ORIGINAL

20030156

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20030156

North Dakota Department of Human Services,

Appellee,

v

Central Personnel Division, Office of Management and Budget; Office of Administrative Hearings

Appellees,

Thomas P. Ryan,

Appellant.

****

BRIEF OF APPELLANT THOMAS P. RYAN

****

Appeal from Judgment dated March 31, 2003
Burleigh County District Court Civil No. 08-02-C-02638
The Honorable Burt L. Riskedahl Presiding

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STATEMENT OF THE CASE

This case is an appeal from a final order of the Central Personnel Division dated August 7, 2002. On August 7, 2002 Administrative Law Judge (ALJ) Bonny Fetch, of the Office of Administrative Hearings (OAH), issued her Findings of Fact, Conclusions of Law and Order. App. 62. The Order of ALJ Fetch was a final decision of the Central Personnel Division, pursuant to the authority granted by N.D.C.C. § 54-44.3-12.2. App. 71. The North Dakota Department of Human Services ("Human Services") filed with the district court Notice of Appeal and Specifications of Error, dated September 5, 2002. App. 2. On September 6, 2002, Thomas P. Ryan served his Notice of Cross-Appeal and Specifications of Error. App. 4. The Certificate of Record on Appeal to district court was filed by Human Services on October 28, 2002. Doc. No. 9.

District Court Judge Burt L. Riskedahl issued his Memorandum Opinion on March 7, 2003, holding in favor of Human Services and concluding on "jurisdictional grounds" (App. 81) that: (1) ". . . jurisdiction did not lie for reviewing the Department's decision in not rehiring Mr. Ryan, because he was not a 'non-probationary employee,' subject to the protections of N.D.C.C. [§] 54-44.3-12.2"; and (2) "Further, an appeal related to reduction in force may be made only on the basis that factors required by Administrative Code Section 4-07-11-03 were not followed, or that the reduction in force was conducted in a discriminatory manner, neither of

which have application in this instance." App. 80. The Order for judgment of the district court was issued on March 28, 2003 (App. 82). Judgment entered on March 31, 2003 (App. 83) with Notice of Entry of Judgment (App. 84) dated April 3, 2003. Ryan timely filed Notice of Appeal on March 30, 2003 to the North Dakota Supreme Court. App. 85.

STATEMENT OF THE FACTS

Thomas P. Ryan was employed by Human Services for over 15 years. CR 115/4-5. Ryan was an addiction counselor at the Northwest Human Service Center in Williston, North Dakota. Id. Ryan's employment was terminated through a reduction-in-force procedure on December 1, 2000. See, e.g., CR 309. Ryan subsequently, on December 22, 2000 (and at all times relevant thereafter) was reemployed by Human Services in an unclassified, temporary part-time position as a community home counselor. App. 62.

Human Services subsequently advertised vacancies for the positions of "Mental Illness Case Manager II", (with a closing date of July 13, 2001) and Human Relations Counselor (with a closing date of September 7, 2001). App. 11-12 and App. 13, respectively. Ryan filed for both positions. CR 154-55 and 157-58.

As correctly concluded by ALJ Fetch (Conclusion 4; App. 72):

"4. N.D. Admin. Code § 40-07-11-07[1] pertains to reemployment following a reduction-in-force. The rule provides:

> An individual who has lost employment due to a reduction-in-force must be offered reemployment by the former employing agency if the following conditions are present:
>
> 1. A position vacancy occurs in the former employing agency, and the appointing authority decides to fill the vacancy by appointing someone other than a current employee.
>
> 2. **The individual meets the minimum qualifications established for the particular position.**
>
> 3. No more than one year has elapsed since the individual lost employment due to the reduction-in-force.

There is no dispute over subsections 1 and 3. The dispute in this case centers on subsection 2, and the question whether Mr. Ryan met the **minimum qualifications established** for the positions of mental illness case manager and human relations counselor advertised by Northwest Human Service Center." Id.; emphasis added.

The specific "Minimum Qualifications" set forth in each job announcement for the respective positions are as follows:

- Mental Illness Case Manager II:

> "Requires a Bachelor's degree in social work, psychology, counseling, nursing or human resource management (human service track) and two years experience working with special population groups and in a direct care setting, **OR** a Master's degree in one of the fields listed above." App. 11; emphasis in original;

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[1]N.D. Admin. Code ch. 4-07-11, reduction-in-force, is Attachment A to this brief.

- Human Relations Counselor:

> "Requires a Bachelor's degree in social work, counseling, nursing or psychology and two years of professional therapeutic counseling experience; **OR** a Master's degree in one of the above fields." App. 13; emphasis in original.

On July 11, 2001, the Merit System Manager[2] for Human Services, Marshall Flagg, found as follows **regarding the Mental Illness Case Manager II position:**

> "We have determined that the applicant [Ryan] meets requirements and is on the register effective 7/11/01.
>
> Determination is based upon **minimum qualifications** as published in the job announcement for this vacancy." App. 14; emphasis added.

On September 4, 2001, Merit System Manager Flagg made the exact same determination **with regard to the Human Relations Counselor position**, i.e., that Ryan met the ". . . **minimum qualifications** as published in the job announcement for this vacancy." App. 15; emphasis added.

Ryan, despite meeting the "minimum qualifications established" for the two positions, was subsequently interviewed for both positions but was not hired for either of them. CR 159 ("Thank you for taking the time to interview on both occasions. Another applicant was offered the position and accepted") and CR 160 ("Thank you

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[2]Flagg's title as he stated it when questioned at the formal hearing. CR 87/5. He was listed as the "Human Resource Director" on both of the "Employee Application Review" forms. See App. 14 and 15.

for interviewing for the position of Human Relations Counselor at Northwest Human Service Center. The position was offered to and accepted by another applicant").

Ryan filed employee grievances regarding both denials of reemployment. See Ryan grievance forms dated August 24, 2001 and September 26, 2001, at App. 16 and 28, respectively.

The Executive Director of Human Services, Carol Olson, designated Human Resource Director, Ron Leingang, to review Ryan's grievances and render decisions on both. E.g., CR 144. Leingang denied both grievances (CR 144-47 and CR 148-52, respectively) reasoning that: (1) the reemployment mandates of N.D. Admin. Code § 4-07-11-07 no longer applied to Ryan as he had accepted employment as a community home counselor; and (2) that Ryan "did not meet the qualifications" for either the mental illness case manager position (CR 146) or the human relations counselor position (CR 151). CR 144-47 and CR 148-52.

Therefore, despite Ryan having met the "minimum qualifications established" for the two job openings, as those "minimum qualifications" were specifically listed in the job announcements, Human Resource Director Leingang, when asked why he denied Ryan's grievance, responded:

> "The basis for my denial was that the staff at the Northwest Human Service Center and Marilyn [Rudolph, Regional Director, Northwest Human Service Center (CR 57/4-5)] did not feel that he had the knowledge, skills, and ability as demonstrated in the interview to successfully do the work assigned to this position." CR 78/1-3.

Leingang did not dispute the fact that Ryan met the ". . . minimum qualifications as set out by the appointed authority and screened by Flagg . . ." CR 81/4-23. Jeri Weiss, the Extended Care Coordinator at Northwest Human Service Center (who participated in the interviews of Ryan (CR 97/4-20)) subsequently attempted to be explain this anomaly as follows:

> "Runge: So everything that's talked about in the interview is considered a minimum qualification?
>
> Weiss: We are looking for the - yes, we are looking for the minimum qualifications in the job. **And then over that, superior qualifications.**" CR 103/6-9; emphasis added.

Flagg admitted that the "initial screening requirements" are, in fact, the "minimum qualifications" for the job. CR 93/5-7. Flagg also explained that once Ryan, as an "internal applicant" met the "minimum qualifications" for the position, he was placed on the hiring list on a "pass/fail" basis, rather than given a numerical score required of outside applicants. Therefore, the internal applicants are ". . . listed at the top of the certificate of eligibles." CR 93/5 through CR 94/4.

Moreover Ryan was never informed at any time that he did not meet the "minimum qualifications" for the positions:

> "Runge: And Mr. Ryan wasn't notified by you or anyone in your department that he didn't meet minimum qualifications. Isn't that correct?
>
> Flagg: Not from the Human Resource Division, no." CR 94/5-7.

Finally, Flagg was asked by the Human Services' attorney:

> "Are the minimum qualifications on those announcements typically listed as they are in Exhibits 1 and 2 [job announcements for Mental Illness Case Manager II and Human Relations Coordinator, respectively; App. 11 and 13]?
>
> Flagg: Yes, they are." CR 95/8/10.

Upon Ryan's appeal to the Central Personal Division, Central Personnel made requests to OAH to designate an ALJ to preside over Ryan's appeals (CR 258 and 320) concerning his not being hired for the Case Manager II and Human Relations Counselor positions. ALJ Fetch was assigned to hear both appeals, and she consolidated them into one hearing. CR 161-62.

ALJ Fetch ruled **against** Human Services on two prehearing issues:

First, Human Services urged that N.D. Admin. Code § 4-07-20.1-07 ("Limitations for reduction-in-force appeal") did not authorize Ryan's appeal. Judge Fetch ruled that, "The administrative rule [§ 4-07-20.1-07] which limits reduction-in-force appeals to a determination whether certain factors were followed in conducting the reduction-in-force attempts to constrict the scope of the statute. Judge Fetch determined that the statute is both mandatory and controlling, and must therefore be applied over the administrative rule." App. 63-64.

The second issue, "... was whether Mr. Ryan's employment in the community home counselor position constitutes reemployment under N.D. Admin. Code § 4-07-11-07, thereby precluding any further entitlement to reemployment under that rule."

App. 64. The parties asked for a ruling on the issue and, on November 16, 2001, "Judge Fetch ruled that Mr. Ryan was a regular employee in a classified position at the time he lost employment due to a reduction-in-force, consequently, his employment in a temporary, unclassified position does not constitute reemployment under N.D. Admin. Code § 4-07-11-07." App. 64-65.

On November 21, 2001, Human Services made "Application for Writ of Prohibition" in district court (CR 219-233). On January 28, 2002, District Judge Donald L. Jorgensen, issued an order denying Human Services' Application for Writ of Prohibition. CR 193-94 and see App. 66.

An evidentiary hearing was held on April 23, 2002. App. 67. ALJ Fetch determined that, "The issue to be considered and decided upon [at] the hearing is whether the agency's failure to reemploy Mr. Ryan in the positions of Mental Illness Case Manager . . . and Human Relations Counselor . . . is in violation of N.D. Admin. Code § 4-07-11-07, administrative rule pertaining to reemployment following a reduction-in-force." App. 67.

Despite ruling for Ryan on both procedural issues raised by Human Services, ALJ Fetch found in favor of Human Services, on the merits, by concluding as follows:

> "5. The preponderance of the evidence presented at the hearing shows that **while Mr. Ryan met the initial minimum qualifications** that were stated on the job announcements for the positions of mental illness case manager and human relations counselor, the interviews

> conducted for those positions revealed that he did not possess the required knowledges (sic) and skills necessary to perform the job of either mental illness case manager or human relations counselor, and thus, **he lacked the minimum** qualifications for those positions." App. 72-73 (Conclusion 5; emphasis added).

On its appeal to district court, Human Services' sole specification of error was that the ALJ ". . .ignored and declared void an administrative rule which limited her jurisdiction. In doing so the ALJ acted in excess of her jurisdiction." App. 2. This specification of error is with respect to ALJ Fetch's conclusion that N.D.C.C. § 54-44.3-12.2 ". . . is both mandatory and controlling, and must therefore be applied over the administrative rule [N.D. Admin. Code § 4-07-20.1-07]." App. 71.

In his "Notice of Cross-Appeal and Specifications of Error", Ryan noted, *inter alia*, that, "The final decision of ALJ Fetch on behalf of the Central Personnel Division is not in accordance with the law of North Dakota because: . . . A. ALJ Fetch misapprehended and misconstrued N.D. Admin. Code § 4-07-11-07 pertaining to reemployment following a reduction in force - - a regulation whose unambiguous terms require that Ryan be reemployed to a position in the Department where he met the '. . . minimum qualifications established for the particular position.'" App. 4-5.

Ryan also noted that, as a matter of law, ALJ Fetch erred in misreliance upon Dyer v. N.D. Department of Human Services, 498 N.W.2d 160, 165 (N.D. 1993) and that, allowing Human Services ". . . at its whim and caprice, to determine 'minimum qualifications' after its own Merit System Manager previously found Ryan met

'minimum qualifications' violates the '. . . intent of the State of North Dakota to assure fair and equitable treatment and promote harmony between and among all classified employees . . .' as specifically mandated by the Central Personnel System (see N.D.C.C. § 54-44.3-12.2)." App. 5; emphasis in original. Alternatively, Ryan specified that ". . . ALJ Fetch's order must be found in violation of Ryan's constitutional rights of due process." App. 5.

Ryan also affirmatively stated that Human Services, and ALJ Fetch on behalf of the Central Personnel Division, ". . . acted without substantial justification because, as a matter of law, Ryan was entitled to reinstatement under the reduction-in-force regulation (N.D. Admin. Code § 4-07-11-07) and, therefore, the 'court must award . . . reasonable attorney's fees and costs . . . accordingly.' N.D.C.C. § 28-32-50(1)." App. 6.

Despite the fact that the issue was not preserved in Human Services' Specification of Error. District Court Judge Riskedahl stated, "It is this Court's conclusion that the appellant is correct in asserting that jurisdiction did not lie for reviewing the Department's decision in not rehiring Mr. Ryan, because he was not a 'non-probationary employee,' subject to the protections of N.D.C.C. [§] 54-44.3-12.2." App. 80. Judge Riskedahl also concluded that: "Further, an appeal related to reduction in force may be made only on the basis that factors required by Administrative Code Section 4-07-11-03 were not followed, or that the reduction in

force was conducted in a discriminatory manner, neither of which have application in this instance." Id. The court, therefore, did not consider the "merits of the cross-appeal" and ordered that Ryan's ". . . appeal be dismissed on jurisdictional grounds." App. 81.

ISSUES

- Does an ALJ, appointed to issue a final decision for the Central Personnel System, have jurisdiction to rule that a statute is controlling over an implementing regulation? N.D.C.C. § 54-44.3-12.2; N.D. Admin. Code § 4-07-11-07.
- Is the ALJ's conclusion of law that Ryan did not meet the "minimum qualifications established" (N.D. Admin. Code § 4-07-11-07) for reemployment after he lost his job because of reduction-in-force either "in accordance with the law" or "supported by [the ALJ's] Findings of Fact"? N.D.C.C. § § 28-32-46(1) and (6).
- Did the district court abuse its discretion by considering and ruling on a jurisdictional argument that was not identified in Human Services' Specification of Error under N.D.C.C. § 28-32-42(4)? Aalund v. N.D. Workers Comp. Bureau, 2001 ND 32, ¶ 12, 622 N.W.2d 210.

- Did the North Dakota Department of Human Services act "without substantial justification," thereby mandating an award of attorney's fees and costs as prescribed by N.D.C.C. § 28-32-50.

LAW AND ARGUMENT

A. Scope of review upon appeal from final decision of Central Personnel Agency of employee grievance. N.D.C.C. § 54-44.3-12.2; N.D.C.C. ch. 28-32.

> "An appeal . . . of a classified state employee is governed by N.D.C.C. § 54-44.3-12.2. Under the statute, an employee may appeal . . . to Central Personnel, which must request appointment of an ALJ. The ALJ is to 'conduct the hearing and related proceedings, including receiving evidence and preparing findings of fact, conclusions of law, and issuing a final decision.' N.D.C.C. § 54-44.3-12.2. The ALJ's decision is the final decision of Central Personnel." Developmental Center v. Central Personnel Division, 2000 ND 7, ¶ 8, 604 N.W.2d 230.

"Appeals to the district court from the ALJ's final decision, and further appeals to [the Supreme] Court, are governed by N.D.C.C. ch. 28-32." Id., ¶ 9.

The scope of and procedure on appeal are set forth at N.D.C.C. § 28-32-46:

> **28-32-46. Scope of and procedure on appeal from determination of administrative agency.** A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:
>
> 1. The order is not in accordance with the law.
>
> 2. The order is in violation of the constitutional rights of the appellant.

3. The provisions of this chapter have not been complied with in the proceedings before the agency.

4. The rules or procedures of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

Upon judicial review of a decision of an administrative agency, the Supreme Court reviews the decision of the administrative agency, not of the district court. E.g., Carlson v. Job Service North Dakota, 548 N.W.2d 389 (N. D. 1996).

There are no disputed facts in this case. Rather, the issue in this case is whether the ALJ erred in concluding that the undisputed facts supported a legal conclusion that Ryan had not met the "minimum qualifications established" for reemployment with Human Services after he lost his employment through a reduction-in-force. Where any agency's ". . . order is not in accordance with the law" or its

"conclusions of law and order of the agency are not supported by its findings of fact", the agency decision must be reversed. N.D.C.C. § § 28-32-46(1) and (6). "When an appeal from an administrative agency involves a legal question . . . we will affirm the agency's decision unless it is not in accordance with the law." E.g., Krueger v. Richland Co. Social Services, 526 N.W.2d 456, 457 (N.D. 1994). Questions of law are fully reviewable by the Supreme Court. Shiek v. N.D. Workers Comp. Bureau, 2002 ND 85, ¶ 10, 643 N.W.2d 721.

Because Ryan prevailed on the two procedural issues in the "final decision" of the Central Personnel Division - - and because this Court reviews the decision of the Central Personnel Division and not the district court - - Ryan relies upon these holdings by ALJ Fetch as the law of the case and that they are controlling absent being reversed or modified by the Supreme Court. Rather than wait to address these legal issues in his reply brief, however, Ryan has elected to set forth his argument in support of these two conclusions of ALJ Fetch in his brief in main. Nonetheless, the burden of the argument that ALJ Fetch erred in concluding these two issues in favor of Ryan is squarely upon Human Services in this appeal to the Supreme Court.

B. The Administrative Law Judge properly construed the "Limitations for reduction-in-force appeal" regulation (§ 4-07-20.1-07) to make it consistent with the enabling statute (N.D.C.C. § 54-44.3-12.2) that specifically mandates that the Central Personnel Division ". . . shall certify appeals from non-probationary employees in the classified service which are related to . . . reduction-in-force. . ."

In her own words:

> Judge Fetch reasoned that the statute, N.D.C.C. § 54-44.3-12.2,[3] is broad in its language. **The statute provides for appeals related to a reduction-in-force**. The administrative rule sections pertaining to appeals for a reduction-in-force in N.D. Admin. Code §§ 4-07-20.1-07[4] and 4-07-11-03 provide that an appeal may be made only on the basis that certain factors were not followed or that reduction-in-force was conducted in a discriminatory manner. The administrative rule which limits reduction-in-force appeals to a determination whether certain factors were followed in conducting the reduction-in-force attempts to constrict the scope of the statute. Judge Fetch determined the statute is both mandatory and controlling, and must therefore be applied over the administrative rule. See Findings of Fact, Conclusions of Law and Order of ALJ Fetch, App. 63-64; emphasis added.

Indeed, N.D.C.C. § 54-44.3-12.2 specifically states as follows: "The [Central Personnel] Division **shall** certify appeals from non-probationary employees in the classified service which are related to . . . **reduction in force**. . . ." Emphasis added. The language is mandatory, not discretionary.

Human Services' argument that N.D. Admin. Code § 4-07–20.1-07 does not allow Ryan to appeal from his reduction-in-force determinations and, therefore, this regulation of the Central Personnel Division should take precedent over the clear and mandatory direction of the statute. Human Services' district court brief at 3-4; Doc.

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[3]N.D.C.C. § 55-44.3-12.2 is Attachment "C to this brief.

[4]N.D. Admin. Code ch. 4-07-20.1 is Attachment "B to this brief.

No. 11. This argument is, of course, absurd in that it stands the law on its head, i.e., stating that a regulation takes precedent over the mandatory enabling statute.[5]

It is "black letter law" that all powers of an administrative agency must be exercised in accordance with the **statute** or other law conferring such power and that an agency's jurisdiction or authority to act depends upon compliance with the **statute** vesting power in the agency. 2 AmJur 2d, Administrative Law § 270; emphasis added.

This Court has also made it clear that a statute will control in the event that an agency regulation restricts, conflicts or limits the statute. "It is a basic rule of administrative law that an administrative regulation may not exceed statutory authority or supercede a statute, and that a regulation which goes beyond what the Legislature has authorized is void." Moore v. N.D. Workmen's Comp. Bureau, 374

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[5]Of course, this interpretation is being made by Human Services and not the administrative agency that promulgated the rule, i.e., the Central Personnel Division (CPD). CPD has not entered an appearance in any regard in this matter nor has the Attorney General appointed a separate Assistant (or "Special") Assistant Attorney General to represent CPD. Thus, there exists the anomalous situation of an Assistant Attorney General, acting on behalf of Human Services, ostensibly arguing what a regulation of a **separate** (but unrepresented) independent agency (Central Personnel Division) means! This is all the more bizarre (and unfair to Ryan) given the fact that CPD is the **adjudicative** agency in this matter. Under these circumstances, the otherwise meritless interpretation of Human Services regarding CPD's regulation is entitled to absolutely no deference. Compare Americana Health Care Center v. North Dakota Department of Human Services, 540 N.W.2d 151 (N.D. 1995) (Although interpretation and application of the administrative regulations generally present questions of law, the courts accord some deference to administrative agency's reasonable interpretation of its **own** regulations).

N.W.2d 71, 74 (N.D. 1985). The North Dakota Century Code complements this concept by providing that an agency may make and amend regulations so long as they are in conformity with the applicable statutes. N.D.C.C. § 28-32-02(1).

Therefore, ALJ Fetch did exactly what judges are supposed to do; she applied a "mandatory and controlling" statute "over the administrative rule" that "attempts to constrict the scope of the statute." Findings of Fact, Conclusions of Law and Order at App. 64.

The legislature has seen fit to give the Administrative Law Judge appointed to hear a Central Personnel Division appeal the authority to make ". . . findings of fact, conclusions of law and [issue] a **final** decision." N.D.C.C. § 54-44.3-12.2; emphasis added. In the face of this broad authority, it is absurd to suggest that the ALJ does not have the authority, in the first instance, to interpret the statutes and regulations that go to the heart of the issues in the case being heard by her.

Moreover, the regulations of the Central Personnel Division embrace the obvious legislative intent that an ALJ has the authority to interpret the statutes and regulations before her: "The Administrative Law Judge shall consider whether the Central Personnel Division has jurisdiction over the subject matter of the appeal and whether all rules and regulations were followed in the grievance process." N.D. Admin. Code § 4-07-20.1-08(4). This regulation dictates that the initial determination of jurisdiction lies solely in the hands of the Administrative Law Judge subject, of

course, to judicial review. This same authority is implicit in the enabling legislation that created the Office of Administrative Hearings and the corps of independent Administrative Law Judges. See N.D.C.C. § 54-57-04, incorporating the duties of hearing officers under N.D.C.C. § 28-32-31, i.e., including, *inter alia*, the broad authority to "make findings of fact and conclusions of law and issue a final order, if required by statute. . ." N.D.C.C. § 28-32-31(6).

Also, under the implementing regulations of the Office of Administrative Hearings, the authority of the ALJ is stated in broad terms and is "not limited." N.D. Admin. Code § 98-02-03-02.

The absurdity of Human Services' argument to the contrary is that not only would Ryan be precluded from his "day in court" before the Central Personnel Division but also, by extension, his right of appeal to district court and the Supreme Court. Such a draconian argument flies in the face of any notions of due process, i.e., an unconstitutional result that must be avoided. Gregory v. N.D. Workers Comp. Bureau, 1998 ND 94, ¶ 27, 578 N.W.2d 101.

Therefore, the ALJ, in making her final order, has jurisdiction to hear and determine issues as to interpretation of statutes and regulations that are, as here, essential to the issues in the case before her.

Even assuming, hypothetically, the Central Personnel Division was represented in this proceeding and had embraced the statutorily limiting regulation of N.D.

Admin. Code § 4-07-20.1-07, such an interpretation cannot stand. Even long established administrative policy must be set aside if it violates the intent of the statute. Berger v. State Personnel Bd., 502 N.W.2d 539 (N.D. 1993); Smith v. N.D. Workers Comp. Bureau, 447 N.W.2d 250 (N.D. 1989). All of the relevant case law authority in North Dakota supports the "black letter rule of law" in this regard, to wit:

> "Administrative rules may not enlarge, alter or restrict the provisions of the statute being administered. Whatever force and effect a rule or regulation has is derived entirely from the statute under which it is enacted, so administrative regulations that are inconsistent or out of harmony with the statute or that conflict with the statute, for instance by extending or restricting the statute contrary to its meaning, or that modify or amend the statute or enlarge or impair its scope are invalid or void, **and courts not only may, but it is their obligation to strike down** such regulations." 2 AmJur2d, Administrative Law § 228; emphasis added.
>
> Further:
>
> "[A]n administrative agency may not, under the guise of a regulation, substitute its judgment for that of the legislature. . . . An agency cannot create, remove, or limit substantive rights granted in the enabling act; and an agency cannot, without sufficient statutory criteria expressed in the statute, vary the impact of a statute by restricting or limiting its operation through creating waivers or exemptions." 2 AmJur 2d Administrative Law, § 152.

Therefore, ALJ Fetch was correct in ruling that the broad statutory authority provided to the Central Personnel Division to hear, *inter alia*, appeals regarding "reduction-in-force" cannot be constrained by a subsequent regulation that restricts the scope of the statute.

This Court has implicitly recognized the authority of an Administrative Law Judge to make "legal conclusions." In JM Corp v. Juran & Moody, Inc., 2000 ND 136, ¶¶25-26, 613 N.W.2d 503, this Court ruled that where an agency has designated an ALJ to issue a final decision, judicial review of the ALJ's legal conclusions must be reviewed in the same manner as legal conclusions generally (albeit without special deference to the ALJ).

This Court has not ruled on the specific narrow issue as to whether an ALJ has the authority to interpret statutes and regulations that come before the ALJ in an administrative hearing - - probably because it is so self-evident. However, this Court has made it perfectly clear that both with regard to matters of discovery (Medical Arts Clinic v. Franciscan Initiatives, 531 N.W.2d 289 (N.D. 1995)) and admissibility of evidence in an administrative setting (Knudson v. Director, N.D. Dept. of Transportation, 530 N.W.2d 313, 317 (N.D. 1995)) the ALJ has broad authority.

In Medical Arts Clinic, supra at 301, the Court held that judicial review of administrative decisions is restricted by the doctrine of separation of powers and a reviewing court may not insert itself into the agency's administrative role. "Rather, the hearing officer, like a trial judge in a civil action, is responsible in the first instance for exercising the wide range of his or her discretion . . ." and those rulings are subject to judicial review under the narrow standard of abuse of discretion. Id. While the Court in Knudson and Medical Arts Clinic, supra, was speaking to the role

of the ALJ in making discovery and evidentiary rulings, the "wide range" of ALJ discretion applies no less to the obvious authority of an ALJ to make rulings on the laws and regulations that come before the ALJ.

This Court has made it clear that, in such situations, the remedy of the party aggrieved by the ALJ decision is judicial appeal of the ALJ's final decision - - and adamantly not to so hamstring the ALJ that making a final administrative decision is impossible. Knudson and Medical Arts Clinic, supra.

Therefore, ALJ Fetch not only acted within her jurisdiction in interpreting and applying the statute over the constricting regulation, but she did so correctly as well.

C. Ryan, as "An individual who has lost employment due to a reduction-in-force must be offered reemployment . . ." because it is uncontested that he met ". . . the minimum qualifications *established* . . ." for the available positions. N.D. Admin. Code § 4-07-11-07; emphasis added.

As found by the ALJ and within the plain meaning of the regulation and the undisputed facts of this case, "the preponderance of the evidence presented at the hearing shows that . . . Mr. Ryan met the initial minimum qualifications that were stated on the job announcements for the positions of mental illness case manager and human relations counselor. . ." Conclusion 5, Findings of Fact, Conclusions of Law, and Order (App. 72-73). Undoubtedly, the "minimum qualifications that were stated on the job announcements" (id.) were the "established" minimum qualifications for the "particular position(s)" within the meaning of § 4-07-11-07(2). There is

absolutely **no** evidence to the contrary. As ALJ Fetch plainly stated in the "Statement of the Case and Issues":

> "Mr. Ryan applied for both positions and was determined to meet the requirements for the positions, based upon the minimum qualifications published in the job announcements." App. 62. And see "Exs. B and D" at App. 11 and App. 13, respectively.

No one at Human Services offered any "established" procedures to determine what "minimum qualifications" were required for the jobs Ryan applied for **other than** the job announcements. Ryan was, of course, certified by Flagg as having met the "minimum qualifications" for those jobs. Therefore, there is no written policy - - only the subjective musings of Ryan's superiors to the effect - - that further and oxymoronic "more minimum" requirements needed to be met. The **only** requirements **established** (within the meaning of N.D. Admin. Code § 4-07-11-07(2)) were those "minimum qualifications" that Ryan undisputedly met. App. 11 and 13.

Having indisputably met the "minimum qualifications" that had been "established" by Human Services for the two positions, it is also undisputed that Human Services **added** the following requirement - - found nowhere in its regulations or in any written procedure :

> "After receiving the certificate of eligibles for each of the two positions, the agency conducted interviews to **screen the applicants further to determine whether they possess the required knowledge and skills to do the particular jobs.**" Id.; Finding 5 at App. 69; emphasis added.

This bald-faced non-sequitur and completely unauthorized maneuver to violate the clear intent of the reduction-in-force (RIF) regulation is exactly the type of "totally arbitrary or unjustified" agency action that the merit system was designed to eradicate. See, e.g., Dyer v. North Dakota Department of Human Services, 498 N.W.2d 160, 165 (N.D. 1993). The *de facto* "interviews" **cannot**, as a matter of law, be determined to be part of the "minimum qualifications" requirement of § 4-07-11-07(2) because, in fact, the "minimum qualifications **established**" had already - - as admitted by Human Services and as found by ALJ - - been met by Ryan when he applied for the jobs. Id.; emphasis added.

Interpretation of statutes and administrative regulations must be reasonable and consistent with legislative intent, and done in a manner which will accomplish the policy goals and objectives of the statute or regulation. Heartview Foundation v. Glaser, 361 N.W.2d 232 (N.D. 1985).

The salutary and remedial purpose of Ch. 54-44 regarding establishment of the classified civil service system could not be clearer:

> "It is the intent of the state of North Dakota to assure fair and equitable treatment and promote harmony between and among all classified employees." N.D.C.C. § 54-44.3-12.2.

The Central Personnel System chapter, moreover, is legislation specifically intended to assure fair and equitable treatment and harmony with regard to "all classified employees" and as such, is **remedial** legislation. Remedial legislation must

be construed to afford relief and avoid forfeiture with a view of extending its benefits to all who fairly can be brought within its provisions. Compare, Shiek v. N.D. Workers Comp. Bureau, 2001 ND 166, ¶ 26, 634 N.W.2d 493 (confirming the Workers' Compensation Act is "remedial" legislation).

Furthermore, the North Dakota Century Code ". . . establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be construed liberally, with a view to effecting its objects and to promoting justice." N.D.C.C. § 1-02-01. And see, Scott v. District Court of Fifth Judicial Dist. for Barnes County, 15 ND 259, 107 NW 61, 64 (1906).

Here, the reduction-in-force reemployment regulation (N.D. Admin. Code § 4-07-11-07) mandates ("shall") that an otherwise obviously experienced and competent classified civil servant be transferred to any other job within the agency for which he meets the "minimum qualifications established" **without** having to **once again** go through the competitive civil service process. However Human Services and ALJ Fetch wish to characterize it, the *de facto* "interviews" of Ryan **after** he met the "established minimum qualifications" are nothing less than further subjugation of Ryan to conditions of employment that are **not allowed** by the plain meaning and obvious intent of N.D. Admin. Code § 4-07-11-07.

This fundamental flaw is underscored by the abject misreliance by ALJ Fetch on two cases totally inapposite on both their facts and law, to wit: Dyer, supra and

City of Bismarck v. Santineau, 509 N.W.2d 56, 60 (N.D. 1993). Both cases are referenced by ALJ Fetch at Conclusion 5 of the Findings of Fact, Conclusions of Law and Order. App. 72-74.

Both the Dyer and Santineau cases dealt with the issue of the weight to be given to veterans' preference in an **initial** hiring. In both cases, the Court recognized that veterans' preference was but one factor to be considered in making a determination that otherwise required the public employer to "employ the most worthy applicant" (Santineau, at 59) or the "one with the highest examination grade, whether a non-veteran or a veteran, [will be] first entitled to the position and, in the absence of justifiable cause, must be so appointed or employed" (Dyer at 164). **Neither** Dyer **nor** Santineau remotely stand for the proposition, urged by Human Services and found by ALJ Fetch, that **additional** "minimum" requirements can be arbitrarily and capriciously "stacked" onto the "minimum qualifications established for the particular position" that **already have been met**. N.D. Admin. Code 4-07-11-07(2). Ryan is not a "new hire" and he need not - - indeed cannot - - be held to the standard of a new perspective hiree in the civil service system. He has **already** met that burden by his unquestioned, lengthy, and valuable service to Human Services as a classified employee - - employment that he would have continued to enjoy absent the reduction-in-force.

The plain meaning of the phrase "minimum qualifications **established**" is that there are quantified and known criteria **in place prior** to the time the RIF'd employee seeks reemployment in a different job. The word "established" is, of course, past tense. The first preferred definition for the word "established" is "to make stable; make firm; settle." New Webster's World Dictionary (3rd College Edition). The notion that once "minimum qualifications" have been "established", **additional** "minimum qualifications" can be subsequently added is absurd. Nowhere has Human Services even asserted - - let alone proved - - that the process to ". . . screen the applicants further to determine whether they possess the required knowledge and skills to do the particular jobs" is part of the "established" minimum qualifications. See quoted material at Finding 5, Findings of Fact, Conclusions of Law and Order at App. 69.

As with statutes, interpretation of administrative regulations must be reasonable and consistent with legislative intent, and done in a manner which will accomplish the policy goals and objectives of the regulation. Heartview Foundation, supra. In this regard, this Court has made it clear that: (1) the primary goal in statutory construction is to ascertain the intent of the legislature; (2) in ascertaining the legislature's intent, the court looks to the plain language of the statute and gives each word of the statute its ordinary meaning; (3) the statute is construed as a whole and effect given to each of its provisions if possible; (4) if the language of the statute

is clear and unambiguous when read as a whole, the court will not ignore the language under the pretext of pursuing its spirit because the legislative intent is presumed clear from the face of the statute; (5) only if the statute is ambiguous or adherence to the strict letter of the statute would lead to an absurd and ludicrous result, may a court resort to extrinsic aids to interpret the statute. See, e.g., Shiek v. N.D. Workers Comp. Bureau, 2002 ND 85, ¶ 12, 643 N.W.2d 721. **All** of these salutary rules of statutory construction, when applied to the RIF regulation (N.D. Admin. Code § 4-07-11-03(2)) lead to but one inescapable conclusion: Ryan, a classified employee who was RIF'd "must be offered reemployment" because he undisputedly met the "minimum qualifications **established** . . ." for the two positions in question. Id.; emphasis added.

To allow the result urged by Human Services and sanctioned by ALJ Fetch would be to render the RIF regulation meaningless and thus absurd. Under that interpretation, any agency would be allowed to "make up the rules as it goes along" despite the "established" minimum qualifications of a RIF'd classified employee and deny that RIF'd and classified employee his rights as a civil servant. This violates all notions of common sense in statutory construction. See, Shiek v. N.D. Workers Comp. Bureau, 1998 ND 139, ¶ 17, 582 N.W.2d 639 (". . . statute should be interpreted to avoid absurd and ludicrous results"). Also ". . . an interpretation that does contradict clear and unambiguous statutory language cannot be called reasonable." Id.; ¶ 16.

Likewise, Human Services' argument that Ryan is "not qualified" for the two jobs, based upon the *de facto* interviews **after** he had previously been found in writing by Human Services to possess the "minimum qualifications established" is equally ludicrous. However, to the extent that any legitimate question remains as to whether Ryan can "do the job," that will be seen through subsequent training, experience, performance evaluations, and such agency reviews and appeals under the Central Personnel Merit system as are available to Human Services and to Ryan as a classified employee.

Again, this is not a case where only the **most** qualified person gets the position, as clearly was the case with both Dyer, supra, and Santineau, supra. Nor is this a case dealing with qualifications of a job applicant who is **not already a classified employee**. Rather, this case involves a regulation that deals strictly and solely with a classified employee **already in the classified system** and that employee's **right** to be reemployed if he meets the "minimum qualifications established" for a position **after** he has suffered a loss of civil service employment due to no fault of the employee, i.e., through a reduction-in-force. The regulation clearly embraces the statutory intent to "assure fair and equitable treatment and promote harmony between and among all classified employees" (N.D.C.C. § 54-44.3-12.2) generally. And, specifically, the regulation is intended to reward the efforts of longstanding classified civil service employees - - and to alleviate the harshness of a loss of employment due

to reduction-in-force - - by establishing a "floor" of "minimum qualifications" rather than a "ceiling" of "most qualified."

At its essence, Human Services' argument is that it reserves the right - - despite the reduction-in-force regulation that clearly expresses a mandatory obligation to the contrary - - to hire **only** what it perceives to be the "most qualified" person for a position, **regardless** of whether the applicant falls squarely within the reduction-in-force regulation provisions.

Such a result raises obvious issues of violation of due process. An application of law that "produces profound constitutional conflicts" simply will not be allowed. Gregory v. N.D. Workers Comp. Bureau, 1998 ND 94, ¶ 27, 578 N.W.2d 101. "If a statute is open to divergent constructions, one that would make it of doubtful constitutionality and one that would not, this Court must adopt the construction that avoids the constitutional conflict." Id., ¶ 28; citations omitted.

ALJ Fetch simply erred, as a matter of law, in ignoring the clear and unambiguous requirements of the regulation that established Ryan was entitled to reemployment once he met the "minimum qualifications established" for both job positions. Thus, ALJ Fetch's conclusion that Ryan "was not qualified for either position" is erroneous as a matter of law and on that basis, alone, cannot be upheld. N.D.C.C. § 28-32-46(1) ("The order is not in accordance with the law"). Moreover, this conclusion of law is not supported by any of the relevant findings of fact of ALJ

Fetch. N.D.C.C. § 28-32-46(6) ("The conclusions of law and order of the agency are not supported by its findings of fact").

D. The district court abused its discretion by considering and ruling on an issue that was not identified in Human Services' Specifications (sic) of Error under N.D.C.C. § 28-32-42. Aalund v. N.D. Workers Comp. Bureau, 2001 ND 32, ¶ 12, 622 N.W.2d 210.

At the district court level, Human Services continued to assert its position that, "Ryan was NOT a non-probationary classified employee." Reply brief; Doc. No. 16 at p. 1; emphasis ("NOT") in original. This argument was previously asserted and specifically rejected by ALJ Fetch in her third Conclusion of Law (see Order of August 7, 2002 at App. 71), to wit:

> "3. Mr. Ryan was a regular employee in a classified position at the time he lost employment due to a reduction-in-force, consequently, his employment in an unclassified temporary position does not constitute reemployment under N.D. Admin. Code § 4-07-11-07."

In its "Specifications (sic) of Error," Human Services did not reference, in any regard, this issue as one preserved upon appeal. Rather, the **sole** issue raised by Human Services in its specification of error is that the ALJ ". . . ignored and declared void an administrative rule, which limited her jurisdiction." See Human Services "Notice of Appeal and Specifications of Error" dated September 5, 2002 at App. 2. This Court has repeatedly ruled that, in appeals from administrative agency decisions, courts may consider only those grounds identified in specifications of error under § 28-32-42 (previously N.D.C.C. § 28-32-15). Aalund v. North Dakota Workers'

Comp. Bureau, 2001 ND 32, ¶ 12, 622 N.W.2d 210. See also, e.g., Vetter v. North Dakota Workers' Comp. Bureau, 554 N.W.2d 451, 453-54 (N.D. 1996) (holding specifications of error in appeal from an administrative agency decision must be reasonably specific and calculated to identify the matters truly at issue sufficient to fairly apprise the agency, other parties and the court of the particular issues claimed); Dean v. North Dakota Workers' Comp. Bureau, 554 N.W.2d 455 (N.D. 1996). Therefore, Human Services' otherwise erroneous assertion that "Ryan was NOT a probationary classified employee" must be rejected out-of-hand because it was not a matter raised in Human Services' specification of error.

The argument that, as a matter of law, Human Services could not argue an issue upon judicial appeal that it did not preserve in its specification of error was fully briefed to the district court. Doc. No. 18, Reply brief of Thomas P. Ryan, at pp. 1-2. Nonetheless, the district court not only specifically entertained the argument of Human Services regarding this non-specified issue, but also ruled in favor of the Department's position on it! App. 77. Because the district court's opinion is in direct contravention of the mandate of this Court that non-specified issues may not be entertained on judicial appeal (Aalund, supra), the district court Judge abused his discretion in entertaining it. Thus, the conclusion of ALJ Fetch, favorable to Ryan's position, constitutes the "final decision" of the agency and, on that issue, is nonreviewable.

E. Ryan is entitled to an award of attorneys' fees and costs pursuant to N.D.C.C. § 28-32-50.

As a threshold matter, the legislative intent of § 28-32-50 (North Dakota's state counterpart to the Federal Equal Access to Justice Act (EAJA))[6] could not be clearer, i.e., its language is "expansive and inclusive" (Aggie Investments GP v. Public Service Comm., 470 N.W.2d 805, 813 (N.D. 1991). It serves the remedial purpose of insuring that a private litigant who has to sue his own government for relief from an unreasonable order will not have to do so at the expense of his own attorneys' fees and costs, i.e., ". . . the Court must award . . . reasonable attorney's fees . . ." N.D.C.C. § 28-32-50(1). The specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions. Sullivan v. Hudson, 490 US 879, 883 (1989) ("'For many citizens, the costs of securing vindication of their rights and the inability to recover attorneys' fees preclude resort to the adjudicatory process. . . . ."). Id.

In his specifications of error (App. 6), Ryan preserved his right to pursue attorney's fees and costs under this state's "Equal Access to Justice Act" statute, N.D.C.C. § 28-32-50. Ryan has sought "judicial review of a final agency order" which is a specific requirement of N.D.C.C. § 28-32-50(2). Therefore, "In any civil

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[6]N.D.C.C. § 28-32-50 is Attachment "D" to this brief. This Court's comparison of the state law to the Federal Equal Access to Justice Act, 28 U.S.C. § 2412, was noted in Medcenter One v. North Dakota State Board of Pharmacy, 1997 ND 54, ¶ 27, n. 1, 561 N.W.2d 634.

judicial proceeding involving as adverse parties an administrative agency and a party not an administrative agency . . . the court **must** award the party not an administrative agency reasonable attorneys' fees and costs if the court finds in favor of that party and, in the case of a final agency order, determines that the administrative agency acted without substantial justification." N.D.C.C. § 28-32-50(1); emphasis added.

A "substantial justification" exists **only** where a reasonable person could think that there is a reasonable basis in law and fact to support his/her position. Lamplighter Lounge, Inc. v. State ex. rel. Heitkamp, 523 N.W.2d 73 (N.D. 1994). "Substantial justification" represents a middle ground between the automatic award of fees to the prevailing party on one side, and awarding fees only when a position is frivolous or completely without merit on the other. Id.

Determination of the issue of "substantial justification" is in the sound discretion of the court and will not be disturbed absent abuse of that discretion. Walton v. North Dakota Dep't of Human Services, 552 N.W.2d 336 (N.D. 1986). Ryan briefed the § 28-32-50 issue to the district court, requesting merely that, "To the extent that Ryan prevails as appellee and cross-appellant in this matter, he will move the court for [an] award of attorney's fees and costs at that time. See Lamplighter Lounge, Inc. v. State ex rel. Heitkamp, 523 N.W.2d 73 (N.D. 1994)." Brief of Thomas P. Ryan, Doc. No. 14, p. 16. The district court, because it ruled entirely in favor of Human Services, never reached the issue.

In determining what the definition of "substantially justified" is, this Court, recognizing the comparability between the Federal EAJA law and our state statute, has cited the U.S. Supreme Court case of Pierce v. Underwood, 487 U.S. 552, 565 (1988); see Lamplighter, supra at 75 ("There it was said that substantially justified means 'justified in the substance or in the main - - that is, justified to a degree that could satisfy a reasonable person."). The overriding question, in reviewing the actions of Human Services in this case, therefore, is whether ". . . a reasonable person could think that [Human Services' position] has a reasonable basis in law and fact." Id.; citing Aggie Invs. GP, 470 N.W.2d at 814.

This court has specifically stated that our state law is ". . . comparable to the Federal Equal Access to Justice Act, 28 U.S.C. § 2412." Medcenter One v. North Dakota State Board of Pharmacy, 1997 ND 54, ¶ 27, n. 1, 561 N.W.2d 634. Therefore, reference to Federal EAJA case law is appropriate to assist the Court in interpreting the state's statute. Id. And see Aggie Invs. GP, supra.

Moreover, this Court, in reviewing the "reasonableness" of Human Services' actions, should not strain to find "reasonable" grounds. On the contrary, in Trundle v. Bowen, 830 F.2d 807, 809 (8th Cir. 1987), the Court stated:

> The government **bears the burden of proving** that its position at **both the administrative and litigation stages** was substantially justified; the test for determining substantial justification is essentially one of reasonableness. However, the government 'must show not merely that its position was **marginally** reasonable; its position must be **clearly**

> reasonable, well founded in law and fact, solid though not necessarily correct.'

Citations omitted; emphasis added.

"In a petition for attorneys' fees under the EAJA, it is the **government's burden** to show that its position in **every stage of the proceedings** was substantially justified." Herron v. Bowen, 788 F.2d 1127, 1130 (8th Cir. 1990); emphasis added. While Ryan has addressed the EAJA issue in his brief in main, he puts Human Services to its strictest burden in its appellee brief to show why the position of Human Services "in every stage of the proceedings" was "substantially justified." Id.

As noted in Trundle, supra, the government's conduct and position at **both** the administrative and judicial levels are examined and **both** must have been substantially justified to prevent entitlement to EAJA fees. See also, e.g., Commissioner, I.N.S. v. Jean, 496 US 154 (1990). This requires the court to, ". . . focus on two questions: first, whether the government was substantially justified in taking its original action; and second, whether the government was substantially justified in defending the validity of the action in court." Guiterrez v. Barnhart, 274 F.3d 1255, 1259 (9th Cir. 2001); citing Kali v. Bowen, 865 F.2d 329, 332 (9th Cir. 1988).

Therefore, in order to prevail, Human Services must first establish that its underlying position (two major components of which ALJ Fetch specifically rejected; see Statement of Facts, supra) at the administrative level was substantially justified

and, second, that the litigation of its position on appeal was also substantially justified. E.g., Welter v. Sullivan, 941 F.2d 674, 676 (8th Cir. 1991).

It is also noteworthy that even when a Federal District Court viewed the Social Security Administration's actions as "substantially justified" and denied EAJA fees, the Eighth Circuit Court of Appeals has shown a willingness, despite the abuse of discretion standard of review,[7] to reject the district court's opinion and award attorneys' fees. E.g., Koss v. Sullivan, 928 F.2d 1226, 1228-29 (8th Cir. 1993).

Applying the holdings of the above case law to the facts of the case, the position of Human Services was not substantially justified and EAJA fees and costs **must**, therefore, be awarded.

There are two separate and distinct bases for this Court to conclude that the position of Human Services was not "substantially justified":

(1) The district court relied upon an argument of Human Services that Human Services knew, or should have known, as a matter of law, that it did not have the right to argue because it did not preserve the issue in its specification of error; and

(2) As a matter of law the "reemployment following a reduction-in-force" regulation (§ 4-07-11-07) is clear and unambiguous and all of the relevant facts

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[7]This Court has also adopted the abuse of discretion standard with regard to EAJA fees. E.g., Lamplighter Lounge v. Estate ex rel Heitkamp, 523 N.W.2d 73, 75 (N.D. 1994).

disclose that Ryan was entitled to the benefit of the regulation because he undisputedly was "minimally qualified" for the jobs he sought.

1. Because Human Services raised and argued an issue at district court that was not included in the Specifications of Error, its position cannot be "substantially justified."

Human Services led off in its district court reply brief with the bald-faced assertion and argument that, "Ryan was NOT a non-probationary classified employee." Doc. No. 16 at p. 1; emphasis ("NOT") in original. See Law and Argument Section D, supra, at pp. 31-33. Human Services knew, or certainly should have known, that it is legal error to raise and argue grounds for reversal not identified in the specification of error. Here, Human Services not only erroneously raised the issue, but the error was compounded by the district court specifically agreeing with the argument of Human Services. Human Services is an administrative agency and is charged with knowledge of the provisions of the Administrative Agencies Practice Act and the case law construing it. Yet Human Services ignored the clear and unequivocal direction of this Court that only issues preserved in the specifications of error may be considered by the district court. Aalund, supra, Vetter, supra, Dean, supra. As a matter of law, there can be no "substantial justification" for failing to adhere to the mandates of this Court.

2. Human Services was not "substantially justified" in misconstruing the plain and unambiguous language of N.D. Admin. Code § 4-07-11-07.

The merits of this issue have been fully briefed at Law and Argument, Section C, supra, pp. 21-30. Simply put, the regulation, in plain and unambiguous terms, provides that Ryan was entitled to reemployment if he met the "minimum qualifications established" for job openings in Human Services after he lost his job due to a reduction-in-force. There are no facts or even reasoned argument on this record to suggest that Ryan did not meet the "minimum qualifications established" for the two positions for which he applied. Rather, the *post hoc*, *ad hoc* process whereby he was, in effect, not found to be the **most** "minimally qualified" is as arbitrary and capricious as it is absurd and ludicrous. This Court has stated that the words "arbitrary and capricious" when used in a "legal sense" mean that either the ". . . findings. . ." are without rational basis or that the evidence to support the findings is nonexistent or without probative value in either direction." Tri-County Electric Cooperative, Inc. v. Elkin, 224 N.W.2d 785, 794 (N.D. 1974). There simply is no legal "rational basis" evidence to support Human Services' position that it can, in effect, make up additional "minimum qualifications" to those that have already been "established." See N.D. Admin. Code § 4-07-11-07. Ryan is mandated his attorney's fees and costs under § 28-32-50 if Human Services' position is not "substantially justified." It follows, *a fortiori*, that where, as here, Human Services' position is arbitrary and capricious, Ryan must be awarded his fees and costs.

In Aggie Invs. GP, supra, at 815, this Court noted that the Supreme Court usually remands ". . . to the trial court for determination of the amount of reasonable attorney's fees" and that ". . . judicial economy dictates that the district court determine reasonable attorney's fees for [the Supreme Court] appeal. The district court will be determining the closely interrelated issue of reasonable attorney's fees for the 'civil judicial proceeding[s]' in the district court." Id. Therefore, this Court directed ". . . the district court, on remand, to determine the amount of attorney's fees to be allowed for this [Supreme Court] appeal." Id.

Therefore, Ryan submits that this Court should conclude that the position of Human Services was not "substantially justified" and that the district court be ordered, on remand, to determine the amount of reasonable attorney's fees and costs that will be paid to Ryan pursuant to N.D.C.C. § 28-32-50(1) for both the district court and Supreme Court appeals.

CONCLUSION

Wherefore, Ryan respectfully requests that this Court reverse the Judgment of the district court in its entirety and, further, to instruct the district court, after notice and opportunity for hearing by Human Services, to award reasonable attorney's fees and costs to Ryan for both his district court and Supreme Court appeals as required by N.D.C.C. § 28-32-50. This Court is further respectfully requested to order the district court, after reversal and remand, to issue a new Judgment that remands the

matter to the Central Personnel Division for a final agency decision that includes: (1) the prior conclusions of law of the Administrative Law Judge favorable to Ryan; **and** (2) that Ryan meets the "minimum qualifications established" for both of the jobs for which he applied and he is entitled to reemployment accordingly.

Respectfully submitted this 11th day of July 2003.

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