STATE OF MICHIGAN

COURT OF APPEALS

ANN ARBOR TRANSPORTATION AUTHORITY, FLINT MASS TRANSPORTATION AUTHORITY AND SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION,

Plaintiff-Appellants,

V

MIGHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED
October 18, 2002

No. 232163
Wayne Circuit Court
LC No. 99-939892-CZ

Before: Meter. P.J., and Saad and R.B. Burns*, JJ.

PER CURIAM.

Plaintiffs, Ann Arbor Transportation Authority (AATA), Flint Mass Transportation Authority (FMTA), and Suburban Mobility Authority for Regional Transportation (SMART), appeal as of right from an order denying their motion for summary disposition and granting summary disposition for defendant, Michigan Department of Transportation (MDOT). We affirm.

Plaintiffs are three public transit authorities that supply bus services to large urban areas. Plaintiffs obtain funding from a variety of sources including the state of Michigan and the federal government. MCL 247.660 establishes the Michigan Transportation Fund, which is funded by various taxes and fees. The Legislature has appropriated ten percent of the Fund to the Comprehensive Transportation Fund (CTF) for the purposes set forth in MCL 247.660e. MCL 247.660e establishes the priorities of appropriations from the CTF. The third priority of appropriations is set forth in MCL 247.660e(4)(a), which provides for operating grants or "formula operating assistance" for transit authorities such as plaintiffs:

> The third priority shall be the payment of operating grants to eligible authorities and eligible governmental agencies according to the following formulations and subject to the following requirements:

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

> (i) For the fiscal year ending September 30, 1998, and for each fiscal year thereafter, each eligible authority and eligible governmental agency which provides public transportation services in urbanized areas under Public Law 103-272, 49 USC 5307, with a Michigan population greater than 100,000 shall receive a grant of up to 50% of their eligible operating expenses as defined by the state transportation department.
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> (ii) For the fiscal year ending September 30, 1998, and each fiscal year thereafter, each eligible authority and eligible governmental agency which provides public transportation services in urbanized areas with a Michigan population less than or equal to 100,000 and nonurbanized areas under Public Law 103-272, 49 USC 5311, shall receive a grant of up to 60% of their eligible operating expenses as defined by the state transportation department. For purposes of receiving a grant under this subparagraph in nonurbanized areas, eligible costs of services provided by water vehicle shall be reimbursed at not less than 50% of the portion of the costs not eligible for reimbursement by the federal government.

Defendant administers the above provisions and defines what constitutes "eligible operating expenses" in its Revenue and Expense Manual. Before fiscal year 1998, defendant considered "preventative maintenance expenses" to be eligible operating expenses. Defendant reimbursed eligible authorities for their preventative maintenance expenses under its operating assistance program because it considered them to be "eligible operating expenses" under MCL 247.660e(4)(a). However, in 1998, the United States Congress enacted the Transportation Equity Act for the 21st Century ("TEA-21"), PL 105-178, 112 Stat 107. As part of TEA-21, Congress eliminated federal funding of urban authorities' preventative maintenance expenses as "operating assistance," but allowed federal funding for urban authorities' preventative maintenance expenses as "capital expenses." In response to the change, defendant revised its revenue and expense manual to provide that the preventative maintenance expenses of urban authorities that are funded by federal grants pursuant to 49 USC 5307 ("urban grants") do not fall within the statutory definition of "eligible operating expenses" under MCL 247.660e(4)(a)(i). However, the Manual provides that the preventative maintenance expenses of nonurban authorities that are funded by federal grants pursuant to 49 USC 5307 or 49 USC 5311 ("nonurban grants") *do* fall within the definition of "eligible operating expenses" under MCL 247.660e(4)(a)(ii). Under the revised Manual, eligible urban authorities cannot both treat their preventative maintenance expenses as capital expenses for federal purposes and also continue to treat them under State law as operating expenses under MCL 247.660e.

In December 1999, plaintiffs filed a complaint for declaratory and injunctive relief. Plaintiffs argued that defendant failed to follow the rule-making procedures of the Administrative Procedures Act (APA), MCL 24.241, in promulgating the revised Manual. Plaintiffs also contended that defendant's policy of excluding preventative maintenance expenses in determining urban authorities' eligible operating expenses was invalid because it was contrary to the Legislature's intent for MCL 247.660e(4). Plaintiffs subsequently moved for summary disposition on these grounds. The trial court denied the motion and instead granted summary disposition in defendant's favor, ruling that a plain reading of MCL 247.660e(4)(a)(i)

demonstrated that the legislature intended for defendant to define eligible operating expenses, and the defendant acted within its statutory powers when it changed the definition.

This Court reviews decisions regarding motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition if the affidavits and other documentary evidence show that there is no genuine issue in respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id*. MCR 2.116(I)(2) provides that the trial court may render judgment in favor of the party opposing the motion for summary disposition "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment . . . ."

Plaintiffs assert that defendant's revised definition of "eligible operating expenses" is invalid because it is a "rule" that was not properly promulgated pursuant to the APA. We disagree.

The APA requires administrative agencies to follow certain specified procedures for promulgating rules, including the requirements of notice and a hearing. MCL 24.241.

> "The APA requires an agency to give notice of proposed rules or rule changes, to hold a public hearing, and to submit the proposed rule or rule changes to the Legislature's Joint Committee on Administrative Rules for review and approval." *AFSCME v Dep't of Mental Health*, 452 Mich 1, 9 n 8; 550 NW2d 190 (1996). An agency's failure to follow this process renders the rule invalid. [*Faircloth v Family Independence Agency,* 232 Mich App 391, 402; 591 NW2d 314 (1998).]

In *American Federation of State, Co & Municipal Employees* (*AFSCME*) *v Dep't of Mental Health*, 452 Mich 1, 8; 550 NW2d 190 (1996), the Supreme Court set forth what constitutes a "rule" under the APA, MCL 24.207:

> [A] rule is: (1) "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability," (2) "that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency . . . ."

However, under MCL 24.207(j), "[a] decision by an agency to exercise . . . a permissive statutory power . . ." is not considered a "rule" that must be promulgated under the APA's procedural requirements. Courts have recognized decisions of an agency as being within the § 7(j) exception where "explicit or implicit authorization for the actions in question has been found." *Detroit Base Coalition for the Human Rights of the Handicapped v DSS,* 431 Mich 172, 187-188; 428 NW2d 335 (1988).

In *Michigan Trucking Ass'n v Public Service Comm (On Remand)*, 225 Mich App 424; 571 NW2d 734 (1997), the Public Service Commission (PSC) implemented a safety rating system for motor carrier vehicles pursuant to the Motor Carrier Act, MCL 475.1 *et seq.* The

Motor Carrier Act provided, in pertinent part: "The public service commission, in cooperation with the department of state police, will develop and implement by rule or order a motor carrier safety rating system within 12 months after the effective date of this article." MCL 479.43; *Michigan Trucking Ass'n, supra*, 225 Mich App 426. This Court concluded that "MCL 479.43 directly and explicitly authorizes the PSC to implement, either by rule or order, a safety rating system for motor carriers. Because the safety rating system is clearly an exercise of permissive statutory power, it is exempted from formal adoption and promulgation under the APA." *Michigan Trucking Ass'n, supra*, 225 Mich App 430. This Court then added, "This conclusion is buttressed by the fact that the statute does not expressly require the PSC to promulgate the rating system before implementation." *Id.* See also *Pyke v Dep't of Social Services*, 182 Mich App 619, 631-632; 453 NW2d 274 (1990).

Here, MCL 247.660e directly and explicitly authorizes defendant to define "eligible operating expenses." Moreover, the statute does not expressly require defendant to promulgate the definition of eligible operating expenses before implementing it. Accordingly, we conclude that defendant's revision of the definition of that term was exempted from the rule-making requirements of the APA.

Plaintiffs also contend that defendant's definition of eligible operating expenses is contrary to the Legislature's intent for MCL 247.660e. In defining the term, defendant may not exceed the statutory authority granted by the Legislature. See *Columbia Associates, LP v Dep't of Treasury*, 250 Mich App 656, 688; 649 NW2d 760 (2002). In support of this claim, plaintiffs first assert that the Legislature decided not to include any language regarding federal funding in determining "eligible operating expenses" because it intended that the amount of federal funding for preventative maintenance expenses be irrelevant in determining eligibility for reimbursement of preventative maintenance expenses under MCL 247.660e. We disagree. There is no indication from this omission that the Legislature intended to prohibit defendant from considering federal grants in determining what constituted "eligible operating expenses." Furthermore, there is no language in the statute restricting defendant's discretion in determining what constitutes "eligible operating expenses" or prohibiting defendant from considering federal grants in making this determination.

Plaintiffs further maintain that the history of MCL 247.660e shows that the Legislature intended federal reimbursement to be irrelevant in determining what constituted "eligible operating expenses." Plaintiffs point out that for the fiscal year 1988 and before, MCL 247.660e(4)(a)(i) required defendant to distribute grants equal to up to fifty percent of the difference between the eligible operating expenses of the eligible authority and the amount of federal operating grants received by that authority. However, for fiscal years 1989 and after, federal grants were no longer considered in determining grants received from the state. Instead, eligible authorities were reimbursed for a percentage of their "eligible operating expenses," as defined by defendant. Plaintiffs argue that the Legislature's act of deleting the statute's language regarding the consideration of federal grants in determining an eligible authority's grant from the state is an indication that the Legislature intended that federal grants should be irrelevant in determining "eligible operating expenses." We disagree.

A change in statutory language is presumed to reflect a change in the meaning of the statute. *Wortelboer v Benzie Co*, 212 Mich App 208, 217; 537 NW2d 603 (1995). Therefore, the Legislature's deletion of this language reflects its intention to eliminate the *requirement* that

defendant consider federal funding in determining the amount of the state grant. However, the Legislature's deletion of this language does not indicate its intention that defendant should be *prohibited* from considering federal grants in determining what constitutes "eligible operating expenses." We believe that the Legislature's deletion of this language merely showed its intent to give defendant the discretion to define "eligible operating expenses," rather than showing its intent to prohibit defendant from considering federal grants in defining "eligible operating expenses."

Plaintiffs also asserts that the Legislature intended that the term "eligible operating expenses" be given the same definition for both urban and nonurban authorities. In the Manual, defendant allows nonurban authorities, but not urban authorities, to claim their preventative maintenance expenses as "eligible operating expenses." Plaintiffs argue that the definition of "eligible operating expenses" should be the same for all transit authorities because one statutory phrase should not have two different meanings. We disagree.

"It is reasonable to conclude that words used in one place in a statute have the same meaning in every other place in the statute." *Little Caesar Enterprises, Inc v Dep't of Treasury*, 226 Mich App 624, 630; 575 NW2d 562 (1997). However, although a statutory phrase should generally be given the same meaning in every part of a statute, the Legislature gave defendant the express authority to form the definition for "eligible operating expenses." Defendant was given the authority to define "eligible operating expenses" for urban authorities under MCL 247.660e(4)(a)(i) and nonurban authorities under MCL 247.660e(4)(a)(ii). There is nothing in the statute providing that the definition must be the same for all transit authorities. Because defendant was given discretion to define "eligible operating expenses," the definition need not have the same meaning in every place it is mentioned in the statute.

Finally, we reject plaintiffs' contention that defendant improperly incorporated by reference future federal law. MCL 247.660e does not incorporate by reference the federal definition of "operating expenses" or "capital expenses." Instead, MCL 247.660e(4)(a)(i) and (ii) merely give defendant the authority to define "eligible operating expenses." The fact that defendant changed its definition of "eligible operating expenses" in response to the federal government's change in its characterization of "operating expenses" and "capital expenses" through TEA-21 does not invalidate defendant's revised definition.

Here, the plain language of the statute gives defendant the discretion to define "eligible operating expenses." The Legislature's omission of guidelines regarding how defendant should define "eligible operating expenses" shows its intent to give defendant discretion in forming the definition. There is no language in the statute limiting defendant's discretion in defining that term. Accordingly we reject plaintiffs' contention that the definition is contrary to Legislative intent.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Robert B. Burns