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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 20

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GEORGE REYNOLDS,

Plaintiff,

Index No. 401813/94

-against-

Decision and Order

MICHAEL J. DOWLING, et al.,

Defendants.

DEC 0 1996

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JOAN B. LOBIS, J.S.C.

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FOR THE

Petitioner has brought the **present motion** for attorneys fees pursuant to CPLR § 8601. That section provides **that:**

A court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust.

It is undisputed that petitioner was the prevailing party' in the underlying litigation. Respondents argue that petitioner, is not entitled to **attorneys** fees on the grounds that the **position of** the state was substantially justified and that special circumstances make an award unjust.

The first issue to be determined is whether the **state's** position in the: underlying , litigation was "substantially **justified**". The "**test** of whether or not a government action is substantially justified is essentially one of reasonableness. Where the government can show that its case had a reasonable basis both in law and fact, no award will be **made.**" **N.Y.S. Clinical Lab v. Kaladian**, 85 N.Y.2d 346, 356 (1995). The burden is on the

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state to establish that its position was substantially justified. Huggins v. Coughlin, 209 A.D.2d 770, 770-71 (3d Dep't 1994). As will be explained more fully below, the state **has failed** to establish its position was "substantially justified."

The issue *in* the underlying litigation was whether subdivision(e) of § 381.3 of Title 18 of the Official **Compilation of Codes, Rule and Regulations of the State of New York ("18 N.Y.C.R.R. § 381.3(e)")** was invalid and void in that it **conflicted** with Social Services Law ("**SSL**") § 106-B. **The challenged** regulation prohibited the retroactive payment of/ prior underpayments of home relief benefits to persons who are **no** longer on public assistance. The court found in its prior decision that the challenged regulation directly conflicted with and violated SSL § 106-B. As a result, the court granted plaintiff summary judgment declaring the regulation null and void on the ground that it was inconsistent with the social services law on which it was based. The court also held that plaintiff was entitled to an order directing the Commissioner of the New York State Department of Social Services ("N.Y.S.D.S.S.") to institute and establish regulations requiring the payment to the former recipients: of home relief retroactive corrective underpayments to the same extent that they were offered to former recipients of AFDC.

SSL § 106-B provided that social service **officials** should take all necessary steps to correct any overpayment or underpayment

to a public assistance recipient. The challenged regulation provided that underpayments would be corrected for former AFDC recipients but would not be corrected for former home relief recipients. The court held that the social services law was totally unambiguous in not making any distinction between AFDC recipients and home relief recipients. There was nothing in the language of the statute which implied or suggested that home relief recipients and AFDC recipients would be treated differently. Therefore, there was no legislative authority for the regulations enacted by N.Y.S.D.S.S. which provided that underpayments would be corrected for former AFDC recipients but would not be corrected for former home relief recipients. The court went on to hold that since the statute was unambiguous in not making any distinction between AFDC recipients and home relief recipients, there was no reason for the court to look at the legislative history of the statute to determine whether the legislature intended to treat these two groups differently with respect to the correction of underpayments. Based on the court's analysis in the underlying litigation, the court finds that the position taken by the state in defending the challenged regulation was not substantially justified -- i.e., that its position in defending the challenged regulation did not have a reasonable basis in law and fact as the statute was unambiguous.

In arguing that there was a substantial justification for its position in the underlying litigation, the state points to a

1995 legislative amendment to SSL § 106-B eliminating correction of underpayments to a person who is currently not eligible for and in receipt of home relief or AFDC payments except that such payments may be made to AFDC recipients if required by federal statute or regulation. The state argues that the legislative history of the 1995 amendment indicates that the purpose of the 1995 amendment was to "clarify" that the statute was intended to prohibit corrective underpayments with respect to a person not currently eligible for and in receipt of home relief and only authorizes **corrective** payments to persons formerly eligible for or in receipt of AFDC payments to the extent required by federal law and **regulations**. **According** to the state, this amendment makes clear that **the state's** interpretation of the statute in the underlying litigation was correct. This argument is without basis. The **1995 amendment** to the social services law does not change the **fact that the 1981** amendment to SSL § 106-B was unambiguous and did not make any distinction **between** former AFDC recipients and former home relief recipients. The fact that the legislature made the amendment in 1995 simply shows that a legislative change was required if a distinction was to be made in correcting underpayments for AFDC and home relief recipients. Moreover, even though the legislative history to the 1995 amendment **states that its purpose is to clarify** the statute's intent, that does not alter this court's previous finding that the language of the 1981 amendment to SSL § 106-B was unambiguous and did not require clarification. Based on the foregoing, this court finds that the state has failed to

demonstrate a reasonable **basis** in law and fact for its position that the challenged regulation was authorized by **the** social services law.

The state also argues that plaintiff is not entitled to attorneys fees because the special circumstances of this case make an award unjust -- **i.e., the** subsequent "**clarification**" of the 1995 amendment. **See** CPLR § 8601(a). As previously discussed, the 1995 amendment was not a clarification but was a change **in** the law which was required to justify the **state's** actions in making a distinction between home relief and AFDC recipients. Therefore, the state has failed to establish special circumstances which would justify denying plaintiff's request for attorneys fees.

The recovery of attorneys fees is only chargeable as against the **state** defendant and is not chargeable against the city defendant as there is no statutory basis *for* an award against the city. The city's argument that the application is untimely is denied as without basis.

Finally, the state argues that the amount of attorneys fees requested by plaintiff should be reduced because **the** hourly rate requested by plaintiff's attorneys is excessive and the number of hours requested is excessive. CPLR § 8601 provides that fees shall be determined by the prevailing market rates **for** the **kind** and quality of the service provided. This court finds that **the** amount

of \$175 per hour for plaintiff's attorneys who are both 1990 law school graduates and had both been employed **for five years** respectively by Brooklyn Legal Services Corporation **B** and, Queens Legal Services is the prevailing market rate for the work they performed in the litigation. Nor has the state established that the number of hours claimed by plaintiff's attorneys is excessive. This court finds ^I after reviewing the submissions by plaintiff's attorney that the number of hours spent was not excessive **and** the time spent by each of the two attorneys was not redundant or duplicative. Plaintiff is entitled to **\$13,195.00** in attorneys fees for the work performed **in the** underlying litigation and to an additional fee of **\$2,730.00** for the time spent on the **present** application for attorneys fees.

This constitutes the decision and order of the court. The clerk **is directed** to enter judgment accordingly.

Dated:

Aug. 16, 1996

JBL

J.S.C.

FILED
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