

FILED \_\_\_\_\_

AT \_\_\_\_\_ O'Clock \_\_\_\_\_ M  
CLERK OF DISTRICT COURT

\_\_\_\_\_  
Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**JEREMIAH PAUL FREER,** )  
 )  
 *Petitioner,* )  
 vs. )  
 )  
 **STATE OF IDAHO, DEPARTMENT OF** )  
 **TRANSPORTATION,** )  
 )  
 *Respondent.* )  
 )  
 )  
 \_\_\_\_\_ )

Case No. **CV 2010 6094**

**MEMORANDUM DECISION AND  
ORDER ON APPEAL AFFIRMING  
ADMINISTRATIVE HEARING  
OFFICER DECISION**

Attorney for the Petitioner: John E. Redal  
Attorney for the Respondent: Susan K. Servick

**I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.**

This matter is before the Court on a Petition for Review of 90-day Driver’s License Suspension of Jeremiah Paul Freer’s (Freer) license by the Idaho Transportation Department (ITD). Freer has errantly captioned the respondent in the case as Idaho Department of Transportation.

Freer was arrested for Driving Under the Influence on May 16, 2010, by Idaho State Police Trooper Chuck Robnett. Freer had been riding an all-terrain vehicle (ATV) northbound near Highway 41 when he high-centered on a tree stump. An individual who arrived to assist Freer suspected he was intoxicated and contacted law enforcement. On May 16, 2010, Freer was served with a “Suspension Advisory” by the arresting officer. On June 7, 2010, following Freer’s having timely requested an administrative hearing on the 90-day suspension of his driver’s license, an

Administrative License Suspension (ALS) hearing was held on June 7, 2010. On June 29, 2010, the 90-day suspension was upheld by the hearing officer in his decision. Agency Record, pp. 33-40. Freer filed the Petition for Review now before the Court on July 19, 2010, and this Court issued a stay of Freer's driver's license suspension on July 23, 2010.

On November 12, 2010, Freer filed his Petitioner's Brief, arguing only that he was not operating his ATV on property open to the public, and that the hearing officer therefore made a finding in this regard which was not supported by substantial evidence in the record. Petitioner's Brief, p. 2. The Department of Transportation (ITD) filed its Respondent's Brief on December 3, 2010, and argued the hearing officer's findings with regard to the public or private nature of the property on which Freer operated the ATV was not clearly erroneous. Respondent's Brief, p. 7. Oral argument was held on January 26, 2011.

## **II. STANDARD OF REVIEW.**

Review of decisions to deny, cancel, suspend, disqualify, revoke, or restrict driver's licenses is governed by the Idaho Administrative Procedures Act (IDAPA). See I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270. Reviewing Courts review the agency record on appeal independently. *Marshall v. Idaho Dep't of Transp.*, 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct.App. 2002). But reviewing courts do not substitute their judgment for that of the agency as to weight of the evidence presented. I.C. § 67-5279(1); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. An agency's findings of fact are deferred to unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the

agency, so long as the determinations are supported by substantial, competent evidence in the record. *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3d 1091, 1094 (2005).

Courts may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial right of that party has been prejudiced. *Price v. Payette County Bd. Of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998).

### **III. ANALYSIS.**

Freer's Brief is a model of brevity. Freer argues:

The only evidence offered by the State as to where Freer was operating his motor vehicle is in the probable cause affidavit listed as exhibit 3 of the agency record. In that affidavit the officer states that Freer was high centered on a stump. He also states that "Freer was riding his Arctic Cat 4-wheeler northbound on the west side of State Highway 41 on the graveled right or [sic] way portion of the road" exhibit 3. The problem with this statement is that there is no basis for it. When the officer arrives it is obvious Freer is already on the stump. Nothing in the affidavit indicates that neither the Rathdrum officer, the homeowner, or Freer indicated he was on the gravel area.

During testimony at the hearing by Freer, he clearly states that he was on private property off the roadway, Transcript p. 4-6. He even responds to questioning by the officer indicating that he was not on a public right of way and that the property is private. Transcript, p. 6-7.

Petitioner's Brief, p. 2. At oral argument, counsel for Freer simply emphasized Freer's testimony before the hearing examiner that he was 75-80 feet away from the highway when he was driving the four-wheeler (Tr. p. 6, Ll. 20-24), and that page 22 of the Agency Record shows the stump Freer high centered upon was 95 feet from the

highway.

ITD responds the burden of proof at the ALS hearing rested on Freer.

Respondent's Brief, p. 6. ITD argues:

Here, Freer raised an issue of fact at [sic] to where he was operating the ATV. Therefore, the burden of proof *was on Freer* to establish that he was operating the ATV on private property that was not open to the public.

Respondent's Brief, pp. 6-7. At oral argument, counsel for ITD emphasized the burden of proof rests on Freer. Although the evidence on this issue was conflicting, ITD argues the hearing officer properly weighed the conflicting evidence and found Freer's testimony was uncertain (he stated he "believed" he'd been on private property); the exhibits failed to show the property Freer was on was private and Exhibit A "shows what could be considered as a normal well-maintained ATV and/or motorcycle trail"; and although the tree stump was not located in the gravel portion of the highway, Exhibit 3 specifically stated Freer *had been* driving the ATV on the gravel portion of the highway. Respondent's Brief, p. 7.

An agency's factual determinations are binding upon the reviewing court, even where there was conflicting evidence before the agency, so long as the factual determinations are supported by substantial and competent evidence in the record. *Urrutia v. Blaine County, ex rel. Bd. Of Comm'rs*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000). Substantial evidence is relevant evidence which a reasonable mind might accept to support the conclusion reached; it is more than a scintilla and less than a preponderance. *Kinney v. Tupperware Co.*, 117 Idaho 765, 769, 792 P.2d 330, 334 (1990).

Freer argues Exhibit 3, the Officer's Probable Cause Affidavit, stating Freer had been driving on the graveled portion of Highway 41 and was found high-centered on a

stump, provided an insufficient basis for the finding that Freer was on the gravel area (and therefore not on private property). Petitioner's Brief, p. 2. Freer states he testified at the ALS hearing that he had been operating the ATV on private land; and, indeed in response to his attorney's question Freer testified to having been approximately 100 feet away from the highway on private land off of a railroad grade (Tr., p. 5, Ll. 2-8), and in response to the hearing officer's question, Freer changed that to 75-80 feet from the highway. When questioned by the hearing officer, Freer testified he "believed" the property he was operating the ATV on was private. Tr., p. 6, L. 24 – p. 7, L. 3. The hearing officer made findings which concurred with the Officer's probable cause affidavit. Specifically, the hearing officer found, "While driving an ATV on the gravel portion of Highway 41, Freer high centered the ATV on a tree stump when turning the ATV around." Findings of Fact and Conclusions of Law and Order, p. 4. Similarly, Trooper Robnett stated in his sworn affidavit that:

Jeremiah Freer was riding an Arctic Cat 4-Wheeler northbound on the west side of State Highway 41 on the graveled right of way portion of the road. He tried to turn around and drove onto a tree stump and high centered his 4-Wheeler and was unable to drive any further.

A.R., p. 5. The hearing officer, as stated above, went on to find Freer's claim to have been on private property was not certain; no exhibits demonstrated the area Freer was operating the ATV on had No Trespassing signs, fences or other indicia that the area was closed to the public; Exhibit A could have been a normal and well-maintained ATV and/or motorcycle trail; and even if, as Freer argues, the tree stump was located at a location other than the graveled portion of Highway 41, Trooper Robnett's Affidavit states Freer *had been* driving the ATV on the graveled portion of the highway. A.R., p. 39, ¶ ¶ 6-10.

Freer's testimony was that he operated the ATV "far, far away" from Highway 41.

Tr., p. 6, Ll. 5-8. But in his testimony Freer never addressed having high-centered on the stump because he had been turning the ATV, nor did he explicitly deny ever having been on public property or private property open to the public. In Idaho, where evidence is in conflict with testimony, a credibility issue is presented for resolution to the hearing officer and such a determination will not be overturned if it is supported by substantial evidence in the record. *In re Mahurin*, 140 Idaho 656, 661, 99 P.3d 125, 130 (Ct.App. 2004).

In addition to making a credibility finding arguably adverse to Freer (taking into account Freer's qualified statement that he "believed" he had been on private property), the hearing officer also noted the absence of support by Freer affirmatively demonstrating he had been on private property. Specifically, the hearing officer noted the absence of No Trespassing signs or fences. In *State v. Knott*, 132 Idaho 476, 974 P.2d 1105 (1999), the Supreme Court overturned the Court of Appeal's decision in *State v. Gibson*, 126 Idaho 256, 881 P.2d 551 (Ct.App. 1994), and declined to adopt the Court of Appeals' conclusion that because the DUI statute is not part of the motor vehicle code, it is not subject to definitions found in Title 49. *Knott*, 132 Idaho 476, 479, 974 P.2d 1105, 1108. The Court held, "The definition in section 49-117(15) (now section 49-117(16)) is applicable to the phrase "private property open to the public" used in section 18-8004." 132 Idaho 476, 480, 974 P.2d 1105, 1109. As a result, the definition of "private property open to the public means real property, which is not owned by the federal government of the State of Idaho or its political subdivisions, but which is available for vehicular traffic or parking by the general public with permission of the owner or agent of the real property. *Id.*

In *State v. Schmitt*, 144 Idaho 768, 171 P.3d 259 (Ct.App. 2007), the Court of

Appeals discussed portions of and reasoning in *Gibson* which was not overruled by *Knott*:

In *State v. Gibson*, 126 Idaho 256, 881 P.2d 551 (Ct.App. 1994), *overruled on other grounds by Knott*, 132 Idaho at 480, 974 P.2d at 1109, the defendant was charged with violating the Idaho DUI statute for operating a motor vehicle under the influence of alcohol in the privately-owned parking lot of a local bar. On appeal, the defendant asserted that the bar parking lot was not open to the general public, as it was only available for use by the patrons of the bar and was, therefore, private property. The defendant argued the DUI statute did not prohibit operating a motor vehicle in a private parking lot.

In reviewing that case, we were persuaded by the Connecticut Supreme Court's interpretation that a "public" parking lot is any parking lot which the general public has access to. *Gibson*, 126 Idaho at 258, 881 P.2d at 553, *quoting State v. Boucher*, 207 Conn. 612, 541 A.2d 865, 867-68 (1988). We held that, for an area to be open to general public use, it was not necessary that the area be open to everybody all of the time. *Gibson*, 126 Idaho 256, 258, 881 P.2d 551, 553. Instead, a place is open to the public when the indefinite public, rather than a predetermined group of individuals, is invited, either expressly or by implication, to enter the property for any reason. *Id.* In affirming the defendant's judgment of conviction, we noted that the bar parking lot, while private property, was not restricted by physical barriers or had any posted signs controlling access. Rather, any member of the general public who wanted to patronize the bar could come onto the property.

*Schmitt*, 144 Idaho 768, 771, 171 P.3d 259, 262.

Similarly, here, the hearing officer made a specific finding of fact that no evidence proffered by Freer "show[ed] any no trespassing signs, fences, or any other indicia indicating where Freer was driving the ATV was closed for public usage." Findings of Fact and Conclusions of Law and Order, p. 7. In fact, "Exhibits A through D [the photos submitted by Freer] failed to support Freer's position that the private property where the crash occurred was **not** open to the public." *Id.* (emphasis in original).

At oral argument, counsel for Freer directed the Court's attention to Exhibit C and D, which are found at page 22 of the Agency Record. Exhibit C shows what appears to be nothing but area appearing to be open to the public between the tree stump and the

highway. If it is private property (and that has not been proven) then it is private property that certainly appears to be open to the public. The Administrative Hearing Officer's conclusion to that effect are supported by substantial competent evidence. It was Freer's burden before the hearing officer and that burden was made clear by the hearing officer. A.R. p. 36. Freer failed in that burden with the proof he placed before the hearing officer. The hearing officer noted Freer's testimony was uncertain as he "believed" the area was private right-of-way property. A.R. p. 39. That finding is confirmed by the transcript. Tr. p. 6, L. 23, - p. 7, L. 3. But most importantly, even if this were in fact private property, the hearing officer found "Other pictures submitted including Exhibit A failed to show any no trespassing signs, fences, or any other indicia indicating where Freer was driving the ATV was closed for public usage." A.R. 39. On appeal, there is substantial competent evidence to support that decision.

#### **IV. CONCLUSION AND ORDER.**

Given the hearing officer's credibility and weight determination, and his analysis of "private property open to the public" being in line with Idaho case law, this Court must deny Freer's Petition and affirm the June 29, 2010, decision of Administrative Hearing Officer Eric G. Moody in all aspects. For the reasons stated above;

IT IS HEREBY ORDERED the June 29, 2010, decision of Administrative Hearing Officer Eric G. Moody is AFFIRMED in all aspects.

IT IS FURTHER ORDERED the stay imposed by this Court on July 23, 2010, is RESDINDED effective immediately.

Entered this 27<sup>th</sup> day of January, 2011.

---

John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of January, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

**Lawyer**  
John E. Redal

**Fax #**  
676-8680

| **Lawyer**  
Susan K. Servick

**Fax #**  
667-1825

---

Jeanne Clausen, Deputy Clerk