STATE OF IDAHO)
County of KOOTENAI)ss

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AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

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

KENNETH RAABE,

Petitioner,

vs.

STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. **CV 2011 3076**

MEMORANDUM DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING PETITIONER'S APPEAL

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on respondent Idaho Transportation Department's (ITD) motion for summary judgment on the Petition for Judicial Review filed by petitioner Kenneth Raabe (Raabe).

On March 3, 2011, Raabe was arrested for driving under the influence (DUI) after he failed an evidentiary breath test administered by Kootenai County Sheriff's Deputy R.A. Miller (Miller). On that date Raabe was read and provided with a "Suspension Advisory" by Miller according to the Idaho Department of Transportation. Affidavit of Amy Kearns, p. 2, ¶ 3. Raabe disputes he was ever read the notice of suspension, raising the question of whether he was read the Administrative License Suspension (ALS) advisory verbatim as required by I.C. § 18-8002 as a disputed issue of fact. Answering Brief Pursuant to I.R.C.P. 56 and Idaho Code § 67-5271, pp. 4-5.

Raabe did not request a hearing to contest the administrative license suspension within seven (7) days as required by I.C. § 18-8002A(7). On March 9, 2011, Raabe spoke with the attorney whom he later retained as counsel. Because Raabe was unable to pay a retainer at that time, he was provided guidance on filling out a *pro se* Request for Conditional Hearing form on that date. Answering Brief Pursuant to I.R.C.P. 56 and Idaho Code § 67-5271, pp. 1-2. A temporary assistant in Raabe's now-counsel's office then faxed the request to an incorrect facsimile number. Thus, it was not received by ITD. *Id.,* pp. 2-3. On March 14, 2011, Raabe's by-then-retained counsel filed a notice of substitution. On March 16, 2011, both Raabe and his counsel were mailed a Notice of Untimely Request for a Hearing. Raabe claims: "The scrivener's error was discovered only after receipt of the Notice of Untimely Request for Hearing was received." *Id.,* p. 3. On March 21, 2011, Raabe's counsel wrote a letter to ITD explaining the error. *Id.* On April 6, 2011, Raabe filed an Amended and Corrected Conditional Request for Administrative Hearing and Objection, and a motion to reconsider the denial of his request for an ALS hearing. *Id.* at p. 3. On April 8, 2011, ITD denied Raabe's motion to reconsider the department's denial of a hearing. Petitioner's Answering Brief Pursuant to IRCP 56, and Idaho Code § 67-5271. Raabe appeals from this denial by filing his Petition for Judicial Review on April 14, 2011.

On May 31, 2011, ITD moved for summary judgment on the issue of Raabe's untimely request for an ALS hearing amounting to a failure to exhaust administrative remedies and precluding an entitlement to judicial review. Memorandum in Support of Motion for Summary Judgment, p. 4. On August 11, 2011, Raabe filed Petitioner's Answering Brief Pursuant to I.R.C.P. 56, and Idaho Code § 67-5271. In his brief, Raabe moves the Court to strike the Affidavit of Amy Kearns, filed by ITD in support of

its motion for summary judgment, as amounting to hearsay because Kearns was not present at the traffic stop on March 3, 2011, and therefore could not have had personal knowledge of the matters which transpired. Petitioner's Answering Brief Pursuant to I.R.C.P. 56, and Idaho Code § 67-5271, p. 4. Ten exhibits were filed with Raabe's brief, along with the Affidavit of Coleen Ferris, setting forth her injury which kept her out of Raabe's counsel's office on the March 9, 2011, date the request for a hearing was improperly faxed to a number not belonging to ITD. ITD filed its Objection and Reply on August 22, 2011. ITD objected to Raabe's exhibits, stating they were improperly attached to Raabe's brief "without any supporting affidavit establishing foundation for the exhibits." Objection and Reply, p. 1.

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).

When reviewing the decision of the District Court in its appellate capacity, Appellate Courts examine the record of the trial court independently of, but with due regard for, the District Court's intermediate appellate decision. *Hentges v. Hentges,* 115 Idaho 192, 194, 765 P.2d 1094, 1096 (Ct.App. 1988).

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Riverside Dev.*

Co. v. Ritchie, 103 Idaho 515, 519, 650 P.2d 657, 662 (1982). In a matter set for a court trial, in which the Court acts as the trier of fact, the District Judge is entitled to draw all reasonable inferences from any undisputed facts "because the court alone would be responsible for resolving the conflict between those inferences." *Parker v. Kokot,* 117 Idaho 963, 967, 793 P.2d 195, 199 (1990) (citing *Riverside Dev. v. Ritchie,* 103 Idaho 515, 650 P.2d 657 (1982).

III. ANALYSIS.

A. Evidentiary Issues.

As set forth in the next section, ITD's motion for summary judgment must be granted and Raabe's appeal must be dismissed because Raabe has failed to exhaust his administrative remedies, and thus, is not entitled to judicial review. That ruling makes the following evidentiary disputes moot. The Court addresses them only for future guidance.

Raabe argues the Court should strike the affidavit of Amy Kearns as hearsay because Kearns was not present during the traffic stop on March 3, 2011, and therefore could not have had personal knowledge of the factual allegations made in her affidavit. Answering Brief Pursuant to I.R.C.P. 56 and Idaho Code § 67-5271, pp. 4-5.

Raabe is wrong for two reasons. First, administrative hearings are not formal court hearings and the rules of evidence do not strictly apply. *See, Wheeler v. Idaho Transportation Department,* 148 Idaho 378, 383, 223 P.3d 761, 766 (Ct.App. 2009) ("A hearing officer is not bound by the Idaho Rules of Evidence."); IDAPA 04.11.01.600); *Application of Citizens Util. Co.,* 82 Idaho 208, 213, 351 P.2d 487, 489 (1960 ("a fact-finding, administrative agency…is not bound by the strict rules of evidence governing courts of law.") Second, Kearns claims only that she has reviewed Raabe's records

and found information including that Miller arrested Raabe, gave him an evidentiary breath test, read Raabe the Notice of Suspension and provided Raabe a copy of the notice. Affidavit of Amy Kearns, pp. 1-2, ¶ 3.

Raabe's motion to strike the affidavit of Amy Kearns is denied.

In its reply brief, ITD objects to Raabe's exhibits, attached to his Answering Brief, as opposed to an affidavit establishing a proper foundation for the exhibits. Objection and Reply, pp. 1-2. But, as the Idaho Court of Appeals wrote in *Wheeler:*

> Additionally, IDAPA gives presiding officers at administrative hearings the discretion to exclude certain types of evidence and provides that "all other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs."

148 Idaho 378, 383, 223 P.3d 761, 766, citing I.C. § 67-5251(1). Here, all exhibits proffered by Raabe were before the agency below and are applicable to a determination of the timeliness of Raabe's request for a hearing. ITD also argues Kearns' affidavit does not amount to hearsay because it references records of a regularly conducted activity pursuant to Idaho Rules of Evidence 803(6) and (8). *Id.,* p. 3. And, ITD makes clear that IDAPA rules, while they are to be construed liberally, do not supersede the Idaho Code's requirements for filing of a request for hearing within seven days. *Id.,* p. 5. This Court properly exercises its discretion in determining the propriety of the motions to strike raised in the parties briefing; and overrules ITD's objection to Raabe's exhibits.

B. Analysis of ITD's Motion for Summary Judgment.

ITD moves this Court for summary judgment, arguing Raabe's appeal is untimely and must be dismissed under Idaho Rule of Civil Procedure 56 and Idaho Code § 67-5271. Memorandum in Support of Motion for Summary Judgment, p. 1. ITD later clarifies that it was Raabe's request for a hearing which was untimely, resulting in his

failure to have exhausted administrative remedies, and precluding Raabe's entitlement to judicial review by this Court. *Id.,* p. 4; I.C. § 67-5271. ITD cites *Wanner v. State, Dep't of Transportation,* 150 Idaho 164, 244 P.3d 1250 (2011), for the proposition that failure to timely request an administrative hearing on suspension amounts to a failure to exhaust administrative remedies. *Id.,* pp. 3-4.

In response, Raabe disputes the Affidavit of Amy Kearns, submitted in support of ITD's motion for summary judgment, arguing the DVD (purportedly submitted as Exhibit 10 to Raabe's Answering Brief, but not in the Court file) does not contain Miller reading the Notice of Suspension to Raabe. Answering Brief Pursuant to I.R.C.P. 56 and Idaho Code § 67-5271, p. 4. It is unclear from Raabe's briefing whether Raabe is arguing Miller had a duty to read the Notice of Suspension to him in its entirety, or whether Raabe, who signed the Notice of Suspension on March 3, 2010, was not given the suspension advisory despite having received a written copy. I.C. § 18-8002A(2) clearly states that the information to be given to an individual at the time of evidentiary testing "need not be… verbatim." I.C. § 18-8002A(2).

Raabe then argues the facts of *Wanner* are distinguishable from those in the instant matter because unlike Wanner, Raabe did request an administrative hearing on suspension within seven days, but that he merely faxed the request to an incorrect facsimile number. Answering Brief Pursuant to I.R.C.P. 56 and Idaho Code § 67-5271, p. 5. Finally, Raabe urges that IDAPA rules are to be construed liberally (presumably to provide the agency with discretion to grant untimely requests like Raabe's) and "[t]here is a genuine issue of material fact as to whether the plethora of evidence provided to the IDOT and their refusal to allow an ALS hearing violates the substantive due process rights of Petitioner." *Id.,* p. 6.

Dispositive of the issue before the Court is *Hansen v. State of Idaho,* 138 Idaho 865, 71 P.3d 464 (Ct.App. 2003). The procedural posture of *Hasnen* varies widely from that in the instant case, but its applicability is readily apparent. In *Hansen,* following a DUI arrest, the arresting officer failed to advise Hansen of his right to request a hearing regarding his refusal to submit to evidentiary testing. 138 Idaho 865, 866, 71 P.3d 464, 465. After Hansen retained an attorney, and the attorney discovered that a request for a show cause hearing had not been made, the seven-day time period in I.C. § 18-8002(4)(c) to request such a hearing had expired and the Magistrate had entered an order suspending Hansen's driver's license. *Id.* Hansen's attorney then filed a Rule 60(b)(1) motion, arguing mistake, inadvertence, or excusable neglect as to his failure to request a show cause hearing and the Magistrate granted the relief sought. *Id.* The State thereafter appealed to the District Court, which reversed the Magistrate and held Rule 60(b)(1) was not an available remedy for such an untimely request. 138 Idaho 865, 867, 71 P.3d 464, 466. The Idaho Court of Appeals upheld the District Court and held that the Idaho Rule of Civil Procedure 60(b)(1), providing for relief of a judgment on the grounds of mistake, inadvertence, or excusable neglect, is not a remedy for the untimely filing of a request for a driver's license suspension hearing. 138 Idaho 865, 867-68, 71 P.3d 464, 466-67. The show cause hearing at issue in *Hansen* was one contemplated by Idaho Misdemeanor Criminal Rule 9.2(c). Rule 9.2(c) reads in part:

> Show Cause Hearing. If a show cause hearing is timely requested by the defendant, the court shall notice it for hearing within the time provided by law. The hearing shall be limited to those issues provided by Section 18-8002(4)(b), Idaho Code.

I.M.C.R. 9.2(c). Rule 9.2(b) sets forth the time limit applicable to a show cause hearing:

> Suspension by the Court. After being presented with a sworn statement of an officer under this rule, if the person whose license was seized does not request a hearing within 7 days from the date of seizure of his license,

> as allowed by Section 18-8002, Idaho Code, the judge shall thereupon enter an order suspending the driver's license of the defendant for 180 days pursuant to Section 18-8002, Idaho Code, without further notice to the party.

I.M.C.R. 9.2(b). In the present case Raabe is clearly arguing mistake, inadvertence, or excusable neglect with regard to his request for a hearing having been faxed to an incorrect number. Raabe's attempt to frame the issue as one of due process fails. The exhaustion doctrine unquestionably precludes judicial review where there has been a failure to exhaust administrative remedies. I.C. § 67-5271. In *Owsley v. Idaho Industrial Commission,* 141 Idaho 129, 106 p.3d 455 (2005), the Idaho Supreme Court recognized a limited exception to exhaustion requirements: where there exists "a showing that there is a probability that a decision maker in a due process hearing will decide unfairly", a litigant is permitted to bypass exhaustion requirements. 141 Idaho 129, 137, 106 P.3d 455, 463, quoting *Johnson v. Bonner County School District No. 82,* 126 Idaho 490, 494, 887 P.2d 35, 39 (1994).

Raabe makes no allegation that ITD, the decision maker in what would have been a due process hearing had Raabe timely requested one, would have decided the hearing unfairly. All that is before the Court is Raabe's argument and supporting evidence, amounting to a claim of mistake, inadvertence, or excusable neglect. ITD is correct in arguing no material issues of fact remain. It is beyond argument that Raabe failed to timely file a request for hearing. As in the context of a I.M.C.R. 9.2(c) hearing, mistake, inadvertence or excusable neglect will not remedy Raabe's untimely request for a hearing. In light of the forgoing, ITD has properly set forth the absence of disputed issues of fact, and summary judgment is proper in favor of ITD as Raabe's appeal involves relief to which he is not entitled.

It could be construed that Raabe is not moving the Court for relief from ITD's April 8, 2011, denial of his motion for reconsideration of ITD's Notice of Untimely Request for a Hearing, which is found at Exhibit 9 to Petitioner's Answering Brief Pursuant to IRCP 56, and Idaho Code § 67-5271. Raabe has focused on the denial of his application for hearing. However, Raabe is arguably moving the Court for relief from ITD's denial of his motion for reconsideration of ITD's Notice of Untimely Request for a Hearing pursuant to I.R.C.P. 60(b)(1). Petition for Judicial Review/Appeal, p. 2, ¶ 4.3 Raabe's Motion to Reconsider set forth the facts surrounding the fax transmission to the wrong fax phone number, and submitted those facts to ITD. Petitioner's Answering Brief Pursuant to IRCP 56, and Idaho Code § 67-5271, Exhibit 8. Thus, ITD has considered this "excusable neglect" argument. Even if Raabe has made the denial of the request for reconsideration an issue on appeal, Raabe has set forth no evidence to show that ITD abused its discretion in denying Raabe's motion for reconsideration. IDAPA 39.02.72.100.02 reads:

> **02. Timely Requests.** Hearing requests must be received by the Department no later than 5 p.m. of the seventh day following the service of the Notice of Suspension. Hearing requests received after that time shall be considered untimely. The Department shall deny an untimely hearing request unless the petitioner can demonstrate that a request should be granted.

Wanner does not address this IDAPA provision, but *Truman v. State of Idaho, Department of Transportation,* 2010 Unpublished Opinion No. 329 (January 27, 2010), submitted by ITD does address that provision. According to the Idaho Court of Appeals website:

> No unpublished opinion shall constitute precedent or be binding upon any court. Except to the extent required by res judicata, collateral estoppel, the law of the case doctrine or any other similar principle of law, no unpublished opinion shall be cited as authority to any court.

Thus, ITD should not have cited *Truman* to this Court as *authority* for its proposition that: "However, interpreting this exception with the strict mandatory language immediately preceding it implies that such discretion should be reserved for limited, exceptional circumstances." Objection and Reply, p. 4, n. 2. This Court appreciates that *Truman* is not precedent, nor has ITD argued such. However, this Court finds *Truman* is indicative of how the Idaho Court of Appeals would construe the IDAPA provision. In *Truman*, the Idaho Court of Appeals upheld ITD's narrow reading of IDAPA 39.02.72.100.02, and reversed the district court judge that disagreed with ITD's interpretation.

> Both Truman and the district court rely heavily on the discretionary nature of IDAPA 39.02.72.100.02. We disagree with the extent of discretion conferred on the department by this section as interpreted by the district court. The section provides that hearing requests *must* be received no later than 5 p.m. on the seventh day following notice and that any request received after that time *shall* be deemed untimely and *shall* be denied. This leaves little room for an unfettered exercise of discretion. Some discretion is left to the department to grant a hearing request, despite its untimeliness, if a petitioner can demonstrate that it should be granted. However, interpreting this exception with the strict mandatory language immediately preceding it implies that such discretion should be reserved for limited, exceptional circumstances. The department exercised this limited discretion upon reconsideration of Truman's hearing request on remand from the district court when it found that his allegation was clearly contradicted by the record and, thus, failed to demonstrate why a hearing should be granted.

Unpublished Opinion No. 329, p. 4. (italics in original). In the present case, ITD was confronted with Raabe's explanation as to why his request for hearing was denied. It cannot be said the ITD abused its discretion in denying that request as untimely in ITD's April 8, 2011, denial of Raabe's motion to reconsider.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED Raabe's motion to strike the Kearns affidavit is DENIED;

IT IS FURTHER ORDERED ITD's objection to Raabe's Exhibits is OVERRULED;

IT IS FURTHER ORDERED ITD's motion for summary judgment is GRANTED, and Raabe's appeal is DISMISSED. Raabe failed to exhaust his administrative remedies and is not entitled to judicial review of ITD's action.

Entered this 30th day of August, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 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	Fax #	Lawyer	Fax #
Suzanna L. Graham	208 665-7079	Susan K. Servick	208 667-1825

_____
Jeanne Clausen, Deputy Clerk