

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

IOWA FAR BUREAU FEDERATION, :
IOWA RENEWABLE FUELS :
ASSOCIATION, and IOWA WATER :
ENVIRONMENT ASSOCIATION, :
 :
Petitioners, : NO. CVCV008371
AND :
 :
AGRIBUSINESS ASSOCIATION OF :
IOWA, ASSOCIATION OF BUSINESS :
AND INDUSTRY, IOWA CATTLEMEN'S :
ASSOCIATION, IOWA INSTITUTE FOR :
COOPERATIVES, IOWA LIMESTONE :
PRODUCERS ASSOCIATION, IOWA : RULING
PORK PRODUCERS ASSOCIATION, :
IOWA POULTRY ASSOCIATION, IOWA :
TURKEY FEDERATION, and IOWA :
CORN GROWERS ASSOCIATION, :
 :
Intervenors, :
 :
vs. :
 :
ENVIRONMENTAL PROTECTION :
COMMISSION and IOWA DEPARTMENT :
OF NATURAL RESOURCES, :
 :
Respondents, :
AND :
 :
ENVIRONMENTAL LAW & POLICY :
CENTER OF THE MIDWEST, IOWA :
ENVIRONMENTAL COUNCIL and THE :
SIERRA CLUB, :
 :
Intervenors. :
 :
— : —

BE IT REMEMBERED, the above matter came on for hearing on the 30th day of September, 2011 before the undersigned, Judge of the Fifth Judicial District of Iowa, on multiple pending motions. The Petitioners appeared by counsel, Michael L. Mock and Paul S. Swinton. Intervenors aligned with the Petitioners appeared by counsel, Julia L. Vyskocil. Respondents appeared by counsel, David Sheridan. Intervenors

Environmental Law & Policy Center of the Midwest (ELPC) and Iowa Environmental Council (IEC) appeared by counsel, Bradley Klein, and Intervenor The Sierra Club, appeared by counsel, Wallace Taylor.

This judicial review proceeding challenges rules related to antidegradation adopted by the Environmental Protection Commission (EPC). Among the claims being asserted are that the EPC Board was improperly constituted, that one of the members of the Board had a conflict of interest and should not have participated in the process, and that procedural irregularities exist related to the adoption of the rules.

Since it was originally filed, intervenors have joined as parties on both sides of the issue. Now before the Court are several motions filed by the Petitioners, including a motion to extend the time for resisting a pending motion for summary judgment, a motion asking the court to establish a pretrial discovery scheduling order, and a motion seeking to compel discovery directed at IEC, one of the intervenors aligned with the Respondents. IEC has filed a Motion to Quash the discovery request at issue in the Motion to Compel.

On December 15, 2009 the EPC adopted antidegradation rules in response to concerns that Iowa's policies were not in compliance with federal requirements. At issue in the Petitioner's efforts to set aside the adoption of those rules was the participation in the rulemaking process by two members of the Environmental Protection Commission Board: Carrie LaSeur and Susan Heathcote.

In their Petition for Judicial Review Petitioners allege that Carrie LaSeur was not an elector of the State of Iowa at the time she participated in the rulemaking. Issues related to her membership on the Board are not relevant to the motions now pending.

Petitioners also allege that Susan Heathcote was ineligible to participate in the adoption of the antidegradation rules due to bias, prejudice and a direct pecuniary interest arising out of her employment with IEC. Throughout the rulemaking process

related to the antidegradation rules Ms. Heathcote was employed as the water program director for IEC. Since IEC was an environmental advocacy group lobbying in favor of adoption of antidegradation rules, and since Ms. Heathcote was the water program director for IEC, responsible for providing technical leadership on water quality and water monitoring issues, Petitioners contend her participation invalidates the rules ultimately adopted by the EPC.

The motions now before the court are interrelated. Petitioners seek additional time to respond to the summary judgment motion, claiming they need the outstanding discovery to adequately respond to that motion.

Pursuant to the provisions of Iowa R. Civ. P. 1.981(3), a party resisting a motion for summary judgment must ordinarily file a resistance within 15 days from the time a copy of the motion has been served. If the party opposing the motion “cannot present by affidavit facts essential to justify the opposition”, the court may allow additional time to resist “to permit affidavits to be obtained or depositions to be taken or discovery to be had”.¹ There is no requirement in the summary judgment rules that entry of summary judgment be delayed until after all discovery is completed.² Nevertheless, the general rule is that a nonmoving party should be given the opportunity to make discovery prior to resisting a summary judgment motion.³

Petitioners claim that IEC has refused to produce “communications sent or received from Susan Heathcote” related to adoption of the antidegradation rules by the EPC as well as IEC documents, including notes, correspondence and memoranda,

¹ Iowa R. Civ. P. 1.981(6).

² *Bitner v. Ottumwa Community School District*, 549 N.W.2d 295, 302 (Iowa 1996).

³ *Miller v. Continental Insurance Company*, 392 N.W.2d 50, 503 (Iowa 1986).

relating to the antidegradation rules.⁴ As noted above, Petitioners claim this information is necessary to allow them to respond to the summary judgment motion.

IEC resists the Motion to Compel, and has filed a Motion to Quash related to the information Petitioner seeks to discover. They characterize the Petitioner's discovery requests as seeking "access to IEC's private communications". In resisting disclosure of the requested information IEC points to the large quantity of discovery materials they have already produced.⁵

IEC resists production of the requested materials, not only because they characterize the request as unduly burdensome, but also on constitutional grounds. They claim that the requested discovery represents an "extraordinary intrusion on protected First Amendment associational rights that would severely impair IEC's effectiveness as an advocacy organization". Petitioner acknowledges constitutional rights that dictate against disclosure may exist, but argues they have a compelling need for the requested information, and the concerns of IEC may be safe guarded by an appropriate protective order.

The constitutional right now recognized as freedom of "expressive association" was first recognized by the United States Supreme Court in *NAACP v. Alabama ex rel. Patterson*.⁶ In that case, in which the State of Alabama sought to compel the NAACP to disclose names and addresses of all members in its organization, the court concluded that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth

⁴ The parties advised the court at argument on the pending motions that they had resolved discovery issues related to Ms. Heathcote's payroll records at IEC.

⁵ Included in the materials already produced by IEC are "IEC fundraising letters; newsletters and other printed publications sent to IEC members; IEC quarterly and annual reports; 'action alerts' to the general public; letters to the editor and other media; Board of Directors minutes and reports to the Board; copies of relevant IEC web pages; and other documents relating to Susan Heathcote's confirmation to the EPC" as well as "many thousands of responsive documents including an entire CD-ROM of e-mail messages sent or received by Susan Heathcote and a separate DVD containing nearly 15,000 e-mails with attachments, many of them relating to Susan Heathcote".

Amendment”.⁷ The Court noted that the freedom of association necessarily entailed a right of privacy, for “inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”⁸

As noted by IEC, on point to the issues raised in the instant proceeding is the case of *Wyoming v. United States Department of Agriculture*.⁹ In that case the State of Wyoming filed suit against the USDA seeking to have certain forest-management regulations set aside. Wyoming claimed that the USDA adopted the regulations based upon recommendations from an advisory committee consisting only of representatives of several national environmental organizations. As part of the litigation, Wyoming sought documents from a number of the non-party environmental organizations which it considered to be “crucial” to proving its claim against the USDA. The organizations filed a motion to quash, arguing, *inter alia*, that the requests infringed upon their First Amendment rights to free association.

In its decision, the court recognized that discovery requests are generally construed liberally, “in order to ensure that litigation proceeds with ‘the fullest possible knowledge of the issues and facts before trial.’”¹⁰ When discovery disputes arise, however, it becomes necessary to balance the need for the requested information against the burden imposed upon the party from whom the information is sought. In concluding that the balancing test weighed against permitting discovery of the requested information the court cited *NAACP v. Alabama*¹¹: “[i]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural

⁶ 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

⁷ *Id.*, at 460, 78 S.Ct. at 1171.

⁸ *Id.*, at 462, 78 S.Ct. at 1172.

⁹ 208 F.R.D. 449, 454 (D.D.C. 2002)

¹⁰ *Id.*, at 455, citing, *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

¹¹ 357 U.S. at 460-61.

matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” The court observed that “the threat to First Amendment rights may be more severe in discovery than in other areas because a party may try to gain advantage by probing into areas an individual or a group wants to keep confidential.”¹²

As was the situation in *Wyoming*, the Petitioner in the case at bar contends that the requested information is necessary for them to establish their claim that Ms. Heathcote had such a conflict of interest that her participation rendered the rule-making process illegal. IEC, on the other hand, contends that the information sought by Petitioner is the type of information IEC has a constitutional right to keep confidential.

The discovery dispute must be considered in the context of the issue now pending before the court: the motion for summary judgment filed by the Respondents. In their motion, Respondents contend that, as a matter of law, no conflict on the part of Ms. Heathcote existed that prevented her from participation in the rule-making process. In ruling on the motion, the court will be compelled to view the factual evidence in a light most favorable to the Petitioner and to afford to the Petitioner every legitimate inference the record will bear.¹³

The Petition for Judicial Review alleges that Ms. Heathcote had a “direct personal and pecuniary interest” and an “improper purpose”, making the antidegradation rules the result of bias under both common law and by statute. Pursuant to rule, “counsel’s signature to every . . . pleading . . . shall be deemed a certificate that: counsel has read the . . . pleading . . . ; that to the best of counsel’s knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of

¹² *Wyoming*, *supra*, at 457.

¹³ *Campbell*, 670 N.W.2d 108, 110 (Iowa 2003) *Smidt v. Porter*, 695 N.W.2d 9, 14 (Iowa 2005).

existing law.”¹⁴ Presumably, at the time the Petition for Judicial Review was filed, counsel for the Petitioner had factual information to support the allegations contained in the Petition.

Indeed, in support of its motion to compel discovery Petitioner has provided numerous exhibits, already in its possession, to illustrate the alleged bias, prejudice, and conflict of interest on the part of Ms. Heathcote. When the Court rules on the pending motion for summary judgment, that evidence will be viewed in a light favorable to Petitioner.

IEC has substantial First Amendment privacy interests in keeping confidential the information Petitioner seeks to review. Applying close scrutiny to the Petitioner’s discovery request, and balancing the present need for disclosure against the burden imposed by disclosure, the court is unable to conclude that the present need of the Petitioner for the requested information outweighs the privacy rights of IEC.

Accordingly, the undersigned finds, at this time, that the motion to compel filed by the Petitioner should be denied and that the motion to quash filed by IEC should be granted. The undersigned is aware that this discovery dispute may again arise if the Respondents are unsuccessful on their motion for summary judgment. That possibility does not justify requiring production at the present time.

Based upon the court’s ruling on the motion to compel and motion to quash, the court finds it unnecessary to rule on the request to establish a pre-trial discovery schedule. The parties are encouraged to cooperate in the establishment of a schedule for future discovery, if needed. In the event they are unsuccessful, they may again request the intervention of the court.

The Petitioner should be required to promptly respond to the pending motion for summary judgment.

¹⁴ Iowa R. Civ. P. 1.413(1).

IT IS THEREFORE ORDERED that the motion to compel filed by the Petitioner is denied. The motion to quash filed by IEC is granted. The motion for a pre-trial discovery schedule is denied.

IT IS FURTHER ORDERED that the Petitioner is granted to and including November 4, 2011 to file responsive pleadings to the Motion for Summary Judgment filed by the Respondents.

Dated this _____ day of October, 2011.

Brad McCall
Judge – Fifth Judicial District

Original Filed

Copies to: Michael L. Mock and Paul S. Swinton, Attorneys for Petitioner
michael.mock@fbfinancial.com
paul.swinton@fbfs.com
Julia L. Vyskocil, Attorney for Petitioner/Intervenors
jvyskocil@bevinglaw.com
David Sheridan, Attorney for Respondents
dsherid@ag.state.ia.us
Bradley Klein, Attorney for Intervenors ELPC and IEC
bklein@elpc.org
Wallace Taylor, Attorney for Intervenor, The Sierra Club
wtaylorlaw@aol.com