

OFFICIAL OPINION NO. 76-103, Whether a UniServ director is practicing law if he handles a case before the Department of Labor

October 25, 1976

Mr. Dennis Finch, Secretary  
Department of Labor  
Foss Building  
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 76-103

**Whether a UniServ director is practicing law if he handles a case before the  
Department of Labor**

Dear Mr. Finch:

You have requested an opinion from this office in regard to the following factual situation.

**FACTS:**

SDCL 3-18 provides public employees with the right to designate an exclusive representative for the purpose of representation on various matters set forth in 3-18. One of these public employee units involves a group of teachers who have organized and designated themselves as an Education Association. Under the Association they pay dues and belong to the South Dakota Education Association. The South Dakota Education Association has several UniServ districts throughout the state headed by executive directors, who in turn assist local education associations in the filing of, and representation of, unfair labor practices and grievances before the Division of Labor and Management. These unfair labor practices and grievance petitions may involve the local education association or one of its individual members depending on the fact situation. Hearings are set on the filing of the petitions and the UniServ Director represents the local unit or individual member at such hearing. The issues heard by the Division are set out in SDCL 3-18 and the relief granted is that consistent with the enforcement of the chapter, either a denial of the union's or grievant's request or a reinstatement of employment, reissuance of a contract, back pay, reinstatement of employee benefits, etc. The Division of Labor and Management acts completely in a quasi-judicial capacity in these matters and in no event is

the Division a party to or in any way interested in the action as is frequently the case with various other state agencies which conduct hearings on contested cases.

Based on the above facts, you ask:

QUESTION:

In view of the above fact situation and AGR 76-56, can a UniServ director handle such cases before this division without subjecting themselves to SDCL 16-18-1 and the penalties thereunder?

Your question raises once again the very difficult issue of what constitutes the unauthorized practice of law before an administrative agency. With no specific case law yet developed under Article V, Section 12 of our State Constitution and no specific Supreme Court Rules on this issue, it is necessary to look to other jurisdictions for guidance.

One of the most helpful discussions which I have discovered on this general issue is found in the decision of the Colorado Supreme Court in the case of *Denver Bar Association v. Public Utilities Commission*, 391 P.2d 467 (1964). The application of the general principles there expressed seem to me to be appropriate general standards to apply in South Dakota, in absence of statute or Supreme Court Rules to the contrary. I fully recognize here that the final determination of this issue in South Dakota is one for the South Dakota Supreme Court, not this office. In the absence of definitive regulation on this matter, however, I also believe the Legislature can impose restrictions and standards relating to the practice of law before administrative agencies. *State Bar of Arizona v. Arizona Land Title and Trust Company*, 366 P.2d 1. For my opinion, the Legislature has done so in regard to the situation you raise.

As in South Dakota, the Supreme Court in the *Denver Bar Association* case had the final power to define and regulate the practice of law in the state. Accordingly, the following quotation from the Colorado Supreme Court decision would generally seem to be appropriate in regard to rules such as ARSD 47:02:04:06 relating to possible departmental authorization by rule of nonlawyers to engage in the practice of law before administrative agencies:

We conclude that the creature of the legislature, the commission with its rule-making

power, does not in any way have the prerogative of superseding the exclusive power of the judiciary, ultimately residing in this Court, to determine what is or is not the practice of law and to restrict such practice to persons licensed by this Court to serve as lawyers.

In the absence of Supreme Court rules to the contrary, I believe that administrative agencies such as the Department of Labor do have authority to promulgate procedural rules relating to the conduct of hearings which the department and its hearing officers conduct. In citing the above section of the *Denver Bar Association* case, I merely wish to point out that the *final* determination of what is the unauthorized practice of law is one for the Supreme Court, not for the Department of Labor to establish by rule or for this office to assert by official opinion.

In my opinion, an answer to the general question of what constitutes the unauthorized practice of law before an administrative agency must recognize that certain "representative" conduct before an agency on behalf of another may be the unauthorized practice of law whereas other conduct in a representative capacity may not be the practice of law. It is not really possible, in my view, to generally exclude all types of conduct before certain administrative agencies as not being the practice of law. To me, it seems that it is as much the nature of the representation performed before an administrative agency as it is where the representation takes place which determines if there is, in fact, unauthorized practice of law occurring.

In the *Denver Bar Association* case, the Colorado Supreme Court laid forth the following helpful guidelines in regard to what sorts of general practice before an administrative agency would constitute the practice of law:

1. Where one instructs and advises another in regard to the applicable law on an agency matter so that he may properly pursue his affairs and be informed as to his rights and obligations. (Citation omitted.)
2. Where one prepares for another documents requiring familiarity with legal principles beyond the ken of the ordinary layman. (Citation omitted.)
3. Where one prepares for another, for filing before the administrative agency, applications, pleadings, or other procedural papers requiring legal knowledge and technique. (Citation omitted).

4. Where one appears for another before an administrative tribunal in adversary or public proceedings involving the latter's right of life, liberty or property according to the law of the land. (Citation omitted.)

5. Where one, on behalf of another, examines and cross examines witnesses and makes objections to the introduction of testimony, the exercise of which requires legal training, knowledge, and skill. (Citation omitted.)

6. Where one represents another in a ratemaking or raterevision case and the question of deprivation of property without due process of law is present. (Citation omitted.)

The Colorado Supreme Court then proceeded to discuss the following practices by nonlawyers before an administrative agency which would *not* constitute the unauthorized practice of law:

1. The completion of forms which do not require any knowledge and skill beyond that possessed by the ordinary experienced and intelligent layman. (Citation omitted.)

2. Representation of another in a hearing relating to the making or revision of rates, except as noted in the foregoing item No.6. (Citation omitted.) (May differ from one opinion previously.)

3. Performing the services of engineers, experts, accountants and clerks. (Citation omitted.)

4. Acting in an agency proceeding involving the adoption of a rule of future action which affects a group and where no vested rights of liberty or property are at stake. (Citation omitted.)

The above general comments and authorities appear to me to be helpful general guidelines for agencies to follow in the absence of applicable Supreme Court Rules or legislative enactments in regard to the question of what would constitute the unauthorized practice of law before the agency. I will not in turn deal more specifically with the precise question and facts which you raise in regard to SDCL 3-18.

SDCL 3-18-2 and 3-18-3 provide that the employees shall have the right to select a formal

designated representative and that such representative shall be the exclusive representative of all employees in such unit for the purpose of such representation and respect to rates of pay, wages, hours of employment, or other conditions of employment. SDCL 3-18-3 further provides that individual employees of the group would have the right at any time to present grievances to their employer without the intervention of the formal representative. SDCL 3-18-2 specifically refers to the designated representative negotiating with the governmental agency with respect to grievance procedures and conditions of employment.

Although the final determination of what constitutes unauthorized practice of law before an administrative agency is a matter for the State Supreme Court to determine, it seems obvious to me that the Legislature has intended that the designated representatives authorized by SDCL 3-18-2 and 3-18-3 be given the power to formally represent employees in respect to pay, wages, hours and other conditions of employment. Although much of this "representation" will probably be done before the local governing board or agency, it is my opinion that it is implicit if not explicit in SDCL 3-18-1 and 3-18-3 that the designated representatives can formally represent these employees in grievance procedures before the Department of Labor. Obviously, this authorization of the designated representative to "represent" employees in grievances would not extend to the practice of law before a court of law in South Dakota since the law requires lawyers to be involved at that level. In my opinion, however, in the absence of court rules or decisions to the contrary, SDCL 3-18-3 does carve out authorization for "designated representatives" to represent public employees before the Department of Labor in regard to the matter you refer to.

This decision by the Legislature is not without its practical reasons and considerations. If lawyers were required to be involved in representations in all administrative hearings, in each and every department in state government, the practicalities of the situation would make it difficult, if not impossible, for many people to have assistance in bringing their grievances before the administrative agencies. Many grievances involve such minimal amounts of money that the cost of procuring legal representation would be more expensive than letting the matter rest without a hearing or decision of the administrative agency. Making the broad scope of administrative "representation" the practice of law definitely does have its practical difficulties. In the *Denver Bar Association* case, the Colorado Supreme Court also recognized this problem when they said:

As to matters in which no legal principle is involved and the subject matter of the hearing has a value or represents an amount insufficient to warrant the employment of an attorney,

permission is granted until withdrawn by this Court to permit laymen to represent others in accordance with Rule 7(b), *even though such representation may constitute practicing law*. (Emphasis added.)

The argument is raised that administrative representation and consultation in labor grievances and unfair labor practice cases have traditionally been found to be outside of what constitutes the practice of law. *Auerbacker v.*

*Woods*, 53 A.2d 800. Reference is also made to the fact that surrounding states do not consider "UniServ" directors' involvement in grievances as being the practice of law.

Whether this is or is not a universal "practice," I do not here attempt to determine. I believe, however, that in view of decisions such as *Florez v. City of Glendale*, 463 P.2d 67 (1969), where the Arizona Supreme Court found that the representation of another in an unfavorable practice claim before the City personnel board by a nonlawyer *did* constitute the unauthorized practice of law, some doubt is shed on the universality of this "practice."

My position in regard to the specific issue you present here is that until the Legislature would amend SDCL 3-18 or until the Supreme Court would lay down definitive rules on what constitutes "practice of law before administrative agencies," SDCL 3-18 and ARSD 47:02:04:06, provide sufficient authority for the department to authorize nonlawyer "designated representatives," to represent public employees before the department in the grievance procedures you refer to.

Respectfully submitted,

WILLIAM J. JANKLOW  
ATTORNEY GENERAL

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