

6-2000-8388-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Application
of Lac qui Parle - Yellow Bank
Watershed District to Excavate
Four Floodways in the Lac qui Parle
River, Lac qui Parle County.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER ON REQUEST

FOR ATTORNEY'S FEES

This matter originally came on for hearing before Administrative Law Judge Allan W. Klein, who issued Findings of Fact, Conclusions, Recommendation and Memorandum on April 22, 1994. The Recommendation was transmitted to the Commissioner of Natural Resources (the Commissioner) who issued the Commissioner's Order on June 27, 1994. An Application for attorney's fees under the Equal Access to Justice Act (EAJA) was filed with the Administrative Law Judge on May 25, 1994, by CURE, an intervenor in the action.

Brian Bates, Attorney at Law, 1985 Grand Avenue, No. B1, St. Paul, Minnesota 55105, filed the Application on behalf of CURE. Stephen Torvik, Nelson Oyen Torvik, 221 North First Street, P.O. Box 656, Montevideo, Minnesota 56265, filed a response on behalf of Lac qui Parle - Yellow Bank Watershed District (the Watershed District) in opposition to the Application. Matthew Seltzer, Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155-4199, filed a response on behalf of the Department of Natural Resources (the DNR) in opposition to the Application. The record closed in this matter on July 5, 1994.

Based on the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On December 15 and 16, 1993, a contested case hearing was held on the question of whether the Department should issue a permit to the Watershed District for the creation of four cutoffs on the Lac qui Parle River to control flooding. The project was proposed by the Watershed District.

2. CURE opposed the grant of a permit by the DNR. The project, CURE argued, was a structural solution to a problem that could be better solved through nonstructural methods. CURE maintained that the project would cause environmental damage and that there were alternatives which would not cause environmental damage.

3. The Commissioner ordered a hearing to assist him in making a decision on the permit application. The Watershed District was opposed to holding a hearing. At the start of the hearing, the Agency staff did not take any position on whether the application should be granted or denied.

4. The Administrative Law Judge issued a Recommendation based on the record from the contested case hearing. The Recommendation was that the application of the Watershed District be denied. The basis for the denial was the Watershed District's failure to meet either the requirement of Minn. Stat. § 103G.315, subd. 3 (1992), that the plan be "reasonable, practical, and .. [promoting of] the public welfare;" or the requirement of Minn. Stat. § 116D.04, subd. 6 (1992), that there be no feasible or prudent alternative to the project.

5. The Commissioner's Order adopted the ALJ's Report with three minor modifications to the Findings of Fact. The Commissioner's Order adopted all the Conclusions of Law and also adopted the Recommendation. The Watershed District's application was denied on June 27, 1994.

6. CURE filed its Application for attorney's fees under the EAJA on June 25, 1994.

7. CURE is incorporated under the laws of the State of Minnesota. CURE has no full time employees and two part-time employees, not including its attorney. Total gross revenues for CURE in 1993 were \$5,600.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction of this matter pursuant to Minn. Stat. § 3.762 (1992) and Minn. Rule 1400.8401.

2. All relevant, substantive and procedural requirements of law or rule have been fulfilled for an application for attorney's fees, witness fees, and costs under the Minnesota Equal Access to Justice Act.

3. CURE is a party as defined by Minn. Stat. § 3.761, subd. 6 (1992)

4. CURE prevailed in the contested case conducted on the issuance of permit.

5. The Watershed District is not a state agency as that term is defined in Minn. Stat. § 14.02, subd. 2 (1992). The contested case conducted on the issuance of the permit was not brought "by or against the state," as required for an award of fees and costs by Minn. Stat. § 3.762(a) (1992).

6. CURE failed to demonstrate that the state's position was "not substantially justified" within the meaning of Minn. Stat. § 3.761, subd. 3 (1992).

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

The application by CURE for attorney's fees and costs is hereby DENIED

Dated this 27th day of July, 1994.

s/ Allan W. Klein
ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 3.764, subd. 3 (1992), this Order is the final decision in this case and under Minn. Stat. § 3.764, subd. 3, any party dissatisfied with the fee determination made here may seek judicial review pursuant to Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

The EAJA authorizes an administrative law judge to award the payment of attorney's fees and other expenses to a party prevailing over a state agency in a contested case where the agency's position was not substantially justified. Minn. Stat. § 3.762(a) (1992). If any element of this standard is not met by the applicant, the request for attorney's fees and other expenses must be denied. Because "[this Act] is a limited waiver of sovereign immunity, courts should strictly construe its language." Donovan Contracting v. Minnesota Department of Transportation, 469 N.W.2d 718, 720 (Minn.App. 1991), rev. denied (Minn. August 2, 1991).

Minn. Stat. § 3.761, subd. 6(a) (1992), defines "party" under the EAJA to include corporations with fewer than 50 employees and annual revenues below \$4,000,000. CURE meets the definition of a party under the EAJA.

CURE sought the denial of the permit requested by Watershed District. A contested case hearing was held under the authority of the DNR to determine if a permit should be granted. CURE appeared at the hearing and argued that feasible alternatives existed to the project. The permit was denied by the DNR, on the grounds advanced by CURE. CURE is a prevailing party for the purposes of the EAJA.

The Watershed District argues that Minn. Rule 1400.8401, subp. 1, excludes this matter from consideration under the EAJA. That rule excludes parties in contested cases conducted for "granting or renewing a license" from eligibility for an award under the EAJA. The rule is based on Minn. Stat. § 3.761, subp. 1 (1992) which excludes from the definition of "contested case" those proceedings which are held to "grant or renew a license." The matter at issue in this contested case was a permit to perform work in a public water.

No license was sought to be issued or renewed. The Watershed District's historical analysis of the term "license" is not applicable to the terms used in current administrative law. Neither the statute or the rule preclude CURE from seeking attorney's fees and costs under the EAJA in this proceeding.

It is not sufficient for a party to prevail in any contested case to qualify for attorney's fees under the EAJA. The contested case must be "by or against the state" for an award to be appropriate. "State" is defined as the state of Minnesota, a state agency, or an official of the state when acting in an official capacity. Minn. Stat. § 3.761, subd. 7 (1992). The definition does not include political subdivisions or watershed districts.

In this matter, a permit was sought by the Watershed District. The contested case came before the DNR, but the DNR did not take a position on whether the permit should be granted. The Watershed District was opposed to the hearing, believing the Commissioner already had adequate data to act on the application. CURE opposed the granting of the permit to the Watershed District. The DNR, through the Administrative Law Judge's Recommendation and the Commissioner's Order, assessed whether the permit should be granted. A watershed district is, at most, a political subdivision only in limited circumstances. Minn. Stat. § 103D.011, subd. 20 (1992).¹ To qualify as a state agency, a watershed district must have statewide jurisdiction.² Minn. Stat. § 14.02, subd. 2 (1992). The jurisdiction of a watershed district ends at its borders. The contested case was not brought "by or against the state" and the "by or against the state" element in the EAJA analysis is not met.

This issue was examined in another DNR permit contested case. See In Matter of the Application of Channel Drive Homeowners Association to Dredge Channel in an Inlet on the East Side of St. Alban's Bay of Lake Minnetonka the City of Greenwood, Findings of Fact, Conclusions of Law, and Order on Request for Attorney's Fees, at 6-7, OAH Docket No. 9-2000-5410-2 (Order issued February 17, 1993). In Channel Drive Homeowners, an intervenor opposed DNR issuance of a permit to do work in public waters. DNR was neutral during the hearing. While the EAJA application was rejected since the intervenor did not prevail, the ALJ in that case also found that the contested case was not brought "by or against the state." Id.

¹/ Where a political subdivision is carrying out a state agency function under a cooperative agreement, a political subdivision can stand in an agency relationship. See In Re the Revocation of the License of Jacalyn M. Rohn, Findings of Fact, Conclusions of Law, and Order on Request for Attorney's Fees

at 4-5, OAH Docket No. 9-1800-6720-2 (Order issued March 24, 1993). No such arrangement exists in this case.

2/ CURE points out that Minn. Stat. § 14.02, subd. 2, expressly includes the Capitol Area Architectural and Planning Board (the Board). Since the Board has less than state-wide jurisdiction, CURE argues that watershed districts also be included in the statutory definition of agency. The reason the Board is expressly included in the statute is that it does not fit the definition. Since only the Board is mentioned, there is no basis to conclude watershed districts were intended to be included in the definition of agency.

Another element in an EAJA analysis is the requirement that the state's position in the contested case be "not substantially justified." Minn. Stat. § 3.762(a). "Substantially justified" is defined as "[having] a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation or contested case proceeding." Minn. Stat. § 3.761, subd. 8. Merely because a nonstate party prevails does not meet this standard. Donovan Contracting v. Department of Transportation, *supra*, at 720-721; Minn. Rule 1400.8401, subp. 3(A)(2)(c). Instead, the state's position must be shown to have lacked a reasonable basis in law and fact. CURE did not establish that the DNR's position³ was not substantially justified.

CURE is a prevailing party under the EAJA. However, because the contested case in this matter was not brought by or against the State and because the State's position was not demonstrated to be "not substantially justified", CURE has not met all the elements to support and award of attorney's fees or costs. Therefore, CURE's Application must be denied.

A.W.K.

^{3/} CURE, which filed the petition for fees in this case, argues that it is not the DNR's position which was not "substantially justified", but rather the Watershed District's position. However, DNR is the only state agency from whom CURE could possibly collect fees. Therefore the Administrative Law Judge has analyzed the DNR's position to determine whether it was or was not substantially justified.

