G. Letter to Hagen (May 17, 1985)**

May 17, 1985

Honorable Orville W. Hagen  
Commissioner of Labor  
Department of Labor  
State Capitol  
Bismarck, ND 58505

Dear Mr. Hagen:

Thank you for your letter of April 22, 1985, as to whether the wage claim hearings conducted by the Department of Labor are open governmental meetings under N.D.C.C. § 44-04-19 and therefore open to the public.

North Dakota law contains two provisions regarding open meetings. Article 92 of the Amendments to the North Dakota Constitution, as well as N.D.C.C. § 44-04-19, require that, except as otherwise provided by law, all meetings of public bodies, boards, commissions, etc., be open to the public. N.D.C.C. § 44-04-19, specifically provides as follows:

44-04-19. OPEN GOVERNMENTAL MEETINGS. Except as otherwise specifically provided by law, all meetings of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be open to the public. The governing members of the above bodies, boards, commissions, agencies, or organizations meeting in violation of this section shall be guilty of an infraction for a first offense. A public or governmental body, board, bureau, commission, or agency meets in violation of this section if it refuses any person or persons access to such meeting, unless such refusal, implicitly or explicitly communicated, is due to a lack of physical space in the meeting room for the person or persons seeking access.

The authority of the Commissioner of Labor to receive assignments of wage claims and to take action for the collection of such claims is provided for in N.D.C.C. Ch. 34-14. In accepting such wage claim assignments, N.D.C.C. § 34-14-05, states, in part, as follows:

34-14-05. ENFORCEMENT. . . .The commissioner or his deputy may hold hearings to satisfy himself as to the justice of any claim, . . .

In applying the open meetings statute to the wage claim hearings held by the Commissioner of Labor, several issues must be addressed. These issues are:

1. Whether the Commission of Labor, in conducting wage claim hearings, is a public or governmental body, board, bureau, etc., for purposes of N.D.C.C. § 44-04-19?
2. Whether the wage claim hearings held by the Commissioner of Labor are "meetings" under N.D.C.C. § 44-04-19?
3. If the wage claim hearings held by the Commissioner of Labor are "meetings" under N.D.C.C. § 44-04-19, has the Legislature provided an exception thereby allowing these meetings to be closed?

The first issue to be discussed is whether the Commissioner of Labor is to be considered a governmental body under N.D.C.C. § 44-04-19 while conducting a wage claim hearing. While there is some question as to whether a single and administrative head of a governmental agency fits the definition of a board, bureau, commission, or agency of the state, there is no doubt that the Department of Labor is a governmental body supported in whole or in part by public funds. Therefore, it will be assumed that the Commissioner of Labor, in conducting a wage claim hearing, is considered a governmental body for purposes of N.D.C.C. § 44-04-19.

The next issue which must be discussed is whether the wage claim hearings conducted by the Commissioner of Labor are to be considered "meetings" for purposes of N.D.C.C. § 44-04-19. There has been a problem in defining the exact meaning of the word "meeting." As is stated in a North Dakota Law Review article which looked at the definition of "meeting."

There is a spectrum of gatherings of agency members that can be called a meeting, ranging from formal convocations to transact business to chance encounters where business is discussed. However, neither of these two extremes is an acceptable definition of the statutory word "meeting." Requiring all discussion between members to be open and public would preclude normal living and working by officials. On the other hand, permitting secrecy unless there is formal convocation of a body invites evasion. In formulating a definition of "meeting" the public's need for access to information must be balanced against the official's need to act in an administratively feasible manner.

Public officials must be able to become acquainted with community problems in depth, to test ideas without becoming publicly committed to them, and to fill out opposition and begin compromise. the problem of the courts, legislature and executive department is to find a definition of "meeting" that can accommodate officials and still protect the public's access to the information. Guy & McDonald, Government in the Sunshine: The Status of Open Meetings and Open Records Laws in North Dakota, 53 N.D.L.Rev. 51, 56-7 (1973)

Notwithstanding the fact that neither the North Dakota Supreme Court nor the North Dakota Legislature has given us any guidance as to what types of procedures and hearings fall within the definition of "meeting" under N.D.C.C. § 44-04-19, the definition of the word "meeting" will not be dispositive in answering your letter. As will be expressed in the

remainder of this letter, the conclusion that I will reach will be the same regardless of whether or not the hearings conducted by the Commissioner of Labor are considered "meetings" under N.D.C.C. § 44-04-19.

N.D.C.C. § 44-04-19, as stated above provides that "except as otherwise specifically provided by law, all meetings of public or governmental bodies, . . . shall be open to the public." If it were determined that the hearings conducted by the Commissioner of Labor were not to be considered meetings under this statute, it would follow that the meeting would not have to be open to the public and the Commissioner of Labor could close it if he chose to do so. However, for the sake of argument, if it were determined that the wage claim hearings were meetings under N.D.C.C. § 44-04-19, such meetings would be open to the public unless the Legislature has specifically provided an exception. Therefore, we must now turn to the third issue to determine that if the wage claim hearings are to be considered "meetings" under N.D.C.C. § 44-04-19, has the Legislature provided an exception?

N.D.C.C. § 34-05-03 provides as follows:

34-05-03. OFFICIALS AND EMPLOYERS TO FURNISH CERTAIN INFORMATION - PENALTY. All public officers and all employers shall furnish to the commissioner of labor such information as he may request relating to their respective offices or businesses. The information obtained shall be preserved, systemized, and tabulated by the commissioner. Information concerning the business or affairs of any person shall not be divulged or made public by the commissioner or anyone in the employ of his office. . . . (Emphasis supplied).

While the statute provides for an exception to the open records statute (N.D.C.C. § 44-04-18), the issue is whether it becomes an exception to the open meetings provisions of N.D.C.C. § 44-04-19. In 1978, this office faced a similar issue of whether the exception to the open public records laws of N.D.C.C. § 15-10-17 impliedly provided an exception to the open meeting law when confidential records were involved. In a letter issued May 3, 1978, this office answered the question in the affirmative after considering the case of Marston v. Gainesville Sun Publishing Co., Inc., 341 So.2d 783 (Fla. 1977) which held that a state statute making records of students confidential except under certain conditions also requires hearings at which those records are discussed to be closed even though another statute required meetings of a state agency to be open to the public at all times. After citing the Marston case, the letter went on to state:

We do not believe the Legislature, in enacting statutes providing for the confidentiality of student records, intended that those records could be made public indirectly through the open meeting statute but not directly by virtue of the open records statute. Such a result would, as the Florida court noted, subvert the policy of the Legislature.

In direct response to your first question we conclude that Section 15-10-17 of the North Dakota Century Code does provide an exception to the open meeting law where confidential records are inherently involved or are being formulated. Letter from Gerald VandeWalle to Thomas Clifford (May 3, 1978).

It is my opinion that the holding of the Marston case and the conclusion reached in the 1978 Attorney General's letter are directly applicable to wage claim hearings. Therefore, it is my opinion that N.D.C.C. § 34-05-03 does provide an exception to the open meetings law under N.D.C.C. § 44-04-19 and therefore wage claim hearings do not have to be open to the public.

Sincerely,

Nicholas J. Spaeth

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