

1978 WL 34655 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

January 16, 1978

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Director
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QUESTIONS:

I.

Do the contested case requirements of the State Administrative Procedures Act, [Code of Laws of South Carolina §§ 1-23-310 et seq.](#) (Supp. 1977) apply to internal agency grievance procedures set up under authority of the State Employee Grievance Procedures Act, Code of Laws of South Carolina §§ 8-17-20, [et seq.](#) (1976)?

II.

If the contested case provisions apply, must an agency allow an attorney to represent the grievant in the hearing?

AUTHORITIES CITED:

[Colonial Hilton Inns of New England v. Rego](#), 109 R.I. 259, 284 A.2d 69 (1971);

[Faile v. South Carolina Employment Security Comm.](#), 267 S.C. 536, 230 S.E.2d 219 (1976);

[Helfrich v. Brasington Sand and Gravel Co.](#), 268 S.C. 236, 233 S.E.2d 291 (1977);

Code of Laws of South Carolina §§ 8-17-20 [et seq.](#) (Supp. 1977);

[Code of Laws of South Carolina §§ 1-23-310 et seq.](#) (Supp. 1977);

Opinion of Att'y. Gen., April 18, 1977.

DISCUSSION:

I.

[Code of Laws of South Carolina § 8-17-20](#) (hereinafter referred to as the State Employee Grievance Procedures Act) requires each agency or department of state government to set up an internal employee grievance procedure. That statute also created a State Employee Grievance Committee which hears appeals from decisions of the internal grievance procedure in a de novo hearing. This office, in an opinion of April 18, 1977, stated that the Committee was an 'agency' within the meaning of [Code of Laws of South Carolina § 1-23-310 et seq.](#) (Supp. 1977) (hereinafter referred to as the Administrative Procedures Act) and that hearings conducted by that Committee were subject to the contested case requirements of that Act. The issue presented in this opinion is whether the contested case provisions of the

Administrative Procedures Act apply to hearings held according to regulations promulgated by state agencies pursuant to the State Employee Grievance Procedures Act.

The contested case provisions of the Administrative Procedures Act apply only to those proceedings where the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing. [Code of Laws of South Carolina § 1-23-310\(2\) \(Supp. 1977\)](#). The State Employee Grievance Procedures Act does not specifically require that a formal adjudicatory hearing be held at the lower level grievance proceeding. That Act only requires that each agency and department of the state establish an employee grievance procedure. [Code of Laws of South Carolina § 8-17-20 \(Supp. 1977\)](#). A review of the different employee grievance procedures, that various state agencies have submitted to the Personnel Division, reveals that some agencies provide for formal hearings whereas others do not. An example of a formal hearing would be the situation where a committee of the employee's peers conducts hearings and independently determines whether the grievants' complaints are justified or that action taken with respect to the grievant was arbitrary or capricious. The question presented then is whether formal hearings mandated by agency regulation are subject to the contested case provisions of the Administrative Procedures Act.

*2 Agency regulations that have been properly promulgated have the full force and effect of law. [Faile v. South Carolina Employment Security Comm.](#), 267 SC 536, 230 S.E.2d 219 (1976). It is therefore the opinion of this Office that there is little difference between a statutory requirement that a hearing be held and an agency regulation requiring such a hearing. When one construes a statute, the intention of the legislature is, of course, the primary guide. [Helfrich v. Brasington Sand and Gravel Co.](#), 268 SC 236, 233 S.E.2d 291 (1977). The intent of Section II of the Administrative Procedures Act was to provide an uniform system, with specified procedures, for the conduct of contested cases proceedings. In order that this purpose be served, it is the opinion of this Office that when formal hearings are required by law or regulation, the provision of the Administrative Procedures Act concerning contested cases should be followed. This position is supported by the decision of the Rhode Island Supreme Court when it dealt with a similar statute in the case of [Colonial Hilton Inns of New England v. Rego](#), 109 R.I. 259, 284 A.2d 69 (1971). It should be noted however that where the internal grievance procedure of a particular agency provides for only discussions and conferences between the employee and the employee's supervisors the contested case requirements would not apply until the grievant reaches the stage of a formal hearing. The purpose of these discussions and conferences is to allow the agency and the employee to resolve the problems in a manner which is equitable and which promotes harmonious employee-employer relations. Until the situation reaches a point where the issues can only be resolved in an adversary proceeding, there is no need or requirement that the formal contested case provisions attach.

II.

The second question to be addressed in this opinion is whether the agency must allow an attorney to represent the grievant in the grievance procedure. This office is of the opinion that attorney representation should be permitted at the formal hearings which are conducted in accordance with the Administrative Procedures Act. Since these hearings are to be conducted in accordance with the rules of evidence as applied in civil cases, it follows that a grievant should be allowed to have an attorney represent him in the proceeding. [Code of Laws of South Carolina § 1-23-330 \(Supp. 1977\)](#).

CONCLUSION:

I.

The contested case provisions of the Administrative Procedures Act apply to formal hearings which are required to be held by agency regulations pursuant to the State Employer Grievance Procedures Act.

II.

Attorney participation should be allowed in the formal hearings conducted in accordance with the contested case provisions of the Administrative Procedures Act.

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