

MISSOURI STATE BOARD OF EDUCATION AGENDA ITEM: May 2020

CONSIDERATION OF APPLICATION FOR ATTORNEYS’ FEES

STATUTORY AUTHORITY:

Section 168.071, RSMo

Consent
Item

Action
Item

Report
Item

PRIORITY AREA

Educator Recruitment & Retention

SUMMARY

On November 20, 2019, the Department of Elementary and Secondary Education (DESE) received an email with the Statement of Charges and Board Resolution for the annulment of written contract of Kelly Wilcox pursuant to Section 168.071, RSMo, from the law office of Patrick Brazill on behalf of the Belton No. 124 School District (Belton School District).

The State Board initially set the hearing for January 28, 2020. Upon Belton School District’s Motion for Continuance, the State Board continued the hearing to March 17, 2020.

On February 18, 2020, David J. Moen entered his appearance on behalf of Ms. Wilcox.

Also on February 18, 2020, the Belton School District filed a Voluntary Dismissal, with prejudice. Accordingly, the State Board entered an Order dismissing this matter with prejudice on March 6, 2020.

On April 8, 2020, the State Board received Ms. Wilcox’s Application for Attorneys’ Fees via email from Mr. Moen.

PRESENTER

Margaret K. Landwehr, Chief Counsel, will participate in the presentation and discussion of this agenda item.

RECOMMENDATION

The Department recommends the State Board of Education deny Ms. Wilcox’s Application for Attorneys’ Fees under Sections 36.050 and 536.087, RSMo.

**BEFORE THE STATE BOARD OF EDUCATION
STATE OF MISSOURI**

| | | |
|---------------------------------------|---|---------------------------|
| IN THE MATTER OF: |) | |
| |) | |
| Belton No. 124 School District |) | |
| Petitioner, |) | |
| |) | |
| v. |) | Case No. HR 19-022 |
| |) | |
| Kelly Wilcox, |) | |
| Respondent. |) | |

ORDER

Now on this 4th day of May, 2020, the designee of the State Board hearing this matter takes up Respondent’s Application for Attorneys’ Fees.

Procedural History

1. On November 20, 2019, the Department of Elementary and Secondary Education (DESE) received an email with the Statement of Charges and Board Resolution for the annulment of written contract of Kelly Wilcox (Respondent) pursuant to § 168.071, RSMo, from the law office of Patrick Brazill on behalf of Belton No. 124 School District (Petitioner). The email requested notification once the Missouri State Board of Education (State Board) set a hearing.
2. The State Board initially set the hearing for January 28, 2020. Upon Petitioner’s Motion for Continuance, the State Board continued the hearing to March 17, 2020.
3. On February 18, 2020, David J. Moen entered his appearance on behalf of Respondent.
4. Also on February 18, 2020, Petitioner filed a Voluntary Dismissal, with prejudice. Accordingly, the State Board entered an Order dismissing this matter with prejudice on March 5, 2020.
5. On April 7, 2020, the State Board received Petitioner’s Response to Respondent’s Application for Attorneys’ Fees.¹ The State Board received Petitioner’s Supplemental

¹ The Application for Attorneys’ Fees was submitted by David Moen, but it was brought on behalf of both Mr. Moen and Kyle Farmer. Mr. Farmer did not formally enter his appearance in the underlying matter.

Response to Respondent's Application for Attorneys' Fees on April 10, 2020, and Respondent's Reply to Petitioner's Supplemental Response to Respondent's Application for Attorneys' Fees on April 17, 2020.

6. On April 8, 2020, the State Board emailed counsel for Respondent and stated that no motion for attorney's fees had been received from him and asked counsel to submit any motion for consideration within 10 business days. The State Board received Respondent's Application for Attorneys' Fees pursuant to §§ 536.050.1 and 536.085, RSMo, via email on April 8, 2020. The Certificate of Service indicates that a copy of the Application for Attorneys' Fees was mailed to Petitioner on April 3, 2020. An email from counsel for Respondent indicates that a copy was also mailed to the State Board on April 3, 2020. Based on the mail received by the State Board and DESE Chief Counsel, Respondent's application does not appear to have been delivered to the State Board on April 6, 2020.
7. This matter is now before the State Board pursuant to Chapter 536, RSMo.

Conclusions of Law

I. Jurisdictional Requirements under Sections 536.050 and 536.087, RSMo

Legal Authority

1. Under § 168.071.2, RSMo, and 5 C.S.R. 20-400.230(2), school districts may file charges to discipline a holder of a certificate of license to teach, including annulment of a written contract.
2. Respondent's first ground for seeking attorney's fees² is under § 536.050.1, RSMo, which allows parties to bring a declaratory judgment to challenge the ". . . validity of rules, or threatened applications thereof. . ." by bringing suit against an administrative agency.
3. Section 536.050.4, RSMo, requires the

. . . nonstate party seeking an award of fees and other expenses, shall, *within thirty days of a final disposition of an action brought* pursuant to [§ 536.050.1, RSMo], submit to the court which rendered the final disposition or judgment an application which shows that the party is a prevailing party and is eligible to receive an award pursuant to this section, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed

² Counsel for Respondent appears to abandon his claims for attorney's fees pursuant to § 536.050, RSMo, in his Reply to Petitioner's Response to Respondent's Application for Attorneys' Fees. Regardless, this hearing officer will examine this claim in the State Board's Order.

[emphasis added].

4. Respondent's second ground for seeking attorney's fees is under § 536.087.1, RSMo, which provides that:

[a] party who prevails in an agency proceeding or civil action arising therefrom, brought by or against the state, shall be awarded those reasonable fees and expenses incurred by that party in the civil action or agency proceeding, unless the court or agency finds that the position of the state was substantially justified or that special circumstances make an award unjust.

5. Section 536.087.3, RSMo, states the following:

[a] party seeking award of fees and other expenses shall, *within thirty days of a final disposition in an agency proceeding or final judgment in a civil action*, submit to the court, agency or commission which rendered the final disposition or judgment an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed

[emphasis added].

Analysis

6. DESE's order on March 5, 2020, which dismissed the underlying matter, was a final disposition in an agency proceeding or civil action. *See, Davis v. Agnoff*, 957 S.W. 2nd 340, 343 (Mo. App. W.D. 1997), which states:

[l]ong established principles of Missouri law provide that a 'final' disposition in an agency proceeding or a civil action occurs whenever the decision disposes of all issues as to all parties and leaves nothing for future determination.

7. Because the Order dismissing the underlying matter was a final disposition, the thirty-day filing requirement began tolling on March 6, 2020.
8. As a matter of law, the thirty-day requirement is jurisdictional:

. . . [f]ailure to request attorney's fees within thirty days of a final disposition in an agency proceeding or a final judgment in a civil

action deprives the court or agency of jurisdiction to consider the request

Id. (internal citations omitted).

9. Because Respondent's Application for Attorneys' Fees was not received on or about April 6, 2020, Respondent's Application exceeds the thirty day time limit required under both §§ 536.050 and 536.087, RSMo, and should be dismissed for lack of jurisdiction.

II. Merits of Arguments under Sections 536.050 and 536.087, RSMo

Legal Authority

10. Even assuming, arguendo, that Respondent's Application for Attorneys' Fees was received timely by mail, counsel for Respondent must meet the statutory requirements of the provisions under which he brings his claims for attorney's fees.

As stated above, § 536.050.1, RSMo, allows parties to bring a declaratory judgment to challenge the “. . . *validity of rules, or threatened applications thereof.* . . .” [emphasis added] by bringing suit against an administrative agency. Section 536.050.3, RSMo provides:

[a] nonstate party who prevails in an action brought pursuant to [§ 536.050.1, RSMo] shall be awarded reasonable fees and expenses, as defined in section 536.085, RSMo, incurred by that party in the action.

Section 536.050.4-.6, RSMo, then describes how the prevailing non-state party in an agency proceeding must submit an application for fees and the process by which the court would determine an award (*see, e.g.*, § 536.050.5, RSMo: “[a] prevailing nonstate party in an agency proceeding shall submit an application for fees and expenses to the court before which the party prevailed”).

11. As stated above, § 536.087.1, RSMo, provides that:

[a] party who prevails in an *agency proceeding* or civil action arising therefrom, brought by or against the *state*, shall be awarded those reasonable fees and expenses incurred by that party in the civil action or agency proceeding, unless the court or agency finds that the position of the state was substantially justified or that special circumstances make an award unjust

[emphasis added].

12. Finally, definitions for both §§ 536.050 and 536.087, RSMo, are found in § 536.085, RSMo. This section first makes clear that for purposes of both provisions, an “agency proceeding” is one in which “the state is represented by counsel” (*see*, § 536.085(1), RSMo). Section 536.085(5), RSMo, goes on to say that with respect to both §§ 536.050 and 536.087, RSMo, the term “state” “. . . shall *not* include political subdivisions of the state” [emphasis added].

Analysis

13. Counsel for Respondent first brings his Application for Attorneys’ Fees under § 536.050.1, RSMo. This provision is inapplicable to the underlying matter. Respondent did not bring a declaratory judgment challenging the validity of a DESE regulation. Rather, the underlying matter was one brought by the Belton No. 124 School District pursuant to § 168.071, RSMo, concerning the alleged abandonment of Respondent’s teaching contract.³

Further, based on the definitions provided by § 536.085, RSMo, *Belton No. 124 School District v. Kelly Wilcox*, HR 19-022, was not an agency proceeding (*see*, § 586.085.1, RSMo, which states that an agency proceeding is one in which “. . . the state is represented by counsel. . .”) [emphasis added]. Here, the State of Missouri was not represented by counsel in the matter. Similarly, § 536.050, RSMo, assumes that the state is a party to the action (*see*, § 536.050.5, RSMo: “[a] prevailing nonstate party *in an agency proceeding* shall submit an application for fees and expenses to the court before which the party prevailed”) [emphasis added].

Section 168.071.2, RSMo, and 5 C.S.R. 20-400.230(2), allow school districts to file charges to discipline a holder of a certificate of license to teach, including annulment of a written contract. In the underlying case, the Belton No. 124 School District did so.

As discussed more fully below, the “state” was not party to the underlying action, because local school districts are not considered the “state” for purposes of §§ 536.050 and 536.087, RSMo.

14. Second, counsel for Respondent argues he is entitled to attorney’s fees pursuant to § 536.087, RSMo. Again, this legal argument is misplaced. As stated previously, § 536.087.1, RSMo, provides for reasonable fees and expenses “. . . in an *agency proceeding* or civil action arising therefrom, brought by or against the *state*. . .” [emphasis added].

Per definitions provided in § 536.085, RSMo, the underlying case was neither an agency proceeding, nor an action brought by or against the state. DESE was not a party to the case, nor was it represented by counsel.

³ This hearing officer would stress that the merits of the underlying matter were not adjudicated, as the matter was dismissed by party consent.

Political subdivisions, such as school districts, are specifically not included within the definition of “state” for purposes of § 536.087, RSMo (*see*, § 536.085(5), RSMo). Section 536.010(8), RSMo, provides the following definition of “state agency” for purposes of Chapter 536, RSMo:

. . . each board, commission, department, officer or other administrative office or unit of the state *other than the general assembly, the courts, the governor or a political subdivision of the state*, existing under the constitution or statute, and *authorized by the constitution or statute to make rules or to adjudicate contested cases*

[emphasis added].

P.L.S. ex rel Shelton v. Koster, 360 S.W.3rd 805 (Mo. App. W.D. 2011), a case that examined whether Missouri’s State Legal Expense Fund covered the acts of an employee of a school district, examined at length whether a school district is a state agency or a political subdivision. *P.L.S.* stated that while school districts are certainly

. . . governmental instrumentalities of the state and serve important governmental purposes. They are ‘agencies of the state’ in the ordinary and usual sense of the word ‘agency’; and it has been said that they form ‘an integral part of the state, and constitute that arm or instrumentality thereof discharging the constitutionally [e]ntrusted function of imparting knowledge and intelligence to the youth of the state.’ But they are also ‘political subdivisions.’

Thus, a school district is not an ‘agency of the state’ in the same way that we understand a department or a division of the machinery of state government to be. Let us not forget that, generally, the school districts, with minor exception, while *authorized* by the General Assembly, are, like other political subdivisions authorized by law, generally formed by the vote of the citizenry in the geographic area desiring to establish the district

Id. at 813 [internal citations omitted; emphasis supplied].

While the *P.L.S.* holding relates to the question of coverage under the State Legal Expense Fund, *P.L.S.* makes it clear with regard to Chapter 536 of the Missouri Revised Statutes, or Missouri’s Administrative Procedure Act, school districts are not included:

. . . school districts are not bound by the provisions of Chapter 536 that are pertinent to “state agencies.” “State agency” is a phrase that is

separately defined in Chapter 536 as specifically *excluding, inter alia*, political subdivisions of the state. *See* 536.010(2) (defining “agency”) and 536.010(8) (defining “state agency”).

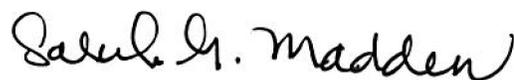
Id. at 818.

15. Through Respondent’s Application for Attorneys’ Fees, Petitioner’s Responses to Respondent’s Application, and Respondent’s Response to Petitioner’s Responses, both parties have introduced evidence that has not been properly received pursuant to § 536.070, RSMo. In light of the decision below, the State Board need not reach a conclusion as to the merits of such evidence here.
16. Based on a reading of the statutes and Missouri case law, Respondent’s counsel is not entitled to attorney’s fees under either §§ 536.050 or 536.087, RSMo. Because Respondent’s counsel is not entitled to attorney’s fees as a matter of law, there will not be a hearing in this matter.

Recommendation

It is recommended that the State Board of Education deny Respondent’s Application for Attorneys’ Fees under §§ 536.050 and 536.087, RSMo.

Submitted this 4th day of May 2020, by
the designated Hearing Officer for the
Commissioner of Education.



Sarah G. Madden, Hearing Officer