ORIGINAL

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.

****

PETITION FOR REHEARING

****

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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A. The Court should not have entertained issues and arguments never raised by Appellant North Dakota Department of Human Services.

The Court, *sua sponte*, relied upon N.D. Admin. Code § § 4-07-05-03 and 4-07-25-02 in interpreting the meaning of N.D. Admin. Code § 4-07-11-07(2). See slip opinion at ¶ ¶ 22-24. Nowhere in this record - - at either the administrative hearing - - in its briefs to the ALJ - - in its appeal to district court - - in its appeal or in its argument to this Court - - did NDDHS **even mention** either N.D. Admin. Code § 4-07-05-03 or § 4-07-25-02. Ryan asserts that NDDHS did not argue the application of either administrative rule because, under proper analysis of the law, they do **not** apply. See argument B, *infra*, pp. 2-6.

Nonetheless, this Court has repeatedly admonished appellants that this Court will simply not entertain issues and arguments that were not raised and reserved for appeal. "It is well settled that an issue not presented to the trial court will not be considered for the first time on appeal." *E.g., Peters-Riemers v. Riemers*, 2002 ND 72, ¶ 8, 644 N.W.2d 197. Moreover, in administrative cases, such as the one at bar, this Court has repeatedly ruled that the Court will consider only those grounds identified in the specifications of error under N.D.C.C. § 28-32-42 (previously N.D.C.C. § 28-32-15). *E.g., Aalund v. N.D. Workers' Comp. Bureau*, 2001 ND 32, ¶ 12, 622 N.W.2d 210. *See also, e.g., Vetter v. N.D. Workers' Comp. Bureau*, 554 N.W.2d 451, 453-54 (N.D. 1996) (holding specifications of error in an appeal from

an administrative agency decision must be reasonably specific and calculated to identify the matters truly at issue sufficient to fully appraise the agency, other parties, and the court of the particular issues claimed). By its *sua sponte* consideration of two Central Personnel rules that were **never** raised or argued in **any** manner in this case, Ryan has been deprived of the right to timely, fairly, and completely argue why the two regulations do not support the proposition urged by the Court. Surely, one of the salutary reasons for the rule of not allowing parties to raise issues for the first time on appeal is to avoid just this type of result! How can Ryan fairly or possibly distinguish an argument he was unaware of until it was created by the Court and presented as a *fait accompli* in its final decision?

As argued, *infra*, had the argument involving the two administrative rules been preserved at either the district court or administrative level, Ryan could have shown why the regulations do not fairly support the proposition urged. The Court's decision denying Ryan the employment to which he argues he is entitled was made without affording Ryan the opportunity to make an informed argument to the contrary. Mr. Ryan, as with any party before this Honorable Court, should be allowed to "answer the bell," not be forced to try to "unring" it.

B. The specific "reduction-in-force" (RIF) regulation controls over the general regulations found in separate chapters of the Central Personnel Division administrative code. N.D.C.C. § 1-02-07.

As the Court properly stated in a separate portion of its decision (¶ 17): "We construe administrative regulations, which are derivatives of statutes, under well-established principles for statutory construction." Here, this Court chose to rely upon two rules, each found in **separate** chapters of the Central Personnel administrative rules, to construe a provision found in yet a **third** chapter of the Central Personnel rules. First, the Court cited § 4-07-05-03 (which is in the chapter entitled "Recruitment and Selection") for the proposition that an "examination" requirement can be tacked on to the RIF regulation which mentions no such requirement. *Id.*; ¶ 23. Then, this Court cited a separate rule, § 4-07-25-02 (in the chapter entitled "Merit System Examinations") for the proposition that the term "examination" may include, *inter alia*, "a scored oral interview." *Id.* Only through this tortured process did the Court then arrive at **imputing** an "examination" by a "scored oral interview" requirement to the entirely separate and specific RIF rule (in the chapter entitled "Reduction-In-Force"; § 4-07-11-07(2)) that otherwise nowhere exists in the rule itself!

The Court has misapprehended a cardinal rule of construction that is directly applicable in this case.

> "Whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable, the special provisions must prevail and must be construed as an exception to the general provision, unless the general provision is enacted later and it is

> the manifest legislative intent that such general provision shall prevail." N.D.C.C. § 1-02-07. *And see Sprunk v. N.D. Workers' Comp. Bureau*, 1998 ND 93, ¶ 5, 576 N.W.2d 861 (opinion per Maring, J.).

Quite simply, the "specific" reduction-in-force rule (§ 4-07-11-07(2)) does **not**, in any manner, require as a condition of re-employment anything beyond "minimum qualifications." Moreover, the intent of Central Personnel is clear, to wit: When it wishes to require an "examination" **in addition to** "minimum qualifications", it specifically makes that provision. This is exactly what N.D. Admin. Code § 4-07-05-03 provides, as quoted by the Court at ¶ 23 ("minimum qualifications" for the position "**and** successfully completes any examination requirement . . ."; emphasis added).

Clearly, the same Central Personnel agency that promulgated the RIF regulation - - had it so intended - - would have added both tiers of the "minimum qualifications" **and** "examination" requirements to a RIF'd employee if that was the agency's intent!

Both of the rules upon which the Court relies to deny Ryan his re-employment rights are found in separate chapters that have **general** application to **all** persons applying for or employed in the Central Personnel system. As such, these general Central Personnel chapters have - - and are intended to have - - broad application. However, the "Reduction-In-Force" chapter (ch. 4-07-11) is a **specific** chapter which deals **solely** with employees **already in** the Central Personnel system and pertains

only to the very narrow issue of re-employment of a public employee after a "reduction-in-force."

In applying the mandatory statutory construction of N.D.C.C. § 1-02-07 to the three separate Central Personnel chapters and rules in question, it is not only "possible" - - but compelling - - that the two broad Central Personnel rules not be construed as controlling the third specific reduction-in-force provision which simply does **not** require anything more than "minimum qualifications established" for the position. Again, if Central Personnel had wished to have an "examination" requirement for RIF'd employees, it would have said so.

As with the construction of any statute, the primary objective of regulatory construction must be to ascertain the intent of the agency that promulgated the regulation, i.e., the Central Personnel Division. Slip opinion at ¶ 17; *and see Shiek v. N.D. Workers' Comp. Bureau*, 1998 ND 139, ¶ 16, 582 N.W.2d 639. Further, this Court: "Normally will defer to a reasonable interpretation of a statute by the agency enforcing it when that interpretation does not contradict clear and unambiguous statutory language." *Id.*; citing *Lende v. N.D. Workers' Comp. Bureau*, 1997 ND 178, ¶ 12, 568 N.W.2d 755. By the same token, this Court should "defer" to the regulatory scheme of the Central Personnel Division and give Central Personnel Division the benefit of knowing exactly what it regulations are intended to say and **not** say. Such construction does **not** result in a conclusion that purports to say what a regulation

does **not** say (as the Court has done in its slip opinion) but it harmonizes the provisions of the general regulations to the specific one so that all are completely complementary to one another. i.e., the result mandated by N.D.C.C. § 1-02-07. which is the ". . . cardinal rule of statutory construction. . ." that the Court otherwise embraced in its slip opinion at ¶ 11.

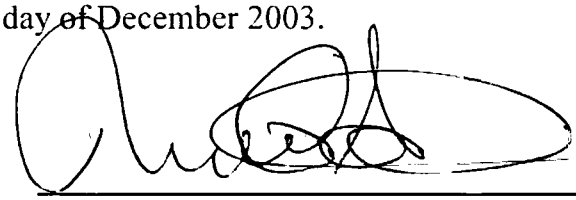
C. Each party should bear its own costs on appeal.

The Court has taxed costs in favor of NDDHS. Rule 39(a)(4), N.D.R.App.P. provides that unless otherwise provided by a Court ". . . if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders." NDDHS was the initial appellant in this case. NDDHS appeal was rejected in its entirety - - it neither prevailed in its assertion that the ALJ acted without jurisdiction in interpreting an agency regulation nor that Ryan had not perfected his cross appeal. Concededly, Ryan did not prevail on his cross appeal either. Quite simply, the final decision of the ALJ was upheld in its entirety by this Court. Because both parties appealed from that decision - - and both parties lost - - common sense and common fairness dictates that each party should be responsible for their respective costs. Taxation of costs against Ryan in this case gives an appearance of an arbitrary, if not punitive, action by the Court. Because Ryan is convinced that the Court did not intend that impression. the Court should order both parties to absorb their respective costs on appeal if this Petition for Rehearing is denied.

CONCLUSION

The Court should grant Ryan's Petition for Rehearing and, upon rehearing, revise its slip opinion to provide that the **specific** rule dealing with reduction-in-force is harmonious with the general rules otherwise cited by the Court. This is a result dictated by proper application of the rules of statutory construction. When the Court properly applies the rules of statutory construction, therefore, the decision of the ALJ to impose a requirement of a subsequent examination to the "minimum qualification" that does not exist in the specific RIF regulation, will be reversed and this case will be remanded by the Court with instructions to NDDHS to employ Ryan, with all benefits, effective with the date he met the "minimum qualifications" for the job as a "RIF'd" employee.

Respectfully submitted this 29th day of December 2003.



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