STATE OF IDAHO)
County of KOOTENAI)ss

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

MARVIN ERICKSON,

Petitioner,

vs.

IDAHO BOARD OF REGISTRATION OF ROFESSIONAL ENGINEERS AND PROFESSIONAL LAND SURVEYORS,

Respondent,

and

ALAN R. SODERLING

Intervenor.

Case No. **CV 2006 5256**

MEMORANDUM DECISION AND ORDER DENYING MOTION TO DISMISS

I. BACKGROUND.

This is a Motion to Dismiss, brought by Alan R. Soderling (Soderling), claiming Petitioner Marvin Erickson (Erickson) was late in filing his Petition for Review with the Respondent Idaho Board of Professional Engineers (Board). After filing the Motion to Dismiss, Soderling was allowed to intervene.

In June 2005, Erickson filed a formal complaint with the Board against 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. Only July 12, 2006, Erickson filed a Petition for Review in this Court.

On September 22, 2006, Soderling filed his Motion to Dismiss Erickson's Petition for 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. Erickson and the Board

oppose the Motion to Dismiss, arguing I.R.C.P. 84(b) and I.C. §67-5273(2) are not applicable when determining the time frame for filing an administrative appeal. Erickson and the Board argue IDAPA 04.11.01.740 applies and provides that the twenty-eight day deadline begins to run on the *date of service* of the final order. Erickson also argues Soderling's Motion to Dismiss is essentially a Motion for Summary Judgment, and under IRCP 56 it should be denied because it was not timely served. The hearing on the Motion to Dismiss was initially scheduled for October 16, 2006, and was not more than 28 days after the September 19, 2006, filing of the Motion to Dismiss. However, because the Court had concerns about Soderling not being a party, the hearing on the Motion to Dismiss was continued to November 1, 2006, the day after the hearing on Soderling and J-U-B's Motion to Intervene. (Soderling's Motion to Intervene was granted, J-U-B's was not). Since the hearing on the Motion to Dismiss was held on November 1, 2006, Erickson's argument that the Motion to Dismiss was untimely under IRCP 56 is now without merit.

II. ANALYSIS.

A. STANDARD OF REVIEW.

The facts of this case, as they pertain to the timeliness of Erickson's Petition for Review, are not in dispute. The Court is being asked to review a question of law. Since the Board has not decided the issue of timeliness, Idaho Code § 67-5279 is not applicable.

B. INTRODUCTION.

The Boards' "Final Order" on Petitioner's Motion for Reconsideration was entered on June 10, 2006, and served on June 16, 2006. Erickson filed his Petition for Review on July 12, 2006. At issue is whether Erickson filed his Petition for Review late, thereby

depriving the District Court of jurisdiction to hear the matter.

The Boards' "Final Order" stated in part: "THIS IS A FINAL ORDER OF THE BOARD. * * * Pursuant to Section 67-5270 and 62-5272, Idaho Code, * * * 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." R. p. 111. Soderling argues that I.R.C.P. 84(b) and I.C. §67-5273(2) applies and limits the time to file a petition for review to twenty eight (28) days after the Agency's decision was *rendered*. Respondent and Petitioner argue that the IDAPA rules apply, which state that the time to file a petition for review does not begin to run until *service* of the Agency's final order.

Idaho Rules of Civil Procedure 84(b) states in part:

> *Unless a different time or procedure is prescribed by statute*, a petition for judicial review from an agency to district court must be filed with the appropriate district court within twenty-eight (28) days after the agency action is ripe for judicial review under the statute authorizing judicial review, but the time for filing a petition for judicial review is extended as provided in the next sentence. When the decision to be reviewed is issued by an agency with authority to reconsider its decision, the running of the time for petition for judicial review is suspended by a timely motion for reconsideration, and the full time for petition for judicial review commences to run and is computed from the date of any decision on reconsideration, the date of any decision denying reconsideration, or the date that reconsideration is deemed to be denied by statute by inaction on a petition for reconsideration.

(emphasis added). Similar, but different language is also found in Idaho Code §67-5273(2), which states in pertinent part:

> A petition for judicial review of a final order or a preliminary order that has become final when it was not reviewed by the agency head or preliminary, procedural or intermediate agency action under section 67-5271(2), Idaho Code, must be filed *within twenty-eight (28) days of the issuance of the final order*, the date when the preliminary order became final, or the issuance of a preliminary, procedural or intermediate agency

> order, or, *if reconsideration is sought, within twenty-eight (28) days after the decision thereon*.

(emphasis added). Soderling argues the above statutes apply to the filing of a petition for review of an Agency's decision and clearly limit the time to file to twenty eight days after the Agency's decision was rendered. Soderling cites *Herret v. Herret*, 105 Idaho 358 (Ct.App.1983) to rebut any argument Erickson might make that the time frame in which to file an appeal is tolled until the party receives notice. In *Herret*, the court held that the time frame in which to file an appeal is not tolled until the party receives notice. Instead, it is only tolled if the original time to file an appeal has expired *before* the appellant receives notice, in which the appellant is therefore deprived of the opportunity to appeal altogether. Soderling concludes that although the Board did not issue a certificate of mailing until June 16, 2006, Erickson's time to file an Appeal was not tolled under *Herret* because petitioner received notice before his time to appeal had completely expired, and therefore Erickson's time to file his appeal began to run when the Final Order was rendered on June 10, 2006.

The Board counters this argument by asserting that it is the Idaho Rules of Administrative Procedure of the Attorney General that apply in this case, not the I.C. §67-5273(2) and *Herret*, and that the Idaho Administrative Rules require a Petition for Review to be filed within twenty-eight days of *service* of the Final Order. The Board opposes the motion to dismiss and argues that the Board has adopted the Attorney General's administrative rules in all contested cases before the Board and in administrative appeals.

The Board points out it is required in its final orders to inform the aggrieved parties that they have the right to appeal within 28 days of the *service* date of the final order pursuant to IDAPA 04.11.01.740(02)(c). The Board argues this rule conforms

with I.C. §67-5273(2), which states that in a case where reconsideration is sought, the Petition for Review must be filed within twenty-eight days "after the decision thereon." Memorandum in Opposition to Motion to Dismiss, p. 4. (The Board's Memorandum does not contain page numbers, but this issue is covered on the fourth page of the Memorandum). The Board argues the language of I.C. § 67-5273(2) does not indicate whether the twenty-eight day deadline begins to run on the date the decision was signed or on the date the decision was served. However, for I.C. §67-5273(2) to be in conformity with IDAPA 04.11.01.740, it would require the filing date to be no later than 28 days after service of the Order. This argument misses the point. It really does not matter what the IDAPA states. What is relevant is what the statute states. The Board overlooks the fact that the first portion of I.C. §67-5273(2) discusses "twenty-eight (28) days of the *issuance* of the final order". (emphasis added).

IDAPA 04.11.01.740(2)(c) requires the following:

> 02. Content. Every final order issued by the agency head must contain or be accompanied by a document containing the following paragraphs or substantially similar paragraphs:
>
> c. An appeal must be filed within twenty-eight (28) days (a) of the service date of this final order, (b) of an order denying petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

The Idaho Administrative Code makes it clear that the rules to apply in Administrative Appeals are those of the Idaho Rules of Administrative Procedure of the Attorney General. IDAPA 10.01.01.995 states that "Persons desiring to contest the actions taken in accordance with these rules shall seek administrative relief under the Attorney General's Rules, IDAPA 04.11.01."

IDAPA 04.11.01.740(2)(c) sets the time frame for filing an appeal depending on

the type of order handed down from the Board. That section states the appeal must be filed within twenty eight days…

(a) of the service date of this final order
(b) of an order denying petition for reconsideration… whichever is later…

It is easy to see how the parties can be confused as to when to file an appeal in this case because there was a "Final Order" rendered by the Board on June 10, 2006, but that "Final Order" is also the "order denying petition for reconsideration." The Board and the Petitioner argue subsection (a) would apply and that the time to file would not begin to run until *service* of the Final Order, which was June 16, 2006. That would allow Erickson until July 14, 2006 (28 days from June 16, 2006) to file his petition for review. Thus, Erickson's Petition for review would be timely under that analysis.

Although the decision handed down from the Board was an order denying the Petitioner's Petition for Reconsideration, and therefore it would seem that (b) would apply, giving the Petitioner twenty-eight days from the Board's Final Order to file a timely Appeal, the IDAPA section allows the *later* of the two dates to govern the timeliness of the petition. Therefore dismissal would not be warranted.

Soderling argues that Idaho Code § 67-5273(2) should apply and not IDAPA 04.11.01.740(2)(c). Idaho Code § 67-5273(2) reads in pertinent part: "A petition for judicial review of a final order… must be filed within twenty-eight (28) days of the issuance of the final order, …or, if reconsideration is sought, within twenty-eight (28) days after the decision thereon." This statute does not contain the IDAPA language "whichever is later". However, that omission is not material, as I.C. § 67-5273(2) applied to this situation refers to the same order. (This Court is not persuaded by Soderling's argument that the "Final Order" only refers to the May 12, 2006, "Findings of Fact, Conclusions of Law and Order" of the Board. The May 12, 2006, in fact was not

the final order, and the June 10, 2006, is labeled "Final Order" by the Board). The "Final Order", as is captioned by the Board, *is* the decision on reconsideration. Idaho Code § 67-5273(2) does not have the language that the time period does not begin to run until the "*service* date of this final order." That is a material difference as applied to this case and determines whether Erickson was timely or not.

C. IDAHO CODE § 67-5273(2) CONTROLS.

The question that determines this Motion to Dismiss is: "Which applies, the IDAPA or Idaho Code § 67-5273(2)?"

If IDAPA 04.11.01.740 applies, Erickson had 28 days from the service of a final order or 28 days from the order denying reconsideration, *whichever is later*. The Final Order was issued on June 10, 2006, but served on June 16, 2006. Twenty eight days after June 16, 2006, is July 14, 2006, and Erickson's Petition for Review filed on July 12, 2006, would be timely.

If Idaho Code § 67-5273(2) applies, Erickson had 28 days from "…the issuance of the final order, …or, if reconsideration is sought, within twenty-eight (28) days after the decision thereon." Timeliness under I.C. § 67-5273(2) is determined by the word "issuance". If "issuance" means the date the Final Order was signed on June 10, 2006, Erickson's 28 days would have run on July 8, 2006. Since that was a Saturday, the 28 days would run on Monday, July 10, 2006, two days before Erickson filed his petition. Thus, Erickson's petition would have been filed two days late. If "issuance" means something else, Erickson may be timely.

First, this Court must analyze whether the statute, I.C. § 67-5273(2) controls or the IDAPA regulations control. Based on the following, this Court is convinced the statute controls.

The administrative rules promulgated by the Attorney General of the State of Idaho under IDAPA "shall deal with all general functions and duties performed in common by several agencies." I.C. § 67-5206(2). It would be difficult to imagine that an administrative rule promulgated by the Idaho Attorney General and applicable to agencies would trump a statute (I.C. § 67-5273) passed by the Idaho Legislature, which governs petitions of review in District Court.

While rules and regulations enacted by administrative agencies may be given the force and effect of law, they do not rise to the level of statutory law; only the legislature can make law. *Mead v. Arnell,* 117 Idaho 660, 664-66, 791 P.2d 410, 416-18 (1990). It would seem to this Court that if IDAPA 04.11.01.740 applies, this Court would be allowing the Attorney General to make law, circumventing the statute, I.C. § 67-5206(2). "Nevertheless, it is also the law that administrative rules are invalid which do not carry into effect the legislature's intent as revealed by existing statutory law, and which are not reasonably related to the purposes of the enabling legislation." *Holly Care Center v. State, Dept. of Employment,* 110 Idaho 76, 78, 714 P.2d 45, 47, (1986), *citing*: *Halford v. City of Topeka,* 234 Kan. 934, 677 P.2d 975, 980-81 (1984); *Ferguson v. Arizona Department of Economic Security,* 122 Ariz. 290, 594 P.2d 544, 546 (1979); *Kelly v. Zamarello,* 486 P.2d 906, 911 (Alaska 1971).

> We reiterate that which declared in *Speer* [*In re Speer,* 53 Idaho 293, 300, 23 P.2d 239, 241 (1933)], and *Gossett* [*Scott v. Gossett,* 66 Idaho 329, 335, 158 P.2d 804, 807 (1945)]: it is this Court's duty to interpret the law. Within that duty is the responsibility of deciding whether an administrative rule contradicts the wording of a statute.

Holly Care Center v. State, Dept. of Employment, 110 Idaho 76, 82, 714 P.2d 45, 52 (1986).

The case law from other jurisdictions is in accord. "It is axiomatic that an

administrative rule cannot contradict or conflict with the statute it attempts to implement." *Hyatt Corp. v. Honolulu Liquor Com'n,* 69 Haw. 238, 241, 738 P.2d 1205, 1206-07 (Hawaii1987), *citing Agsalud v. Blalack,* 67 Haw. 588, 591, 699 P.2d 17, 19 (Hawaii 1985). *In re Waiola O Molokai, Inc.,*103 Hawai'i 401, 423, 83 P.3d 664, 686 (Hawai'I ,2004) states:

> The rule of judicial deference, however, does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose. *See Camara v. Agsalud,* 67 Haw. 212, 216, 685 P.2d 794, 797 (1984) ("To be granted deference, ··· the agency's decision must be consistent with the legislative purpose."); *State v. Dillingham Corp.,* 60 Haw. 393, 409, 591 P.2d 1049, 1059 (1979) ("[N]either official construction or usage, no matter how long indulged in, can be successfully invoked to defeat the purpose and effect of a statute which is free from ambiguity····"). Consequently, we have not hesitated to reject an incorrect or unreasonable statutory construction advanced by the agency entrusted with the statute's implementation. *See, e.g., Government Employees Ins. Co. v. Dang,* 89 Hawai'i 8, 15, 967 P.2d 1066, 1073 (1998); *In re Maldonado,* 67 Haw. 347, 351, 687 P.2d 1, 4 (1984).

The Montana Supreme Court has held:

> The courts have uniformly held that administrative regulations are 'out of harmony' with legislative guidelines if they (1) 'engraft additional and contradictory requirements on the statute' (citation omitted); or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature. *Arizona St. Bd. of Funeral Directors v. Perlman,* (1972), 108 Ariz. 33, 492 P.2d 694.

Board of Barbers of Dept. of Professional and Occupational Licensing of the State of Montana, 192 Mont. 159, 161, 626 P.2d 1269, 1270 (Mont. 1981).

There is an inconsistency between I.C. § 67-5273(2) and IDAPA 04.11.01.740(2)(c). The former uses the word "issuance", the latter the word "sevice". As between I.C. § 67-5273(2) and IDAPA, the statute controls. The Attorney General should resolve this inconsistency and make the IDAPA consistent with the statute. Were this already the case, this issue likely would not have arisen before this Court.

Not only is IDAPA 04.11.01.740 inconsistent with I.C. § 67-5273, the Final Order

misstates the language of I.C. § 67-5273. The Final Order states:

> 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.

The problem is Idaho Code Section 67-5273 says nothing about the "service date" of the final order. While the above language in the Final Order is a direct quote from IDAPA 04.11.01.740, since nothing in I.C. § 67-5273 mentions the "service date" of the final order, the language in the Final Order is wrong. Until the Attorney General corrects this defect, Idaho agencies will dispense errant information in their final orders.

Having determined the statute controls, the next issue becomes the meaning of the word "issuance" in I.C. § 67-5273(2).

D. "ISSUANCE" UNDER IDAHO CODE § 67-5273 IMPLIES SERVICE.

In briefing, Erickson claims that under both I.C. § 67-5273 and IDAPA 04.11.01.740, "the 28-day appeal deadline begins to run on the date of service of the Board's final order." Petitioner's Opposition to Motion to Dismiss, p. 2. That claim is true as it pertains to IDAPA 04.11.01.740, but false as it pertains to I.C. § 67-5206(2). Idaho Code § 67-5206(2) does not contain the word "service" and it makes no reference to requiring service of the final order. At oral argument, Erickson claimed I.C. § 67-5206(2) is ambiguous but gave no reasoning to support such claim. The Board in its briefing argues that I.C. § 67-5273 is ambiguous because "the statute does not indicate whether the twenty-eight-day deadline begins to run on the date the decision is signed, or on the date the decision is served." The Board's argument that the statute is ambiguous is correct, only if there is ambiguity in the word "issuance." Any ambiguity in this case arises from the conflict between the IDAPA language of "service" and the

statutory language of "issuance." This Court finds no ambiguity within I.C. § 67-5206(2). That statute requires filing within 28 days of the issuance of the final order, or within 28 days of the decision on reconsideration. The statute makes no reference to the word "served" or "service". The Final Order in this case was issued on June 10, 2006. The decision on reconsideration, the Final Order, was made on June 10, 2006.

However, this Court is convinced the word "issuance" contemplates service of the order. The word "issuance" is not defined in I.C. § 67-5201, and a review of the index to the Idaho Code shows that "issuance" has not been defined elsewhere in the Idaho Code. "Issue" is defined as "to send out or distribute officially". Black's Law Dictionary, 836 (7th Ed. 1999). Thus, since the June 10, 2006, Final Order was "sent out" or "distributed officially" on June 16, 2006, the "issuance of the final order" under I.C. § 67-5273(2) did not occur until June 16, 2006. Thus, Erickson's Petition for Review was timely filed.

E. IDAHO RULE OF CIVIL PROCEDURE 84(b) DOES NOT APPLY.

Finally, this Court finds that I.R.C.P. 84(b) does not apply, due to the first ten words of that rule: "*Unless a different time or procedure is prescribed by statute*, a petition for judicial review from an agency to district court must be filed with the appropriate district court within twenty-eight (28) days after the agency action is ripe for judicial review under the statute authorizing judicial review…". The statue that is applicable in this case is I.C. § 67-5206(2).

III. ORDER.

IT IS HEREBY ORDERED that Soderling's Motion to Dismiss is **DENIED.**

Entered this 9th day of November, 2006.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the 9th day of November, 2006, 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 #**
Scott L. Poorman	208 772-7243	Morgan w. Richards	208 345-8371
Jay J. Kiiha	208 934-8873	Ann J. Richards	" " "

_____
Secretary