STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: November 2, 2020)

NEWPORT COMMUNITY SCHOOL, Plaintiff,	:	
v.	:	**C.A. No. PC-2018-3326**
RHODE ISLAND BOARD OF EDUCATION COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION, et al., Defendants.	:	

DECISION

KEOUGH, J. The matter before the Court is an appeal by Plaintiff Newport Community School (Plaintiff or NCS) from a decision of the Rhode Island Board of Education Council on Elementary and Secondary Education (Council) affirming a decision of the Rhode Island Education Commissioner (Commissioner), in which he denied Plaintiff's request for attorneys' fees associated with an administrative action against Defendants Middletown School Department (Defendant Middletown) and Tiverton School Department (Defendant Tiverton). NCS argues it is entitled to fees in this case under either the Equal Access to Justice for Small Businesses and Individuals Act (EAJA) or G.L. 1956 § 9-1-45. For the foregoing reasons, Plaintiff's appeal and request for attorneys' fees is hereby denied. This Court exercises jurisdiction pursuant to G.L. 1956 §§ 42-35-15 and 42-92-5.

I

Facts and Travel

The underlying issue in this case concerns a dispute over who is financially responsible for the fees and expenses incurred in conjunction with a legislatively mandated obligation to provide Alternative Learning Plans (ALPs) for high school students within the State of Rhode Island. Specifically, in 2011 the General Assembly amended the Rhode Island compulsory school attendance statute to require attendance for all children between the ages of sixteen and eighteen. *See* G.L. 1956 § 16-19-1(a); P.L. 2011, chs. 338 and 376, § 1, eff. July 13, 2011. The statute further provides that students sixteen years of age and older may obtain an attendance waiver so long as they have "an [ALP] for obtaining either a high school diploma or its equivalent." Section 16-19-1(b). Regardless of whether the student is attending a city/town operated school or is pursuing an ALP, the student remains as an enrolled student of the resident local education authority (LEA) until they complete their plan or conditions for withdrawal are met. Pl's Post-Hr'g Br. at 7 (citations omitted). As a result, the LEAs continue to receive state education aid consistent with the "[f]unding [f]ormula" outlined in the State's Education Equity and Property Tax Relief Act, G.L. 1956 §§ 16-7.2-1. Commissioner's Decision and Order, Feb. 22, 2016 (Commissioner Decision I*)* at 4.

In the instant matter, Defendants Middletown and Tiverton both waived the compulsory school attendance requirement for the 2014-2015 school year and thereafter referred students to NCS, a domestic, non-profit corporation providing services to students in Newport County. *Id.* at 4-5. Defendant Middletown referred ten students aged 16-18 while Defendant Tiverton referred five such students. *Id.* at 5. When NCS sent invoices to Defendants Middletown and Tiverton seeking compensation for these ALP services, they refused to honor the invoices. *Id.* at 4-5.

Defendant Middletown alleged that the parents of students receiving ALP services were responsible for the costs of the program, while Defendant Tiverton simply stated they had no obligation to pay. *Id.* at 5-6.

As a result, Plaintiff filed a petition with the Commissioner on July 16, 2015 asking him to declare that Defendants Middletown and Tiverton had an obligation to compensate NCS for ALP services provided to the referred students. In addition, the petition requested that the General Treasurer be directed to deduct the amount of the rejected invoices from state school aid provided to Defendants Middletown and Tiverton "plus all reasonable attorneys' fees and costs." *Id.* at 2. Defendants Middletown and Tiverton opposed the petition arguing among other things that the Commissioner lacked subject matter jurisdiction because the petition was merely a "claim for breach of contract" over which the Commissioner had historically declined to exercise jurisdiction and because there is a lack of specific statutory authority expressly mandating that LEAs fund local ALP services. *Id.* at 7-8 (citations omitted).

On February 22, 2016, the Commissioner issued his Decision and Order granting NCS's petition. *Id.* at 1-2. After concluding that he did have jurisdiction to hear the petition, the Commissioner held that the LEAs have an obligation to educate children of a compulsory age and therefore could not avoid their financial obligations to do so by waiving their attendance. Relying solely on the statutory obligations imposed by the 2011 amendments to the compulsory school attendance statute, the Commissioner reasoned that had the General Assembly intended to allow LEAs to avoid this responsibility relative to students receiving ALP services, it would have clearly said so. *Id.* at 13-15. Indeed, because ALP services are mandatory if compulsory attendance is waived and because the LEAs continue to receive state aid with respect to students receiving such services, the Commissioner concluded that the failure to pay for the services "violates a

fundamental principle of Rhode Island School Law." *Id.* at 14.[1] With respect to the request for attorneys' fees and costs, however, the Commissioner found that they were not warranted in this matter because "[a]lthough a close call, it cannot be said that Respondents were not 'substantially justified' within the meaning of the [EAJA], or that there was 'a complete absence of a justiciable issue of either law or fact' as required under RIGL § 9-1-45 . . ." *Id.* at 16.

Defendants Middletown and Tiverton thereafter appealed this decision to the Council. On July 19, 2016, the Council held a hearing on the appeal and thereafter issued a decision reversing Commissioner I Decision. Council Decision, Aug. 9, 2016 (Council Decision I) at 3. In so doing, the Council focused on the "procedural travel" of the case and noted that despite an original scheduling order directing the parties to "submit a joint stipulation of relevant and material facts," no such stipulation was ever provided. *Id.* at 1. The Council then noted that § 16-39-2 provides for a hearing and that the failure of the parties to submit a joint stipulation of facts, or, in the alternative, for the Commissioner to hold a hearing, resulted in an appeal upon "which there are disputed facts" and thus constituted error. *Id.* at 2. The Council explicitly declined to address any of the remaining legal questions in the case and instead remanded the case with a directive that the Commissioner either hold an evidentiary hearing or permit the parties to waive a hearing and submit a stipulation of facts. *Id.* at 2-3.

On remand, Defendants Middletown and Tiverton maintained that there remained various facts that were still in dispute and therefore no stipulation was submitted. As a result, the Commissioner held an evidentiary hearing on December 8, 2016 and January 27, 2017, after which the parties submitted post-hearing memoranda. On October 18, 2017, the Commissioner issued

[1] In so holding, the Commissioner rejected the argument of Defendants that the matter was a claim for breach of contract, despite the characterization of it as such by Plaintiff in its Complaint. *Id.* at 10.

his Decision and Order on Remand, again granting NCS' petition and finding that Defendants Middletown and Tiverton were responsible for the costs of referring students to an ALP program. Commissioner's Decision and Order, Oct. 18, 2017 (Commissioner Decision II) at 1-2. Specifically, the Commissioner determined that nothing offered by Defendants on remand "either by way of documentary evidence, testimony or legal memoranda" altered the position or conclusions reached in his prior decision. *Id.* at 16. The Commissioner therefore adopted and incorporated relevant portions of Commissioner Decision I and concluded that the statutory silence in the 2011 amendments to the state's compulsory attendance statute did not "alter the fact that charging parents or other third parties for ALP services would 'violate a fundamental principle of Rhode Island school law.'" *Id.* [2]

With respect to the issue of attorneys' fees and costs, the Commissioner once again denied Plaintiff's request. He opined that while Defendants Middletown and Tiverton "made a close call even closer" by making unjustified arguments and ignoring the legal conclusions in Commissioner Decision I, attorneys' fees under the EAJA were not warranted "given the confusing procedural posture of the case on remand and viewing Respondent's positions in their totality . . ." *Id.* at 21-22. Plaintiff appealed the denial of attorneys' fees to the Council, which affirmed the Commissioner by finding that attorneys' fees were not warranted under either the EAJA or § 9-1-45. Council Decision, Apr. 28, 2018 (Council Decision II).

[2] In so doing, the Commissioner was clear to note that it would be a "mistake" to conclude that a party is "always entitled to an evidentiary hearing * * * even in the absence of any genuine issue of material fact." *Id.* at 13. "If RIDE hearing officers are to ensure the 'requisite and speedy' process contemplated by the Legislature, they must be able to determine whether the parties before them have actually raised a genuine issue of material fact before reflexively initiating lengthy (and expensive) hearing processes." *Id.* at 15. Nevertheless, the Commissioner indicated that this point was rendered moot by the fact that Defendants were afforded a full evidentiary hearing. *Id.*

On May 14, 2018, Plaintiff filed its appeal, asking this Court to reverse and vacate the decisions of the Council and Commissioner insofar as they denied NCS an award of attorneys' fees and costs of litigation and to grant those fees and costs. Complaint at 7. This Court heard oral argument from the parties on December 3, 2019.

II

Standard of Review

Section 42-35-15 of the Administrative Procedures Act governs this Court's review of an agency decision and provides:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> "(1) In violation of constitutional or statutory provisions;
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> "(2) In excess of the statutory authority of the agency;
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> "(3) Made upon unlawful procedure;
>
> "(4) Affected by other error of law;
>
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 42-35-15(g).

When reviewing a decision on attorneys' fees under the EAJA, the Court "may modify the fee determination if it finds that the failure to make an award, or the calculation of the amount of the award, was not substantially justified based upon a de novo review of the record." Section 42-92-5. However, our Supreme Court held that because a review of attorneys' fees is '"necessarily intertwined with the [underlying] agency decision,'" the trial justice should defer to the hearing

officer's findings of fact where they pertain to witness credibility and evidence while reviewing questions of law *de novo. Rollingwood Acres, Inc. v. Rhode Island Department of Environmental Management*, 212 A.3d 1198, 1206 (R.I. 2019) (quoting *Tarbox v. Zoning Board of Review of Town of Jamestown*, 142 A.3d 191, 198 (R.I. 2016)). The Court has also held that because "statutes providing for an award of attorney's fees are in derogation of the common law," they must be strictly construed. *Moore v. Ballard*, 914 A.2d 487, 489 n.3 (R.I. 2007); *see also Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1226 (R.I. 1996) ("[A] statute that establishes rights not recognized by common law is subject to strict construction.").

III

Discussion

In this instant matter, Plaintiff maintains that it is entitled to the costs and fees incurred during the administrative litigation of its petition and relies on two separate and distinct statutory provisions. First, Plaintiff cites the EAJA, specifically § 42-92-3(a), and asserts that because Defendants Middletown and Tiverton were not substantially justified in their positions before the Commissioner, even more so after the Council remanded the matter for a full evidentiary hearing, reasonable litigation fees are warranted. Specifically, Plaintiff argues that Defendants raised issues that had no bearing on the outcome of the overall controversy and failed to offer any substantial evidence that contested Plaintiff's allegations of financial responsibility for ALPs.

Plaintiff also seeks an award of attorneys' fees under § 9-1-45, which permits a court to award reasonable attorneys' fees "in any civil action arising from a breach of contract in which the court: (1) Finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party . . ." Section 9-1-45(1). Plaintiff contends both that there was a "complete absence of a justiciable issue of either law or fact" in Defendants' positions and that the

Commissioner, by failing to consider an award of attorneys' fees pursuant to this statutory provision, committed reversible error.

In response, Defendants Middletown and Tiverton maintain that they were substantially justified in the actions not only leading to the proceedings but in the proceedings itself. Specifically, they contend that the issue of ALP liability was a matter of first impression, and that at least Middletown had relied on guidance from RIDE in arguing that schools would not be responsible for funding ALPs. With respect to the demand for an evidentiary hearing, Defendants Middletown and Tiverton maintain that they were statutorily entitled to one in the absence of an agreed upon statement of facts, and that the record is replete with testimony, documentation, and exhibits identifying several areas of dispute, including how much state aid actually was received by Defendants Middletown and Tiverton and how the bills for individual students were calculated.

With respect to the award of fees pursuant to § 9-1-45, Defendants Middletown and Tiverton argue that this was not a "civil action" within the meaning of the statute and that the Commissioner's findings were in no way predicated on a breach of contract theory.[3] Nevertheless, they argue that even had the Commissioner considered this argument or relied on contract theory in awarding Plaintiff the relief requested, there was not a complete absence of a justiciable issue as defined by the statute or legal precedence, and therefore, fees were not warranted.

[3] It should be noted, however, that in their original objection to Plaintiff's petition, Defendants argued just the opposite, suggesting the Commissioner lacked subject matter jurisdiction because it was nothing more than "a claim for breach of contract – a 'pure collection matter.'" Commissioner Decision I at 7.

A

Attorneys' Fees Under Equal Access to Justice Act

The Equal Access to Justice Act is meant to "encourage individuals and small businesses to contest unjust actions by the state and/or municipal agencies" by providing state reimbursement of reasonable litigation expenses "when the individual or small business prevails in contesting an agency action, which was without substantial justification." Section 42-92-1(b). To that end, the EAJA further provides that

> "Whenever the agency conducts an adjudicatory proceeding subject to this chapter, the adjudicative officer shall award to a prevailing party reasonable litigation expenses incurred by the party in connection with that proceeding. The adjudicative officer *will not award fees or expenses if he or she finds that the agency was substantially justified in actions leading to the proceedings and in the proceeding itself*. The adjudicative officer may, at his or her discretion, deny fees or expenses if special circumstances make an award unjust." Section 42-92-3(a) (emphasis added).

The EAJA defines "[s]ubstantial justification" to mean when "the initial position of the agency, as well as the agency's position in the proceedings, has a reasonable basis in law and fact." Section 42-92-2(7).

In interpreting this particular provision, our Supreme Court has held that "'the Government now must show not merely that its position was marginally reasonable; its position must be clearly reasonable, well founded in law and fact, solid though not necessarily correct.'" *Taft v. Pare*, 536 A.2d 888, 892 (R.I. 1988) (quoting and adopting *United States v. 1,378.65 Acres of Land*, 794 F.2d 1313, 1318 (8th Cir. 1986)). Moreover, the agency must further demonstrate that its position *continued* to be substantially justified throughout the proceedings, requiring the court to undertake "a review of the record of the underlying merits decision to evaluate whether an agency's position *initially was and remained justified.*" *Rollingwood Acres*, 212 A.3d at 1205 (emphasis added). An administrative agency's position is *not* substantially justified where it has no basis in law or where

the position is based on a fundamental mistake of fact. *See Taft*, 536 A.2d at 893 (registry of motor vehicles not substantially justified in denying post-suspension hearing to driver because its position had no statutory or legal support); *Rollingwood Acres*, 212 A.3d at 1210 (DEM not substantially justified in issuing violations to plaintiff for drainage alterations because after investigation it "knew or should have known" that another administrative agency was responsible for alterations at issue).

In assessing a governmental agency's position with respect to statutory interpretation and application, courts are instructed to consider the clarity of the law as well as any precedent, or lack thereof, that may have left the status of the law "unsettled" and whether the legal issue is "novel or difficult." *Norris v. S.E.C.*, 695 F.3d 1261, 1265 (Fed. Ct. App. 2012) (citations omitted). "When the issue is a novel one on which there is little precedent, courts have been reluctant to find the government's position was not substantially justified." *Schock v. United States*, 254 F.3d 1, 6 (1st Cir. 2001). *See also Cinciarelli v. Reagan*, 729 F.2d 801 (D.C. Cir. 1984) (government was substantially justified due to lack of clarity in governing statute and where construction of statute was matter of first impression). Finally, "for EAJA purposes, the position of a government agency can be substantially justified even if a court ultimately determines the agency's reading of the law was not correct." *Aronov v. Napolitano*, 562 F.3d 84, 94 (1st Cir. 2009) (citations omitted).

In this particular matter, there is no dispute that Plaintiff was the prevailing party in the underlying action. The record is also clear that the compulsory school attendance statute, and its amendments, are silent relative to who is responsible for the fees and expenses incurred in conjunction with the obligation to provide ALPs to high school students within the state. Indeed, in its original memorandum submitted to the Commissioner in support of its petition, NCS conceded that there was "'a gap in the statutory and regulatory framework' regarding payment for

ALP services since 'nowhere in the statute or current regulations does it directly state who must pay for the provision of services related to an [ALP].'" Commissioner Decision I at 7. What is also clear is that this was a matter of first impression. Prior to the Commissioner's ruling on the merits of this case, no court or agency had opined on the effect of the legislature's statutory silence relative to the LEAs' financial obligations. While Defendants Middletown and Tiverton were ultimately unsuccessful in their attempt to "delegate their legal and financial obligations" relative to high school students pursuing an ALP, given the lack of clarity in the governing statute and lack of any precedent relative to the construction of the statute, this Court finds that the government's initial position was substantially justified. *Id.* at 13. Accordingly, on this point, the Court affirms the Commissioner's decision.

What is more difficult for this Court and what in this Court's opinion serves as the gravamen of Plaintiff's appeal is whether Defendants Middletown and Tiverton position *remained* reasonable, particularly after Commissioner Decision I was entered. The Plaintiff maintains that Defendants Middletown and Tiverton thereafter completely disregarded the Commissioner's legal conclusion and failed to articulate *any* disputed material facts that would have necessitated an evidentiary hearing, resulting in an improper use of the hearing process, which ultimately resulted in onerous and unwarranted litigation costs. Conversely, Defendants take the position that the evidentiary hearing was required pursuant to Council's Decision I and as such they were entitled to present "whatever evidence" or arguments that they thought necessary. Defendant Middletown's Brief on Appeal at 5. After a thorough review of the record, particularly the factual and legal arguments advanced by Defendants Middletown and Tiverton, this Court agrees wholeheartedly with the Commissioner: this is an extremely "close call." [4]

[4] Commissioner Decision I at 16 and Commissioner Decision II at 21.

To begin, the Court is troubled by the fact that in support of their initial appeals to the Council, Defendants Middletown and Tiverton offered what amounts to boilerplate language indicating that Commissioner Decision I and subsequent orders[5] were in "violation of statutory, regulatory, administrative and procedural rights, as well as prior case law and precedent," and were "arbitrary and capricious." At no point in the record before the Court did either Defendant precisely identify the error of law or submit any legal precedent that would justify their positions. Moreover, it also appears as though only Defendant Middletown included as a basis for the appeal that Commissioner Decision I was reached without the benefit of "an evidentiary hearing or other hearing, and without any agreed statement of facts," At no point, however, does it appear as though either party identified *any genuine issues of material fact* which would have necessitated an evidentiary hearing.

Nevertheless, the Council seems to have summarily and inexplicably adopted the Defendants' assertions and concluded that there were "disputed facts." As a result, the Council concluded that it need go no further with respect to the appeal than to focus on the "threshold question of whether the Commissioner should have provided the parties with a hearing prior to the issuance of a final Decision and Order." Council Decision I at 2. The Council held that without an agreed statement of facts, the parties had a statutory right to an evidentiary hearing and therefore this procedural issue alone necessitated a remand. While this Court may question the propriety of that decision and agrees that an agency should not be '"required to conduct an evidentiary hearing

[5] Subsequent to Commissioner Decision I, the Commissioner issued subsequent orders denying Defendants Motion(s) to Stay and Objections to the Proposed Order to the State Treasurer, which directed him to withhold education aid to the respective towns in accordance with the directives of the February 22, 2016 decision. Those orders were appealed as well.

when it can serve absolutely no purpose,'" [6] once the Council remanded the case for that very purpose, this Court is unable to conclude that Defendants Middletown and Tiverton were not justified in requesting the hearing and raising and/or exploring allegedly relevant factual issues.

This conclusion is further supported by the fact that in at least Defendants' view, certain factual issues needed to be resolved. For example, the original petition sought not only a declaration with respect to the parties' obligations but also a request that the General Treasurer be directed to deduct the amount of the rejected invoices from state school aid. Questions concerning the propriety of certain invoices and/or the amount of state aid received by each municipality would seem to be relevant regarding this latter point. Defendants Middletown and Tiverton also questioned whether payment was dependent on enrollment or actual attendance. With respect to Defendant Middletown, there appear to have been additional questions concerning what effect, if any, certain lease credits afforded to Plaintiff would affect that balance that was due and owing. Therefore, even assuming Defendants Middletown and Tiverton were statutorily required to pay Plaintiff for services rendered, they were also contesting *how much* they would be required to pay and as a result, they were entitled to explore these factual issues.

Also supporting the position that Defendants Middletown and Tiverton were substantially justified in pursuing the litigation after the February 22, 2016 decision is the very language, albeit ambiguous, of the remand order itself. The Council without reservation adopted Defendants' position and held that "there are disputed facts" and further indicated that without a stipulation of facts from the parties, a hearing was mandated. The Council was also equally clear that it was not reaching the remaining issues of law but instead relying solely on the procedural error to reverse

[6] Commissioner Decision II at 14 (quoting *Independent Bankers Association of Georgia v. Board of Governors of the Federal Reserve System*, 516 F.2d 1206, 1220 (D.C. Cir. 1975))

Commissioner Decision I. As a result, this Court cannot unequivocally state that Defendants Middletown and Tiverton were unjustified in assuming that the slate had been "wiped clean," opening the door for them to present similar arguments and evidence following the remand.

This Court certainly empathizes with Plaintiff's apparent frustration that Defendants Middletown and Tiverton appeared to have ignored the Commissioner's earlier legal conclusions and advanced what the Commissioner characterized as "factual arguments which were not 'substantially justified.'" Indeed, a thorough review of the record more than supports Plaintiff's assertion that this particular case "followed a [*sic*] unduly long and unnecessary path"[7] as well as the conclusion that Defendants Middletown and Tiverton made certain baseless arguments and all but ignored the legal conclusions articulated in the February 22, 2016 decision. Nevertheless, even the Commissioner seemed to concede that the effect of the remand itself was unclear noting that "[whatever] the Council's intention," and despite the fact that Defendants Middletown and Tiverton may not have raised "issues of fact" that necessitated an evidentiary hearing, Defendants Middletown and Tiverton had been afforded the opportunity to raise factual issues and revisit legal arguments previously made, and the Court cannot find as a matter of law that they were then unjustified in doing so.

Therefore, because at least one permissible view of the record supports the conclusion that the government has shown a reasonable basis in fact and law for its position, and "given the confusing procedural posture of the case on remand and viewing [Defendants Middletown and Tiverton'] positions in their totality," this Court is constrained to affirm the decision of the

[7] Pl's Mem. at 2.

Commissioner in concluding that Defendants Middletown and Tiverton were "substantially justified" under the EAJA such that Plaintiff's claims for attorneys' fees must be denied.[8]

B

Attorneys' Fees Under § 9-1-45

Section 9-1-45 of the Rhode Island General Laws permits a court to award attorneys' fees "to the prevailing party in *any civil action arising from a breach of contract* in which the court . . . [f]inds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party." Section 9-1-45 (emphasis added). Regrettably, the statute does not provide a definition for a "civil action." Nevertheless, our Supreme Court has offered guidance in this regard and has previously determined that an appeal to the court from an administrative agency decision is not a civil action. *See Mauricio v. Zoning Board of Review of City of Pawtucket*, 590 A.2d 879, 880 (R.I. 1991) ("[A]n appeal from a decision of the zoning board is not a civil action but is essentially an appellate proceeding."); *Ims v. Town of Portsmouth*, 32 A.3d 914, 925 (R.I. 2011) (holding that proceeding under Law Enforcement Officer's Bill of Rights was not civil action because such a proceeding was remedial in nature).[9] Finally, it is well established "that the award

[8] Commissioner Decision II at 22.

[9] Nevertheless, Plaintiff cites two cases in arguing that administrative proceedings are included in the Court's definition of "civil action"; however, these cases are distinguishable. In *Retirement Board of Employees' Retirement System of City of Providence v. Corrente*, our Supreme Court found that the statutory phrase "initiate a civil action" was ambiguous because "it can encompass either a *de novo* proceeding or an administrative appeal." *Corrente*, 174 A.3d 1221, 1233 (R.I. 2017). However, the Court in *Corrente* was considering what standard of review to apply and whether the "civil action" requirement required deference to the proceedings being appealed. *Id.* Plaintiff likewise cites to *Alegria Construction v. Building Contractor's Registration Board*, a Superior Court case wherein the court considered and denied attorneys' fees under § 9-1-45 in an administrative appeal context, but this approach has not been affirmed by any subsequent decision. *Alegria Construction*, 1995 WL 941437, at *4 (R.I. Super. May 30, 1995).

of attorney's fees [pursuant to § 9-1-45] rests within the discretion of the trial justice." *Greensleeves, Inc. v. Smiley,* 754 A.2d 102, 103 (R.I. 2000).

Turning to the facts of the instant case, the record reveals that at no time did the Commissioner or the Council evaluate Plaintiff's claim on a breach of contract theory. On the contrary, in his original decision, the Commissioner determined that "NCS [had] not relied upon contract theory in any conventional sense" when arguing that ALP financial liability be imposed onto Defendants Middletown and Tiverton. Commissioner Decision I at 11. Following the Council's remand, the Commissioner again stated that his "imposition of liability under [Commissioner Decision I] was not based upon any common law contract theory" and did not alter that finding in the second decision. Commissioner Decision II at 12. Therefore, if the Commissioner did not consider this a "civil action arising from a breach of contract," and did not award Plaintiff the requested relief based on this theory, this Court cannot find error in his refusal to award attorneys' fees pursuant to this statutory provision. Moreover, because § 9-1-45 is inapplicable to administrative proceedings and because any such awards are discretionary in nature, this Court cannot conclude that the Commissioner was clearly erroneous in deciding to deny attorneys' fees pursuant to § 9-1-45 in Commissioner Decision I and/or even address the issue in Commissioner Decision II.

IV

Conclusion

For the foregoing reasons, the Court affirms the Commissioner and Council's denial of attorneys' fees under both the EAJA and § 9-1-45 and finds that, albeit a close call, the substantial rights of the Plaintiff have not been prejudiced. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Newport Community School v. Rhode Island Board of Education Council on Elementary and Secondary Education, et al.**
CASE NO:	**PC-2018-3326**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**November 2, 2020**
JUSTICE/MAGISTRATE:	**Keough, J.**
ATTORNEYS:	
For Plaintiff:	**Michael B. Forte, Jr., Esq.**
For Defendant:	**Paul V. Sullivan, Esq.** **Kevin McAllister, Esq.**