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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**

MARVIN ERICKSON,)
)
Petitioner,)
)
vs.)
)
IDAHO BOARD OF REGISTRATION OF)
PROFESSIONAL ENGINEERS AND)
PROFESSIONAL LAND SURVEYORS,)
)
Respondent,)
and)
)
ALAN R. SODERLING)
)
Intervenor.)
_____)

Case No. **CV 2006 5256**

**MEMORANDUM DECISION AND
ORDER ON APPEAL**

I. BACKGROUND.

In June 2005, Marvin Erickson (Erickson) filed a formal complaint with the Idaho Board of Registration of Professional Engineers and Professional Land Surveyors (Board) against Alan R. Soderling (Soderling), an engineer working for J-U-B. Soderling responded to the complaint in August, 2005. The Board determined that the complaint warranted investigation. The Board's director recused himself because of a conflict of interest, and the Board was charged with finding a replacement to investigate the claims. After some difficulty, John Elle, an engineer qualified to investigate the complaint, was recruited. Soderling and his attorney met with the investigator in February, 2006. In March, 2006, the Board found justifiable cause and unanimously voted to indefinitely extend the six-month time period for holding a hearing in the case.

In April 2006, Soderling filed a Motion to Dismiss/Motion for Reconsideration, arguing that the case should be dismissed because it had not been heard within the six month time period provided in Idaho Code § 54-1220(2), nor had the Board extended the time in compliance with the statute. In May 2006, the Board considered the matter, and after reviewing the documents and cases cited therein, on May 12, 2006, the Board issued its “Findings of Fact, Conclusions of Law and Order” which concluded that it had no choice but to dismiss the matter because the initial six-month deadline for holding the hearing had expired *before* the statutory timeline was extended by the Board. R. pp. 76-79.

On June 5, 2006, Erickson filed a Motion for Reconsideration. On June 10, 2006, the Board on reconsideration affirmed the dismissal of the matter by issuing a “Final Order” pursuant to IDAPA 04.11.01.740, which stated in part:

THIS IS A FINAL ORDER OF THE BOARD. Pursuant to Section 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order...may appeal this final order and all previously issued orders in this case to district court by filing a petition... An appeal must be filed within twenty-eight (28) days (a) of the service date of this final order, (b) of an order denying a petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for consideration, *whichever is later*. See Section 67-5273, Idaho Code.

(emphasis added). That Order was served on June 16, 2006. On July 12, 2006, Erickson filed a Petition for Judicial Review in this Court. Erickson’s Petition for Judicial Review asks this court to reverse the Board’s decision dismissing the complaint against Alan Soderling and remand the case back to the Board for a hearing and decision on the merits.

On September 22, 2006, Soderling filed his Motion to Dismiss Erickson’s Petition for Judicial Review pursuant to the Idaho Rules of Civil Procedure 84(b) and Idaho Code § 67-5273(2), arguing Erickson’s Petition for Review was not timely filed since it was not filed within 28 days after the Board’s decision was rendered. After filing the

Motion to Dismiss, Soderling and J-U-B filed a motion to intervene in this appeal. On October 31, 2006 this Court allowed Soderling to intervene, and this Court denied J-U-B its motion to intervene. After hearing on November 1, 2006, this Court denied Soderling's Motion to Dismiss in a written opinion filed November 9, 2006. A briefing schedule was issued and oral argument on the appeal was held June 7, 2007. Following the hearing, the Court asked for additional briefing on two issues: 1) Under Idaho Code § 54-2330(2), does the Board have the power and duty to dismiss complaints (other than those which are without foundation or trivial) if a hearing is not held within six months; and, if so, 2) When the final order of the Board dismissing the complaint does not specifically state that its decision was with prejudice, can the petitioner re-file? Briefs were filed by Erickson, Soderling and the Board by June 28, 2007. The Court has reviewed those briefs. Accordingly, Erickson's Petition for Judicial Review is now at issue.

II. STANDARD OF REVIEW.

When reviewing an appeal from an agency decision, the court should place great weight on the agency's interpretation of its own rules. *Angstman v. City of Boise*, 128 Idaho 575, 917 P.2d 409 (1996). An 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. *Price v. Payette County Bd. of County Com'rs*, 131 Idaho 426, 958 P.2d 583 (1998). "Substantial evidence" which supports an agency's factual determination is "relevant evidence that a reasonable mind might accept to support a conclusion." *Pearl v. Bd. of Professional Discipline of Idaho State Bd. of Medicine*, 137 Idaho 107, 44 P.2d 1162 (2002).

Additionally, under the Idaho Administrative Procedures Act, a court shall affirm an agency's decision on appeal unless "substantial rights of the appellant have been prejudiced" or the court finds that the agency's findings, inferences, conclusion or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3)-(4).

There is limited Idaho case law defining "arbitrary" and "capricious." However, *Brett v. Eleventh Street Dock Owners*, 141 Idaho 517, 112 P.3d. 805 (2005) provides guidance. In *Brett*, the Court found that the IDL's decision was not arbitrary and capricious since it was "sufficiently detailed to demonstrate that it considered applicable standards and reached a reasoned decision... based on substantial evidence in the record." 141 Idaho at 523.

III. ANALYSIS.

Again, Erickson's Petition for Judicial Review asks this court to reverse the Board's decision dismissing the complaint against Alan Soderling and remand the case back to the Board for a hearing and decision on the merits. Erickson has also asked for an award of attorney fees and costs pursuant to Idaho Code §12-117.

Erickson argues that the Board's decision to dismiss Erickson's complaint was based on an erroneous interpretation and application of the law. Idaho Code § 54-1220 governs disciplinary actions and states in part:

- (2) All charges, unless dismissed by the board as unfounded or trivial, shall be heard by the board within six (6) months after the date they were received at the board office unless such time is extended by the board for justifiable cause.

I.C. § 54-1220(2). (underlining added).

In 2000, the Idaho Legislature amended I.C. § 54-1220 to include the underlined text above. In March of 2007, the Idaho Legislature again amended the statute, as shown by the underlining below, to read:

All charges, unless dismissed by the board as unfounded or trivial, or unless settled informally, shall be heard by the board within six (6) months after the date they were received at the board office unless such time is extended by the board for justifiable cause.

I.C. § 54-1220(2). (underlining added).

The issue in the case is whether the Board properly dismissed Erickson's complaint based on the Board's failure to hold a hearing within six months from the date the complaint was received. The plain language of the statute gives little guidance. A plain reading of the statute would lead to the interpretation that the Board has no right to dismiss a Complaint other than the situation where the charges are unfounded or trivial, or have settled informally. The statute is silent on the Board's ability to dismiss a complaint after reviewing the merits, and the statute is silent on the Board's ability to dismiss a case after the expiration of the six-month time limit. Given that "administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statute reposing power in them and they cannot confer it upon themselves" (*Washington Water Power Company v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979)) there is a very strong argument, perhaps *the strongest argument*, that the Board in fact had no ability to dismiss Erickson's complaint, because the statute simply does not provide the remedy of dismissal in the situation where the Board forgets to extend the six-month time limit. A plain reading of the statute allows the Board to dismiss only in two instances, where the charges are unfounded or trivial, and

where the matter has settled. That is it. But as shown below, it is not for this Court to determine the *strongest* argument. This Court's role is to determine if the Board's interpretation of this statute is "reasonable". *J.R. Simplot Co. v. Idaho State Tax Commission*, 120 Idaho 849 (1991). The Board claims: "...it is the statutory provision which required dismissal." Respondent's Brief, p. 3 (unnumbered). No argument is given to support this bald claim, and this Court finds the claim totally unsupported by a plain reading of the statute.

There are more problems with the statute. The statute, on one hand, does not require that a complaint be dismissed in the event a hearing is not held within six months, but on the other hand does not expressly *grant* the Board the option to extend the six-month period after the time period has expired. A plain reading of the statute allows the Board to extend the time limit if they do so within the six-month period, and oddly, there is no limit to the extension. In the future, the Board could avoid the problem it created by its own inaction in this case, by simply extending all cases submitted to it for determination, and then it would have an unlimited amount of time to hear all cases. That solution creates its own problems, as Complaints could languish indefinitely. The better solution is for the Legislature to redraft this very poorly thought out statute. Even though it is obviously based on a "Model Act", it is fraught with problems that will undoubtedly arise again if the Legislature does not act.

Erickson asserts that I.C. § 54-1220 must be read together with the Idaho Rules of Administrative Procedure of the Attorney General, IDAPA 04.11.01. Section 052 of the Attorney General's Rules states:

The rules in this chapter will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency. Unless prohibited by statute, the agency may permit deviation from these rules when it finds that compliance with them is impracticable,

unnecessary or not in the public interest. Unless required by statute, the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested case proceedings conducted before the agency.

IDAPA 04.11.01.052.

The application and construction of a statute is a question of law over which the Court exercises free review. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct.App.2003). Where the language of a statute is plain and unambiguous, the Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). The language of the statute is to be given its plain, obvious, and rational meaning. *State v. Burnright*, 132 Idaho 654, 659, 978 P.2d 214 (1999). If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *State v. Escobar*, 134 Idaho 387, 3 P.3d 65 (Ct.App. 2007). When a statute is ambiguous, the Court must engage in statutory construction and has a duty to ascertain the legislative intent... giving effect to that intent. *State v. Rhode*, 133 Idaho 459, 988 P.2d 685 (1999). To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.* It is incumbent upon a court to give a statute an interpretation, which will not render it a nullity. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct.App.2001).

Erickson argues that I.C. § 54-1220(2) is ambiguous because it does not specify *when* the Board can exercise its authority to extend the time frame, and therefore the court must construe the statute and its amendments to give effect to the intent of the legislature. Erickson suggests that the legislative intent behind the statute is to allow the Board extra time to review, investigate, and adjudicate complaints against engineers on the merits. Erickson argues that the Board's interpretation of the statute and its decision

to dismiss Erickson's complaint does not allow for that purpose because the Board may overlook a complaint, by mistake or by malice, and then have no recourse if the six months expires without a hearing and without the Board's ability to extend the deadline. Erickson asserts the Board's interpretation of I.C. § 54-1220 in essence nullifies the 2000 amendment allowing the six-month extension and asserts the court should not endorse an interpretation of the statute that frustrates the legislative purpose.

Soderling argues the legislative history gives very little insight to the legislature's intent because the history fails to cite to any desire on the part of the Board to retroactively extend the deadline found in I.C. § 54-1220(2).

The State of Idaho has never addressed the issue of whether the Board of Registration of Professional Engineers and Professional Land Surveyors may extend the timeframe in which a hearing may be held after the running of the statutory period, and there is little, if any case law in other jurisdictions that can give this court guidance. The Board cites several cases to support their argument that the court should adhere to a strict interpretation of the statute and uphold the statutory limitations found therein. However, there is a significant difference between Idaho's statute which contains an opportunity to extend the time period, and the statutes in the cases cited from other jurisdictions.

The Board leaned heavily on the decisions in *Fenwick v. Colorado Board of Registration for Professional Engineers and Land Surveyors*, 31 Colo. App. 501, 503 P.2d 910 (Ct.App. Colo.1980), *In the Matter of Trulove*, 54 N.C. App. 218, 282 S.E.2d 544 (N.C.App. 1981), and *In the Matter of Revocation of Certificate of Registration of Shaw*, 189 Mont. 310, 615 P.2d 910 (Mont. 1980), and found that although there were differences in the applicable statutes, "courts have found that limitations on time periods

should be strictly applied and are grounds for dismissal if they are exceeded". Final Order, pp. 2-3; Agency Record, pp. 108-109. The Board went on to state that "we have concerns about whether we have the power to 'extend' a time period after it has already terminated." Final Order, p. 4; Agency Record, p. 110. The Board held that:

Extending the time in our minds implies that there is no break in time. It appears to be more of a revival of the time limits if it occurs after the time period has terminated.

Id. The Board held that because the hearing had not been held within six months and because the time period was not extended during the initial time period, the Board "believed that we are required to affirm our original decision to dismiss this complaint". Final Order, p. 5; Agency Record, p. 111.

The Montana Supreme Court in the case of *In the Matter of Revocation of Certificate of Registration of Shaw*, 189 Mont. 317, 615 P.2d at 914-15 (Mont. 1980), referred to a statute similar to I.C. § 54-1220(2) as a "limitation period." In *Fenwick v. Colorado Board of Registration for Professional Engineers and Land Surveyors*, 31 Colo. App. 501, 503 P.2d 910 (Ct.App. Colo.1980), the Colorado Court of Appeals, without referring to it as a statute of limitations, held that a similar statute could not be "tolled" by the Board continuing its investigation. 31 Colo.App. at 503, 503 P.2d at 1039-40. The Court of Appeals in North Carolina in the case of *In the Matter of Trulove*, 54 N.C. App. 218, 222, 282 S.E.2d 544, 547 (N.C.App. 1981), analyzed a similar statute and found that failure to hear the matter within the three-month period resulted in the Board acting "...without subject matter jurisdiction in hearing and ruling on the claim..." These cases, cited by the Board, support the Board's determination in dismissing Erickson's complaint.

Erickson asserts that the Board's decision to dismiss his complaint was based solely on an erroneous interpretation of the law and did not involve any questions of fact.

At issue is what deference this court must apply to the Board's interpretation of I.C. §54-1220(2)? Generally, an agency's interpretation of a statute is entitled to deference. *Canty v. Idaho State Tax Commission*, 138 Idaho 178 (2002). When reviewing an appeal from an agency decision, the court should place great weight on the agency's interpretation of its own rules. *Angstman v. City of Boise*, 128 Idaho 575, 917 P.2d 409 (1996). However, as a pure question of law, the Court can exercise free review of the Board's decision without any deference to the Board's interpretation. *Martin v. State Farm Mutual Auto Insurance Co.*, 138 Idaho 244, 61 P.3d 601 (2002). The Idaho Supreme Court has developed a four-prong test to determine the appropriate level of deference that a court should give to an agency's construction of a statute. *Preston v. Idaho State Tax Commission*, 131 Idaho 502 (1998) citing *J.R. Simplot Co. v. Idaho State Tax Commission*, 120 Idaho 849 (1991). First, the court must determine if the agency has been entrusted with the responsibility to administer the statute at issue. Second, the agency's statutory construction must be reasonable. Third, the court must determine that the statutory language at issue does not expressly treat the precise question at issue. Finally, under the fourth prong of the test, a court must ask whether any of the rationales underlying the rule of deference are present. *Id.* "If the underlying rationales are absent then their absence may present reasons justifying the court in adopting a statutory construction which differs from that of the agency." *Id.* If the four-prong test is met, then courts must give "considerable weight" to the agency's interpretation of the statute. *Id.*

The first prong is not at issue here. There is no dispute that the Board has the power and the responsibility to administer I.C. § 54-1220. What is in dispute is whether the statutory language is ambiguous and, therefore, whether the Board's statutory construction was reasonable and subject to this Court's deference.

The second prong looks at whether or not the Board's interpretation of the statute was reasonable. Soderling argues that the Board's construction of I.C. § 54-1220 was reasonable because its interpretation allows for the Board to extend the timeframe of a hearing indefinitely as long as the Board does so within six months of when the complaint was filed. Soderling argues this comports with a plain reading of the statute and asserts that the Board in essence lost its jurisdiction under the statute to extend the time period when it failed to comport with the six-month requirement. Soderling points out that the Board's interpretation is reasonable because, as an important procedural safeguard, its interpretation prevents the Board from resurrecting old complaints, while providing the accused with a timely hearing while facts are still ripe and witnesses are still available.

Erickson argues the Board's final order imposes a restriction that is not found under the current statute and therefore its interpretation is problematic. The Board believed a thorough investigation was necessary and needed to be completed. Through no fault of Erickson the investigation took longer than six months. However, the Board believed its hands were tied and had no other choice but to dismiss the complaint due to the six month restriction. Erickson argues this is problematic because the Board's decision on the six month restriction nullifies the Board's requirement of a thorough investigation, and nullifies the statutory amendment. The amendment was requested and designed for the purpose of allowing the Board to extend the time to hear complaints when an investigation was warranted but could not be completed within the six-month statutory time frame. Erickson asserts that after the Board finds justifiable cause to extend the hearing, the previous passing of an arbitrary six month time period should not render that justification invalid. Erickson argues that the Board's interpretation of I.C. § 54-1220 invalidates the amended text and leaves the Board in no better position than it

was in prior to the amendment.

Although the Court is sympathetic with Erickson's position, as the passage of six months was not his fault, and that as a matter of principle the underlying complaint should be heard on its merits, this Court is unable to find the Board's interpretation of I.C. § 54-1220(2) is unreasonable. The statute requires the Board to conduct a hearing "**within** six (6) months after the date they were received at the board office". I.C. §54-1220(2). (emphasis added). The Board interpreted this statute to mean that if a hearing cannot be held within the six-month time period, the Board has the authority to choose to extend the deadline (for justifiable cause) or dismiss the complaint, but such choice must be made before the expiration of the statutory period. This interpretation is reasonable under the language of the statute, and therefore this Court must give deference to that interpretation under the second *Simplot* prong.

Furthermore, the Board's interpretation that once the six months elapsed the Board in essence lost its jurisdiction over the matter, and therefore lost its ability to hear the matter, is a reasonable interpretation of the statute. This is consistent with case law discussed above, construing other statutes that impose a limitations period. Although most other statutes do not provide an option for extension, when a statutory period runs *before* any type of extension is granted, the party loses the chance to litigate and the tribunal loses its jurisdiction to hear the matter.

Under the third *Simplot* prong, an agency's construction of a statute will not be followed if it contradicts the clear expression of the legislature. *J.R. Simplot Company Inc., v. Idaho State Tax Commission*, 120 Idaho at 862. Soderling asserts the Board's construction of I.C. § 54-1220(2) should be followed because there is no clear expression of legislative intent and the language of the statute does not expressly treat the precise

question at issue. Soderling argues the court must defer to the Board's interpretation because the statute does not contain clear language stating what happens when the Board fails to grant an extension prior to the six-month hearing deadline passing.

Erickson, on the other hand, argues that the purpose and intent underlying I.C. § 54-1220 is clear. It allows any affected person to file charges against a licensed engineer or surveyor for the purpose of safeguarding life, health, and property, and to give the Board enough time to have those charges reviewed, investigated and adjudicated on its *merits*. Erickson contends that if the Board's interpretation is upheld, then the Board can simply ignore a complaint for six months or longer, leaving the public with virtually no recourse. Erickson claims this would subvert the clear intent of the legislature. This Court finds that argument quite compelling, but it must be balanced against Soderling's and the Board's argument that to overturn the dismissal would allow the resurrection of any complaint filed in the past which was not heard within six months, no matter how old the claim might be.

There is nothing in the legislative history that suggests or clarifies the legislative purpose behind the amended statute. It is clear from the language of the statute that the Legislature wanted to give the Board a little leeway by giving the Board authority to extend the time period during which it could hear a complaint. However, given the prior language of the statute and the case law from other jurisdictions, it does not appear this authority was unbounded. Although the legislature did not specify that the Board had to act *within* the six-month time period in order to preserve its right to extend the six-month time period, it is safe to presume that the Legislature intended to include some limitations to the Board's powers and responsibilities. The Board's analysis that it had to act within the six-month period in order to preserve its right to extend the six-month period is

reasonable and supported by the limited case law which was cited to the Board and which the Board analyzed in its Final Order.

Under the fourth prong of the test, a court must ask whether any of the rationales underlying the rule of deference are present. If the underlying rationales are absent then their absence may present “cogent reasons” justifying the court in adopting a statutory construction which differs from that of the agency. *Preston v. Idaho Tax Commission*, 131 Idaho at 505. When some of the rationales underlying the rule exist but other rationales are absent, a balancing is necessary because all of the supporting rationales may not be weighted equally. *Id.* Therefore, the absence of one rationale in the presence of others could, in an appropriate case, still present a “cogent reason” for departing from the agency's statutory construction. *Id.* However, if one or more of the rationales underlying the rule are present, and no “cogent reason” exists for denying the agency some deference, the court should afford “considerable weight” to the agency's statutory interpretation. *Id.*

The five rationales underlying the rule of deference are: (1) the rationale requiring that a practical interpretation of the statute exists, (2) the rationale requiring the presumption of legislative acquiescence, (3) the rationale requiring agency expertise, (4) the rationale of repose, and (5) the rationale requiring contemporaneous agency interpretation. *J.R. Simplot Co.*, 120 Idaho at 858-59.

Soderling argues all five rationales have been met in this case, and therefore the court should afford considerable weight to the Board's statutory interpretation. This Court disagrees and finds that all five rationales have not been met. However, the Board's decision is still entitled to some deference. Erickson did not offer any counter argument specifically addressing these rationales.

The first rationale is the only rationale that is clearly met in this case. The Board's interpretation of the six-month deadline was practical because the Board based its decision on the plain language of the statute. Its interpretation allows the Board six months in which to "get its act together" and extend the time period in which to hold a hearing. This safeguards the due process rights of the Respondent (Soderling in this case) because he is not strung out for longer than six months while the Board decides how to proceed. This interpretation requires the Board to act quickly to ensure that the Petitioner's complaint is heard or to timely grant an extension.

The other four rationales are not pertinent the court's inquiry. There is little, if any, "legislative acquiescence" because the legislative history is virtually silent on the legislature's intent underlying the adoption of the amended statute. Also, there is little need for agency expertise in this matter because right now the Court is being asked to consider a procedural matter. This rationale would be given more weight if the decision under review dealt with the substantive matters underlying the complaint. Because this is a procedural matter, agency expertise is not really an issue. There is no rationale for repose because there is no case law and no precedent dealing with the retroactive nature of the statute. The Idaho courts have yet to address the issue of when an agency must exercise its authority to extend the six-month deadline. The final rationale does not apply because the Board's decision was not a decision made contemporaneous with the enactment of the amended statute.

Soderling tries to apply each rationale, but his analysis falls a little flat. However, because all rationales are not weighted equally, the Court gives "considerable deference" to the Board's decision because the first rationale outweighs the other rationales in this instance. The Board's interpretation of the statute is practical and gives effect to the

statutory deadline found therein. There is no guiding precedent in Idaho, and the precedent from other jurisdictions cited by the Board in its Final Order support the Board's decision. The Board would prefer to hear the matter on the merits, but the Board did what it thought it had to do.

There is no dispute between the parties that the Board has the authority to extend the six-month time period. The question is whether or not the Board can exercise that authority *after* the initial six-month time period has run. The plain language of the statute does not decisively answer this question, and case law and the legislative history offers no help in interpreting the statute. The Board's decision to dismiss Erickson's complaint was based on its interpretation of the statute, and because the statute is ambiguous, this court should give great deference to the Agency's interpretation of I.C. §54-1220 which was reasonable and practical in this case. For those reasons, the Board's decision to dismiss Erickson's complaint must be affirmed as analyzed by the rationale in *Preston* and *J. R. Simplot Company*.

Since "dismissal" for grounds other than charges which are "unfounded or trivial" is not mentioned as a remedy in I.C. § 54-1220(2), the Court, at oral argument on June 7, 2007, asked the parties to brief whether the Board has authority to dismiss Erickson's Complaint if a hearing is not held or an extension of time is not granted within the six months as provided in I.C. § 54-1220(2).

Erickson argues that the Board's decision to dismiss Erickson's complaint was based on an erroneous interpretation and application of the law. Again, Idaho Code § 54-1220 governs disciplinary actions and currently reads:

(2) All charges, unless dismissed by the board as unfounded or trivial, or unless settled informally, shall be heard by the board within six (6) months after the date they were received at the board office unless such time is extended by the board for justifiable cause.

I.C. § 54-1220(2) (underlining to illustrate recent changes in the statute).

Erickson asserts that there is no express or implied provision in Title 54 Chapter 12 giving the Board the authority to dismiss a meritorious complaint. Erickson also argues that the Idaho Rules of Administrative Procedure of the Attorney General (IDAPA) only set forth procedural requirements, not substantive standards, and offer no guidance as to whether motions brought under the IDAPA Rules should be granted or denied. Erickson asserts that, instead, the IDAPA rules merely send the moving party back to the controlling statutes found in the Idaho Code. Erickson argues that because the enabling statute, I.C. §54-1220(2), gives the Board the authority to dismiss the charges only if they are unfounded or trivial, this case should be remanded to the Agency for a hearing on the merits. Erickson further argues that the statute only allows for a dismissal of a meritorious complaint *after* a hearing on the merits, and since there was no hearing on the merits in this case, the Board has no statutory authority to dismiss the complaint until the allegations against Soderling are heard.

Both the Department and Soderling argue that IDAPA Rules 04.11.01.260 and 04.11.01.565 outline the procedures used in motions brought before the Board and give the Board the power needed to dismiss complaints brought by motion in contested cases. Specifically, the Respondents argue that Rule 260 gives the Board an additional source of procedural authority to dismiss motions brought before the Board. Rule 260 provides:

260. Motions - - Defined - - Form and Contents - - Time for Filing

01. Motions Defined. All other pleadings requesting the agency to take any other action in a contested case, except consent agreements or pleadings specifically answering other pleadings, are called "motions".

02. Form and Contents. Motions should:

- a. Fully state the facts upon which they are based;
- b. Refer to the particular provision of statute, rule, order, notice or other controlling law upon which they are based; and
- c. State the relief sought.

03. Oral Argument -- Time For Filing. If the moving party desires oral argument or hearing on the motion, it must state so in the motion. Any motion to dismiss, strike or limit an application or claim or appeal, complaint, petition, or protest must be filed before the answer is due or be included in the answer, if the movant is obligated to file an answer. If a motion is directed to an answer, it must be filed within fourteen (14) days after service of the answer. Other motions may be filed at any time upon compliance with Rule 565.

Rule 565 states:

The presiding officer may consider and decide prehearing motions with or without oral argument or hearing. If oral argument or hearing on a motion is requested and denied, the presiding officer must state the grounds for denying the request. Unless otherwise provided by the presiding officer, when a motion has been filed, all parties seeking similar substantive or procedural relief must join in the motion or file a similar motion within seven (7) days after receiving the original motion. The party(ies) answering to or responding to the motion(s) will have fourteen (14) days from the time of filing of the last motion or joinder pursuant to the requirements of the previous sentence in which to respond.

The Board's decision to dismiss Erickson's complaint was in response to a Motion to Dismiss filed by Soderling pursuant to IDAPA Rule 260. Soderling and the Board argue that dismissal was therefore proper.

The Board also advances the argument that Erickson's complaint was in fact "unfounded" because it was "without legal basis." The Board asserts that the six month time period outlined in the statute is a six month statute of limitations which, if not met, deprives the Board of jurisdiction. And, since the six month time period was not met in this case, the complaint became "unfounded" for lack of jurisdiction, requiring dismissal by the Board of Engineers.

Soderling argues Idaho Code § 54-1220 gives the Board the authority to adopt and enforce rules of procedure, including rules that procedurally allow for the Board to

dismiss actions which are not timely filed. Soderling argues I.C. § 54-1220 therefore gives the Board the power to follow the procedures outlined in Rule 260 and grant the procedural relief requested by Soderling in his Motion to Dismiss. Soderling contends that the “unless dismissed by the board as unfounded or trivial” language found in I.C. §54-1220(2) gives the Board power to dismiss charges *before* the six-month time period has expired when, after investigation, the complaint is found to have no merit.

Erickson poses an interesting argument asserting that I.C. § 54-1220 merely authorizes the Board to *hear* a motion to dismiss, but does not actually empower the Board to *grant* such a motion in the absence of any other statutory authority. While that is an interesting argument, the Court does not understand why a statute would grant the Board the power to hear a motion without giving it authority to act upon its decision. Even after the additional briefing, the Court finds reasonable the Board’s interpretation that once the six-month time period had expired, the Board “lost jurisdiction” to hear the complaint and therefore had to dismiss pursuant to the Motion filed by Soderling.

IV. ERICKSON MAY RE-FILE HIS COMPLAINT WITH THE BOARD.

Erickson has asked the court to determine whether or not he can re-file his complaint with the Board should this court determine that the Board had the power to dismiss the action. Petitioner’s Brief, p. 11. The Board responded on this point. Respondent’s Brief p. 5 (if there were numbered pages in Respondent’s Brief). Soderling responded in more detail. Respondent’s Brief (Soderling), pp. 20-21. The fact that all parties addressed the issue causes this portion of the Court’s opinion not to be merely an “advisory” opinion. “An advisory opinion results if the court resolves a question of law that is not presented by the facts of the case.” *In re Outboard Marine Corp.*, 304 B.R. 844, 859 (Bkrctcy. N.D. Ill. 2004). It is an “issue presented for the court’s

decision”, does not deal with “hypothetical statutes” and can “affect the legal rights of the parties”. *Id.* at 859-60. Given the fact that all parties briefed this issue to various levels, the Court ordered supplemental briefing on the issue. All parties complied with that request. Erickson argues that because the final order of the Board was clearly not a decision on the merits and was not expressly “with prejudice”, Erickson should be allowed to re-file the complaint to begin the process anew. Erickson asserts that there is no time restriction in Idaho law on the filing of charges with the Board. Erickson also points out that if this Court buys into the Respondent’s argument that the complaint was dismissed “for lack of jurisdiction,” the Court can analogize the situation to an involuntary dismissal under I.R.C.P. 41(b), which would allow Erickson to re-file his charges because the involuntary dismissal would not be an adjudication on the merits.

Erickson cites to *The Matter of Williams*, 122 Idaho 902, 841 P.2d 432 (1992) for the proposition that when an agency dismisses an action on procedural grounds, the applicant is not prevented from re-filing his complaint for an adjudication on the merits. In *Williams*, the Idaho Supreme Court allowed Williams to re-file an application for reinstatement of his license with the Idaho State Bar after the Bar dismissed his petition on procedural grounds. The Court held that because Williams did not receive a hearing on the merits of the case, the underlying rule was inapplicable. 122 Idaho at 904, 841 P.2d at 434. The Court found that the term “judgment”, as found within the rule, meant “a decision which resolves the merits of the petition” and held that Williams was free to file another petition should he elect to do so. *Id.*

The Board concedes that its original decision was not a decision on the merits and the final order did not specifically state that the order was with prejudice. However, the Board and Soderling argue that if this Court were to allow Erickson to re-file his

complaint, it would be akin to nullifying the six-month deadline found in I.C. § 54-1220(2). The problem with this argument is it really opens no can of worms for the Board or for the engineer complained against, Soderling in this case. Allowing Erickson to re-file, due to the sole fact that the Board's inaction (failure to extend prior to the expiration of the six-month period), when the Board wanted to hear the action on its merits, but simply neglected to extend the time period, creates a nullity of the six-month limitation in only a very limited circumstance (when the Board negligently forgets to extend), and even in those circumstances, the additional time period the person is exposed to the complaint is only six months. So any "nullity" in those rare instances, needs to be balanced against the outcome Soderling advocates. That is, if the engineer did something wrong, he or she gets a free ticket out of being held accountable, **forever**, simply because the Board was negligent in not extending its own deadline. The Board and Soderling argue that *In the Matter of the Revocation of The Certificate of Registration of James T. Shaw, Professional Land Surveyor*, 189 Mont. 310, 615 P.2d 910 (1980), addressed the same issue. In that case, the Supreme Court of Montana stated:

If the court were to now allow the Board to refile those same charges sixteen months later, under the guise that the charges are being initiated on its own motion and, thus, somehow renewed, the three month limitation would become vacuous of purpose and meaning. We cannot tolerate such an outcome.

189 Mont. at 316, 615 P.2d at 914. First of all, this statement is dicta, as the Montana Supreme Court's decision turned on the doctrine of equitable estoppel. The Montana Supreme Court upheld the trial court which upheld Montana's Board of Professional Engineers and Land Surveyor's decision that the surveyor complained against was equitably estopped from asserting the three-month limitation period because that

surveyor had stated twice after the complaint had been filed that he had gone back and done the survey work paid for, when he actually had not. *Id.* Second, the Montana Supreme Court was dealing with a situation where, based on the assurances of the surveyor that the work was done, the Board dismissed the complaint, then re-filed the charges on its own once it was discovered that the surveyor had lied about such work. 189 Mont. at 313, 615 P.2d at 912. That is not the situation here where the Board simply did not act in time. At the end of the six-month period, the Board had simply made no decision on the merits in Erickson's case. In the Montana case, the Montana Supreme Court would not "tolerate such an outcome" where the Board itself re-filed as a solution to its own error in failing to meet the three-month deadline. In other words, the negligent party, the Board, tried to fix the problem. In this case, the person who is without fault, the person who was perhaps wronged, is trying to fix the problem. That concern voiced by the Montana Supreme Court is less present where the Board made no decision on the merits, and the complaining party Erickson did absolutely nothing to cause the Board to go beyond the period of limitation. Since the Board made no decision on the merits, there is no issue of *res judicata* involved. Third, there really is no analysis by the Montana Supreme Court when it wrote:

If the court were to now allow the Board to refile those same charges sixteen months later, under the guise that the charges are being initiated on its own motion and, thus, somehow renewed, the three month limitation would become vacuous of purpose and meaning. We cannot tolerate such an outcome.

189 Mont. at 316, 615 P.2d at 914. In the present case, allowing Erickson, who is clearly without fault in the Board's failure to hear this matter within six months, to re-file his complaint with the Board is consistent with the Idaho Supreme Court's holding in *The Matter of Williams*, 122 Idaho 902, 841 P.2d 432 (1992). It is also consistent with the

Attorney General's Rules found in IDAPA 04.11.01.052, and *Shipley v. Workers' Comp. Appeals Bd.*, 7 Cal.App.4th 1104, 9 Cal.Rptr.2d 345 (Cal.App. 4 Dist. 1992), both discussed below.

The Board poses a slippery slope argument by asserting that if this Court were to allow Erickson to re-file, any complaint that was dismissed for failure to comply with the six-month time period could be brought time and again without consequence.

Respondent's Supplemental Brief (Soderling), p. 5. (again, no actual page numbers were provided by Soderling in his briefing). This Court is not persuaded by this argument. There is no evidence before the Court as to how often the Board has let a case go by *its own inaction*. If this is the first case, the burden on the Board is not great.

If there are a plethora of cases, the Board should reap what its own negligence has sown. The converse of the Board's argument is that in the future, all the Board need do to get a case off its books, is to let it die by *inaction*. That would deprive everyone to whom that occurred of their right to be heard, deprive them of their right of review, and it would let unprofessional engineers remain at risk to the public. Soderling argues the legislature intended for the Board to hear disciplinary charges within six months or they go away. Soderling argues the issue should not turn on whether or not the final order was "with or without prejudice" but should turn on whether or not the Board complied with the plain language of I.C. § 54-1220(2). If the Board's decision to dismiss Erickson's complaint was due to lack of jurisdiction created by the Board's failure to comply with the six-month period of I.C. § 54-1220(2), then it is analogous to an involuntary dismissal under I.R.C.P. 41(b). Idaho Rule of Civil Procedure provides that a dismissal under Rule 41(b) operates as an adjudication on the merits except dismissal for lack of jurisdiction. Dismissal for lack of jurisdiction does not operate as an

adjudication on the merits, and Erickson should be allowed to re-file his charges with the Board. The Board certainly could have stated Erickson's complaint was dismissed "with prejudice", but did not. It would indeed be odd if the Board were to dismiss Erickson's complaint with prejudice, since the *only* reason for that dismissal was the *inaction* of the Board.

The Court can find no case law in any jurisdiction which holds that a petitioner cannot re-file a complaint with an agency when there was no hearing or determination on the merits. Again, no issue of *res judicata* is present. The California Court of Appeals held it is preferable to decide cases on their merits whenever possible, especially when the error is of the Board's own making. In *Shipley v. Workers' Comp. Appeals Bd.*, 7 Cal.App.4th 1104, 1107, 9 Cal.Rptr.2d 345 (Cal.App. 4 Dist. 1992), the California Court of Appeals held that statute which limited the Worker's Compensation Appeals Board to 30 days to decide a motion for reconsideration was held inapplicable when inaction was due to the petition having been lost by the Board. The California Court of Appeals held:

While this language appears mandatory and jurisdictional, the time periods must be based on a presumption that a claimant's file will be available to the board; any other result deprives a claimant of due process and the right to a review by the board. We emphasize Shipley's file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control. Surely the Legislature did not write the statute in anticipation of a system so inefficient that such gaffes were statutorily provided for.

This is consistent with Section 052 of the Attorney General's Rules, discussed above, which states:

The rules in this chapter will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency. Unless prohibited by statute, the agency may permit deviation from these rules when it finds that compliance with them is impracticable, unnecessary or not in the public interest. Unless required by statute, the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested case proceedings conducted before the agency.

IDAPA 04.11.01.052.

The Court disagrees with Soderling's argument that the legislature intended for the Board to hear disciplinary charges within six months or "they go away." Obviously that is not the case because the legislature gave the Board the authority to extend the six-month period. The problem is that the Legislature was not clear enough as to when the six-month deadline needed to be extended. The appropriate remedy is to allow Erickson to re-file his complaint with the Board so there can be a hearing on the merits of the case, or a finding by the Board that the complaint is unfounded or trivial.

An additional reason to allow Erickson to re-file is that under a plain reading of the statute, the Board had no right to dismiss Erickson's Complaint. As discussed above, a plain reading of I.C. § 54-1220(2) would lead to the conclusion that the Board only has the ability to dismiss in the situation where the charges are unfounded or trivial, or have settled informally. The statute is silent on the Board's ability to dismiss a complaint after reviewing the merits, and the statute is silent on the Board's ability to dismiss a case after the expiration of the six-month time limit. Again, given that "administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statute reposing power in them and they cannot confer it upon themselves" (*Washington Water Power Company v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979)) there is a very strong argument that the Board in fact had no ability to dismiss Erickson's complaint, because the statute simply does not provide the remedy of dismissal in the situation where the Board forgets to extend the six-month time limit. Certainly Erickson should be allowed to re-file his Complaint, if the Board had no statutory authority to dismiss the Complaint after the Board negligently missed the six-month deadline within which to extend.

V. ORDER.

IT IS HEREBY ORDERED that the Final Order of the Board dated June 10, 2006 is **AFFIRMED**. Erickson requested an award of attorney fees and costs pursuant to Idaho Code §12-117. Erickson's request for attorney fees is **DENIED** because he did not prevail on his appeal.

IT IS FURTHER ORDERED that since no decision on the merits has ever been made by the Board, and for the reasons stated above, Erickson is not prohibited from filing a new complaint with the Board against Soderling.

Entered this 8th day of August, 2007.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 8th day of August, 2007, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Scott L. Poorman	208 772-7243	Morgan W. Richards	208 345-8371
Jay J. Kiiha	208 934-8873	Ann J. Richards	“ “ “

Secretary