



Basic Employee Relations Course

Prohibited Ex Parte Communication

Generally, “ex parte communication” is prohibited in legal proceedings. Ex parte communication is a direct or indirect communication on the substance of a pending case without the knowledge, presence, or consent of all parties involved in the matter. Such communications may be referred to as “one-sided,” “off-the-record,” or “private communications.” One-sided communications does not mean that the communication must occur in privacy or among only two people in order to be an ex parte communication. Even a public communication before a large audience may still be an ex parte communication if other parties to the proceeding do not have notice of and an opportunity to participate in the communication.

Only *ex parte* communications that introduce new and material information to the deciding official will violate the due process guarantee of notice. In deciding whether new and material information has been introduced by means of ex parte contacts, the MSPB will consider the facts and circumstances of each particular case. In *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999), the U.S. Court of Appeals for the Federal Circuit determined that among the factor useful for the MSPB to weigh are:

- Whether the ex parte communication merely introduces “cumulative” information or new information.
- Whether the employee knew of the error and had a chance to respond to it.
- Whether the ex parte communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner.

Ultimately, the inquiry of the MSPB is whether the *ex parte* communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances.