

**IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT**

JARED CERNOSKY)	CASE NO. CV-2017-06-2609
)	
Appellant,)	JUDGE MARY MARGARET
-vs-)	ROWLANDS
)	
STATE BOARD OF REGISTRATION)	
FOR PROFESSIONAL ENGINEERS,)	<u>ORDER</u>
)	
Appellee.)	

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This matter is before the Court on Appellant Jared Cernosky, Jr.'s (Cernosky) motion for Appellee, the State Board of Registration for Engineers and Surveyors (Board), to pay fees he incurred pursuant to R.C. 2335.39, which states:

(B) (1) Except as provided in divisions (B)(2) and (F) of this section, in a civil action, or appeal of a judgment in a civil action, to which the state is a party, or in an appeal of an adjudication order of an agency pursuant to section 119.12 of the Revised Code, the prevailing eligible party is entitled, upon filing a motion in accordance with this division, to compensation for fees incurred by that party in connection with the action or appeal. Compensation, when payable to a prevailing eligible party under this section,

is in addition to any other costs and expenses that may be awarded to that party by the court pursuant to law or rule.

(B)(2) Upon the filing of a motion under this section, the court shall review the request for the award of compensation for fees and determine whether the position of the state in initiating the matter in controversy was substantially justified, whether special circumstances make an award unjust, and whether the prevailing eligible party engaged in conduct during the course of the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy. The court shall issue an order, in writing, on the motion of the prevailing eligible party, which order shall include a statement indicating whether an award has been granted, the findings and conclusions underlying it, the reasons or bases for the findings and conclusions, and, if an award has been granted, its amount. The order shall be included in the record of the action or appeal, and the clerk of the court shall mail a certified copy of it to the state and the prevailing eligible party.

With respect to a motion under this section, the state has the burden of proving that its position in initiating the matter in controversy was substantially justified, that special circumstances make an award unjust, or that the prevailing eligible party engaged in conduct during the course of the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy.

On or about February 28, 2017, Cernosky applied to the Board for registration as a professional engineer in Ohio by reciprocity because he had been a licensed engineer in the Commonwealth of Virginia since April 2016. The Board recognized Cernosky had four years and seven months of experience as of January 2017, however, the Board interpreted O.A.C. 4733-9-01(C) to require experience completed one hundred and twenty days before the Principles and Practice Examination (PE) date. The Board set April of 2016, the date Cernosky took the PE exam in Virginia, as the examination date for purposes of O.A.C. 4733-9-01(C). Therefore, the Board asserted Cernosky's experience and education requirements must have been met one hundred and twenty days before April of 2016 (December 2015), leaving Cernosky a full six months short of Ohio's four year experience requirement, if he were applying for the PE. The Board believed its mathematical calculation was a ministerial act of merely counting the days between Cernosky's accrual of qualifying experience and the date he

took the PE exam in Virginia, not an adjudication. Therefore, without a hearing, the Board deemed his application incomplete.

In the case at bar, the Board moved to dismiss Cernosky's appeal asserting the Court lacked subject matter jurisdiction because R.C. 119.12 permits appeals of agency adjudications, not ministerial acts; therefore, Cernosky could not appeal its claimed ministerial act under R.C. 119.12. On September 28, 2017, the Court remanded the matter to the Board for a hearing on Mr. Cernosky's application for reciprocity after finding the Board's "Notice of Incomplete Application" was an adjudication of Cernosky's application for reciprocity and not a ministerial act under R.C. 4733.19.

The Board opposes Cernosky's motion for fees because it asserts it did not initiate the litigation, and if the Court finds it did, its actions were substantially justified, thereby precluding an award of fees pursuant to R.C. 2335.39. Cernosky urges the Court to award him fees because: 1) he is the prevailing party; 2) he prevailed, therefore these proceedings should not have been necessary [the Court construes this argument to be an assertion that the Board's position was not substantially justified], and; 3) to deter the Board "from attempting to treat future similar applicants in the manner in which they treated Cernosky."

To determine whether an administrative board was "substantially justified," a court must look at the information the Board had in its possession at the time it rendered its decision and determine if the Board's action was based on a rationale supported by evidence that a reasonable person could find substantially justified. *Linden Med. Pharm., Inc. v. Ohio State Bd. of Pharm.*, 2003-Ohio-6657 *, 2003 Ohio App. LEXIS 5879. The Board's failure to prevail on the merits does not establish a presumption that its position was not substantially justified. *Id.*, citing *Boyle v. Ohio State Med. Bd.* (Aug. 7, 1990), Franklin App. No. 89AP-1186, 1990 Ohio App. LEXIS 3470 .

The Court finds the Board's position was substantially justified in not granting Cernosky's application for reciprocity without a hearing. The Board applied R.C. 4733.11 and O.A.C. 4733-29-01 requirements for Ohio PE exam applicants to Cernosky's application. Reciprocity is governed by R.C. 4733.19 and includes the exercise of an opinion by the Board that the applicant meets the requirements of R.C. 4733.19. This Court found the statutory exercise of an opinion rendered the Board's act an adjudication and not a ministerial date calculation. The Court finds this matter was a case of first impression and the Board's position was substantially justified.

The Board asserts it did not initiate the matter in controversy, therefore, an award of fees is not warranted. The Board cites to *Holden v. Ohio Bureau of Motor Vehicles*, 67 Ohio App.3d 531 in support of its argument that denying a license does not "initiate" the matter in controversy, but, taking away an existing license does. A review of *Holden* reveals the court was discussing *Highway Valets, Inc. v. Ohio Dept. of Transp.* (1987), 38 Ohio App.3d 45, 47, 526 N.E.2d 112, 114, where the *Highway Valets* court held that because the business, and not the state, initiated the Court of Claims matter, the business could not recover fees. The *Holden* court held the "applicability of *Highway Valets, Inc...* was doubtful" because R.C. 2335.39 contemplates situations where the state is the initiating party of a lawsuit, but failed to take into consideration situations where:

...a party appeals from an agency order to the court of common pleas under R.C. 119.12. In the latter situation, "the matter in controversy" is the action taken by the agency that resulted in an administrative order that is the subject of the appeal. Thus the party who prevails in the appeal of an administrative order to the court of common pleas may bring an R.C. 2335.39 motion to recover attorney fees in that court. The express language of R.C. 2335.39(D) recognizes the right of a prevailing eligible party who is appealing an agency adjudication order under R.C. 119.12 to an award of fees...

The Ohio Supreme Court stated R.C. 2335.39 applies:
...where the state initiates either the *conduct* that gave rise to the litigation *or* initiates the *litigation* caused by the controversy. * * *

Clearly the purpose of R.C. 2335.39 is to protect citizens from unjustified state action. If fees under R.C. 2335.39 were permitted only where the state initiated the legal action, the protection that R.C. 2335.39 would not be available where landowners, such as in the instant case, were compelled to initiate legal action to get relief from the state. *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, 14, 2002-Ohio-6716, P67-P68, 780 N.E.2d 998, 1010-1011, 2002 Ohio LEXIS 3064, *33-34.

The Court finds the Board's conduct did give rise to the litigation; therefore, the Board's assertion that it is not liable for fees because it did not initiate the litigation is without merit.

WHEREFORE, the Court finds the Board's conduct gave rise to the litigation, however, its position was substantially justified. Therefore, Jared Cernosky, Jr.'s motion for fees is DENIED. Costs to the Board.

IT IS SO ORDERED.



JUDGE MARY MARGARET ROWLANDS

The Summit County Clerk of Court shall serve a copy of this Order upon Jared Cernosky, Jr. by regular U.S. Mail to 1328 Timber Trail, Hudson, OH 44236.

CC: JARED CERNOSKY, JR.
ATTORNEY CHRISTIE LIMBERT
ATTORNEY BRIAN R. HONEN