STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Wisconsin Waterfowl Association's Raffle License	Case No. DOA-23-0002

BRIEF IN SUPPORT OF WISCONSIN WATERFOWL ASSOCIATION'S MOTION AND ITEMIZED APPLICATION FOR COSTS

On November 17, 2023, Wisconsin Waterfowl Association ("WWA") prevailed against the Division of Gaming ("Respondent") in the above-captioned contested case. Under Wis. Stat. § 227.485, WWA, as a "small nonprofit corporation", is entitled to its costs in connection with the case unless Respondent was substantially justified in taking its position or there are special circumstances that would make such an award unjust. Respondent was neither substantially justified in its position, nor were there any special circumstances here. Accordingly, WWA should be awarded its costs in connection with this case.

COSTS AWARD STANDARD

Pursuant to Wis. Stat. § 227.485, when a "small nonprofit corporation" prevails against a state agency in a contested case hearing, the small nonprofit corporation is *entitled* to recover its "costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust." Wis. Stat. § 227.485(3).

Because, in this case, there are no apparent special circumstances that would make an award of fees and costs unjust, the focus is on the substantial justification exception. Substantially justified means "having a reasonable basis in law and fact." Wis. Stat. § 227.485(2)(f). To meet this burden, Respondent must demonstrate *all* three of the following:

"(1) a reasonable basis and truth for the facts alleged; (2) a reasonable basis and law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." *Bd. of Regents of Univ. of Wis. Sys. v. State Pers. Comm'n*, 2002 WI 79, ¶ 41, 254 Wis. 2d 148, 646 N.W.2d 759. If Respondent was not substantially justified in its position, then WWA must be awarded the following costs:

- Reasonable expenses of expert witnesses, studies, analyses, engineering reports, tests or projects necessary for the preparation of the case;
- Reasonable attorney or agent fees;
- All the necessary disbursements and fees allowed by law, including a reasonable disbursement for the service of process or other papers in an action; amounts actually paid out for certified and other copies of papers and records in any public office; postage; photocopying, telephoning, electronic communications, facsimile transmissions and express or overnight delivery; depositions; and expert witness fees not to exceed $300 for each expert.

Wis. Stat. §§ 227.485(5) and 814.245(5)(a)-(b).

STANDARD OF REVIEW

Whether Respondent was substantially justified in its position requires interpretations of Wis. Stat. § 227.485. Statutory interpretation presents a question of law which is reviewed de novo. *Susie Q Fish Co. v. Wis. Dep't of Revenue*, 148 Wis. 2d 862, 868, 436 N.W.2d 914 (Ct. App. 1989). Importantly, when interpreting statutes, no deference is given to an agency's interpretation of any law. Wis. Stat. § 227.10(2g) ("No agency may seek deference in any proceeding based on the agency's interpretation of any law.").

ARGUMENT

I. WWA is a small nonprofit corporation.

WWA qualifies as a small nonprofit corporation under the applicable statutes, because it is a nonprofit corporation which employs fewer than 25 full-time employees. Stipulation of Fact ¶ 1; *see* Wis. Stat. § 227.458(2)(d).

II. Respondent lacked a reasonable legal basis for its opposition to WWA's practices.

Respondent cannot demonstrate a reasonable legal basis for its opposition to WWA's motion for summary judgment – a motion that was granted. This Court's decision (the "Decision") readily demonstrates that the case was not even close, quickly dispelling every one of Respondent's arguments:

- "The text of the raffle statutes and Chapter 137 are not ambiguous." DOA-23-0002 at 8.
- "There is no language in the raffle statutes that prevents the purchaser's portion from being electronically stored and sent to the purchaser as an electronic record as allowed in Chapter 137." *Id.*
- The Respondent's "argument has the wrong focus." *Id.*
- "This assertion that Chapter 137 is not an appropriate law because it was not drafted for the purpose of regulating raffles is unsupported." *Id.*
- "The application as stated here is not contrary to either statute's stated purpose or application." *Id.*
- "An interpretation that the legislature meant to exempt the raffle statutes from the application of Chapter 137 without specifically stating so would stray too far from the plain meaning of the text." *Id.*

At no point does the Decision give *any* credence to Respondent's arguments. The one-sidedness of the Decision leads to only one conclusion: Respondent's position was not substantially justified.[1]

III. Despite months of WWA meeting with Respondent, Respondent maintained its unjustified position.

Beginning in March 2023, WWA actively engaged Respondent on whether raffle tickets could be delivered to purchase electronically. Over six months, WWA and Respondent had at least three separate meetings at which they substantively discussed whether the electronic delivery of raffle tickets was permitted under Wisconsin law. *See* Stipulation of Fact. At each meeting WWA consistently asserted that electronic delivery is permissible for the reasons articulated in its motion for summary judgement which were *all* adopted in full by the Decision. At no point during these six months of discussions did Respondent ever clearly or consistently explain why it believed WWA was wrong. That explanation came for the first time in its response brief.[2]

In addition to the meetings, WWA sent multiple letters to Respondent which both memorialized and clearly articulated WWA's legal theory. Respondent provided responses to each letter, but its theories were wholly unsupported by the law.

Reliant on its raffle revenues to pursue its charitable mission, WWA spent months trying to educate and inform Respondent about WWA's position to reach an efficient resolution of this

[1] The stronger the administrative rejection of the Government's arguments, the more thorough the required Governmental explanation for denying attorney's fees to the prevailing party. *United States v. Paisley*, 957 F.2d 1161, 1167 (4th Cir. 1992); *Bricks, Inc. v. U.S. Env't Prot. Agency*, 426 F.3d 918, 922 (7th Cir. 2005).

[2] Briefly, it appears this is not the first time Respondent has overstepped its authority in misconstruing legislative intent: "Notwithstanding s. 227.11, the department may not promulgate or enforce any rule that interprets the provisions under subch. VIII or any other provisions under this chapter that relate to raffles." Wis. Stat. § 563.05(4m). This is an extraordinary prohibition to impose on what would otherwise be a regulatory agency requiring such authority to carry out its duties.

issue. WWA responded to every one of Respondent's requests for information, providing Respondent with both a legal and factual basis to approve of WWA's activities. Still, Respondent refused to abandon its unsubstantiated theory, forcing WWA to initiate this proceeding. WWA has ultimately prevailed, but not without significant costs and fees. It should not have to bear those on its own.

ITEMIZED STATEMENT OF COSTS

An itemized statement of legal costs incurred in connection with this contested case is included as Exhibit A to this application. State law directs the amount of costs shall be determined using the criteria specified in Wis. Stat. § 814.245(5), which caps attorney fees at $150 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys justifies a higher fee.

Based on the limited availability of attorneys specializing in raffle legislation, electronic transactions, and administrative and regulatory law, we are requesting fees be reimbursed at the actual billed hourly attorney rate as detailed in Column G of Exhibit A.

Alternatively, the statutory amount of $150 was enacted in 2003 Wisconsin Act 145 and applying the U.S. Bureau of Labor Statistics CPI Inflation Calculator results in a present-day rate is $250 an hour.[3] If the court does not see fit to award costs based on the actual billed hourly attorney rate, we respectfully request reimbursement of costs based on a $250 hourly rate to reflect the statutory cost of living adjustment as detailed in Column H of Exhibit A. *See Stern ex rel. Mohr v. Wis. Dep't of Health & Fam. Servs.*, 222 Wis. 2d 521, 588 N.W.2d 658 (Ct. App. 1998).

[3] U.S. Bureau of Labor Statistics, *CPI Inflation Calculator*, https://www.bls.gov/data/inflation_calculator.htm.

CONCLUSION

For the above-stated reasons, WWA respectfully requests it be awarded its reasonable attorney fees and costs under Wis. Stat. § 227.485. If the statutory underpinning of Wis. Stat. § 227.485 are to be effectuated, WWA's motion for an award of fees must be granted in this case.

Dated this 14th day of December, 2023.

GODFREY & KAHN, S.C.

Attorneys for Petitioner Wisconsin Waterfowl Association

By: _____
Zachary P. Bemis
State Bar No. 1094291
M. Parker Conover
State Bar No. 1113601

Godfrey & Kahn
One East Main Street
Suite 500
Madison, WI 53703
(608) 257-3911
(608) 257-0609 (fax)
zbemis@gklaw.com
pconover@gklaw.com