

**IN THE COURT OF APPEALS OF IOWA**

No. 6-919 / 06-0165  
Filed January 18, 2007

**BASIK FIVE TRUST AND  
BRUCE POPKEN,**  
Plaintiffs-Appellants,

**vs.**

**CHET CULVER, IOWA SECRETARY OF STATE,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Howard County, George L. Stigler  
and Alan L. Pearson, Judges.

The plaintiffs appeal from orders by the district court regarding their claims  
against the Iowa Secretary of State. **AFFIRMED.**

Craig G. Ensign of Ensign Law Office, Northwood, for appellant.

Lawrence H. Crosby of Crosby and Associates, St. Paul, Minnesota, for  
appellant.

Thomas J. Miller, Attorney General, and Christie J. Scase, Assistant  
Attorney General, for appellee.

Heard by Huitink, P.J., Eisenhauer, J., and Nelson, S.J.\*

Decided by Huitink, P.J., Vogel and Eisenhauer, JJ. and Nelson, S.J. \*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206  
(2005).

**PER CURIAM.**

The Basik Five Trust and Bruce Popken appeal from orders by the district court that (1) dismissed their claim for declaratory relief and writ of mandamus against the Iowa Secretary of State and (2) affirmed on judicial review the actions of the Secretary as an agency under the Iowa Administrative Procedures Act (APA). Because we agree with the district court that the Secretary of State is an agency subject to the purview of the Iowa APA and without statutory authority to file documents creating a business trust, we affirm.

**I. Background Facts and Proceedings.**

The Basik Five Trust was formed in 1996 as a business trust that consists of farms in Howard County, Iowa. Bruce Popken is the general manager of the Trust, and the Declaration of Trust was filed with the Howard County Recorder's office in December 1996. Popken alleges that the United States Department of Agriculture declined to make certain crop support payments under the Commodity Credit Corporation program to the Trust because it determined the Trust was not an entity eligible for participation due to the silence of applicable federal law on business trusts.<sup>1</sup> Therefore, in order to provide supporting documentation of the Trust's legitimacy through the State of Iowa, Popken attempted to file the indenture documents establishing the Trust with the Iowa Secretary of State's office. In November 2004, Marvin Pullman from AFR & Associates emailed the Secretary's office to inquire as to the filing fee and procedure for filing a business trust. The Secretary's office determined that there

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<sup>1</sup> The trust has since been allowed to receive commodity payments, after the plaintiffs appealed the denial to the National Appeals Office of the USDA.

was no direction under the Iowa Code for business trusts to be filed with the office and declined to accept the filing. The statement by the Secretary's office reads:

We are the filing office, as provided by the Code of Iowa, responsible for the filing of certain types of business entities such as corporations, limited liability companies, limited partnerships, limited liability partnerships, and limited liability limited partnerships. There is no statutory provision for our office to file a business trust.

In February 2005, the Trust and Popken then filed suit in Howard County against the Secretary of State,<sup>2</sup> seeking declaratory judgment that the Trust is a valid and legal entity in the state of Iowa and that the Secretary's office has a legal obligation to file business trust documents as a legal business entity, and a writ of mandamus directing the Secretary to file the documents should they be refused. The plaintiffs were granted leave to amend the petition in May 2005 to include a claim against the Secretary under the Iowa APA as an agency action. In June 2005, the Secretary filed a motion to dismiss count one of the petition requesting declaratory relief and/or a writ of mandamus on the basis that the Secretary's actions were agency actions under the Iowa APA; therefore, count two asserted under the Iowa APA was the sole relief available to the plaintiffs. After a contested hearing on the motion to dismiss, the district court found the APA the sole remedy available to the Trust and Popken and granted dismissal of count one of the petition in July 2005.

The remaining count concerning the propriety of the Secretary's decision as agency action under the Iowa APA was reviewed by the district court following

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<sup>2</sup> The Howard County Recorder was also a defendant in the original petition filed, but was later dismissed from the suit by consent of the plaintiffs on May 9, 2005.

another contested hearing in November 2005. Testimony at the hearing reflects that the plaintiffs acknowledged there is no provision under Iowa law establishing the requirements and filing procedures for business trusts in the state. The Secretary's office conceded that business trusts are recognized as valid business entities in the state, but argues that there is no statutory authority establishing the parameters for the formation of such trusts, and therefore the Secretary of State has no ability to determine what would be an acceptable filing of business trust documents. By order in December 2005, the district court found the Secretary's refusal to file the Declaration of Trust for the Basik Five Trust was proper:

Title XII of the Iowa Code sets forth the business organizations which must file origination documents with the Secretary of State. There is no chapter within Title XII that deals with Massachusetts or business trusts or which outlines what must be within any origination document articles to satisfy the needs of Iowa law. The court intimates no opinion as to the general legitimacy of Massachusetts trusts or business trusts except as previously stated<sup>3</sup> in regard to the acknowledged primary purpose of this Declaration of Trust. Business trusts are recognized repeatedly, as cited in the plaintiffs' briefs, and are legal and valid within the state of Iowa as a legitimate form of business association. The Secretary of State's refusal to accept the proposed Declaration of Trust is based on the fact the Iowa Legislature has not chosen to state what must be in origination documents for business trust to be accepted by the Secretary of State's office for filing. The legislature having failed to act, the plaintiffs may not by virtue of an internet-pieced-together document determine for themselves what the requirements of Iowa law will be.

The plaintiffs appeal, arguing that (1) count one was wrongfully dismissed because the Secretary holds a constitutional office whose powers are not limited

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<sup>3</sup> The district court made findings as to the purpose of the Trust to enable Popken and the Trust's beneficiaries to avoid probate and associated taxes of the property in perpetuity by placing it in an irrevocable trust. These findings were beyond the court's scope of review of the Secretary's actions or issues addressed by the Secretary, see Iowa Code § 17A.19; we disavow them and do not affirm any findings dealing with the purpose of the Trust.

by the Iowa APA, therefore their sole remedy does not lie with the Iowa APA; and (2) business trusts are not prohibited by Iowa law and thus the Secretary's actions were an abuse of discretion, wholly irrational, and erroneous.

## **II. Scope and Standards of Review.**

Our review of rulings on a petition for judicial review is for correction of errors at law. *Litterer v. Judge*, 644 N.W.2d 357, 360 (Iowa 2002). We apply the standards of review found in Iowa Code section 17A.19(10) (2003) to the agency action to “determine whether our conclusions are the same as those made by the district court.” *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 830 (Iowa 2002). We may affirm, remand, reverse, modify, or grant other appropriate relief if the agency action meets the criteria enumerated under Iowa Code sections 17A.19(8)(a)-(g).

An abuse of discretion occurs when the agency action is based on untenable grounds or is clearly erroneous. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). Such abuse is “synonymous with unreasonableness,” and is “clearly against reason and evidence.” *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998) (quoting *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994)). “Arbitrary” or “capricious” means the agency acted without regard to the law or facts. *Bernau v. Iowa Dep't of Transp.*, 580 N.W.2d 757, 764 (Iowa 1998). We therefore concentrate on whether the agency's decision is both rational and based in law and fact. *Dico*, 576 N.W.2d at 355.

## **III. Classification of the Iowa Secretary of State.**

The plaintiffs argue that the Secretary is a constitutional officer with

discretion to determine the limitations of his office and not bound by the dictates of the Iowa APA. Although the Secretary of State's office is established by the Iowa Constitution as part of the executive branch, see Iowa Constitution Article IV, section 22, the parameters of the office are not enumerated in the constitutional provisions. Under the unambiguous language of the Iowa APA, only the "general assembly, the judicial branch or any of its components, the office of the consumer advocate, the governor, or a political subdivision of the state or its offices and units" are exempted from coverage as an agency; "each board, commission, department, officer or other administrative office or unit of the state," however, functions as an agency for application of the statute. Iowa Code §17A.2(1). In addition, the Iowa APA explicitly provides that

This chapter shall be construed broadly to effectuate its purposes. This chapter shall also be construed to apply to all agencies not expressly exempted by this chapter or by another statute specifically referring to this chapter by name; and except as to proceedings in process on July 1, 1975, this chapter shall be construed to apply to all covered agency proceedings and all agency action not expressly exempted by this chapter or by another statute specifically referring to this chapter by name.

Iowa Code §17A.23.

We conclude the district court properly dismissed count one of the plaintiffs' petition seeking a declaratory judgment and/or writ of mandamus against the Secretary, as the Secretary of State is an agency under the Iowa APA. See also *Graham v. Baker*, 447 N.W.2d 397 (Iowa 1989) (finding that the attorney general or attorney general's designee, when acting in his or her capacity as farm crisis program coordinator, is a "state agency" for purposes of determining extent of judicial review of farmer-creditor mediator's decisions);

*Citizens' Aide/Ombudsman v. Rolfes*, 454 N.W.2d 815 (Iowa 1990) (finding that the Office of Citizens' Aide was an "agency" for purposes of chapter 17A). We affirm on this issue.

#### **IV. Judicial Review of Agency Action.**

Popken and the Trust also argue that the Secretary abused his discretion and acted erroneously by refusing to accept the Trust documents for filing because business trusts are legitimate and valid entities in Iowa. The Secretary contends that, absent legislative directive, the Secretary through his office is not authorized to accept filings that are not delineated by statutory law.

We start with the general proposition that an administrative agency "has no inherent power and has only such authority as is conferred by statute or is necessarily inferred from the power expressly granted." *Zomer v. West River Farms, Inc.*, 666 N.W.2d 130, 132 (Iowa 2003). Although an administrative agency has the authority and duty to determine its own limits of statutory authority, it is the function of the judiciary to finally decide the limits of the authority of the agency and subject to judicial scrutiny the actions either by appeal or by a certiorari action. *Moderate Income Housing, Inc. v. Bd. of Review of Pottawattamie County*, 393 N.W.2d 324, 326 (Iowa 1986).

We recognize the plaintiffs' argument that business trusts are legitimate business entities, valid in Iowa and referenced many times throughout various Iowa Codes sections.<sup>4</sup> However, the Iowa legislature has enacted numerous statutory chapters dealing with the formation, filing, and governance of other

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<sup>4</sup> For example, several sections define "person" for purposes of that statute to include a business trust. See Iowa Code §§ 4.1, 68A.102, 68B.2, 88.3, 124.101.

business entities that require filing compliance oversight by the Secretary of State. See Iowa Code chapters 486A-487 (Partnerships); 488 (Limited Partnerships); 490 (Business Corporations); 490A (Limited Liability Companies); 491 (Corporations for Pecuniary Profit); 496C (Professional Corporations); 497-499 (Cooperative Associations); and 504-504A (Nonprofit Corporations). While other states may have specific statutes<sup>5</sup> dealing with the formation and governance of business trusts, Iowa does not. We therefore cannot say that the Secretary of State abused his discretion, acted erroneously, or otherwise acted arbitrarily or capriciously when he refused to accept the plaintiffs' business trust documents for filing. The Secretary could not act in the absence of a statutory grant of authority to engage in such practices. *Cf. Litterer v. Judge*, 644 N.W.2d 357, 365 (Iowa 2002) (concluding the secretary of agriculture is not authorized to promulgate certain rules relating to ethanol in motor fuel sold in Iowa without a legislative grant of such authority). We agree with the district court's observations and reiterate that it is the role of the Iowa General Assembly and not this court to expand the authority of the Secretary of State's office to include oversight for the filing of business trusts in this state. See *Iowa Dep't of Soc. Servs. v. Blair*, 294 N.W.2d 567, 570 (Iowa 1980) (holding courts cannot expand an administrative agency's authority beyond the authority granted to the agency by the legislature). We affirm.

**AFFIRMED.**

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<sup>5</sup> See e.g. Mass. Gen. Laws chapter 182 (2005); Minn. Stat. chapter 318 (2005).