
HOUSE BILL No. 1270

DIGEST OF INTRODUCED BILL

Citations Affected: IC 4-1-12; IC 8-1-1-5.

Synopsis: Ex parte contacts and bias in agency proceedings. Prohibits ex parte communications and establishes procedures for removing a hearing officer in adjudications that are exempted from the general law governing administrative adjudications.

Effective: Upon passage; July 1, 2009.

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January 13, 2009, read first time and referred to Committee on Government and Regulatory Reform.

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First Regular Session 116th General Assembly (2009)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2008 Regular Session of the General Assembly.

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HOUSE BILL No. 1270

A BILL FOR AN ACT to amend the Indiana Code concerning state offices and administration.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 4-1-12 IS ADDED TO THE INDIANA CODE AS
2 A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY
3 1, 2009]:

4 **Chapter 12. Conduct of Adjudications by Hearing Officers**

5 **Sec. 1. Except as provided in section 2 of this chapter, this**
6 **chapter applies in every case in which a written or recorded record**
7 **in an adjudication is:**

- 8 (1) **required to be prepared by law or administrative rule; or**
9 (2) **prepared by agency practice;**
10 **including an adjudication involving the validity or application of**
11 **rates, facilities, or practices of public utilities or carriers.**

12 **Sec. 2. This chapter does not apply to the following:**

- 13 (1) **A proceeding to which IC 4-21.5-3-11 (prohibition against**
14 **ex parte communications in proceedings subject to IC 4-21.5)**
15 **applies.**
16 (2) **A matter subject to a subsequent trial of the law and the**
17 **facts de novo in a court.**



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(3) The conduct of military functions.

Sec. 3. As used in this chapter, "adjudication" means an agency process for:

- (1) the formulation of an order; or
- (2) the review of an order;

after providing an opportunity for a hearing. The term includes every stage of the agency process that occurs after notice of the opportunity for a hearing must be given by law, agency rule, or agency practice.

Sec. 4. As used in this chapter, "agency" means any officer, board, commission, department, division, bureau, or committee of state government that is responsible for any stage of an adjudication. The term does not include:

- (1) the governor;
- (2) the judicial department of state government;
- (3) the legislative department of state government; or
- (4) a political subdivision (as defined in IC 36-1-2-13).

Sec. 5. As used in this chapter, "ex parte communication" means an oral or a written communication not on the public record with respect to which reasonable prior notice to all parties is not given. The term does not include requests for status reports on any matter or proceedings.

Sec. 6. As used in this chapter, "hearing officer" refers to any individual serving or designated to serve alone or with others to preside over any part of an adjudication. The term includes any of the following who are responsible for receiving evidence or making a determination based on evidence received in an adjudication:

- (1) The ultimate authority for an agency.
- (2) One (1) or more members of the ultimate authority (if the ultimate authority is a panel of individuals) designated to preside over any part of an adjudication.
- (3) One (1) or more other individuals, not necessarily employees of the agency, who are designated to preside over any part of an adjudication.

Sec. 7. As used in this chapter, "order" means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.

Sec. 8. As used in this chapter, "party" means a person or agency:

- (1) named or admitted as a party in an agency proceeding;
- (2) properly seeking and entitled as of right to be admitted as

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1 a party in an agency proceeding; or
 2 (3) expressly designated in the record of the proceeding as a
 3 party to an agency proceeding.
 4 **Sec. 9.** As used in this chapter, "person" refers to an individual
 5 or an entity.
 6 **Sec. 10.** As used in this chapter, "record" refers to any of the
 7 following:
 8 (1) A notice of proceedings.
 9 (2) Any prehearing order.
 10 (3) Any motion, pleading, brief, petition, request, and
 11 intermediate ruling.
 12 (4) Evidence received or considered.
 13 (5) A statement of matters officially noticed.
 14 (6) A proffer of proof and objections and rulings on it.
 15 (7) A proposed finding, requested order, and exception.
 16 (8) The record prepared for the hearing officer or ultimate
 17 authority or its designee at a hearing, and any transcript of
 18 the record considered before final disposition of the
 19 adjudication.
 20 (9) Any final order, nonfinal order, or order on rehearing.
 21 (10) Any staff memorandum or data submitted to the hearing
 22 officer or ultimate authority.
 23 (11) A matter placed on the record after an ex parte
 24 communication.
 25 **Sec. 11.** As used in this chapter, "ultimate authority" refers to
 26 an individual or a panel of individuals in whom the final authority
 27 of an agency is vested by law or executive order.
 28 **Sec. 12.** Any individual serving or designated to serve alone or
 29 with others as a hearing officer is subject to disqualification for:
 30 (1) bias, prejudice, or interest in the outcome of a proceeding;
 31 (2) failure to dispose of the subject of a proceeding in an
 32 orderly and reasonably prompt manner after a written
 33 request by a party; or
 34 (3) any cause for which a judge of a court may be disqualified.
 35 This section does not prohibit an individual who is an employee of
 36 an agency from serving as an administrative law judge.
 37 **Sec. 13.** (a) Except as provided in subsection (b) or unless
 38 required for the disposition of ex parte matters specifically
 39 authorized by statute, a hearing officer serving in a proceeding
 40 may not communicate, directly or indirectly, regarding any issue
 41 in the proceeding while the proceeding is pending, with:
 42 (1) any party;

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- 1 (2) any individual who has a direct or indirect interest in the
- 2 outcome of the proceeding;
- 3 (3) any individual who presided at a previous stage of the
- 4 proceeding; or
- 5 (4) any individual who is prohibited from assisting the hearing
- 6 officer under section 14 of this chapter;

7 without notice and opportunity for all parties to participate in the
8 communication.

9 (b) A member of a multimember panel of hearing officers may
10 communicate with other members of the panel regarding a matter
11 pending before the panel, and any hearing officer may receive aid
12 from staff assistants. However, a staff assistant may not
13 communicate to a hearing officer any:

- 14 (1) ex parte communications of a type that the hearing officer
- 15 would be prohibited from receiving under subsection (a); or
- 16 (2) information that would furnish, augment, diminish, or
- 17 modify the evidence in the record.

18 (c) Unless required for the disposition of ex parte matters
19 specifically authorized by statute, a person described by subsection
20 (a)(1), (a)(2), (a)(3), or (a)(4) may not communicate, directly or
21 indirectly, in connection with any issue in that proceeding while the
22 proceeding is pending, with any person serving as a hearing officer
23 without notice and opportunity for all parties to participate in the
24 communication.

25 (d) If, before serving as a hearing officer in a proceeding, an
26 individual receives an ex parte communication of a type that would
27 not properly be received while serving, the individual, promptly
28 after starting to serve, shall disclose the communication in the
29 manner prescribed in subsection (e).

30 (e) A hearing officer who receives an ex parte communication
31 in violation of this section shall:

- 32 (1) place on the record of the pending matter all written
- 33 communications received, all written responses to the
- 34 communications, and a memorandum stating the substance of
- 35 all oral communications received, all responses made, and the
- 36 identity of each individual from whom the hearing officer
- 37 received an ex parte communication; and
- 38 (2) advise all parties that these matters have been placed on
- 39 the record.

40 Any person described by subsection (a)(1), (a)(2), (a)(3), or (a)(4)
41 shall be allowed to rebut a charge of wrongful ex parte
42 communication upon requesting the opportunity for rebuttal not

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later than fifteen (15) days after notice of the communication.

(f) If necessary to eliminate the effect of an ex parte communication received in violation of this section, a hearing officer who receives the communication may be disqualified and the parts of the record pertaining to the communication may be corrected, modified, or preserved by protective order.

Sec. 14. (a) An individual who has served as an investigator, prosecuting attorney, or advocate in an adjudication or in its preadjudicative stage may not serve as a hearing officer or assist or advise the hearing officer in the same proceeding.

(b) An individual who is subject to the authority, direction, or discretion of an individual who has served as an investigator, prosecuting attorney, or advocate in a proceeding or in its preadjudicative stage may not serve as a hearing officer or assist or advise the hearing officer in the same proceeding.

(c) An individual who has made a determination of probable cause or other equivalent preliminary determination in a proceeding may serve as a hearing officer or assist or advise the hearing officer in the same proceeding, unless a party demonstrates grounds for disqualification under section 12 of this chapter.

(d) An individual may serve as a hearing officer at successive stages of the same adjudication, unless a party demonstrates grounds for disqualification under section 12 of this chapter.

Sec. 15. An individual who:

- (1) is serving alone or with others as a hearing officer; and
- (2) knowingly or intentionally violates section 12 or 13 of this chapter;

commits a Class A misdemeanor.

Sec. 16. A person who:

- (1) aids, induces, or causes an individual serving alone or with others as a hearing officer to violate section 13 or 14 of this chapter; and
- (2) acts with the intent to:
 - (A) have the individual described in subdivision (1) disqualified from serving in a proceeding; or
 - (B) influence the individual described in subdivision (1) with respect to any issue in a proceeding;

commits a Class A misdemeanor.

SECTION 2. IC 8-1-1-5, AS AMENDED BY P.L.30-2006, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 5. (a) The commission shall in all controversial

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1 proceedings heard by it be an impartial factfinding body and shall make
 2 its orders in such cases upon the facts impartially found by it. The
 3 commission shall in no such proceeding, during the hearing, act in the
 4 role either of a proponent or opponent on any issue to be decided by it.
 5 All evidence given in any such proceeding shall be offered on behalf
 6 of the respective parties to, or appearing in, the proceeding and not in
 7 the name or behalf of the commission itself.

8 (b) Any report, audit, examination, or analysis prepared by the
 9 commission staff at the request or direction of the commission may be
 10 made a part of the record of the proceeding, subject to
 11 cross-examination by any party of the person who performed or
 12 directed the preparation of the report, audit, examination, or analysis.

13 (c) If in any such proceeding the public interest is not otherwise
 14 adequately represented by counsel, in the opinion of the commission,
 15 it shall be the duty of the utility consumer counselor, if requested by the
 16 commission, to make adequate preparation for the presentation of the
 17 interests of the public in such proceeding and the utility consumer
 18 counselor shall at the hearing represent the public interests therein
 19 involved.

20 (d) However, nothing in this section prevents the commission from
 21 instituting, prosecuting, hearing, or determining any investigation or
 22 proceeding which it is authorized to do, or make, on its own motion by
 23 any law with the administration of which it is charged.

24 (e) ~~Except as otherwise provided in this chapter,~~ No member or
 25 employee of the commission assigned to make findings of fact and
 26 conclusions of law in a formally docketed evidentiary proceeding may
 27 communicate in connection with any issue of fact or law disputed in
 28 that proceeding with any party or any party's representative, except on
 29 notice and with opportunity for all parties to participate.

30 (f) In addition to holding an executive session in the instances
 31 described in IC 5-14-1.5-6.1(b), the commission may hold an executive
 32 session to deliberate on a proposed order if all the following are
 33 satisfied:

34 (1) All evidence on the matter has been received by the
 35 commission.

36 (2) The deliberations are preparatory to taking final action on an
 37 order subject to judicial review.

38 (3) Only ~~the following~~ **commission members** are permitted to
 39 participate in the executive session.

40 (A) ~~Commission members.~~

41 (B) ~~Commission employees who are formally assigned to~~
 42 ~~advise or assist in preparing the order, including the~~

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1 ~~commission's technical staff and attorneys.~~
2 IC 5-14-1.5-5, IC 5-14-1.5-6.1, and IC 5-14-1.5-7 **otherwise** apply to
3 an executive session held under this subsection.
4 (g) A person who violates a **provision of this section other than**
5 **subsection (e)** commits a Class C infraction. **IC 4-1-12 applies to a**
6 **violation of subsection (e).**
7 SECTION 3. [EFFECTIVE UPON PASSAGE] (a) **The definitions**
8 **in IC 4-1-12, as added by this act, apply throughout this SECTION.**
9 (b) **An agency shall bring any rule or practice that is in conflict**
10 **with IC 4-1-12, as added by this act, into conformity with**
11 **IC 4-1-12, as added by this act, not later than July 1, 2009.**
12 **Notwithstanding any other law, an agency may correct a rule to**
13 **bring it into conformity with this SECTION in the manner**
14 **provided for correcting other matters under IC 4-22-2-38.**
15 (c) **IC 4-1-12, as added by this act, applies to proceedings**
16 **conducted in an adjudication pending before an agency on July 1,**
17 **2009. The presiding hearing officer shall, after June 30, 2009, and**
18 **before the earlier of the date a final determination is made in the**
19 **adjudication or September 1, 2009, place on the record and resolve**
20 **any ex parte communications occurring before July 1, 2009, that**
21 **would have been a violation of IC 4-1-12-13, as added by this act,**
22 **if they had occurred after June 30, 2009, in the manner provided**
23 **by IC 4-1-12-13(e) and IC 4-1-12-13(f), as added by this act.**
24 **IC 4-1-12-13, as added by this act, does not apply to an action or**
25 **omission that occurred before July 1, 2009, in any adjudication.**
26 (d) **This SECTION expires September 1, 2009.**
27 SECTION 4. **An emergency is declared for this act.**

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