

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

substantial prejudice, even in the absence of some showing of actual injury; assessment of \$14,812.88 in taxes, penalty, and interest for failure to pay State income taxes in 1965 and 1966 annulled.)

Albeit in a different proceeding, unreasonable delay by an administrative agency in reaching a decision has been found sufficient in and of itself to support the issuance of a writ of mandamus requiring an agency to act on an unadjudicated request. See; e.g., *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413 (D.C. Cir. 2004)(The extraordinary remedy of mandamus reserved for extraordinary circumstances; an administrative agency's unreasonable delay presents such a circumstance because it signals the "breakdown of regulatory processes.") In such cases several federal courts have followed the holding and rationale in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984)("TRAC") to determine if agency delay was unreasonable. In *TRAC*, the court identified six principles relevant to determining whether agency delay is so unreasonable as to warrant mandamus: (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Another formula for determining whether agency delay is unreasonable is the four-part test used in the Federal Third Circuit. Under that test, the court ascertains the length of time that has elapsed since the agency came under a duty to act; second, the reasonableness of the delay is judged in the context of the statute authorizing the agency's action; third, the court assesses the consequences of the agency's delay; and fourth, the court considers any plea of administrative error, administrative inconvenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources. *Oil, Chemical, and Atomic Workers Union v. Occupational Safety & Health Administration*, 145 F3d 120 (3d Cir. 1998) ("OCAWU").

Whether the four-part test or the six-principles analysis is applied, the federal courts also follow the rule that the application of these factors to a particular case is "fact intensive" and the agency must be afforded "considerable deference" in establishing a timetable for completing its proceedings. *OCAWU*.

While the federal Administrative Procedures Act is different from Nebraska's, and while the Nebraska Supreme Court has not adopted the federal courts' approach to the review of administrative agency decisions, and while the granting of a writ of mandamus requires considerations different from appellate review of an agency decision, the *TRAC* principles and the OCAWU test are useful guides to this court's determination of whether the complained of delay was unreasonable.

Additional factors bearing on the reasonableness or unreasonableness of the delay considered by the court are the applicant's diligence in prosecuting the application; the applicant's responses to changed circumstances materially affecting the representations made in

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 |

| | | | |
|------------|--|-----------|-------------------|
| 07/26/2004 | Dept letter to NRC proposed amendment denied | 1 month | 6 years 10 months |
| 09/03/2004 | Meeting btwn Dept and NRC & oral request for application amendment | 1 month | 6 years 11 months |
| 10/12/2004 | NRC letter to Dept submittal of add'l info & request to amend | 1 month | 7 years |
| 06/20/2005 | Dept letter to NRC request to amend denied | 8 months | 7 years 8 months |
| 11/29/2005 | NRC letter to Dept request for reconsideration of amendment denied | 5 months | 8 years 2 months |
| 04/24/2006 | Dept letter to NRC request for reconsideration denied | 5 months | 8 years 7 months |
| 12/14/2006 | NRC filed petition w/ Dept for declaratory ruling | 8 months | 9 years 3 months |
| 11/27/2007 | Hearing on petition | 11 months | 10 years 2 months |
| 05/13/2008 | Commissioner's ruling denying petition | 6 months | 10 years 8 months |

Until the filing of the petition for a declaratory ruling, NRC's application was before the Department in an uncontested proceeding. Neb. Rev. Stat. §84-901(3). As an applicant, NRC was responsible for prosecuting the application with reasonable diligence. *In re Applications A-15995 & A-16006 of Twin Platte NRD*, 223 Neb. 430 (1986). NRC also had an obligation to disclose the occurrence of facts after filing of the application which materially affected the bona fides of the application. NRC also was obligated to avoid prejudicing its own

rights under the application by seasonably revising, amending, or supplementing the application as needed to ensure the application's factual accuracy and integrity as it proceeded under the agency's examination.

In his order, the Commissioner found the "delay in the processing" of NRC's application had no bearing on the Department's reliance on NRC's plan described in its application and upon which the draft agreement was ultimately based. The Commissioner also found that neither "... the three-year period between NRC's application filing and its eventual response to the Department's request for more information, nor the three-year period thereafter in which the Department decided the question of the qualified business activity made any difference with respect to the running of the attainment period at the end of 2002 or the employment declines experienced by NRC during the same period of time."

An examination of the Commissioner's rulings yields the finding that the ruling is supported by the factual record and is not arbitrary, capricious, or unreasonable. Further examination of the record supports a finding that the delay in the processing of the application was not unreasonable.

First, the court notes there is no statutorily-imposed deadline for the completion of the Department's review of an application under the Act. As a consequence, there is no definitive time when the Department came under a duty to act. The Commissioner's May 13, 2008 order stated "time is of the essence in meeting employment and investment levels during the attainment period as described by LB775." However, there does not appear to be a corresponding expression of "time being of the essence" as it relates to the Department's consideration of an application or its consideration of whether the applicant met the required

investment and employment levels before the “attainment date.” There is no statute or case law in Nebraska which requires the Department to make an immediate or expeditious ruling on an application under the Act. The statute authorizing the Department to grant the tax benefits under the Act contemplates a thorough examination of the proposed application, the operations of the applicant, and the nature and extent of the “qualified business activity,” but the statute does not set a deadline for such work.

In determining whether delay is unreasonable, the time required for action on an application is dependent on the intensity of the financial and economic analysis of the claimed investments and employment levels, as well as the level of analysis required to determine whether the activity to be pursued with such investment and employment qualifies for incentives under the Act. This stems from Nebraska law which requires tax credits and exemptions be strictly construed. *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 239 Neb. 100 (2000) and Neb. Rev. Stat. §77-4104(3) which requires the Commissioner to be “satisfied” that the plan defines a project “consistent with the purposes stated in §77-4102 in one or more qualified business activities.” In this context the novelty of the planned business activity and the assessment of the strength of the likelihood such activity will result in increased investment and employment in Nebraska are factors which weigh in favor of providing the administrative agency more time to process an application.

The court also considered the ability of the Department to have acted more promptly on the application and finds that there was little evidence put before the Commissioner on this point by either the Department or NRC. In this respect, since NRC was the proponent of the amendment to the application, NRC must bear the consequences of failing to adduce

sufficient evidence to carry the point. There was evidence Department employees were engaged in other work which reduced the time available for work on NRC's application. At the same time the Department was under a "hiring freeze." The inference arises that had more effort been directed toward the NRC application, other work required of the employees would have had to be set aside. Thus, there was evidence of a need in the Department to prioritize in the face of limited resources, but there was no evidence as to whether NRC's project was of a higher priority than other business before the agency. The presumption the administrative agency acted validly when it took approximately three years to reach a conclusion on the application was not rebutted by NRC's evidence.

NRC attempted to show prejudice from the delay by showing that it would have made changes to its application prior to the 2002 attainment deadline had it known the changes in its operation would adversely affect the Department's ruling on the application. NRC offered testimony to the effect the company could have delayed changes in its operations and could have changed hiring decisions to attain the required employment levels. The suggestion that NRC would have manipulated its business operations solely to "maintain employment levels" does not reflect the actual adroit business decisions made by NRC during the relevant time period to respond to changes in its clients' business needs. Instead, such claim suggests the illogical; i.e., that NRC would have pursued activities divorced from NRC's actual profit-motivated business strategies and activities. Further, even if NRC had made the claimed changes in its operations, it appears unlikely the changes would have had a material effect; i.e., it does not appear NRC would have met the required employment targets set in its original application.

An examination of the record shows there was no evidence adduced that the processing delay was occasioned or brought about by any impropriety. The evidence in the record supports a conclusion the Department employees were searching for ways to fairly and with due regard to industry practices, resolve the issues relating to the “qualified business activity” issue presented by NRC’s application.

In evaluating the delay the court considered the consequences of the Department’s delay. It appears the delay did not materially affect the ultimate conclusion because changes in NRC’s business activities and strategies appear to have prevented NRC from obtaining the \$10 million and 100 employee level benefits it sought. The evidence supports the Director’s finding that even if the application had been acted on without delay, it is unlikely NRC, under the exercise of its normal and continuing business judgment, would have attained the levels necessary for the higher incentive award. Thus, it appears the consequences of the Department’s delay were not determinative of whether NRC qualified for the higher level of incentives.

Of particular importance in gauging the reasonableness or unreasonableness of the delay is NRC’s diligence in prosecuting the application. There is abundant evidence in the record NRC was aware of and knew of the changes in its business operations and the effect such changes had upon NRC’s ability to qualify for the incentives. These changes occurred prior to the deadline for attaining the employment levels under the original application. Further, it appears that during a good part of the time that elapsed, NRC was in possession of sufficient information to allow it to proceed on its own, without Department prodding, to restate or amend its application before the proposed agreement was issued. Further, it appears the changes in NRC’s business occurred during a time when NRC was submitting addenda to the application.

Thus, the application as originally submitted did not reflect the actual business strategies or activities NRC employed during the time it was under review by the Department. Under such circumstances, NRC, as part of its good faith obligation to truthfully present its application, had a responsibility to ensure the application maintained its accuracy and truthfully reflected the facts and circumstances the Department was to rely upon in granting the incentives.

If NRC had fulfilled its obligations to diligently pursue its application and to maintain the integrity and veracity of the application by disclosing the changes in its business, it would have become apparent to both NRC and the Department very early in the process that NRC's ability to achieve the employment and investment levels had become unlikely. NRC's lack of diligence in the prosecution of its application contributed to the delay in the processing of the application.

After consideration of all the elements of whether the delay was reasonable or unreasonable, the court finds the conclusion reached by the Department that the delay did not cause the denial of the amendment and the implicit finding that the delay was not unreasonable, were made with due regard to the facts and circumstances of the case and were made on a basis that would lead a reasonable and honest person to the same conclusions. Such findings by the Commissioner were the result of the exercise of reasoned judgment and settled purpose and were not capricious. Further, the findings were reasonable because the evidence presented leaves room for difference of opinion among reasonable minds.

B. Commissioner's finding concerning intent of LB775

In denying the proposed amendment, the Commissioner found there was nothing in the Act which requires the Department to consent to and approve application amendments.

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

levels to be met before December 31, 2003. NRC changed its tax status from a S Corporation to a C Corporation, changing the attainment deadline to December 31, 2002.

The record before the Department shows NRC did not add the required number of new employees necessary to qualify for the incentives before the attainment deadline. This is due in large part to the determination NRC made to change business strategies and to eliminate its use of call centers. In its June 22, 2004 proposed amendment, NRC asked for the exclusion of the survey-based call center from its project. In its original project application and amendments before March 2004, NRC identified telecommunications as a qualifying activity and stated that it owned and operated call centers to pursue its business. The original application included the call center employment in the baseline employee level for the "project."

In the amendments after the issuance of the March 26, 2004 draft agreement, NRC sought to eliminate the call center employees from the baseline, as well as from the projected employment levels in the year of attainment. NRC advised the Department it began changing its method of conducting its surveys from call centers to an Internet and mail-based system before the application was filed. Nevertheless, NRC's original application included the call centers and NRC used the call centers in the underlying employment data not just for the baseline, but for the projected future levels of employment. According to NRC, if it were allowed to amend its application to eliminate the call centers from the project, the baseline hours would have shown 86.61 full-time equivalent employees and without counting the call centers at the attainment deadline, NRC would have had 129.94 full-time employees. Thus, by eliminating the call centers from both the baseline and projected levels, NRC would be able to show a sufficient increase in employees to qualify for incentives.

The Commissioner refused to allow such an amendment because such “addendum” would work to manipulate the employment data to meet requirements under the Act. Specifically, the Director stated “... to grant approval of NRC’s addendum would not be consistent with the purposes stated in Neb. Rev. Stat. §77-4102 and would not result in the hiring of at least 30 new employees for the project period. Instead, approval of the addendum would conversely work to create a legal fiction in determining the measure of new employees added during the attainment period by manipulating the law to fit the facts in order to qualify the applicant to receive LB775 benefits.” T54.

A review of the evidence supports the conclusion reached by the Commissioner. From 1997 to 2002, NRC saw an overall increase in employment, but the overall increase was at a level below the qualifying mark for incentives. Elimination of the call centers from the baseline would allow NRC to use only a portion of its 1996 work force to measure its total increase in employment in 2002 with the effect of showing an increase sufficient to qualify for incentives. The Commissioner determined this was contrary to the legislative intent expressed in the Act.

This finding by the Commissioner is well-supported by §77-4,102 which provides the Act’s purpose is to “promote the creation and retention of new jobs in Nebraska.” The Commissioner’s finding that the amendment to the application would not result in a “real increase” in new jobs is based on the facts and circumstances which appear in the record and is made on a basis which would lead a reasonable person to the same conclusion. The Commissioner’s focus on NRC’s pre-application employment levels and year of attainment employment levels is a direct result of the express legislative intention that the incentives be

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*