

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

MEADE COUNTY RURAL ELECTRIC COOPERATIVE)
CORPORATION AND BRANDENBURG TELEPHONE)
COMPANY, INC.)

) CASE NO. 89-257

ALLEGED FAILURE TO COMPLY WITH)
COMMISSION REGULATIONS)

O R D E R

On June 5, 1990, Brandenburg Telephone Company, Inc. ("Brandenburg") filed a motion requesting the Public Service Commission to enter an Order prohibiting all ex parte communications between the Commission's Office of General Counsel and the Commission and/or the Commission's hearing officer. The motion also requests that the Commission identify all ex parte communications between the Commission's Office of General Counsel and the Commission and/or the Commission's hearing officer.

As grounds for its motion, Brandenburg quotes from the United States Supreme Court Withrow v. Larkin, 421 U.S. 35, 46, (1975) stating that, "the due process requirement of a fair trial and fair tribunal applies to administrative agencies which adjudicate as well as to courts." Brandenburg then cites the Commission to the Model Rules of Professional Conduct Rule 3.5 (1983) which states that a lawyer shall not communicate ex parte with a judge.

Brandenburg's motion is absent of any authority that supports the proposition that in administrative adjudication due process requires the staff attorney acting as prosecutor be excluded from the Commission's deliberations. The United States Supreme Court has refused to require such prohibitions and separation of functions when evaluating the issues strictly upon the criteria of what due process requires. In the Withrow case the Court stated:

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that under a realistic appraisal of psychological tendencies and human weaknesses, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual biased or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Withrow, 421 U.S. at 1464. In Marcello v. Bonds, 349 U.S. 302, (1955), the court held that due process was not violated by adjudicating officers being supervised by officers charged with investigating and prosecuting functions. The United States Supreme Court has addressed this issue in numerous cases and has never held that an administrative system of combined functions violates due process.¹

¹ Shaughnessy v. United States, Ex Rel Accardi, 349 U.S. 280 (1955); Goss v. Lopez, 419 U.S. 565 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974); Arnett v. Kennedy, 416 U.S. 134 (1974); Hortonville Joint School District No. 1 v. Hortonville Educational Association, 426 U.S. 482 (1976); Richardson v. Perales, 402 U.S. 389 (1971).

The majority of lower courts have followed Withrow and have held that the combination of investigative and judicial functions with an agency does not violate due process.² The Court in Malamb v. Panhandle Community Unit School District No. 2, 826 F.2d 526 (7th Cir. 1976) addressed the issue raised by Brandenburg. In Malamb, the Court refused to find a due process violation even though there was a combination of an advisory function with the hearing participants' prosecutorial function. The Complainant in Malamb alleged constitutional defects because the Board's attorney who served as prosecutor in the hearing also went behind closed doors and advised the Board during its deliberations. Malamb and his counsel were excluded from the deliberations. The Court held that under these facts, no constitutional violations existed.

While there does not appear to be any Kentucky case specifically on point, there is a long line of Kentucky cases recognizing that administrative bodies can have investigative, evidentiary, and judicial functions without being in violation of due process. The Court in Whispering Hills C.Cl. v. Kentucky Commission on Human Rights, Ky., 475 S.W.2d 645 (1972) held that the statutes creating the Commission on Human Rights were not invalid and did not violate due process just because the Commission's investigative, evidentiary and judicial functions

² Pangburn v. C.A.B., 311 F.2d 349 (C.A. MASS. 1962); O'Brien v. DiGrazia, 544 F.2d 543 (1st Cir. 1975), cert denied, 431 U.S. 914 (1977); Cato v. Collins, 539 F.2d 656 (8th Cir. 1976); Burnley v. Thompson, 524 F.2d 1233 (5th Cir. 1975).

were not separated. Similarly, in Board of Education of Pulaski County v. Burkett, Ky., 525 S.W.2d 747 (1975) the Court rejected the due process claims against the Board of Education. In this case a tenured teacher who was removed had claimed due process violations because the school board functions in the roles of employer, investigator, accuser, prosecutor, jury and judge. Similar claims of due process violations against the Cabinet for Human Resources were rejected by the Court in Jones v. Cabinet for Human Resources, Ky.App., 710 S.W.2d 862 (1986).

The only authority which can be found that contains a prohibition similar to what Brandenburg is requesting is in the Administrative Procedures Act ("APA"), which has not been adopted by Kentucky law. However, even the prohibition in the APA, 5 U.S.C. §554(d), specifically states that it does not apply to "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers;. . . ." Therefore, even the strict standards of the APA do not require the prohibition requested by Brandenburg.³

Accordingly, the Commission finds that Brandenburg's motion should be denied. However, in an effort to put to rest any


³ Furthermore, even when the APA prohibition is applicable the case law is clear that the decision-makers are free to consult with members of the staff who have not served as investigator or prosecutor in the case. Brandenburg's request that the Commission prohibit communication with the entire office of General Counsel is beyond even the strictest of standards.

party's allegations of wrongdoing, the Commission attaches to this Order the Commission Staff Attorney's Affidavit revealing all communications that have occurred in this specific case.

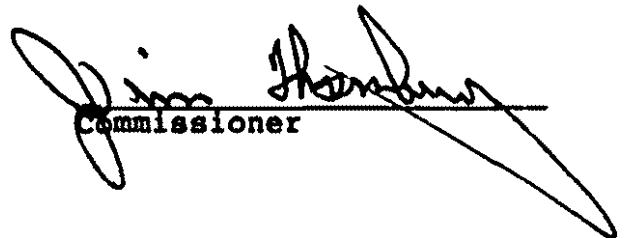
IT IS THEREFORE ORDERED that Brandenburg's motion to prohibit all ex parte communications between the Commission's Office of General Counsel and the Commission and/or the Commission's hearing officer is hereby denied.

Done at Frankfort, Kentucky, this 21st day of August, 1990.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director

A F F I D A V I T

The Affiant, Gerald E. Wuetcher, after first being duly sworn, states as follows:

1. I am employed as a staff attorney with the Office of General Counsel, Public Service Commission of Kentucky.

2. I am the staff attorney assigned to PSC Case No. 89-257. No other employee of the Office of General Counsel was assigned to or participated in this case. Aside from providing occasional updates on procedural status of this case to Susan Mastin, the Commission's General Counsel, I did not discuss this case with any employee of the Office of General Counsel.

3. I discussed PSC Case No. 89-257 with Hearing Officer Paul Shapiro only once. On April 9, 1990 I advised Mr. Shapiro of the names of the witnesses which Commission Staff would call. I further advised him that the Commission Staff would attempt to offer Roscoe Hinton's deposition into evidence. I had no further discussions with Mr. Shapiro about this case prior to the Commission rendering its decision.

4. I spoke with members of the Commission about PSC Case No. 89-257 only once. In early December 1989, I asked George Edward Overbey, Jr., Chairman of the Commission, whether the Commission desired a hearing in this matter. I advised him that each utility had presented their positions to Commission Staff at two informal conferences in November 1989 and that each utility's version was disputed by Joseph and Ida Mae Rosebush and Heidi Riggs. Chairman Overbey stated that, because of these differing versions, a public

hearing should be held. The conversation lasted approximately 2 minutes. I have not discussed this case with any Commissioner since then.

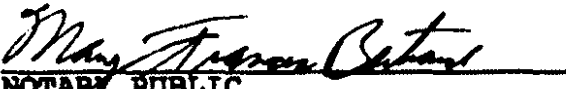
FURTHER THE AFFIANT SAITH NOT.


GERALD E. WOETCHER

COMMONWEALTH OF KENTUCKY

COUNTY OF FRANKLIN

Subscribed and sworn to before me by Gerald E. Wuetcher this
21st day of August, 1990.


NOTARY PUBLIC
State-at-Large

My Commission expires: Nov. 30, 1992