

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF INVER GROVE HEIGHTS

City of Inver Grove Heights
MOTION
v Burnell Beermann, d/b/a
Beermann Services.

RULING ON

By letter Motion dated July 11, 1985, Burnell Beermann, d/b/a Beermann Services (Beermann Services) seeks an Order of the Administrative Law Judge determining that the above-captioned matter, being conducted pursuant to contract under Minn. Stat. 14.55 (1984), is a contested case proceeding subject to the Minnesota Administrative Procedures Act, Minn. Stat. Ch. 14 (1984), and the rules of the Office of Administrative Hearings. A ruling is also sought regarding the issues to be considered at the hearing. A telephonic Prehearing Conference regarding the Motion was held on July 15, 1985.

Appearances: Vance B. Grannis, Jr., Attorney at Law, 403 NorWEST Bank Building, 161 North Concord Street, South St. Paul, Minnesota 55075, appeared on behalf of the City of Inver Grove Heights; and Richard G. Nadler, Attorney at Law, 711 Degree of Honor Building, St. Paul, Minnesota 55101, appeared on behalf of Beermann Services.

The record with respect to the Motion closed on July 30, with the receipt by the Administrative Law Judge of the final memorandum of law.

Based upon the oral arguments of counsel, the memoranda of law submitted and all of the files and records herein, the Administrative Law Judge makes the following:

ORDER

1. Since the instant proceeding is not a contested case, as defined by Minn. Stat. 14.02, subd. 3 (1984), the contested case rules of the Office of Administrative Hearings have no application. The rights and duties of the parties are governed by the due process requirements of a fair hearing.

2. Since the proceeding is not a contested case as defined by the

Minnesota Administrative Procedures Act, the Chief Administrative Law Judge lacks statutory authority to issue subpoenas to compel the attendance of witnesses or for the purposes of discovery pursuant Minn. Stat. 14.51 (1984) A subpoena may be secured from the Chief Administrative Law Judge only upon a demonstration that the City of Inver Grove Heights possesses

statutory authority to issue a subpoena. If the City of Inver Grove Heights does not possess statutory authority to issue a subpoena, a subpoena may be sought from the Clerk of District Court for Dakota County, as provided for by Minn. Rule of Civil Procedure, 45.05.

3. Beermann Services may not assert in this proceeding any defense which constitutes a collateral attack on the validity of the Orders of the District Court for Dakota County, dated December 23, 1980 and July 15, 1981, which require Beermann Services to operate its business in conformance with the Land Use Agreement dated May 11, 1981.

Dated this ,I
 day of August, 1985.

BRUCE D. CAMPBELL
Administrative Law Judge

MEMORANDUM

The instant Motion, initially, requests that the Administrative Law Judge determine that the above-captioned proceeding is a contested case as defined by Minn. Stat. 14.02, subd. 3 (1984), and, therefore, that the rules of the Office of Administrative Hearings apply to the conduct of the case.

The contested case rules of the Office of Administrative Hearings apply only to contested cases as defined by Minn. Stat. 14.02, subd. 3 (1984). Minn. Rules, part 1400.5200. Moreover, the statutory authority of the Chief Administrative Law Judge to adopt procedural rules for the conduct of hearings relates only to rulemaking proceedings and statutorily defined contested case hearings. Minn. Stat. 14.51 (1984). A contested case is defined to include only proceedings before an agency. Minn. Stat. 14.02, subd. 3 (1984). An agency is defined as:

Any state office, board, commission, bureau, division, department, or tribunal, other than a judicial branch court, and the tax court, having a statewide jurisdiction and authorized by law to make rules or to adjudicate contested cases.

Minn. Stat. 14.02, subd. 2 (1984). Clearly, the city of Inver Grove

Heights is not an agency as defined by statute.

Beermann Services argues that Minn. Stat. 14.55 (1984), which authorizes the Office of Administrative Hearings to contract with governmental entities to conduct hearings, makes this proceeding a contested case subject to the rules of the Office of Administrative Hearings. Such an argument disregards the clear limitations on the authority of the Chief Administrative Law Judge to adopt procedural rules, the specific limitations contained in the contested

case rules of the Office of Administrative Hearings regarding their application and the statutory definition of a contested case. When a contract for the services of an Administrative Law Judge is executed by a governmental entity other than an agency defined by Minn. Stat. 14.02, subd. 2 (1984), the Administrative Law Judge may only exercise those powers possessed by the contracting governmental agency according to their procedures. See, *Whalen v. Minneapolis Special School District No. 1*, 245 N.W.2d 440, 444 (Minn. 1976).

That result is supported by practical considerations, The Minnesota Court has recognized that a variety of persons may assume the role of an independent hearing officer, including an administrative law judge, an arbitrator or a retired district court judge. *Schmidt v. Independent School District No. 1*, 349 N.W.2d 563 (Minn.App. 1984). There is no reason in law or policy why the substantive rights of the parties should depend on the identity of the hearing officer selected. Hence, the contested case rules of the Office of Administrative Hearings have no application to the instant case,

The Administrative Law Judge is unaware of any procedural rules for the conduct of hearings which have been adopted by the City of Inver Grove Heights. If such rules exist, they would govern the conduct of this proceeding.

In the absence of promulgated procedural rules, the rights of Beermann Services are governed by consideration of due process inherent in the judicial concept of a "fair hearing". The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The Courts have determined that the elements of a fair hearing include: adequate notice of the charges sufficiently in advance of the hearing to allow the preparation of a defense, *Hardy v. Independent School District No. 694*, 223 N.W.2d 124, 128 (1974), *Pacific Live Stock Co. v. Oregon Water Board*, 241 U.S. 440, 453 (1916); an opportunity to be heard regarding all claims that may validly be raised in the proceeding, *Pacific Live Stock Co. v. Oregon Water Board*, supra; an opportunity to hear the evidence introduced and to know the claims of the

opponent, Philadelphia Co. v. Securities and Exchange Commission, 175 F.2d 808, 817 (D.C. Cir. 1948), appeal dismissed, 337 U.S. 901 (1949); an opportunity to introduce evidence and produce witnesses in explanation or rebuttal, National Labor Relations Board v. Prettyman, 117 F.2d 786, 790 (6th Cir. 1941); the right to cross examine witnesses, Interstate Commerce Commission v. Louisville & Nashville Railroad Co., 227 U.S. 88, 93 (1913); the right to make argument to the hearing officer and to the final decision making authority, Philadelphia Co v. Securities and Exchange Commission, supra; having the ultimate decision of the board or officer governed by and based upon evidence adduced at the hearing, National Labor Relations Board v. Prettyman, supra; and to have the final decision supported by substantial evidence introduced at the hearing, Whitfield v. Hanges, 222 Fed. 745, 749 (8th Cir. 1915).

Beermann Services requests that the full discovery available under the rules of the Office of Administrative Hearings be available in the instant proceeding. Since, as has been previously determined, this hearing is not a contested case, as statutorily defined, and, therefore, not governed by the rules of the Office of Administrative Hearings, Minnesota Rules part 1400.6700 has no application to the instant case. Discovery, if available, must be under rules for such hearings promulgated by the City of Inver Grove Heights.

If no such rules have been promulgated, Beermann Services has no due process right to discovery. *Silverman v. Commodity Future Trading Commission*, 549 F.2d 28, 33 (7th Cir. 1977); *Frilette v. Kimberlin*, 508 F.2d 205, 208 (3rd Cir. 1974); *Cert. Denied*, 421 U.S. 980 (1975); *In Re Del Rio*, 400 Mich. 727, 256 N.W.3d 727 (1977), *appealed dismissed*, 434 U.S. 1029 (1978). Minnesota has specifically adopted the majority view. Assuming appropriate notice, there is no due process right to discovery. *Waller v. Powers Department Store*, 343 N.W.2d 655 (Minn. 1984).

It should be noted that the City has volunteered to disclose to Beermann Services those matter, upon which it will rely for evidence in this proceeding.

Beermann Services requests a ruling of the Administrative Law Judge as to the appropriate method of obtaining subpoenas for use in the above--captioned proceeding. Initially, it should be noted that the Administrative Law Judge has determined that Beermann services has no constitutional right to discovery and, in the absence of such right, a subpoena to obtain such discovery would be inappropriate. As to the general subject of the authority of the Office of Administrative Hearings to Issue subpoenas in a proceeding arising under Minn. Stat. 14.55 (1984) which is not a contested case as defined by statute, the Administrative Law Judge Concludes that the Chief Administrative Law Judge only has derivative and not direct authority to issue subpoenas. Minn. Stat.

14.51 limits the authority of the Chief Administrative Law Judge to issue subpoenas to those hearings involving contested cases, as statutorily defined, rulemaking proceedings and hearings in workers' compensation matters. As previously discussed, this hearing is not a contested case proceeding as statutorily defined. In such proceedings the Chief Administrative Law Judge would have by delegation that authority to issue subpoenas possessed by the governmental entity contracting for the services of the Office of Administrative Hearings. See, *FTC v. Gibson*, 460 F Ad 605 5th Cir. 1972); see also, *Whalen v. Independent School District No. 1*, *supra*.

There is no general statute giving a city council authority to issue subpoenas and the Adminsitrative Law Judge is unaware of any home rule provisi on authori zing the City Council of Iriver Grove fieights to Issue

subpoenas. Should such authority be documented, a subpoena, if otherwise appropriate, could be issued by the Chief Administrative Law Judge exercising derivative authority. In the absence of such authority in the City Council, a party may apply to the district court for a subpoena under Minn. Rules of Civil Procedure 45.05. State ex rel. Rockwell v. State Board of Education, 213 Minn. 184, 6 N.W.2d 251 (1942); Op. Atty. Gen., 144-B-24, Jan. 22, 1944; 2 Herr & Haydock, Minnesota Practice, 381 (1985)

Beermann Services also requests that the Administrative Law Judge delineate the issues that may be heard in the above-caotined proceeding. While specific issues are enumerated in the Motion, the Administrative Law Judge will not limit the hearing to certain defined issues. Issues any be raised, not now in the contemplation of the parties, which cannot be determined in advance of hearings. It is appropriate, however, for the Administrative Law Judge to determine that certain issues raised by Beermann Services are foreclosed by the Orders of the District Court for Dakota County, dated December 23, 1980 and July 15, 1981.

Initially, the City of Inver Grove Heights commenced a criminal action in County Court against Beermann Services for violation of a pre-existing conditional use permit. By way of compromise, the parties agreed to an injunction being entered in the District Court requiring Beermann Services to operate in a specified manner. On May 11, 1981, the parties executed a Land Use Agreement, a/k/a Conditional Use Permit, pursuant to which Beermann Services has conducted business. By a stipulated amendment to the Order dated December 23, 1980, the District Court for Dakota County, on July 15, 1981, entered a permanent injunction requiring Beermann Services to operate in accordance with the Land Use Agreement executed both by the city and Burnell Beermann. The Orders of the District Court, in the form of a continuing injunction, were consensual, remain in full force and effect and have not been subject either to direct attack or an application to the District Court for their modification.

The general principles applicable to the conclusiveness of judgments and decrees apply to a decree awarding or refusing an injunction. Home Savings and Loan Association v. Mount Zion Baptist Church, 139 Neb. 867, 299 N.W.2d 287 (1941). As a general principle of law, a party may not collaterally attack a judgment valid on its face. Fidelity and Deposit Co. of Maryland v. Ripelle, 298 Minn. 417, 216 N.W.2d 674 (1974); Northwest Holding Co. v. Evenson, 265 Minn. 562, 122 N.W.2d 596 (1963); Dean v. Rees, 208 Minn. 3.8, 292 N.W.2d 765 (1940).

The general legal principle that a final judgment or order, valid on its face, which grants an injunction is not subject to collateral attack, has been generally applied in the case law. Save-Mor Drugs, Bethesda, Inc. v. Upjohn Co., 225 Md. 187, 178 2d 223 (1961); Turco Products v. Hydrocarbon Chemicals, 18 N.J. 130, 113 A.2d 5 (1955); Brown v. State, 209 P.2d 715 (Okla.Crim.App. 1949); Harford County Education Association v. Board of Education of Harford County, 380 A.2d 1041 (Md.App. 1977).

The District Court has ordered, in the form of a continuing injunction, that Beermann Services conduct its business in accordance with the Land Use Agreement dated May 11 1981. That Order is a determination of the propriety

of the Agreement. While it is true that the validity of the Agreement was not litigated but came as the result of a settlement agreement, that consideration is not material. An order made upon an agreed statement of the facts or entered by consent is as binding upon the parties as if made after protracted litigation. In re Bush's Estate, 302 Minn. 188, 224 N.W.2d 489, 502 (1974); Pangalos v. Halpern 247 Minn. 80 76 N.W.2d 702, 706 (1956),

Beermann Services could have raised before the District Court the questions regarding the authority of the City Inver Grove Heights to exact the terms of the Land Use Agreement or the constitutionality of the Agreement as a zoning device. It chose not to do so and, under the applicable law, cannot now litigate those questions in a collateral attack on an existing injunction entered by a court of general jurisdiction.

In summary, Beermann Services is foreclosed from raising in this proceeding any issue regarding the legality of the Land Use Agreement dated June 11, 1981. As respects the Motion herein, the determination of the Administrative Law Judge precludes litigating issues regarding illegal spot zoning, whether the conditions of the Agreement are arbitrary and capricious,

whether specific enabling legislation allows the ('it), of Inver Grove Heights to promulgate such conditional use conditions and whether the policies and conditions of the Land Use Agreement violate the public policies of Dakota County, the Metropolitan Council or the laws of the state of Minnesota. Should Beermann Services desire to litigate such issues, they may do so before the Court that entered the permanent injunction, seeking a modification thereof. Collateral attack on the validity of the Agreement in this proceeding is not authorized.

While the Administrative Law Judge has determined that Beermann Services may not collaterally attack the validity of the Land Use Agreement dated May 11, 1981, on constitutional or other grounds in this proceeding, it may, however, raise the issue of selective enforcement. That issue goes not to the constitutionality of the underlying agreement or the authority of the City to enter into such an agreement, but to whether selective enforcement of similar agreements discriminates illegally against Beermann. The Administrative Law Judge does not determine by this ruling that such selective enforcement exists, that there are others similarly situated, or that the defense is not inappropriate as to Beermann Services because of the consensual entering into the Land Use Agreement. Such questions may be raised and determined at the hearing. Selective enforcement may rise to the level of prohibited activity. State v. Vadnais, 202 N.W.2d 657 (Minn. 1972); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Annotation, 4 ALR 3d 404.

Allowing Beermann Services to raise the issue of selective enforcement does not amount to a collateral attack on the orders of the District Court previously discussed. The defense of selective enforcement does not affect the validity of the Agreement, as determined by the District Court, but goes to the issue of whether the enforcement practices of the City with respect to similar agreements might deprive Beermann Services of equal protection of the laws. Nor does the general administrative principle prohibiting an Administrative Law Judge from declaring a statute or ordinance unconstitutional prohibit consideration of the issue herein. See, Jackson City Education Association v. Grass Lake Community, 291 N.W.2d 53, 55-56 (Mich.App. 1979). Consideration of the constitutional issue of selective enforcement is no different than, for example, the suppression of evidence in

an administrative proceeding as a consequence of an unreasonable search
or
seizure, in violation of constitutional rights.

B.D.C.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF INVER GROVE HEIGHTS

City of Inver Grove Heights ,

vs.
COMPLAINT

RULING ON MOTION
TO AMEND

Burnell Beermann, d/b/a Beermann
Services.

By written Motion dated August 23, 1985, the City of Inver Grove Heights seeks to amend the Allegations of Non-Compliance with the Land Use Agreement a/k/a Conditional Use Permit held by Burnell Beermann which is the subject of the above-captioned proceedings. By a Letter Memorandum dated September 6, 1985, the Respondent objected to the attempted amendment.

Based upon the Amended Allegations of Non-Compliance, the Letter Memorandum of Respondent and all the files and records herein, the Administrative Law Judge makes the following:

ORDER

The Motion to amend the Allegations of Non-Compliance in the above-captioned proceeding is granted and the Complaint against the Respondent is hereby amended to include the allegations contained in the Amended Allegations of Non-Compliance, dated August 23, 1985.

Dated this 18th day of September, 1985.

BRUCE D. CAMPBELL
Administrative Law Judge

MEMORANDUM

A party to an administrative proceeding in which the government seeks to restrict rights or privileges is entitled to notice of the claims so that a reasonable opportunity to respond is provided. State v. City of Bemidji, 298

Minn. 27, 212 N.W.2d 876 (1973). Notice of the government's claims, however, need not be given with the specificity required of a criminal complaint. When an amendment to the charges in a contested case proceeding is sought prior to the termination of the hearing, the underlying consideration is one of

fundamental fairness- that is, whether the opposing party has had a reasonable opportunity to know and prepare to litigate the additional claims. NLRB v. Mackay R. & T. Co., 304 U.S. 333, 350 (1938); NLRB v. Temple-Estex Inc., 579 F.2d 932, 936 (5th Cir. 1978). Professor Davis concludes that the interjection into a hearing of a new theory or additional charges does not violate the substantial rights of a party if that party has had adequate time to prepare a response to the additional charges and is not unfairly prejudiced by the amendment. Davis, Administrative Law Treatise, 14.11, p. 48 (1980). lee, Swift & Cc. v. United States, 393 F.2d 247 (7th Cir. 1968)., Free-Flow Packaging Corp. v. NLRB, 566 F.2d 1124 (9th Cir. 1978).

The Administrative Law Judge finds that the amendments herein pi-offered would not result in fundamental unfairness to the Respondent or deprive him of an opportunity to respond to the additional charges. The hearing is still in progress and the Respondent has not offered his tesrimony. He has a fu 1 l opportunity to respond to the additional charges. Moreover, cross-examination of the City's witnesses is available to the Respondent, The Administrative Law Judge, however, will consider the evidence of the public witness relating to the new charges only if she makes herself available for additional cross-examination should Respondent so desire.

The Administrative Law Judge has made evidentiary rulings with respect to certain items of evidence offered in the proceeding based on the charges then extant. He will reconsider such rulings in the light of the Amended Allegations of Non-Compliance when requested to do so by the parties at the continued hearings, Any reconsideration of evidentiary rulings will be guided by the degree to which the Respondent has had an opportunity to cross-examine the City's witnesses with respect to the items of evidence which were ruled not to be relevant to the original charges but now may come within the Amended Allegations of Non-Compliance.

B. D. C.

If

2 -