IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Blume Construction, Inc.,	)	
	)	
Appellant,	)	**Supreme Ct. No. 20150103**
	)	
v.	)	**District Ct. No. 08-2014-CV-01823**
	)	
State of North Dakota by Job Service North Dakota,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT

HONORABLE DAVID E. REICH

BRIEF OF RESPONDENT/APPELLEE JOB SERVICE NORTH DAKOTA

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STATEMENT OF THE ISSUE

[¶1] Whether Blume's appeal from Job Service's November 8, 2013 initial decision was proper and could be considered by Job Service?

[¶2] Whether Job Service had a duty to inform Blume that its appeal was defective and whether Job Service should be estopped from finding Blume's appeal void?

STATEMENT OF THE CASE AND FACTS

[¶3] Blume Construction, Inc. (Blume) appeals the decision of Job Service North Dakota (Job Service) which held it did not effectively appeal from a November 8, 2013 Notice of Determination assigning a penalty tax rate because its purported November 21, 2013 appeal was void as it was prepared by an out-of-state attorney unauthorized to practice law in North Dakota.

[¶4] On November 8, 2013, Job Service issued a Notice of Determination, finding that Blume was subject to the assessment of a penalty tax rate due to a transfer of ownership and payroll for the purpose of obtaining a lower unemployment insurance contribution (tax) rate. Appendix (App.) 3-5. On November 21, 2013, Job Service received an electronic appeal from Blume signed by Craig Fidler (Fidler). App. 6. Job Service's appeal form does not require the signer of the form designate his or her position with the employer as it is presumed the signer is affiliated with the employer when the form is filed electronically with Job Service. App. 6, 9. In response to this appeal Job Service scheduled a telephone hearing for February 27, 2014. App. 9. Prior to the hearing, Blume requested postponement of the hearing because it had retained the service of Fidler who was then identified as a licensed attorney from Colorado. App. 9.

[¶5] Fidler subsequently notified the appeals referee that he was not able to secure a sponsoring attorney licensed to practice law in North Dakota. App. 9. Thereafter, Blume retained the services of a North Dakota practicing attorney. Id. The hearing was reset for June 26, 2014. Id. On the morning of June 26, 2014, prior to the convening of the rescheduled hearing, the appeals referee recognized for the first time that attorney Fidler had filed the November 21, 2013 electronic appeal for Blume. Id. The appeals referee issued a decision finding the appeal filed by Fidler to be void as the unauthorized practice of law and determined the November 8, 2013 Notice of Determination to be final. App. 9-11.

[¶6] Blume appealed the referee's decision to Job Service acting as the Bureau. App. 12-13. The Bureau denied Blume's request for review because there is no right of review when the appeals referee affirms the initial decision. App. 14-15. Blume filed a petition for judicial review with the Burleigh County district court. App. 16-18.

[¶7] On March 25, 2015, the district court issued its Order affirming the decision of Job Service, concluding "Referee Schnase's decision is supported by the weight of the evidence," specifically that Blume's Lower Authority Appeal Request was void and Blume's estoppel argument was without merit. App. 19-25. A Judgment affirming the decision of Job Service was entered on March 30, 2015. App. 27. Notice of Entry of Judgment was provided the same day. App. 28. It is from that Judgment which Blume appeals. App. 29-30.

LAW AND ARGUMENT

I. Scope of Review.

[¶8] A determination of an administrative agency is presumed to be correct. BKU Enter., Inc. v. Job Service North Dakota, 513 N.W.2d 382, 384 (N.D. 1994); Turnbow v. Job Service North Dakota, 479 N.W.2d 827, 828 (N.D. 1992). An agency is afforded a "reasonable range of informed discretion in the interpretation and application of its own rules." Bottineau Cnty Water Res. Dist. v. N.D. Wildlife Soc'y, 424 N.W.2d 894, 900 (N.D. 1988). This Court's review of Job Service decisions is governed by N.D.C.C. § 28-32-46, which requires the Court to review an appeal from the determination of an administrative agency based only on the record filed with the Court. Section 28-32-46, N.D.C.C. requires the Court to affirm an administrative agency decision unless one of the enumerated factors listed in the section is present. Those factors are:

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 procedure 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.

Id.

[¶9] This Court explained the standard courts must follow when reviewing administrative agency decisions:

> "(1) [W]e do not make independent findings of fact or substitute our judgment for that of the agency, but determine only whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence; (2) we exercise restraint when we review administrative agency findings; (3) it is not the function of the judiciary to act as a super board when reviewing administrative agency determinations; and (4) we will not substitute our judgment for that of qualified experts in the administrative agencies."

Sonterre v. Job Service North Dakota, 379 N.W.2d 281, 283-84 (N.D. 1985) (citations omitted). In fact, under N.D.C.C. § 52-06-27, "the finding of the bureau as to the facts, if supported by evidence and in the absence of fraud, is conclusive and the review by the court must be confined to questions of law."

II. Attorney Fidler engaged in the unauthorized practice of law.

[¶10] The unauthorized practice of law is prohibited in North Dakota by N.D.C.C. § 27-11-01, which states:

> Except as otherwise provided by state law or supreme court rule, a person may not practice law, act as an attorney or counselor at law in this state, or commence, conduct, or defend in any court of record of this state, any action or proceeding in which the person is not a party concerned, . . . unless that person has . . . [s]ecured . . . a certificate of admission to the bar of this state; . . . .

(Emphasis added). The general prohibition of the unauthorized practice of law applies to attorneys licensed in other states but not licensed in North Dakota.

See, Ranta v. McCarney, 391 N.W.2d 161 (N.D. 1986) (out-of-state attorney prohibited from collecting fees for legal services rendered in North Dakota). Moreover, it is generally understood that a corporation has no way of appearing in a legal proceeding without a licensed attorney. As explained in Wetzel v. Schlenvogt, 2005 ND 190, ¶¶ 10-11, 705 N.W.2d 836, 840, "[t]his Court has firmly adhered to the common law rule that a corporation may not be represented by a non-attorney agent in a legal proceeding."

[¶11] The North Dakota Supreme Court has promulgated rules allowing for a limited exception for out-of-state attorneys. Rule 5.5 of the North Dakota Rules of Professional Conduct states:

> (b) A lawyer admitted to practice in another jurisdiction and not in this jurisdiction who performs legal services in this jurisdiction on a temporary basis does not engage in the unauthorized practice of law in this jurisdiction when:
> . . .;
>
> (3) with respect to matters for which registration or pro hac vice admission is available under Admission to Practice R.3, the lawyer is authorized to represent a client or is preparing for a matter in which the lawyer reasonably expects to be so authorized . . . .
>
> . . .;
>
> (5) the lawyer performs a service that may be performed by a person without a license to practice law or without other authorization from a federal, state or local governmental body.

Thus, in order to practice in North Dakota, the out-of-state lawyer must reasonably expect to be authorized to be admitted pro hac vice under the requirements of Rule 3 of the North Dakota Admission to Practice Rules, or be performing a function that a person without a license to practice law could do. Rule 3(A) states:

> Pro hac vice admission is required for all nonresident lawyers . . . who engage in the practice of law in this state by appearing, either in

> person, by signing pleadings, or by being designated as counsel in actions filed in . . ., administrative agencies, or tribunals.

Rule 3(A)(2) requires that a "motion requesting permission to appear must be filed no later than 45 days after service of the pleading, motion, or other paper."

[¶12] Pro hac vice admission is expressly required by the Supreme Court rules for appearances by out-of-state counsel to represent a party in a matter pending before an administrative agency such as Job Service. The safe harbor provision of Rule 5.5(b)(3) would allow for initial investigation and limited discovery to be conducted for preparing to represent the party in the matter. However, once an out-of-state lawyer is "designated as counsel" in a Job Service proceeding Rule 3 pro hac vice admission is required and the safe harbor provision of Rule 5.5(b)(3) is no longer applicable. At that point, the lawyer has 45 days to request pro hac vice admission.

[¶13] Rule 3(A)(1)(a)(2) requires that a motion for pro hac vice admission must be submitted to "*the hearing officer of the administrative agency.*" (emphasis added). N.D.C.C. § 28-32-01(5) states that the agency head or his lawful designate is a "hearing officer". Thus, under Rule 3(A)(1)(a)(2), the request would be filed with the agency head or designate. Viewing the rules in a light most generous to Blume, attorney Fidler had 45 days from the date of the Lower Authority Appeal Request to apply for pro hac vice admission to Job Service. Fidler failed to do so and his appeal on behalf of the corporation was properly found to be void.

[¶14] Yet, Blume argues that signing and filing the Lower Authority Appeal Request was not the practice of law because that activity could be performed by a lay person. Appellant's Br. ¶ 25. Blume's conclusion is not necessarily correct,

however, when this activity is done by a person trained as a lawyer. While it is certainly true that some law-related activities may be performed by non-lawyers, if those same acts are performed by a suspended or unauthorized out-of-state lawyer, it may well be the unauthorized practice of law. "An out-of-State lawyer who is not authorized to practice law in this State . . . sits in the same position as a suspended attorney . . .." Ranta, 391 N.W.2d at 164. In Disciplinary Action Against Larson, 485 N.W. 2d 345, 349 (N.D. 1992), it was held that a suspended lawyer, because of his legal training and background, may not engage in activities which lawyers customarily perform even if those activities could, under some conditions, be performed by non-lawyers.

[¶15] At the district court Blume specifically claimed it "could have authorized anyone to complete and send in the form" and that "Fidler could have been a podiatrist or a plumber; his profession was irrelevant for purposes of sending in the appeal." App. 1, Doc. 28 at 6, 8. Now on appeal to this Court Blume claims that "[t]he simplistic nature of filing Job Service's online Request Form shows it is a 'purley mechanical service that could have been performed by a non-lawyer" and "[t]he fact that it was filled out by Mr. Fidler, an attorney, means nothing." Appellant's Br. ¶ 44. Blume's claims are erroneous.

[¶16] Under N.D.C.C. § 52-04-10 in conjunction with N.D.C.C. § 52-04-08.2(3)(a), the penalty tax rate determination "becomes conclusive and binding upon the employer, unless within fifteen calendar days after the mailing of the notice thereof to the employer's last-known address . . . , the employer files a written appeal of the determination." Under the plain language of the statute, the "employer" is to file the

appeal. The individual who files the appeal needs to be affiliated with the employer. If the individual is not affiliated with the employer the appeal is not acceptable. This is no different than when a parent contacts Job Service on behalf of their claimant child requesting an appeal on a denial of benefits. In such cases the parent's appeal is ineffective, because the parent is not a party to the action. Unless evidence of authorization by the party is submitted the action by the non-party is ineffectual.

[¶17] While it is true that Job Service's Lower Authority Appeal Request form does not need to be completed by an attorney and that to request an appeal does not require legal analysis or expertise, the fact is that this is exactly what attorney Fidler did here. Fidler was not acting as just simply "any individual" for the purpose of filing the appeal. To the contrary, Fidler filed the appeal as Blume's hired attorney. Even "the holding out by a suspended [or out-of-state] attorney that he is entitled to practice law in this state" is the unauthorized practice of law. Disciplinary Action Against Giese, 2006 ND 13, ¶ 13, 709 N.W.2d 717, 720-21. Attorney Fidler committed the unauthorized practice of law when he first appeared in the Job Service proceeding holding himself out as attorney for Blume entitled to practice in North Dakota. Importantly, Fidler did not have any alternative qualification for performing any Job Service related legal service in North Dakota. Nor did he have any alternative qualification for representing Blume other than as a Colorado attorney. It is uncontested that Fidler is not an employee of Blume. His only qualification here came from being Blume's corporate attorney. He was expressly retained presumably to use his best legal judgment in representing Blume to

challenge Job Service's decision assessing Blume a penalty tax rate for improperly transferring ownership and payroll in order to obtain a lower unemployment insurance tax rate. All of Fidler's actions involved legal training, judgment and skill and reasonably were considered by Job Service to be the unauthorized practice of law.

[¶18] Blume cites to North Dakota Administrative Code section 27-02-10-03 to claim that Fidler's action in filing the appeal was permissible and not the unauthorized practice of law. Appellant's Br. ¶¶ 45-48. Fidler's argument is meritless. Under the plain language of N.D.A.C. § 27-02-10-03 an out-of-state attorney may only represent an "individual" in a Job Service hearing on rates of contributions. The rule also permits partnerships to be represented by any of its members. Id. The rule, however, does not permit an LLC or corporation to be represented by any of its members or out-of-state attorneys. It is undisputed that Blume is a corporation. Therefore, Blume's reliance on this provision is misplaced.

[¶19] In Carlson v. Workforce Safety and Insurance, 2009 ND 87, 765 N.W.2d 691, as Blume correctly describes, the Supreme Court concluded that the actions of the non-resident attorneys in preparing a request for reconsideration went beyond simply completing a form and did constitute the practice of law. 2009 ND 87 ¶¶ 25-26; Appellant's Br. ¶¶ 30-33. In contrast to what Blume argues Fidler's actions did go beyond simply completing a form. As is readily apparent by a review of the appeal form, Fidler cited to statutes, made legal arguments and specified errors he believed were made in Job Service's initial determination. App. 6. While doing these things may not have been required for completing the form; the record clearly

reflects that Fidler's appeal contained legal argument and analysis. It is these actions that could only be properly done by an authorized attorney.

[¶20] An example of the impact of the failure to obtain pro hac vice status in an administrative agency proceeding is illustrated in Strong v. Gilster Mary Lee Corp., 23 S.W.3d 234 (Mo. Ct. App. 2000). There, a workers compensation claimant's claim was dismissed because the initial claim had been filed by an out-of-state attorney who had failed to comply with pro hac vice requirements. Likewise here, Blume's attempt to submit a Lower Authority Appeal Request should be considered ineffective and void under the reasoning of Carlson, and Job Service's decision affirmed.

III. Job Service is not estopped from dismissing Blume's appeal.

[¶21] Blume argues Job Service should be estopped from dismissing Blume's appeal. Appellant's Br. ¶ 53. Specifically, Blume alleges that if attorney Fidler's appeal was defective it should have been given the right to correct the defect before the appeal deadline passed, because Job Service initially accepted the appeal and scheduled the matter for a hearing. Appellant's Br. ¶¶ 53, 61. Blume's argument is meritless.

[¶22] By Job Service's November 8, 2013 Notice of Determination and under the provisions of N.D.C.C. § 52-04-10, in conjunction with N.D.C.C. § 52-04-08.2(3)(a) Blume had 15 days to appeal the determination assessing it with a penalty tax rate. In Amoco Oil Company v. Job Service North Dakota, 311 N.W.2d 558, 561 (N.D. 1981), this Court held that N.D.C.C. § 1-02-15 applies when computing time under Job Service appeals. Amoco Oil, 311 N.W.2d at

561. This Court also addressed whether "date of mailing" means the date the mailing was received by the claimant. The court stated:

> In this instance, the term "date of mailing" is unambiguous and clear and its meaning cannot, within these rules of statutory interpretation, be expanded to mean date of receipt.

Id. at 561. The court further rejected the contention that Rule 6 of North Dakota Rules of Civil Procedure is applicable to N.D.C.C. § 52-06-13. The court explained:

> We are not aware of any rule or case law which provides that the rules of civil procedure apply to proceedings within an agency or intra-agency appeals as distinguished from appeals from the decision of an agency to the district court. We have held that the court-adopted rules apply to appeals from an administrative agency to the district court, and for that matter, appeals from the district court to the Supreme Court; but no case has been called to our attention and our research does not reflect a decision of this Court which has held that the Court-adopted rules of procedure apply to intra-agency appeals and procedures.

Amoco Oil, 311 N.W.2d at 562.

[¶23] Finally, the court in Amoco Oil, rejected the argument that the time limitations of N.D.C.C. § 52-06-13 were "arbitrary, capricious and unreasonable." Amoco Oil, 311 N.W.2d at 563. The court explained "the state has an interest in processing claims for unemployment benefits and to reach a final resolution on these matters as quickly as possible to ease the burden of involuntary unemployment." Id. The court then concluded that the time limitations of N.D.C.C. § 52-06-13 are reasonable. Id.

[¶24] Blume has cited no authority showing that an administrative agency such as Job Service has a duty to notify a party when its appeal is inadequate or defective. If a party does not properly perfect its appeal the party is to blame and not the agency. Job Service simply had no duty to advise Blume that its out-of-state

attorney lacked authority to file the appeal on Blume's behalf. Additionally, because the appeal form was filed electronically without Fidler designating himself as an attorney on the form, Job Service had no way of knowing Fidler was unauthorized at that time. It was not until later that Job Service's appeal referee recognized that Fidler was an unauthorized out-of-state attorney and that he had filed the appeal request form on behalf of Blume. See App. 9. As mentioned above, Fidler had 45 days from filing the appeal request form to be accepted under pro hac vice admission standards in the state of North Dakota. By failing to do so, Blume's appeal request became void. Without a properly perfected appeal, Job Service was deprived of jurisdiction to consider Blume's appeal. Jurisdiction cannot be conferred by estoppel. See LaRocque v. LaRocque, 1998 ND 143 ¶ 8, 582 N.W.2d 645 ("Rosa LaRocque's counsel has not cited any authority showing jurisdiction can be conferred by estoppel. We conclude Sam LaRocque is not equitably estopped from raising this jurisdictional issue.").

CONCLUSION

[¶25] Job Service respectfully requests this Court affirm its determination that attorney Fidler committed the unauthorized practice of law and, therefore, finding that Blume failed to make a timely appeal from the November 8, 2013 Notice of Determination.

Dated this 7th day of July, 2015.

State of North Dakota
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	)	
State of North Dakota by Job Service North Dakota,	)	
	)	
	)	
Appellee.	)	**AFFIDAVIT OF SERVICE BY MAIL**
	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

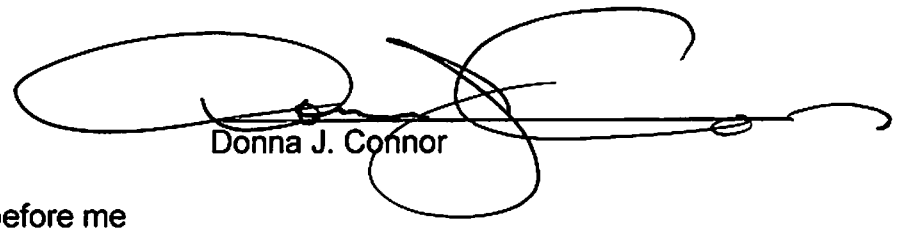
[¶1] Donna J. Connor states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 7th day of July, 2015, I served the attached original **BRIEF OF RESPONDENT/APPELLEE JOB SERVICE NORTH DAKOTA** upon Blume Construction, Inc., by and through its attorney Lawrence A. Dopson, by placing a true and correct copy thereof in envelopes addressed as follows:

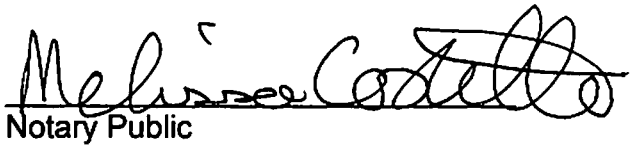
Lawrence A. Dopson
Attorney at Law
Vogel Law Firm
200 North 3rd Street, Suite 201
Bismarck, ND 58502-2097

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.



Donna J. Connor

Subscribed and sworn to before me
this 7th day of July, 2015.



Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2019