

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal of the  
Revocation of the Family Child Care  
License of Paula Harstad and the  
Maltreatment Determination and  
Disqualification of Paula Harstad

**ORDER DENYING RESPONDENT'S  
APPLICATION FOR ATTORNEY'S  
FEES AND COSTS**

This matter is pending before Administrative Law Judge Barbara Case on Licensee Paula Harstad's application for attorneys' fees and costs under the Minnesota Equal Access to Justice Act (MEAJA).<sup>1</sup> The Licensee filed her application on February 22, 2018.<sup>2</sup> The Department of Human Services (Department) filed its objection to the application on March 9, 2018.<sup>3</sup>

Mark A. Lindahl, Blue Earth County Assistant Attorney, appeared on behalf of the Department. Jennifer L. Thon, Jones Law Office, appeared on behalf of Licensee.

Based upon the filings of the parties, the Administrative Law Judge makes the following:

**ORDER**

For the reasons set forth in the Memorandum that follows, Licensee's application for attorney fees is **DENIED**.

Dated: March 23, 2018



BARBARA J. CASE  
Administrative Law Judge

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<sup>1</sup> Minn. Stat. § 15.471, *et seq.* (2016).

<sup>2</sup> Application of Paula Harstad for Attorney's Fees ("Fee Application") (Letter dated Feb. 19, 2018).

<sup>3</sup> Objection to the Application of Paul Harstad for Attorney's Fees ("Department's Objections") (Letter dated Mar. 7, 2018).

## MEMORANDUM

Licensee seeks attorney fees under the MEAJA,<sup>4</sup> which allows a prevailing party in a contested case proceeding brought by or against the state, who shows that the state's position was not substantially justified, to recover its attorney fees and costs.<sup>5</sup> Because the Department's position in this proceeding was substantially justified, the Administrative Law Judge denies Licensee's application for attorney fees and costs.

### I. Background and Prior Proceedings

Licensee's application for attorney fees and costs arises from her appeal of the Department's revocation of her family child care license. The revocation proceedings stemmed from Licensee's minor child, D.H., claiming to have inappropriately touched two young girls at Licensee's home daycare facility.<sup>6</sup>

After receiving a report of D.H.'s admission, Blue Earth County Human Services (County) began an investigation.<sup>7</sup> On January 9, 2017, the County determined that D.H. had committed serious and recurring maltreatment, and disqualified him from direct contact with, or access to, anyone receiving services from a Department-licensed program.<sup>8</sup> The County also determined that Licensee had committed maltreatment by neglect, and disqualified Licensee.<sup>9</sup> A County child protection specialist, Rhonda Mittelstaedt, testified that the basis for the County's maltreatment determination of Licensee was Licensee's failure to report D.H.'s maltreatment.<sup>10</sup> The letter to Licensee informing her of the County's determination of maltreatment and disqualification mentioned that Licensee had failed to make a mandated report and timely notify parents of children at her daycare of D.H.'s actions, but did not cite to the relevant statute<sup>11</sup> as a basis for Licensee's disqualification.<sup>12</sup>

On February 7, 2017, the County recommended to the Department that Licensee's childcare license be revoked.<sup>13</sup> A week later, the Department issued an Order of Revocation to Licensee.<sup>14</sup> The Order stated that the Department was revoking Licensee's license because of Licensee's lack of supervision, Licensee's maltreatment determination, Licensee's disqualification, Licensee's failure to report, and D.H.'s status

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<sup>4</sup> Minn. Stat. §§ 15.471-.474 (2016).

<sup>5</sup> Minn. Stat. § 15.471(a).

<sup>6</sup> Findings of Fact, Conclusions of Law, and Recommendation (Oct. 2, 2017) ("Final Report"), at ¶¶ 1, 6-9, 39-41.

<sup>7</sup> *Id.* at ¶¶ 6-29.

<sup>8</sup> *Id.* at ¶ 34.

<sup>9</sup> *Id.* at ¶ 35.

<sup>10</sup> *Id.*

<sup>11</sup> Minn. Stat. § 245C.15, subd. 4(b)(1) (2016).

<sup>12</sup> Final Report ¶ 39.

<sup>13</sup> *Id.* at ¶ 41.

<sup>14</sup> *Id.* at ¶ 42.

as a disqualified person living in Licensee's home.<sup>15</sup> The Order did not cite to the timely reporting statute.<sup>16</sup>

Licensee requested reconsideration of the Order, and the Department confirmed Licensee's maltreatment determination upon reconsideration.<sup>17</sup> Contested case proceedings followed.

At the contested case hearing on August 21, 2017, both the Department and Licensee centered their arguments on the question of whether Licensee had fulfilled her duty to report. For instance, the Department's closing argument focused on the "key question" of whether Licensee "had a duty to report and failed to do so."<sup>18</sup> Licensee's final argument questioned whether the Department could show by a preponderance of the evidence that D.H.'s alleged abuse occurred within three years of when Licensee heard D.H.'s admission and did not raise the issue of notice.<sup>19</sup>

The Administrative Law Judge's Final Report determined that, because the County and Department merely mentioned Licensee's failure to report as an "additional concern" in their notices, there was "no basis to conclude Licensee was on notice of a potential disqualification for her failure to report."<sup>20</sup> The Final Report also carefully examined the hearing record and determined that, even if Licensee had been on notice of the Department's failure-to-report theory, the Department had not shown by a preponderance of the evidence that Licensee knew or should have known that D.H.'s alleged abuse occurred within three years of D.H.'s admission to Licensee.<sup>21</sup> The Final Report concluded that the Department had not met its burden of showing by a preponderance of the evidence (1) that Licensee committed maltreatment by neglect, and (2) that Licensee had failed to report maltreatment and should therefore be disqualified.<sup>22</sup> But because D.H. was a disqualified person living in Licensee's home, the Final Report concluded that the Department still had reasonable cause to revoke Licensee's license.<sup>23</sup>

The Department substantially adopted the entire Final Report in a Final Order issued on January 23, 2018.<sup>24</sup> The proceedings are now before the Administrative Law Judge on Licensee's Application for Attorney Fees.

## II. Licensee is a "Party" Under MEAJA

MEAJA authorizes an award of attorney fees and costs to a prevailing "party" in contested cases. Neither Licensee's application nor the Department's objection argues the question of whether Licensee's home daycare business is a "party" under MEAJA,

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<sup>15</sup> *Id.* at ¶ 43.

<sup>16</sup> *Id.* at ¶ 44.

<sup>17</sup> *Id.* at ¶ 45.

<sup>18</sup> Dept.'s Closing Argument (Sept 1, 2017) at 8.

<sup>19</sup> Licensee's Final Argument (Sept 1, 2017) at 1-9.

<sup>20</sup> Final Report at 14.

<sup>21</sup> *Id.* at 14-15.

<sup>22</sup> Final Report at 18.

<sup>23</sup> *Id.*

<sup>24</sup> Dept.'s Final Order (Jan. 23, 2018).

but because the statute's language is strictly construed as a limited waiver of the state's sovereign immunity,<sup>25</sup> the Administrative Law Judge will discuss the issue.

MEAJA defines the term "party" restrictively to include only small businesses—or those businesses' partners, officers, shareholders, members, or owners—with no more than 500 employees or \$7 million in annual revenue.<sup>26</sup> Licensee's fee application contains no facts concerning her ownership of a business, or concerning the revenue or number of employees of that business, but her status at the time of the maltreatment determination as the owner of a small home childcare business does not appear to be in dispute.<sup>27</sup>

MEAJA excludes from the definition of party a person "providing services pursuant to licensure or reimbursement on a cost basis by the DHS" when that person is named as a party "in a matter which involves the licensing or reimbursement rates, procedures, or methodology applicable to those services."<sup>28</sup>

In a long line of cases, the Office of Administrative Hearings (OAH) strictly construed this language to prohibit recovery of attorney fees and costs in proceedings involving parties providing DHS-licensed services.<sup>29</sup> But the Minnesota Court of Appeals issued a short unpublished decision that found otherwise.<sup>30</sup> The Minnesota Court of Appeals held that daycare providers may be a small business and therefore are entitled

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<sup>25</sup> *Donovan Contracting of St. Cloud, Inc. v. Minnesota Dept. of Transp.*, 469 N.W.2d 718 (Minn. Ct. App. 1991).

<sup>26</sup> Minn. Stat. § 15.471, subd. 6.

<sup>27</sup> See Department's Objections (which do not attempt to raise any issue of Licensee's business failing to meet the statutory definition of "party"); Final Report at ¶ 1 (stating that Licensee operated a childcare business in the family home).

<sup>28</sup> *Id.*, subd. 6(c).

<sup>29</sup> See, e.g., *In the Matter of the Revocation of the License of Mary Fiola*, Docket No. 68-1800-30422, ORDER ON THE RESPONDENT'S APPLICATION FOR ATTORNEY'S FEES AND COSTS (Feb. 7, 2013) (family child care licensee who challenged a DHS order to revoke her license based upon alleged maltreatment of a vulnerable adult at another DHS-licensed facility, and a resulting disqualification was found to be excluded from the definition of a "party" eligible for attorneys' fees and costs under the MEAJA); *In the Matter of Maltreatment, Disqualification and License Revocation for Patricia and Wayne Zabel*, OAH 15-1800-20591, ORDER DENYING ATTORNEY FEES (June 30, 2011) (foster care licensees who challenged a maltreatment determination, disqualification, and license revocation were involved in a dispute about their license and fell within the statutory exclusion in the MEAJA's definition of "party")); *In the Matter of the Temporary Immediate Suspension of the Day Care License of Samantha Stone*, OAH 4-1800-19490-2, and *In the Matter of the Maltreatment Determination and Revocation of the License of Samantha Stone to Provide Child Care*, OAH 2-1800-19957-2, ORDER ON THE RESPONDENT'S APPLICATION FOR ATTORNEY'S FEES AND COSTS (June 11, 2009) (because contested cases relating to the propriety of suspension or revocation orders "involve the licensing" of family childcare services, licensee was statutorily excluded from the class of persons who may seek recovery of attorneys' fees and costs under the MEAJA).

<sup>30</sup> *In the Matter of the Temporary Immediate Suspension of the Family Child Care License of Lori Gilbertson*, ORDER GRANTING FEES, No. A13-1259 (Minn. Ct. App. June 30, 2014).

to recover fees and expenses under the MEAJA.<sup>31</sup> OAH began following that construction of MEAJA.<sup>32</sup>

Because Licensee's daycare operation was a small business and her appeal concerns the Department's findings of maltreatment and her subsequent disqualification based on those findings, Licensee is a "party" who may seek attorney fees and costs under MEAJA.

### **III. Definition of "Substantially Justified"**

The term "substantially justified" is defined in MEAJA as meaning that the Department's position had a "reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation or contested case proceeding."<sup>33</sup> Under the statute, "substantially justified" means "justified to a degree that could satisfy a reasonable person" rather than "justified to a high degree."<sup>34</sup> "No presumption arises that the agency's position was not substantially justified simply because the agency did not prevail."<sup>35</sup>

#### **A. The Department Was Substantially Justified in its Theory of the Case**

Licensee argues that the Department's position was not substantially justified because the Department's theory of the case centered on failure to report, which the Administrative Law Judge concluded was not properly noticed as a basis of the revocation determination.<sup>36</sup>

This argument ignores the substance of Licensee's own closing argument in the contested case proceeding, which focused entirely on rebutting the Department's theory of the case and did not raise the issue of notice at all.<sup>37</sup>

The parties' final submissions demonstrate that, before the Final Report was issued, both the Department and Licensee treated this as a dispute over whether

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<sup>31</sup> *Id.*

<sup>32</sup> See *In the Matter of the Appeal by East Suburban Resources, Inc., regarding the Maltreatment Determination and Order to Pay a Fine*, OAH 11-1800-31758, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING APPLICATION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES, at 10-11 (Dec. 7, 2015) (concluding that the court of appeals decision "does cast some doubt upon the prior OAH interpretations of the statutory exclusion" when the "the substantive challenge in the present case pertained to the maltreatment determination and the only licensing sanction involved was a \$1,000 fine which flowed automatically by statute"); *In the Matter of the Appeal by MBW Company of Determination of Maltreatment and Order to Pay a Fine; and Appeal by Rachel Domeier*, OAH 60-1800-31795, ORDER DENYING APPLICATION FOR ATTORNEY'S FEES, at 12 (holding that, "[b]ecause the underlying proceeding in this case was a challenge to a maltreatment determination . . . [,] the exception does not apply and MBW meets the statutory definition of a party").

<sup>33</sup> Minn. Stat. § 15.471, subd. 8.

<sup>34</sup> *Donovan Cont. v. Minn. Dep't of Transp.*, 469 N.W.2d 718, 720 (Minn. Ct. App. 1991), review denied (Minn. Aug. 2, 1991).

<sup>35</sup> *Id.* at 720-21.

<sup>36</sup> Affidavit (Aff.) of Jennifer L. Thon (Feb. 19, 2018), at ¶¶ 4, 7.

<sup>37</sup> See Licensee's Final Argument, at 1-9.

Licensee had satisfied her reporting duties. That the Administrative Law Judge ultimately disagreed does not mean that the Department owes Licensee her attorney fees.<sup>38</sup> Substantial justification requires only a degree of justification needed to satisfy a reasonable person.<sup>39</sup> When both parties argue according to the same theory of the case, a reasonable person would conclude that it neither party has a basis to claim that the other was unjustified in its line of argument. The Administrative Law Judge concludes that the Department's position was substantially justified.

#### **B. The Department Was Substantially Justified in Arguing that the Alleged Abuse Took Place Within Three Years of D.H.'s Admission**

Licensee also argues that the Department was not substantially justified because, irrespective of the notice issue, the Final Report determined that the Department did not prove that Licensee knew or should have known that D.H.'s alleged abuse occurred within three years of D.H.'s admission to Licensee.<sup>40</sup>

Determinations of maltreatment, such as those stemming from a failure to report, must be made based on a preponderance of the evidence.<sup>41</sup> The Administrative Law Judge's conclusion that "[t]he Department did not establish that Licensee knew or should have known that the abuse occurred within the last three years" was made under that standard.<sup>42</sup>

The Final Report demonstrates that the Administrative Law Judge found the evidence suggested the alleged abuse took place more than three years from the relevant date more credible than D.H.'s "vague and inconsistent" testimony possibly suggesting otherwise.<sup>43</sup> But the Administrative Law Judge's weighing of the evidence, and the ultimate conclusion that the Department had not carried its burden, does not mean that there was no factual basis to support the Department's argument that the abuse took place within three years of the relevant date. Licensee's final argument admits as much by stating that "[t]here is conflicting evidence as to the time period of the alleged sexual abuse."<sup>44</sup>

One of the pieces of "conflicting evidence" that Licensee cited was D.H.'s claim that he continued his abuse until age 14, which is within three years of his admission to Licensee.<sup>45</sup> That fact alone gave the Department a reasonable basis to argue that Licensee knew or should have known that D.H. had abused children within three years of his admission. Indeed, this is precisely what the Department argued when it stated that

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<sup>38</sup> See *Donovan* 469 N.W.2d at 720-21 (holding that an agency is not necessarily unjustified simply because the decision maker did not hold in its favor).

<sup>39</sup> *Id.*

<sup>40</sup> Thon Aff. ¶¶ 4, 7.

<sup>41</sup> Minn. Stat. § 626.556, subd 10e(e) (2016).

<sup>42</sup> Final Report at 17.

<sup>43</sup> *Id.*

<sup>44</sup> Licensee's Final Argument at 2.

<sup>45</sup> *Id* at 2.

“[t]here is also a reasonable inference that [the abuse] did happen within three years of his self-disclosure, given D.H.’s estimates.”<sup>46</sup>

The statutory standard is whether the Department’s argument had “a reasonable basis in law and fact.”<sup>47</sup> That the Final Report decided to credit other evidence over D.H.’s inconsistent statements does not mean that the Department made an unsupported argument. The Administrative Law Judge concludes that the Department’s position was substantially justified.

#### **IV. Conclusion**

Because the Department took positions that were substantially justified, Licensee’s fee application is denied.

**B. J. C.**

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<sup>46</sup> Dept.’s Closing Argument, at 8.

<sup>47</sup> Minn. Stat. § 15.471, subd. 8.