

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

NATIONAL RESEARCH CORPORATION,
Appellant,
vs.
NEBRASKA DEPARTMENT OF REVENUE,
Appellee.

Case No. CI08-2582

MEMORANDUM OPINION AND JUDGMENT

DEPARTMENT OF JUSTICE
JUL 17 2009
STATE OF NEBRASKA

This is an appeal from the Nebraska State Tax Commissioner's May 13, 2008 order which denied National Research Corporation's (NRC) request for a declaratory order. NRC had requested an order requiring the Nebraska Department of Revenue to allow NRC to amend to its application to qualify for tax incentives under the Employment and Investment Growth Act, Neb. Rev. Stat. §77-4101 et. seq., (the Act).

Factual background

NRC filed a September 1997 application for tax benefits under the Act with the Nebraska Department of Revenue (the Department). In March 2004 the Department issued a draft agreement which approved the application in part. NRC requested amendments to the draft agreement and the Department denied them, the last denial made in April 2006.

In December 2006 NRC filed a petition with the Department asking for a "declaratory ruling and/or an order allowing NRC to file an additional addendum to its application and to incorporate said addendum into the final agreement ..." to be signed by NRC and the Department. In support of its request, NRC claimed it was adversely "affected as a direct result of the Department's delay in determining the initial question of whether the project

was a qualified business activity.” NRC also claimed because of the delay, “changes in technology and the applicant’s business model necessitated changes in the applicant’s project description and parameters” which amendments, because the application was “held by the Department while it determined whether the project was a qualified business activity,” were not discussed with the Department “during the normal course of the project application approval process from 2001 forward and well prior to the close of the attainment period.”

After consideration of the evidence from the hearing on NRC’s petition for a declaratory ruling, the Commissioner denied NRC’s request to amend the application. The Commissioner found the complained of delay did not cause NRC to fail to attain the employment and investment levels required for incentives. Instead, the Commissioner found NRC’s failure to “meet the required staffing levels and properly time the period of attainment was NRC’s fault alone due to its own misjudgment and inadequate planning.” The Commissioner further found NRC failed to properly assess the state of its own business both at the time of the initial application and during the time it was submitting “addendum filings” in 2000 and 2001 in response to the Department’s requests for additional information. The Commissioner found NRC could have amended its application in 2000 and 2001 when it was aware of the changes in technology and its business model and when, at the same time, it was submitting “addendum filings.”

Claims on appeal

On appeal to this court, NRC claims the Commissioner’s ruling is “erroneous and is an incorrect application of the facts and the law in this matter and the final decision is not supported by competent, relevant, material, and substantial evidence, is contrary to the

evidence in the record before the Department, is contrary to law, and is arbitrary, capricious, and unreasonable.” NRC argues under the “facts and circumstances and the law itself, it has a legal right to amend its application prior to entering into any agreement, regardless of any other factor, including the lengthy passage of time as a result of the Department’s undue and unjustifiable delay in processing this application. . . . NRC would not be in this position had the Department acted in any reasonable timely fashion and approved the application well prior to the closure of the attainment period.” Further, NRC argues the Commissioner’s finding that allowing the amendment would be “inconsistent with the intent of LB775” is without statutory or regulatory authority and because there is no such support, the “Department should allow an applicant to amend its application at any time prior to the signing of an actual agreement under LB775.” NRC also argues the Department was “grossly negligent and incompetent” in its handling of NRC’s application and because of such negligence and incompetence, the Commissioner’s decision is arbitrary, capricious, and unreasonable.

Governing principles

Under Neb. Rev. Stat. §84-917(5)(a) (Reissue 2008) this court reviews the Commissioner’s decision without a jury de novo on the record of the agency. The review is de novo, *Tyson Fresh Meats, Inc. v. State*, 270 Neb. 535 (2005), and the court uses the assignments of error as a guide to the factual issues in dispute and makes an independent factual determination based upon the record. *Slack Nursing Home v. Dep’t of Soc. Servs.*, 247 Neb. 452, 461 (1995), *disapproved on other grounds*, *Betterman v. State DMV*, 273 Neb. 178, 187 (2007). A rebuttable presumption of validity is accorded to the Department’s actions and the de novo

standard of review applied by the district court when reviewing administrative agency decisions is consistent with such presumption. In *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821 (1995).

Arbitrary action, in reference to action of an administrative agency, means action taken in disregard of facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion. *Pentzien, Inc. v. State Dep't of Revenue*, 227 Neb. 434 (1988). A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change suddenly; it is freakish, whimsical, humorsome. The term "unreasonable" can be applied to an administrative decision only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Central Platte NRD v. City of Fremont*, 250 Neb. 252, 255-256 (1996).

Analyses, findings, and conclusions

After de novo review of the record of the agency, the court finds the Commissioner's findings of fact are supported by substantial evidence and the court adopts them. The only factual matter which requires further analysis is in part fact and in part opinion, viz., whether the long delay in reaching a decision on NRC's application rendered the decision to deny the amendment arbitrary, capricious or unreasonable.

A. *Effect of Delay*

No appellate cases were found which held that agency delay by itself renders an agency determination arbitrary, capricious, or unreasonable. A single case was found which held, when prejudice was presumed, unreasonable agency delay was alone sufficient to require the annulment of the agency action. *Heller v. Chu*, 111 A.D.2d 1007 (N.Y. App. Div. 3d Dep't 1985)(An unexplained delay of 12 to 16 years is an abnormal type of delay and should constitute

the application; and the nature, complexity, novelty, and certainty of the factors presented in the application.

In the case sub judice, the pertinent activities of NRC and the Department occurred as follows:

Date	Event	Elapsed time from preceding event	Elapsed time from application date
09/05/1997	NRC filed its application		
10/09/1997	Dept. information request	2 months	2 months
06/01/1999	NRC moved call center & employees to Ohio	1 year 7 months	1 year 9 months
12/31/1999	NRC closed Ohio call center	7 months	2 years 3 months
08/29/2000	Dept letter to NRC: Respond to 10/09/1997 request	9 months	3 years
10/09/2000	NRC letter to Dept: Submittal of requested info	1 month	3 years 1 month
01/16/2001	Dept 2d information request	3 months	3 years 4 months
03/15/2001	NRC letter to Dept.: Submittal of requested info	2 months	3 years 6 months
12/31/2001	NRC decision to shut down "phone operations"	9 months	4 years 3 months
12/31/2002	Last day for NRC to attain employm't & invsm't levels 24 less FTEs at NRC's Lincoln call center than in 1996	1 year	5 years 3 months
03/26/2004	Dept issued proposed agreement to NRC	1 year 3 months	6 years 6 months
06/24/2004	NRC letter to Dept proposed addenda to 1997 application	3 months	6 years 9 months

The Commissioner reasoned that because he had discretion to approve any submitted plan, once he is satisfied the plan "... comports with the purposes set forth in §77-4102. It logically follows that such approval includes any and all later-filed addendums to the submitted plan. Therefore, the tax Commissioner has the statutory authority under LB775 to reject any amendment proposed by an applicant absent such finding." T55.

NRC argues the Commissioner "... has not demonstrated any specific statutory authority, or regulatory authority for that matter, which supports [the proposition that allowing amendment of applications prior to the execution of an agreement is inconsistent with the intent of LB775]. Without any such stated authority, the Department should allow an applicant to amend its application anytime prior to the signing of an actual agreement under LB775."

Neb. Rev. Stat. §77-4101.04 (Reissue 2003) provides "in order to utilize the incentives provided by the Act, a taxpayer must ... file an application for an agreement with the tax Commissioner." The statute thereafter requires the submission of documentation, plans, specifications, and written statements and the like to support the request. Section 77-4104(3) requires the Commissioner to "satisfy" himself that the plan defines a project consistent with the purposes stated in §77-4102 and that the project meets other requirements. Section 77-4104(4) states that after approval, the taxpayer and the Commissioner "... shall enter into a written agreement." Thereafter, subsection 4 sets forth the contents of the agreement.

The evidence is the Department issued a proposed agreement on March 26, 2004. Thereafter, NRC proposed an amendment to its application to redefine its project. Under the proposed agreement NRC was to hire at least 30 new employees and invest in qualified property in Nebraska of at least \$3 million to obtain all the incentives. The agreement required these

granted to applicants who produce "new jobs." Further, such determination is based upon judgment and settled purpose, and after a logical and rational analysis by the Commissioner, and is not capricious, unreasonable, or contrary to law.

After a de novo review of the record, the court finds NRC's contention that the Commissioner's determination is not supported by the law or the facts is without merit. The court finds that the Commissioner's determination to reject the amendments is amply supported by the evidence in the record, is made after careful consideration and reference to facts and circumstances present in the record, and was made on bases which would lead a reasonable person to the same conclusion. Further, the decision was based upon reasoning and logical analysis and the expression of judgment and settled purpose. The determination by the Commissioner is reasonable and supported by a reasoned and correct interpretation of the law.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED the above and foregoing findings are so found and ordered accordingly, and the May 13, 2008 decision of the Nebraska State Commissioner is affirmed.

BY THE COURT:

James E. Doyle, IV
James E. Doyle, IV
District Judge

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CERTIFICATE

The undersigned certifies that the foregoing document was served upon all pro se parties to the above cause and to each of the attorneys of record herein at their respective addresses as shown on the pleadings on July 16, 2009.

By: U.S. Mail FAX

Hand Delivered Certified Mail

Signature Kathy Kerner, Bailiff

*original to court
John Boehm
L. Jay Bartel*