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.

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REPLY BRIEF OF APPELLANT THOMAS P. RYAN

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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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LAW AND ARGUMENT

I. The assertion by Human Services that, "Ryan did not properly perfect his cross-appeal to the district court . . ." is meritless.

Human Services' meritless argument is that failure of Ryan to serve the Central Personnel Division (CPD) is jurisdictionally fatal to Ryan's cross-appeal. Appellee Brief, pp. 9-10. Nonetheless, Human Services concedes (id., at 9) that N.D.C.C. § 54-44.3-12.2 requires that ". . . neither the [Central Personnel] division nor the office of administrative hearings may be named as a party to the appeal under Ch. 28-32. . . ." Id.: Appellee brief at 9. If neither CPD nor OAH ". . . may be named as a party to the appeal under Ch. 28-32 . . ." then what possible "jurisdictional" purpose is met by serving notice of appeal upon either or both? The answer: none, of course.

Human Services cites *McDonald v. North Dakota Comm'n on Medical Competency*, 492 N.W.2d 94. 96 (N.D. 1992). Appellee Brief at 10. The mandate of N.D.C.C. § 54-44.3-12.2 that ". . . neither the division nor the office of administrative hearings may be named as a party to the appeal" - - - was not added to the statute until 1995, three years **after** the *McDonald* case was decided. 54th N.D. Legis. Sess. (1995), ch. 524, § 3. Nonetheless, even before the statute prohibited either CPD or OAH from being a named party to a civil service appeal, this Court held, in *McDonald*, that failure to name the adjudicative agency is **not** a jurisdictional defect, but can be corrected with leave of the district court, leave which should obviously be

freely granted ("The district court erred in dismissing McDonald's appeal on [a jurisdictional] basis": Id. at 97). Also, of course, Human Services has not even **addressed**, let alone **alleged**, that it suffered any prejudice with regard to the lack of service on CPD or OAH. (Notice of appeal is not a jurisdictional defect and it may be corrected if no other party's rights are prejudiced). Id.

II. Human Services concedes that the administrative rule that ALJ Fetch found in violation of the statute ". . . exists solely based on the policy choice of the Central Personnel Division."

At p. 7 of Appellee's Brief, Human Services concedes that, "N.D. Admin. Code § 4-07-11-07 exists solely based on the policy choice of the Central Personnel Division." This is the rule that ALJ Fetch found (App. 71) improperly restricts the scope of the enabling statute (N.D.C.C. § 54-44.3-12.2) which mandates that, "The [CPD] shall certify appeals from non-probationary employees in the classified service which are related to . . . reduction in force . . . ." This concession by Human Services, along with the incontrovertable conclusion that the offending rule restricts the otherwise expansive scope of the statue, underscores the correctness of ALJ Fetch's conclusion that the rule cannot take precedent over the statute. App. 71.

III. It was incumbent upon Human Services, not Ryan, to ensure it identified all of the "minimum qualifications established" for positions available to a RIF'd employee, and it simply did not do so in Ryan's case.

Human Services goes on, at length, to demonstrate why it is good employment policy to require even RIF'd employees to meet rigorous rehiring standards including, *inter alia*, "Further review, either through testing, a scored oral interview, or other appropriate job screening [as deemed] necessary to both ascertain whether an applicant meets the minimum requirements **and appropriately rank or grade an applicant so truly merit based hiring decisions can be made.**" Appellee Brief at 12; emphasis added. Human Services describes these tasks as being ". . . both minimum requirements and **those that are merely preferred** . . . ." Id.; emphasis added. This **may** very well be good reemployment policy - - and Human Services is free to implement this policy through appropriate promulgation of rules. The point is that it **has not done so.** Certainly, it is not Ryan's place to guess at what Human Services has in mind with regard to "minimum qualifications" that are nowhere published but "are merely preferred."

Thus, by Human Services' own argument and admission, there is absolutely no way that Ryan knew, or could have known, that in addition to the "minimum requirements established" for rehiring, he also had to meet unpublished, unknown, and unknowable "requirements" that were "merely preferred." Quite simply, if Human Services wants additional "minimum qualifications," then it is incumbent

upon Human Services to make sure that they have been "established" within the clear meaning of the rule. Again, it simply has not done so.

Also, it is disingenuous, at best, to suggest (as "nothing short of ridiculous") that ". . . government must be ineffective, all to the detriment of the public being served, because the job announcement was not as detailed as it perhaps could have been." Appellee Brief at 14. Human Services callously ignores the fact that Ryan was an obviously valued and valuable employee with Human Services for over fifteen years (CR 115/4-5). It is grossly unfair and inaccurate to infer that, *ipso facto*, "government must be ineffective" if Ryan is hired to one of the two jobs with Human Services for which he undisputedly met the "minimum qualifications established" as set forth in the job announcements. On the contrary, one obvious purpose of the rule is to allow experienced and dedicated civil servants who - - such as Ryan - - lose a job through reduction-in-force and through no fault of their own - - to be kept in public service in recognition of their proven experience, dedication and talents.

Finally, of course, to the extent that Ryan would benefit from additional training and experience, Human Services is certainly in the position to provide that experience and training to him, as plainly contemplated by allowing a RIF'd employee to assume a job for which he/she meets only the "minimum qualifications established." N.D. Admin. Code § 4-07-11-07(2).

IV. Human Services materially misstates the unambiguous reduction-in-force requirements of N.D. Admin. Code § 4-07-11-07.

N.D. Admin. Code § 4-07-11-07(2) states that the RIF'd employee merely has to show that: "The individual meets the minimum qualifications established for the particular position."[1] Compare the actual language of this rule with the description of it by Human Services (Appellee's Brief at 11):

> "N.D. Admin. Code § 4-07-11-07 directs agencies to offer reemployment to employees terminated through a reduction-in-force . . . if . . . the **former employee has the qualifications necessary to successfully perform the job.**" Id.: emphasis added.

Human Services refuses to recognize that the rule requires merely that the former employee meet the "minimum qualifications established" by the Department. It is undisputed that Ryan met the "minimum qualifications established" for **both** jobs he applied for and this immutable fact underscores the fallacy of Human Services' argument throughout. Despite the clear and unambiguous wording of the rule, Human Services thinks it can make up additional "minimum" qualifications as it goes along. It cannot and its own argument illustrates the fallacy of asserting otherwise. And see Appellant Brief at 21-30.

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[1]See Attachment "A" to Appellant Brief for full text of "reduction-in-force" N.D. Admin. Code, Chapter 4-07-11.

V. Human Services' contention that Ryan's argument is in the nature of "improper estoppel" is meritless.

Human Services continues to posture Ryan's argument that Ryan shall be placed in the job for which he meets the "minimum qualifications established for the position" as one of estoppel. See Appellee's Brief at 11 (". . . an assertion that the Department should be estopped from denying him employment . . . .") and at 13 ("Ryan's assertion is essentially in the nature of an improper estoppel argument"). Nonsense. Ryan has demonstrated that - - as a matter of law, not equity - - Human Services simply did not follow the mandatory provision of N.D. Admin. Code § 4-07-11-07(2) that requires that an individual "must" be offered reemployment if that employment meets the "**minimum qualifications established** for the particular position." Id.; emphasis added.

There is absolutely **nothing** in **any** rule that allows Human Services to establish an *ad hoc* procedure for determining what **more** "minimum" (sic) qualifications are required beyond the minimum qualifications published in the job announcements. Nowhere in the record has Human Services asserted that its *ad hoc* procedures in Ryan's case are established agency policy, that they were known to Ryan or anyone else prior to being imposed upon Ryan, or that, in fact, **anyone** in Human Services even asserted to Ryan at the time of the subsequent interviews that the interviews were for the purpose of establishing additional "minimum" (sic)

qualifications. Ryan has made no plea for equity because the undisputed facts and law of this case completely support his legal argument.

VI. Human Services makes the point that ". . . allowing an appointing authority to point to qualifications not contained on the job announcement allows appointing authorities to hire whoever they want by simply calling preferred qualifications minimum qualifications 'after-the-fact.'"

In its brief, at 14, Human Services states that the above assertion by Ryan is "perhaps" true. Human Services misses the point, however, by arguing that ". . . Ryan did not even make any suggestion that had occurred in this case at the evidentiary hearing and there certainly is no evidence in the record calling into question the appointing authority's veracity." Id. Of course Ryan has never asserted that Human Services added "qualifications" to the "minimum qualifications established" for the purposes of preselecting anyone other than Ryan - - he simply does not know one way or the other and there is no way he could know. However, Human Services concedes that the **process** that allows an appointing authority to make up the "minimum qualifications" as it goes along affords such a pernicious result, i.e., underscoring the purpose of the rule that requires that the "minimum qualifications" be "established" rather than *ad hoc*. N.D. Admin. Code § 4-07-11-07(2).

VII. Both the "final order" of Human Services and its appellate stance lack "substantial justification"; accordingly, attorney's fees are mandated under N.D.C.C. § 28-32-50.

In a cryptic, two paragraph argument, Human Services attempts to dismiss Ryan's demand for attorney's fees under N.D.C.C. § 28-32-50 as "frivolous." Appellee Brief, at 15. Of course, the "Order" upon judicial review is technically that of the adjudicative Central Personnel Division. Id. However, this is only because of the manner in which civil service administrative appeals are established in North Dakota. N.D.C.C. § 54-44.3-12.2 (CPD conducts the appeal hearing and issues a final decision on the administrative appeal). Human Services overlooks the fact that it is the **only** other party to Ryan's judicial appeal and is the **only** agency that can be a party. See Law and Argument, II, *supra*, regarding prohibition against naming CPD or OAH as a party on judicial appeal.

The "final agency order" (within the meaning of N.D.C.C. § 28-32-50(1)) is, in every real effect, if not literally, the decision of Human Services to refuse to reemploy Ryan after he lost his employment through a reduction in force.

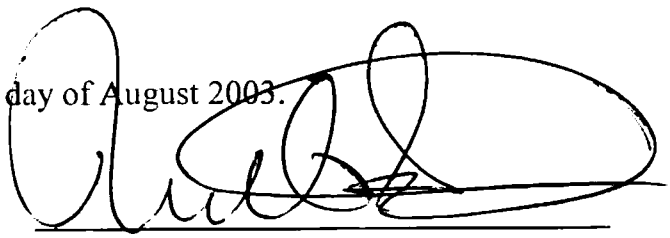
Under the "expansive and inclusive" language (*Aggie Investments GP v. Public Service Comm.*, 470 N.W.2d 805, 813 (N.D. 1991)) of our State's "Equal Access to Justice Act" statute (§ 28-32-50). Ryan should not be deprived of his right to attorney's fees and costs due to the substantially unjustified position of the government against him, simply because he was required, by law, to exhaust his

administrative appeal through the Central Personnel Division. CPD is **not** a party to this action and had nothing to do with the substantially unjustified actions of Human Services in terminating Ryan's employment. The substantially unjustified action of Human Services is the crux of the government action in this case and Ryan's redress through the State's Equal Access to Justice Act certainly falls within the statutes "expansive and inclusive" scope. Id. *Aggie Investment Corp., supra.*

CONCLUSION

Wherefore. Ryan requests the relief from this Court as set forth in his Appellant's Brief, at 39-40.

Respectfully submitted this 22nd day of August 2003.



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