

RACE-87-003-AK
6-2600-1000-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA RACING COMMISSION

In the Matter of the
Occupational License
of Jack Haymes

ORDER DETERMINING
ENTITLEMENT TO
FEES AND EXPENSES

On October 2, 1987, Jack Haymes and Kathy W. Hutchinson d/b/a Hutchinson Racing Stables applied to the undersigned for an award of \$6,550.45 in attorneys' fees and expenses pursuant to the Equal Access to Justice Act, Minn. Stat. 3.761, et Seq. The Minnesota Racing Commission filed a response and objection to the application. No actual in-person hearing has been held in this matter. The record closed on December 16, 1987, upon receipt of the final submission.

Appearing on behalf of the Applicants herein was Robert J. Hennessey, of the firm of Larkin, Hoffman, Daly & Lindgren, Ltd., 1500 Northwestern Financial Center, 7900 Xerxes Avenue South, Bloomington, Minnesota 55431. Appearing on behalf of the Minnesota Racing Commission was Special Assistant Attorney General Mary B. Magnuson, 200 Ford Building, 117 University Avenue, St. Paul, Minnesota 55155. Based upon the record in the original contested case and the filings in connection with the application for fees, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Kathy Walsh Hutchinson is licensed by the Minnesota Racing Commission as an owner/trainer. She has been licensed since 1985. In addition to being licensed in Minnesota, she is also currently licensed in California. She has been involved with horse racing since 1947. As of December, 1986, she maintained 10 horses on the grounds of Santa Anita Park Racetrack in Arcadia, California, in addition to whatever other horses she had here in Minnesota. She employed three grooms, two hot walkers, an exercise boy, a blacksmith and an assistant trainer. In addition to those employees, she also has retained

various outside contractors, notably veterinarians.

2. Jack D. Haymes was employed by Kathy Hutchinson as her assistant trainer. He was first licensed by the Minnesota Racing Commission in 1986 as Hutchinson's assistant trainer.

3. Both in theory and in practice, Hutchinson was Haymes' employer. She directed his activities, particularly with regard to medication of horses. She directed which horses would get which medications. Although Haymes was the person who actually administered the medications, it was Hutchinson who controlled those activities.

4. On September 12, the Board of Stewards suspended Jack Haymes for 30 days, fined him \$500, and ordered him off all grounds controlled by the

Commission. On September 15, Haymes filed a Notice of Appeal and Request for a Stay with the Commission. Haymes (and Hutchinson, who had been similarly suspended and fined on August 28) appeared before a panel of the Commission on September 23. In his Notice of Appeal, Haymes argued that there were serious defects in the Commission's rules. That same argument was repeated to the Commission panel on September 23. On October 10, 1986, the Commission issued Statements of Charges, and subsequently issued Notices and Orders for Hearing against both Hutchinson and Haymes in connection with alleged medications of certain of Hutchinson's horses in violation of Commission rules.

5. As a result of the two contested cases being consolidated for purposes of the hearing, the participants behaved as if Hutchinson had intervened in the Haymes case, and Haymes had intervened in the Hutchinson case. Attorneys for both were allowed to cross-examine witnesses, and there was never a distinction made between them. Hutchinson has agreed to pay the bills for Haymes' litigation.

6. The charges against Haymes were amended so that at the time of the administrative hearing commenced in December of 1986, he was charged with two violations. First of all, Haymes was charged with permitting two horses to race with medications in their systems and being responsible for positive test samples pursuant to Minn. Rule pts. 7890.0130, subp. I and 7877.0170, subp. 2 C(2). Secondly, Haymes was charged with failing to guard two horses so as to prevent the administration of medication to them in violation of Minn. Rule pt. 7877.0170, subp. 2 C(3).

7. Following an administrative hearing before the undersigned, and a review by the Commission pursuant to Minn. Stat. 14.61 and 14.62, the Commission dismissed all charges against Jack Haymes by its Order of August 19, 1987.

8. There has not been any appeal from the Commission's Order dismissing the charges against Haymes.

9. On October 2, 1987, Haymes and Hutchinson applied for an award of attorneys' fees and expenses relating to the proceeding against Haymes. Attached thereto was an affidavit from the attorney who represented Haymes, Thomas F. Miley. The affidavit sets forth, in detail, fees for Miley and a clerk, as well as expenses for copying and delivery charges. The attorney fees are at the rate of \$75 per hour, while the clerk's fees are at the rate of \$35 per hour. These fees relate to activities from September 11, 1986 to September 30, 1987. They include various correspondence and meetings in preparation of the September 15 Notice of Appeal and the hearing before the Commission panel on September 23, 1986.

10. The violations herein were alleged to have occurred in August of 1986. In September, a panel of the Commission heard appeals from stewards suspensions and fines, and stayed actions of the stewards pending its own determination. In October of 1986, statements of charges were issued along with notices and orders for hearing. The hearing was held in December of 1986, with a final session in February 1987. On March 16, 1987, a bill was introduced in the Senate (S.F. 922) which was ultimately enacted and became Laws of Minnesota 1987, chapter 69. On March 19, a companion bill was introduced in the House. On March 23, the Commission published a proposed rule revision in the State Register. The proposed rules amended many of the

Commission's existing rules covering a variety of topics relating to wagering, stabling, licensure, the stewards, and other Matters. Included in the rule amendments, however, was an amendment which clarified the prohibition against horses carrying foreign substances in their bodies during a race. This was an amendment to Rule 7890.0110, which was one of the rules at issue in the Hutchinson/Haymes contested case hearing. The rule amendments became effective in June of 1987. See, 11 State Register 2201. In addition, Laws of Minnesota 1987, ch. 69, approved on May 7, 1987 with an effective date of May 8, 1987, required the Commission to adopt rules prohibiting a horse from carrying foreign substances in a race. Had that statute and that rule been in effect at the time of the alleged violations, they would have had a substantial impact upon the impact of the proceedings against Hutchinson and Haymes. They contain the prohibition which the Commission advocated at the contested case hearing.

11. The hearing, which took portions of four days, was primarily focused upon expert testimony from veterinarians and academicians regarding the state of current knowledge about inderal LA and its effect on horses, particularly how horses metabolize it. The parties were able to dispose of some uncontroverted issues by stipulation and agreement. Both parties avoided wasting time on uncontroverted matters and both proceeded in a professional manner. Neither party engaged in conduct that unduly or unreasonably protracted the final resolution of the matter.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Applicant herein has complied with all substantive and procedural requirements of law or rule so as to establish that the Administrative Law Judge does have jurisdiction in this matter. While the application for fees was not filed within 40 days from the date of the Commission's final disposition as required by Minn. Rule pt. 1400.8401, subp. 3, there is no 40-day requirement in the statute. The rule cannot remove jurisdiction from the ALJ or the agency. *Leisure Hills of Grand Rapids v. Levine*, 366 N.W.2d 302 (Minn. App. 1985), *rey. denied*.

2. As a result of the consolidation, Hutchinson is deemed to be "a person named or admitted as a party" in the Haymes case.

3. Haymes, individually, is not a "party" for purposes of the Equal Access to Justice Act. He is not an unincorporated business within the

meaning of subpart 6(a), nor is he a partner, officer, shareholder, member, or owner of one within the meaning of subdivision 6(b). Haymes, individually, may not receive fees or expenses pursuant to the statute.

4. Hutchinson is the owner of an unincorporated business. She meets the test for the number of employees and annual revenues set forth in Minn. Stat.

3.761, subd. 6(a).

5. The racing of horses was a business interest of Hutchinson, as opposed to any personal interest within the meaning of Minn. Rule pt. 1400.8401, subp. 3 A(1)(f). Hutchinson appeared as the owner of the racing business.

6. Hutchinson is liable to Haymes for the fees and expenses. Her assumption of them is not a mere gratuity, but rather reflects an underlying liability. The exception contained in Minn. Rule pt. 1400.8401, subp. 3 (A)(1)(d) does not exempt Hutchinson.

7. The \$75 per hour fee for the attorney, and \$35 per hour fee for the law clerk, as well as the expenses claimed, are all reasonable within the meaning of Minn. Stat. 3.761, subd. 5 and Minn. Rule pt. 1400.8401, subp. 2 B.

B. The position of the Racing Commission was substantially justified in that it had a reasonable basis in law and fact up to the Commission panel's meeting of September 23, at which point the Respondents' legal theory was fully presented. There was always a reasonable factual basis for the Commission's position. However, after the September 23 presentation, the Commission no longer had a reasonable legal basis for continuing the proceedings against Haymes. The Commission, therefore, was not substantially justified in continuing the proceedings against Haymes after September 23.

9. Haymes was a prevailing party within the meaning of Minn. Rule pt. 1400.8401, subp. 3 A(2).

10. The attached Memorandum is incorporated herein.

Based upon the foregoing, the Administrative Law Judge makes the following:

ORDER

That Kathy Hutchinson is entitled to an award of fees and expenses in the amount of \$4,614.70. This is the total of all attorneys' fees and expenses incurred by Jack Haymes after September 23, 1986.

Dated this 15th day of January, 1988.

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Any party dissatisfied with this determination may petition for leave to appeal to the Minnesota Court of Appeals pursuant to Minn. Stat. 3.764, subd. 2.

MEMORANDUM

This is the first application for an award of fees and expenses incurred in a contested case before the Office of Administrative Hearings pursuant to the Equal Access to Justice Act. This particular case raises two issues which deserve further explanation so that it is clear how they were decided. The

first is whether or not Hutchinson qualifies as a "party" so as to be eligible to collect fees for Haymes under the statute. The second is whether or not the State was "substantially justified" in proceeding against Haymes.

I.

Minn. Stat. 3.7b1, subd. 6, defines "party", in part, as follows:

- (a) Except as modified by paragraph (b), "party" means a person named or admitted as a party..... in a contested case proceeding..... and who is:
- (1) An unincorporated business, partnership, corporation, association, or organization, having not more than 50 employees at the time the contested case proceeding was initiated; and
- (2) An unincorporated business, partnership, corporation, association, or organization whose annual revenues did not exceed \$4,000,000 at the time the..... contested case proceeding was initiated.
- (b) "Party" also includes a partner, officer, shareholder, member or owner of an entity described in paragraph (a), clauses (1) and (2).

The Act also gives the Office of Administrative Hearings rulemaking authority to establish procedures for the submission and consideration of applications for awards of fees and expenses in contested case proceedings. Pursuant to that authority, the Office adopted a more definite definition of a "party" in Minn. Rule pt. 1400.8401, subp. 3. That rule, in pertinent part, provides as follows:

- (1) In determining who is an eligible party, the Judge shall consider the provisions of subpart 2, item C, and the following:
- (a) The annual revenues shall mean the party's annual gross revenue.
- (b) The annual revenue and the number of employees of the applicant and all that's affiliated shall be aggregated

- (c) * * *
- (d) An applicant who participates in a contested case on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.
- (e) * * *
- (f) An applicant who appears individually as a partner, officer, shareholder, member, or owner of an

entity eligible under the provisions of Minnesota Statutes, section 3.761, subd. 6, paragraph (a), clauses (1) and (2) may only assert a claim to the extent the entity which they own or control can assert such claim and may not assert a claim if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

The application of these provisions to the case of Hutchinson and her employee, Haymes, is ambiguous and doubtful. Based upon a review of the rule and the statute, it was determined that the words were not explicit and free from ambiguity and that, therefore, it was appropriate to consider legislative history and other factors in attempting to effectuate the intention of the Legislature. Minn. Stat. 645.1b.

The statute, alone, gives a clearer picture of Hutchinson's status than does the statute combined with the rule. Under the statute, an owner of an unincorporated business with fewer than 50 employees and annual revenues less than \$4,000,000 is deemed to be a "party" so long as the business is either named or admitted as a party. A threshold question is whether or not the business must be named, or merely the owner. A good example is that of Hutchinson. Hutchinson did business in her own name, without any corporation or other formal entity intervening. As such, she was an unincorporated business.

The matter is substantially complicated, however, by the rule. The rule adds two limitations to the statutory standard. The first is that an applicant participating in a contested case on behalf of one or more other persons or entities that would be ineligible is not itself eligible. To take a clear example, assume that an individual is engaged in a contested case with the State over the revocation of his driver's license. The revocation arises out of a purely personal event, such as an implied consent revocation. Assume further that the individual was the sole shareholder and officer of a corporation. It would be improper for the corporation to attempt to get involved in the revocation proceeding and then claim that it was entitled to an award for fees and expenses. The provision, in subpart 3 A(1)(d) would prevent that from happening. It states that an applicant (the corporation) who participates in a contested case on behalf of another person or entity that would be ineligible is not itself eligible. Since the individual would be ineligible, the corporation must be ineligible as well.

A second provision in the rule which clouds the determination of whether or not Hutchinson is an appropriate party for Haymes' fees is contained in paragraph (f) of the same subpart 3. It provides that an applicant who appears individually as an owner of an eligible entity may only assert a claim to the extent that the entity which they control can assert such a claim, and

further that the applicant may not assert a claim if the issues are related primarily to personal interests rather than to business interests. Again, an example might be appropriate.

It is very clear from the legislative history surrounding the adoption of the statute that the intent of the Legislature was to compensate small businesses for court costs and attorneys' fees when they prevailed against the State if the State's was not substantially justified. An example used during a Senate Judiciary Committee hearing on February 24, 1986 was the following:

Every once in a while you get a case where the agency has the wrong person, and so you get a notice that you are not in compliance, and let's just say this is A-Jax Cleaning Company, okay, and A-Jax Cleaning Company gets this notice and calls back and says, I'm not A-Jax Cleaning Company in Brown County, I'm A-Jax Cleaning Company in Redwood County, and you got the wrong person. And notwithstanding that the agency knew or should have known that they got the wrong person, they proceed to commence some disciplinary action. I guess what I'm trying to say is that I think this would be valuable in the case of what I consider administrative screw-ups, where the time and hassle going into the defense is going to be compensated by the State. I think it's a good bill because in some of the complaints that you get against government there will be some form of redress.

Statement of Senator Gene Merriam, included in partial transcript of proceedings of Senate Judiciary Committee on February 24, 1986, as prepared by the Administrative Law Committee of the Minnesota Attorney General's Office and submitted on October 27, 1986 to Administrative Law Judge Melvin B. Goldberg, as Ex. C, p. 2.

The example given by Senator Merriam is an obvious "screw-up". But the Act was intended to cover less obvious situations. There is currently a statute, Minn. Stat. 549.21, which allows for the award of costs, disbursements and reasonable attorney's fees in the case of bad faith, frivolous, delaying, harassing, or fraudulent claims. The EAJA was intended to go beyond "bad faith" cases. As the primary sponsor of the Equal Access to Justice Act stated, the bill is based upon the federal Equal Access to Justice Law (28 U.S.C. 2412), which contains the phrase "substantially justified". In testimony before the House Judiciary Committee on February 11, 1986 he explained:

The "substantially justified" is the doctrine or the clause which is sort of the key to the bill, and those who framed this legislation originally in Washington tried to make it into sort of a reasonableness standard that would sort of cut down the middle between giving the small business a reimbursement for court costs and attorneys' fees whenever they prevail, and to automatically siding with the State, only giving reimbursement when the State reacted in bad faith. So it's sort of a reasonableness standard that tries to cut down the middle.

Submission of Administrative Law Committee of the Minnesota Attorney General's Office, Ex. A, p. 1., Testimony of Mike Hickey, representing the National Federation of Independent Business. See also Ex. E, p. 1, distributed to the Senate Judiciary Committee on February 17, 1986.

The federal Act defines "party" quite differently than the Minnesota law.

Put briefly, the federal definition is much simpler than the state's. Under the federal law, 28 U.S.C. 2412 (d)(2)(B), "Party" means:

- (i) an individual whose net worth did not exceed
\$2,000,000 . . . or

any owner of an unincorporated business, or any partnership, corporation . . . the net worth of which did not exceed \$7,000,000..... and which had not more than 500 employees . . .

Explaining the difference, before the various committees of the Minnesota Legislature, was a challenge for both Mr. Hickey and the legislative sponsors. For example, before the House Judiciary Committee on February 11, 1986, the following colloquy occurred:

REPRESENTATIVE BISHOP: I looked through a previous draft of this bill when it was before the House last year and have read a lot of other material, and in each case I found that while you've covered corporations and partnerships, and individuals who had exactly the same business coverage and had over a million dollars of net worth . . . would have no equal justice I knew some people who would be covered because they were doing business as [Subchapter S] corporations, whereas if they were doing business as individuals with exactly the same business and same number of employees and same number of net worth, they wouldn't. Can you answer that part?

HICKEY: Glad to answer..... Representative Bishop. I to concur with your point on individuals. It would be nice to cover them under the Act. We just feel, this year, with be the potential budgetary impact of the legislation and in think light of the situation here with the State budget, we'd better just to have small business owners covered. I think the concept works just as well for individuals, too, but I think the State's going to have a lot more exposure, and I feel for individuals that are aggrieved by the State just cover as I do for small business owners, but we just felt it better to start off with a small undertaking and just small business owners.

In the Senate Judiciary Committee on February 24, 1986, the following occurred:

WILLET: As I indicated, the subcommittee did a substantial amount of work on the original proposal and I believe has

fine-tuned it now to the extent that I believe it would remove the possibility of frivolous cases. I think that was the concern and nobody certainly wants that to happen Under subdivision 5, the parties eligible to recover would include the sole owner of an unincorporated business or other business entities with a maximal 50 employees. And that'S to keep it down to the small

business

and that's the ones we are concerned about. Individuals, an individual would not be eligible to recover. That was handled by the subcommittee too because there was concern about just having frivolous cases by individuals just pouring into the court and that's not the intent of this proposal

CHAIRMAN: Senator Willet, what's the justification for doing this for small business but not for individuals who might have problems with the State and end up winning their case but having high attorney fees?

WILLET: Well, Mr. Chairman, the main thrust here, and I suppose the argument there could be to include those, but the main reason was, is there would be, and we couldn't think of any cases where that would be the case. Most cases would come in terms of safety regulations or environmental questions with maybe developers or expanding businesses. And the cases in terms of individuals would be either slight or nonexistent that we could point to. There may be some that I did not think about, but I couldn't put my finger on any that would be substantial that you would probably want to consider. And the concern by the subcommittee was that they did not want to load up the docket with just maybe some frivolous action in the court.

POGEMILLER: Mr. Chairman, Senator Sieloff, I am having trouble following all this but are, have you in any way, and I am just going to have to take your word for this, have you in any way changed the criteria that the businesses that would be covered by this would be unincorporated business with less than 50 employees and less than four million in revenue?

SIFLOFF: No, I have only changed the standing to invoke the Act by adding to that not only the business itself, the corporation, but also the persons who, like the owner of the corporation, the little corporation, or the member of the nonprofit organization or somebody who is impacted, because what happens in these things is that they are dragged into these cases personally and should have standing along with the entity itself.

POGEMILLER: Senator Sieloff, all of these changes you made here, and again I haven't had time to go through them all, in no way broadens coverage of this from the way it came out of subcommittee?

SIELOFF: No. No. You still have to have no more than 50 employees or no more than \$4 million. It's the same standards.

COUNSEL: I think it substantively is the same. It takes out the language talking about. It doesn't include a person suing or being sued as an individual but I think with the type, as you say, it has to be one or two and it's the same standards. You know, under 50 employees or/and under \$4 million. That's the controlling language.

When it came time to adopt the Office of Administrative Hearings' rule, there was a great deal of comment on the proposed definition of a "party", both at the rulemaking hearing, and in written submissions. The Administrative Law Committee of the Minnesota Attorney General's Office was particularly vigorous in urging a narrow construction of the Act, one that would limit the amount of any claims paid out. On the other hand, licensed professionals such as a medical doctor, a psychiatric institute, and attorneys representing licensed professionals, urged a broad reading of the Act so that they would be allowed to collect if they prevailed in disciplinary proceedings and showed the State was not substantially justified. The Administrative Law Judge who conducted that hearing recognized the problem and encouraged debate and submission on it. He then prepared his Report, which described the proposed definition of an eligible "party" as the rule which generated the most comment. He noted the following:

The most troublesome argument raised by several parties in oral and written testimony concerns the limitations that must be put on the principle of including the licensed professional within the coverage of EAJA. On the one hand, there is the professional who has no employees and simply bills for his time . . . who therefore meets any reasonable definition of an "unincorporated business." On the other hand, there is the licensed professional who must work for another person or entity (the dental assistant who must work under the supervision of a licensed dentist). The latter person is clearly not included within the meaning of the EAJA which is to apply only to an "unincorporated business . . . [citing from the statute]."

The legislative history is not conclusive. There is a clear legislative intent to limit the applicability of the Act to small businesses, and not provide coverage to all individuals who prevail in proceedings involving the State. The limitation was made primarily to limit the State's potential exposure. This is a reasonable limitation given the Legislature's lack of experience with claims under EAJA. However, the applicability of the term "unincorporated business" to the professionally-licensed, sole practitioner was not directly addressed by the Legislature (at least as evidenced by the materials submitted in this proceeding).

The OAH takes the position that if an applicant for fees can establish that he/she is a "Person" that meets the unincorporated business definition of subd. 6, as well as the rest of the Act, then he/she is a party entitled to compensation. That position is reasonable given the legislation There are many arguments that can be advanced for distinguishing between the self-employed licensee and the employee-licensee. There may also be situations where a professional licensee cannot meet the definition of an unincorporated business. These arguments are best made on an individual basis to an administrative

law judge or a court. To avoid excessive litigation the Legislature may wish to clarify the EAJA. The OAH rules are the best that can be drafted under the existing legislation given the variety of factual circumstances that must be covered.

The position adopted by the Administrative Law Judge in approving the proposed rules is essentially the same conclusion as was reached by the Attorney General's Administrative Law Committee. In its initial post-hearing submission, the Committee recognized that the distinction between a business and an individual created a problem, and urged the Administrative Law Judge to avoid deciding it one way or the other. The Committee stated:

The rules which are proposed do not specifically bar EAJA claims by licensees who have been involved in disciplinary proceedings. If licensees who are involved in such cases wish to assert claims under EAJA, they are free to do so. If such claims are filed, the parties can then litigate the issue of the applicability of EAJA to that specific licensee and proceeding. This is clearly the best means by which to resolve these difficult issues. The question of whether . . . any particular person is an "unincorporated business," is best resolved in the context of a concrete factual situation which has been proven in a contested case hearing, not in the abstract setting of a rulemaking proceeding.

A review of the legislative history of both the statutory adoption and the rulemaking hearing convinces me that the distinction between a business and an individual was intended to be a distinction based upon the type of activity that was at issue. If it was a business activity, it is covered by the statute, but if it is a purely personal activity, then it is not. The distinction will be difficult to draw in some cases, but it is exactly the kind of distinction that must be drawn by taxpayers, tax advisors and tax collectors every day when taxpayers attempt to deduct the cost of hobbies, claiming that they are really businesses. Based upon all the facts and circumstances, a decision must be made as to whether the activities engaged in are primarily for profit, or primarily for pleasure. That is the distinction that was intended to be drawn in the EAJA by the Legislature. The rule adopted by the Office is ambiguous, and Administrative Law Judge Goldberg candidly acknowledged the ambiguity and acknowledged his willingness to defer resolution of the problem to later case-by-case determinations in the context of concrete fact situations.

It is unquestioned that the horseracing business, at least as practiced by Kathy Hutchinson, was a business. It was not a hobby or a personal interest. It was how she made her livelihood, and was clearly a profit-oriented operation. Based on the analysis set forth above, it is concluded that the horseracing business of Kathy Hutchinson qualifies as an "unincorporated business" that was intended to be covered under EAJA to the same extent as if she had incorporated it.

A more difficult question arises, however, out of the fact that the expenses and attorneys' fees were incurred to defend Jack Haymes, not Kathy Hutchinson. Haymes was clearly an employee of Hutchinson, but was also

licensed separately. The applicable rule of the Racing Commission required that assistant trainers must be employed by a licensed trainer. Minn. Rule pt. 7877.0130, subp. 3 C. The immediate analogy is that of a dentist and a dental assistant, as proposed by Administrative Law Judge Goldberg, who stated in his Report that the dental assistant is clearly not included within the meaning of an "unincorporated business". However, it is believed that Judge Goldberg was referring to a dental assistant who was charged with some wrongdoing that had nothing to do with the dentist. For example, a dental assistant who is employed by a dentist and who assaults a patient and is subject to a license revocation proceeding is involved in that proceeding as a result of his or her own intentional act that (presumably) was not directed, authorized or condoned by the licensed dentist. It was beyond the scope of her employment. If the dental assistant were fined \$500 by the licensing board, clearly the licensed dentist would have no responsibility to pay that fine on behalf of the assistant. It is the assistant who was responsible for the assault, and who must pay the fine. The assistant is not an "unincorporated business", and thus would not be eligible to recover under the Act.

On the other hand, however, what of the dental assistant who is merely following the orders of the employer, the licensed dentist, without any intent or knowledge of wrongdoing, but who still becomes embroiled in a disciplinary proceeding? Assume that the licensed dentist directed the assistant to take certain actions which both believed were perfectly legal and appropriate. Does that change the outcome of the EAJA's applicability?

The general rule, both in Minnesota and elsewhere, is that a principal must reimburse an agent for the necessary costs of litigation, including attorneys' fees, brought against the agent by third persons because of the agent's acts done in the furtherance of the agency business. 3 C.J.S., Agency 322.

A principal is subject to a duty to exonerate an agent who is not barred by the illegality of his conduct to indemnify him for expenses of defending actions by third persons brought because of the agent's authorized conduct, such actions being unfounded but not brought in bad faith

Restatement_2d_of Agency, 439. The economic rationale for this common-law rule was set forth by Judge Learned Hand in *Admiral Oriental Lines v. United States*, 86 F.2d 201 (2d Cir. 1936) as:

The venture is the principals as the profits will be his. So should the expenses. Since by hypothesis the agent's outlay is not due to his mismanagement, it should be regarded only as a loss, unexpected it is true, but inextricably interwoven with the enterprise."

86 F.2d at 202. In other words, the principal must bear the costs of litigation, even the agent's separate costs of litigation, just as the principal must bear other costs of the business.

A variant on the standard occurs, however, when both the principal and the agent are sued together. In such a case, if the principal retains competent attorneys to defend the action against both the principal and the agent, the

agent may not be reimbursed for the cost of independent attorneys, so long as there were no antagonistic defenses requiring separate representation, and the principal's attorneys were adequately defending the agent. For example, in the case of Adams v. North Range Iron-Co., 191 Minn. 55, 253 N. W. 3 (1934), a corporation owned a mining lease on land in Crow Wing County. Plaintiff Adams was hired as the corporation's managing officer. The corporation sublet the leased land to a third party to mine ore upon it. In negotiating the sublease, Plaintiff Adams acted for the corporation, with the knowledge and approval of its board of directors. Later, the sublessee sued the company, Adams, and the two co-owners of the company, charging that it had been fraudulently induced to sublease the land. The company employed attorneys to defend the lawsuit on behalf of all of the defendants. The sublessee obtained a verdict against the company and Adams for a great deal of money. Adams happened to own substantial assets of his own, and feared that if the company could not pay the judgment, he would be forced to. He elected to consult other attorneys and employed them to appeal the judgment. Adams' attorneys and the company's attorneys worked together and prepared a joint appeal brief. They obtained a reversal of the judgment in the Circuit Court of Appeals. Adams then sought indemnification from the company for his attorneys' fees and expenses. The company denied the claim and Adams sued. The trial court found for the company, and Adams appealed to the Minnesota Supreme Court. The Minnesota Supreme Court affirmed the trial court, on the ground that the company had performed its obligation to Adams by hiring competent counsel to represent both it and him. The court stated that Adams was the sole officer of the company, and if there had been any misrepresentation made during negotiations, the misrepresentation was made by Adams. There was no allegation that any other person participated in the negotiations, or that the company did anything to expose itself to liability other than what was done through Adams. The Court said there were no facts to base a claim of a divergence of interests or antagonistic positions between the two. The court was satisfied that under the facts of the case, both Adams and the company would either stand or fall together. The Supreme Court held that Adams was not entitled to reimbursement for the fees of his separate attorneys.

In the Admiral Oriental Lines case, supra, judge Hand stated that where the principal and agent are both-sued and where the agent had a different

interest to protect that was not necessarily coincident with the principal's, then the agent is entitled to defend its separate interest with separate attorneys and is also entitled to indemnification from the principal for those attorneys' fees.

A more recent case analyzing both the Adams and Admiral Oriental cases stated the rule thusly:

Together, these cases stand for the proposition that where the principal defends itself, the agent is not eligible for indemnification unless the principal's defense leaves the agent's interests unprotected.

Basmajian v. Christie, Manson & Woods, 629 F. Supp. 995 (S.D.N.Y. 1986).

In the case of *Hutchinson and Haymes*, different attorneys were used because of the potential for a conflict or divergence of interests between the two. Although that divergence never ripened into open disagreement or an

adversary relationship, Haymes was separately represented because Hutchinson's attorneys could not defend his interests if they came into conflict with Hutchinson's interests. Under such a scenario, the case law holds that Haymes is entitled to reimbursement for his reasonable attorneys' fees by Hutchinson's business. Contrary to the Commission's Memorandum in Response and Objecting to Application for Expenses and Attorney Fees, Hutchinson's payment was not a "gratuitous gesture". So long as they had divergent interests warranting separate attorneys, she was obligated to reimburse Haymes for reasonable costs of defense, including attorneys' fees.

II.

The rules adopted to implement the Equal Access to Justice Act specify, in a number of places, that a prevailing party is not entitled to reimbursement solely because the agency did not prevail in the contested case. See Minn. Rule pt. 1400.8401, subp. 3 A(2)(c) and subp. 3 C. Compensation is limited to those cases where the applicant shows that the State's position was not "substantially justified", meaning that it did not have a reasonable basis in law and fact, based on the totality of the circumstances prior to and during the contested case proceeding.

It is concluded that prior to the September 23, 1986 Commission hearing, the Commission was proceeding on a reasonable basis -- that the horses had been given medication, that they had raced with medication in their systems, and that numerous rules had been violated by Hutchinson, Haymes, or both. But after the filing of the September 15 Notice of Appeal and after the September 23 presentation to the Commission panel, the Commission did not have a reasonable legal basis for continuing to proceed against Haymes. After that date, the Commission's position was not "substantially justified".

III.

As noted in Conclusion 1, there is a question regarding the validity of the Office's rule setting a 40-day time limit for the filing of an application for fees.

The rule at issue, Minn. Rule pt. 1400.8401, subp. 3, provides that the application must be filed within 40 days of an agency's final decision.

In this case, the Commission's final decision was issued on August 19. The application for fees was filed on October 2, which is 44 days later.

In the case of Leisure Hills of Grand Rapids v. Levine, 366 N.W.2d 302 (Minn. App. 1985), rev. denied, the Court held that a similar rule was invalid to limit the jurisdiction of an agency because the time limit for filing an appeal was not in a statute -- it was only in a rule. The Court reasoned that the limits of the Agency's jurisdiction had to be set by the Legislature, and that the Agency could not limit its own jurisdiction by rule.

The same factual situation exists here -- there is no time limit in the statute. The 40-day limit is only in a rule. The rule, therefore, is ineffective to bar this claim.

A. W. K.