



A two (2) day administrative hearing was conducted by the Board with respect to a complaint charging Allen with eleven (11) separate counts of violating the local standard of care for a professional land surveyor in the state of Idaho. *See* Second Amended Complaint, R. pp. 78-97. The scope of the hearing focused on four (4) separate surveys conducted by Allen and his method of establishing boundaries in each of these four (4) surveys.

At the conclusion of this hearing, the Board dismissed nine (9) of the eleven (11) counts contained in the Second Amended Complaint. R., pp. 365-77. However, the Board did find that Allen breached the standard of care for a professional land surveyor in the state of Idaho with respect to Counts 10 and 11 of the Second Amended Complaint. *See* R. p. 377. In reaching this conclusion, the Board stated as follows:

[W]hat he [Allen] failed to do was follow the mandatory language of section 6-11 [of the 1973 BLM Manual]:

In the resurvey process the surveyor will determine whether or not lands embraced within a claim as occupied have been correctly related in position to the original survey. Where the demonstration of this question may be one involving more or less uncertainty, as is often the case, the surveyor will examine and weigh the evidence relating strictly to the surveying problem involved. He will interpret the evidence with respect to its effect upon the manner in which the resurvey shall be executed to protect valid rights acquired under the original survey.

The Mike Hyde survey does not show a necessary original corner that would have demonstrated that he followed this section. The corner, the E  $\frac{1}{4}$  corner, is a necessary component of locating the C  $\frac{1}{4}$  corner. What Allen apparently did was ignore this factor, found a fence post, determined that it was an old fence, and set the C  $\frac{1}{4}$  corner monument at this fence post. Nothing on the Mike Hyde survey documents or in the testimony indicates that Allen even looked for the original E  $\frac{1}{4}$  corner, let alone applied it under section 6-11 to his setting of the C  $\frac{1}{4}$  corner monument at the fence post.

Allen will undoubtedly decry the Board's finding as hyper technical, but it is not. It is impossible to find and establish corners in a resurvey without looking for original corners set by the GLO surveyor to relate to. The Board finds this to be a

fundamental problem. The Board finds that it is clear and convincing that the violation of the section falls below the standard of care for professional land surveyors, in that Allen failed to exercise such care, skill and diligence as others in that profession ordinarily exercise under like circumstances.

*Id.* at pp. 378-79.<sup>1</sup> As a result of the Board's determination that Allen had violated the applicable standard of care, the Board "admonished" Allen and assessed a \$500.00 administrative penalty for said violation in accordance with its powers under I.C. §54-1220(4). A motion for reconsideration and/or clarification was filed by the Complainant. This motion was denied by the Board. Allen, in turn, filed the present Petition, as it related to the Board's determination that he had violated the applicable standard of care with respect to Counts 10 and 11.

#### APPLICABLE STANDARDS

Disciplinary proceedings of the Board are governed by the Idaho Administrative Procedures Act. I.C. §12-1220(3). An aggrieved party in an administrative proceeding may petition the district court for judicial review of the agency's action. I.C. §67-5270(3). The procedure for a judicial review proceeding is as set forth by statute or in the event no stated procedure is articulated in said statute, then Rule 84 of the Idaho Rules of Civil Procedure provides the applicable procedure. I.R.C.P. 84(1). In the present case, the Idaho Administrative Procedures Act does set forth the particular procedures to be applied. *See* I.C. §67-5272 through 67-5279. To the extent that applicable procedures are not outlined in these code sections, the Court will implement those procedures outlined in I.R.C.P. 84.

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<sup>1</sup>It appears to be undisputed that the U.S. Department of Interior, Bureau of Land Management Manual of Surveying Instructions, 1973, and the 1974 circular entitled Restoration of Lost or Obliterated Corners and Subdivisions Sections, are the authoritative works for land surveyors. Both parties also acknowledge that this authoritative source is the standard for licensed professional land surveyors. Petitioner's Opening Brief, p. 27 ("Surveyors generally rely upon the Manual of Surveying Instructions to define the measure of conduct when performing sectionalized surveys."), Respondent's Brief, p. 4 ([s]tates have adopted the manual as the standard and guidance for licensed professional land surveyors. Idaho has adopted the manual for this purpose.).

The scope of the Court's review of this administrative proceeding is set forth in I.C. §67-5279(3). This code section provides as follows:

When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the 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.

The most recent pronouncement by the Idaho Supreme Court concerning the standard of review to be applied by a district court in a judicial review proceeding, was articulated in *Maclay v. Idaho Real Estate Com'n*, 2012 WL 231250 (2012), \*4 (*Maclay*). The *Maclay* Court stated in this respect as follows:

Where a district court acts in its appellate capacity pursuant to the Idaho Administrative Procedure Act, this Court independently reviews the agency record. *Cooper v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 134 Idaho 449, 454, 4 P.3d 561, 566 (2000). "This Court exercises free review over the trial court's conclusions of law to determine if the trial court correctly stated the principles of law and if the legal conclusions are supported by the facts as found." *Alcohol Beverage Control v. Boyd*, 148 Idaho 944, 947, 231 P.3d 1041, 1044 (2010). This Court defers to the agency's findings of fact "unless those findings are clearly erroneous and unsupported by evidence in the record." *Cooper*, 134 Idaho at 454, 4 P.3d at 566. "This Court may not substitute its judgment for that of the agency as to the weight of the evidence on factual matters." *See id.*; *see also* I.C. § 67-5279(1).

An agency's actions are afforded a strong presumption of validity. *Cooper*, 134 Idaho at 454, 4 P.3d at 566. However, the agency's action may be set aside "if the agency's findings, conclusions, or decisions (a) violate constitutional or statutory provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence on the record as a whole; or (e) are arbitrary, capricious, or an abuse of discretion." *See id.*; I.C. § 67-5279(3). In addition, an agency action will be affirmed "unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4).

### DISCUSSION

Allen has asserted five (5) issues with regard to its request for judicial review of the Board's administrative ruling and order. These issues are:

- (1) Did the Board err in failing to dismiss Counts 10 and 11, as so vague it did not provide Mr. Allen notice as to the charges against him?
- (2) Did the Board err in holding Mr. Allen breached the standard of care by finding Mr. Allen did not show a necessary original E ¼ where the Complainant did not allege that as a violation?
- (3) Did the Board err in finding that Mr. Allen violated the BLM Manual, Section 6-11?
- (4) Did the Board err in not providing adequate findings of fact and conclusions of law?
- (5) Did the Board err in failing to grant Mr. Allen, the prevailing party, his attorney fees and costs?
- (6) Is Mr. Allen entitled to attorney's fees and costs on appeal?

Petitioner's Opening Brief, p. 25.

#### **A. Did the Board Err in Failing to Dismiss Counts 10 and 11 for Vagueness?**

The first issue raised by Allen is that the Board committed error in failing to dismiss Counts 10 and 11 on the basis that they were unconstitutionally vague, thereby depriving Allen of the safeguards associated with due process.

Each of the eleven (11) counts contained in the Second Amended Complaint, including the two (2) at issue, claimed that Allen violated the standard of care announced in the applicable IDAPA regulations. This standard of care is as follows:

Each Licensee and Certificate Holder shall exercise such care, skill and diligence as others in that profession ordinarily exercise under like circumstances.

IDAPA 10.01.02.005.02.

Allen contends that the counts fail to give Allen "notice" concerning what conduct Allen engaged in that was alleged to be contrary to the standard of care. He further argues that the IDAPA definition does not "define what is or is not acceptable" conduct. See Petitioner's Opening Brief, p. 27.

In *Haw v. Idaho State Bd. of Medicine*, 140 Idaho 152, 90 P.3d 902 (2004) (*Haw*), the Idaho Supreme Court discussed a void-for-vagueness argument in the context of a medical doctor's challenge of the State Board of Medicine's determination that permanently restricted his medical license and imposed financial fines. While addressing the doctor's argument in support of his void-for-vagueness claim, the Idaho Supreme Court noted as follows:

The Due Process Clause of the federal Constitution embodies the principle of void-for-vagueness, which is that a statute which either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Tuma v. Board of Nursing*, 100 Idaho 74, 593 P.2d 711 (1979). Idaho Code § 54-1814(7) provides that a physician licensed to practice medicine in Idaho is subject to discipline by the Board for "[t]he provision of health care which fails to meet the standard of health care provided by other qualified physicians in the same community or similar communities, taking into account his training, experience and the degree of expertise to which he holds himself out to the public." The language of this statute is similar to the well-accepted definition of medical malpractice and is not unconstitutionally vague on its face. *Krueger v. Board of Prof'l Discipline of the Idaho State Bd. of Med.*, 122 Idaho 577, 836 P.2d 523 (1992). It is sufficient to notify medical practitioners that they could be disciplined for failure to conform to community standards, *Laurino v. Board of Prof'l Discipline of the Idaho State Bd. of Med.*, 137 Idaho 596, 51 P.3d 410 (2002), and it is not unconstitutionally vague, even though the Board has not promulgated any regulations to further define and explain the statute, *Krueger v. Board of Prof'l Discipline of the Idaho State Bd. of Med.*, 122 Idaho 577, 836 P.2d 523 (1992).

140 Idaho at 157-58, 90 P.3d at 907-08. Similarly, this Court can find no due process violation as it relates to the standard of care articulated in IDAPA 10.01.02.005.02. Allen, like the doctor in *Haw*, argues that the Board should have defined the conduct that would subject him to

discipline for violating the standard of care.<sup>2</sup> However, the Idaho Supreme Court has noted that it is sufficient to notify the practitioner that they could be disciplined for failure to conform to community standards.

The determination concerning whether a violation of the standard of care occurred must be supported by expert testimony. *Haw*, 140 Idaho at 158-59, 90 P.3d at 908-09. One reason, among many, that expert testimony is necessary, is that the applicable standard of care, of necessity, may vary from circumstance to circumstance. For this reason alone, it is difficult, if not impossible, to articulate what the standard of care would be in every circumstance. Therefore, it would be unrealistic for the Board to determine and articulate the standard of care in each situation or setting, because it is circumstance driven.

In the present case, there was expert testimony concerning the applicable standard of care and whether or not it was violated by Allen. The Board, as the finder of fact and the entity entitled to consider and weigh the evidence, including the evidence adduced from the parties' experts, determined that Allen was in violation of the standard of care as it related to Counts 10 and 11.

Based upon the foregoing, the Court concludes that the Second Amended Complaint, specifically Counts 10 and 11, and the allegations that Allen violated the standard of care for professional land surveyors in Idaho, did not violate Allen's safeguards of due process and was not unconstitutionally void-for-vagueness.

Therefore, the Court will **AFFIRM** the determination of the Board as it relates to Allen's first issue on this judicial review proceeding.

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<sup>2</sup>Dr. Haw similarly argued that he was denied due process "by the Board's failure to promulgate regulations setting forth clearly defined standards with respect to the use of injectable hormones." 140 Idaho at 158, 90 P.3d at 908.

**B. Did the Board Err in Holding that Allen Breached the Standard of Care by Finding that he did not First Locate a Necessary E ¼ Corner, When the Complaint did not Allege this Failure as a Violation?**

The second issue in this judicial review proceeding is similar in many respect to the first but in this Court's mind, is also significantly different. While the first issue deals with whether the standard of care announced by IDAPA 10.01.02.005.02 is insufficiently vague as to create a constitutional bar, this claim asserts that the facts alleged in support of Counts 10 and 11 were insufficient to put Allen on notice concerning the alleged conduct supporting the claim that Allen violated the applicable standard of care.

In this respect, the Second Amended Complaint, Counts 10 and 11 allege as follows:

**COUNT 10**

In Section 22, Allen established the C ¼ corner, the CN 1/16 corner, the CS 1/16 corner, the S 1/16 corner, the SW 1/16 corner, the N 1/16 corner, the NW 1/16 corner and W 1/16 corner between sections 15 and 22 by unknown methods contrary to Section 3-87, Section 3-89, Section 6-11, Section 6-15, Section 6-18 and the general guiding principles of the Manual of Surveying Instruction 1973, in violation of Idaho Code Section 31-2709, and in violation of IDAPA 10.01.02.005.02, "Standard of Care."

**COUNT 11**

In Section 22, Allen failed to show the location of the C ¼ corner, the CN 1/16 corner, the CS 1/16 corner, the S 1/16 corner, the SW 1/16 corner, the N 1/16 corner, the NW 1/16 corner and the W 1/16 corner between sections 15 and 22 as it would be determined by the methods prescribed in Section 3-87, Section 3-89, Section 6-11, Section 6-15, Section 6-18 and the general principles of the Manual of Surveying Instructions 1973, in violation of Idaho Code Section 31-2709, and in violation of IDAPA 10.01.02.005.09, "Standard of Care."<sup>3</sup>

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<sup>3</sup>In their Findings of Fact, Conclusions of Law and Order, the Board concludes that sections 3-87, 3-89, 6-15, and 6-18 of the BLM Manual (1973), do not apply. Therefore, its decision was made exclusively pursuant to section 6-11 of BLM Manual (1973).

As one would expect, the Second Amended Complaint was the third complaint filed in this proceeding. It appears to have been amended twice, in large part, based upon complaints by Allen that the claims contained in the Complaint and the Amended Complaint, were insufficient to notify him of the alleged wrongful conduct giving rise to a claim that he breached the applicable standard of care.<sup>4</sup>

Despite Allen's motion to dismiss which alleged that he did not know what it was that he was alleged to have done that was violative of the standard of care, the Board concluded as follows:

The Motion to Amend is granted. Idaho is a notice pleading state, and the Board finds that Respondent [Allen] is given enough information in the Amended Complaint as to the specific surveys and allegations of conduct falling below the standard of care so that the Respondent may adequately defend against the allegation.

However, as noted in footnote 3, *supra*, there is absolutely no new factual information in the Amended and Second Amended Complaint. The only amendments to the complaint dealt with citation to different sections with the 1973 BLM Manual and Idaho Code.

The matter proceeded to hearing and the Board made the findings outlined above. *Supra*, pp. 2-3. In particular this finding outlines that:

The Mike Hyde survey does not show a necessary original corner that would have demonstrated that he followed this section. The corner, the E ¼ corner, is a necessary component of locating the C ¼ corner.

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<sup>4</sup>A brief discussion concerning the evolving nature of the pleadings in this administrative proceeding is useful. The original Complaint, Counts 10 and 11 provided as follows:

In Section 22, Allen established the C ¼ corner, the CN 1/16 corner, the CS 1/16 corner, the S 1/16 corner, the SW 1/16 corner, the N1/16 corner, the NW 1/16 corner and the W 1/16 corner between sections 15 and 22 by unknown methods in violation of IDAPA 10.01.02.005.02, "Standard of Care."

The Amended Complaint is identical to the original Complaint except it adds the reference "contrary to" and includes sections 3-89, 6-11, and 6-15 and "the general guiding principles of the Manual of Surveying Instructions 1973, in violation of Idaho Code 31-2709." The Second Amended Complaint is identical to the Amended Complaint, except it adds sections 3-87 and 6-15. Although the two (2) amended complaints add additional legal authority for the claim that Allen violated the standard of care, they add nothing by way of a factual basis.

This is the first mention that this Court has been able to locate in the record on this judicial review proceeding, where it is asserted that the basis for the claimed violation of the standard of care on the part of Allen was his failure to locate the E ¼ corner of section 22. However, this failure appears to be the crux of the Board's determination that Allen did not follow Section 6-11 of the 1973 BLM Manual and therefore, violated the standard of care. In fact, this Court's review of Complainant's expert witness testimony, Glenn Kendall Bennett, the E ¼ corner was not even referenced in relationship to the Hyde survey.

The Board appears to conclude, in denying Allen's motion to dismiss, that Idaho is a notice pleading state and that the pleadings in this matter were sufficient to apprise Allen of the "allegations of conduct falling below the standard of care." R. p. 68. This Court disagrees.

The hallmark of due process is to provide a party with notice and an ability to defend. While pleadings in this administrative proceeding did provide Allen with notice that he was accused of violating the applicable standard of care with respect to the Hyde survey; he is not provided with the particulars of that claim sufficient to prepare and defend against the same. This circumstance reminds the Court of the analogy utilized by the Idaho Supreme Court in *Brown v. City of Pocatello*, 148 Idaho 802, 810, 229 P.3d 1164, 1172 (2010):

A plaintiff cannot, in his complaint, paint us a picture of a four-legged animal with fur and a tail labeled "cat" and then assert at summary judgment that the picture depicts a dog.<sup>5</sup>

The Court concludes that a similar occurrence has occurred in the instant administrative proceeding. The complaints focused on Allen's conduct (establishing corners by unknown

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<sup>5</sup>Admittedly this analogy was utilized by the Idaho Supreme Court in a different context, that of attempting to assert a different cause of action (nuisance) than the one pled (negligence). But the Court feels the same analogy is applicable in the present context as well.

methods, Count 10) and (failing to show the location of corners in a manner provided by specific sections of the 1973 BLM Manual). But the conclusions of the Board do not focus on conduct on the part of Allen, but omissions. The Board relies upon his failure to first locate the East  $\frac{1}{4}$  corner of Section 22. Apparently, the Board concluded, as a matter of law, that a prerequisite to establishing the corners at issue, the C  $\frac{1}{4}$  corner, the CN 1/16 corner, the CS 1/16 corner, the S 1/16 corner, the SW 1/16 corner, the N 1/16 corner, the NW 1/16 corner, and the W 1/16, is that the Allen must first locate the E  $\frac{1}{4}$  corner of Section 22. ("It is impossible to find and establish corners in a resurvey without looking for original corners set by the GLO surveyor to relate to." R. p. 378).

It appears to this Court that rather than obfuscate the pleadings by alleging that Allen "established corners" "by unknown methods"; a succinct statement that Allen's failure to first locate the E  $\frac{1}{4}$  corner of Section 22, which was a necessary predicate to establishing the other corners, violated the standard of care.

The Idaho Supreme Court's decision in *Pearl v. BPD of Idaho State Bd. of Medicine*, 137 Idaho 107, 44 P.3d 1162 (2002) (*Pearl*), is most instructive on this issue. A similar claim was advanced by a doctor who was subjected to discipline by the Board of Medicine. Dr. Pearl asserted that her right to due process had been violated because the Board's decision was based upon allegations not contained in the complaint, and that therefore, she did not have the opportunity to prepare and properly defend against such claims. 137 Idaho at 114, 44 P.3d at 1169. The district court that conducted the judicial review proceeding found in Dr. Pearl's favor with respect to three (3) of the counts. Just as in the case at bar, the claims were that Dr. Pearl had violated the applicable standard of care with respect to certain patients or cases. Both Dr.

Pearl, and Allen in this case knew that they were being charged with violating the applicable standard of care. What was lacking, from a due process perspective, is what the particulars of the claimed violation were. Just like Dr. Pearl had no notice in Count One of her Complaint that one of the alleged deficiencies in her conduct was her alleged failure to properly monitor Dilantin levels in her patient, Allen had no notice that the claimed deficiency in his conduct and a prerequisite to the viability of the other corners at issue, was that he first identify the E ¼ corner of Section 22. Similarly, this Court therefore concludes that the Board violated Allen's due process rights. Therefore, the Court will **VACATE** the decision of the Board as it relates to its finding that Allen violated the applicable standard of care with respect to the Hyde survey, Counts 10 and 11. Further, the Court will **REMAND** this action to the Board to reconsider appropriate action as a result of the violations of due process outlined above.

**C. Did the Board Err in Failing to Grant Allen Attorney Fees and Costs?**

Allen next contends that the Board committed error in failing to award him his costs and attorney fees, pursuant to I.C. §12-117 (1) and (2).

I.C. §12-117(1) and (2) provide as follows:

(1) Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees, and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

(2) If a party to an administrative proceeding or to a civil judicial proceeding prevails on a portion of the case, and the state agency or political subdivision or the court, as the case may be, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

While the Board concedes that it did not address Allen's request for attorney fees and costs, it states that it "believes the body of the Board Decision clearly sets forth the Board's position why there was no basis to find that the nonprevailing party acted without a reasonable basis in fact or law." Respondent's Brief, p. 22. This contention at this stage of the proceeding is insufficient. The Board is obligated, pursuant to Allen's request and I.C. §12-117(1) and (2), to make specific findings of fact and conclusions of law. These would include a determination that Allen was the prevailing party (I.C. §12-117(1)), or that he was a prevailing party on a "portion of the case" (I.C. §12-117(2)). If these findings of fact and conclusions of law are determined in the affirmative, the Board must then make findings of fact and conclusions of law concerning whether the nonprevailing party "acted without a reasonable basis in fact or law."

Without these findings of fact and conclusions of law, the Court cannot make an informed decision regarding the same. This Court, in its present capacity, is not the finder of fact, the Board is. The Court, in its present capacity, is not to "substitute its judgment for that of the agency [Board] as to the weight of the evidence on questions of fact." Neither should this Court perform a function, in a judicial review proceeding, which is intended and reserved to be a function of the Board.

Therefore, the Court will **REMAND** this matter to the Board for further proceedings as are necessary to determine Allen's status as a prevailing party, either in part or in full, and in the event he is determined to be the prevailing party, a second determination concerning whether the nonprevailing party, in this case the Board, "acted without a reasonable basis in fact or law."

**D. Is Allen Entitled to an Award of Attorney Fees and Costs  
on this Petition for Judicial Review?**

Finally, Allen requests an award of attorney fees and costs on pursuant to this judicial review proceeding, pursuant to I.C. §§12-117, 12-121, and Idaho Appellate Rules 40 and 41. The Court will **DENY** Allen's request for attorney fees and costs incurred incident to this judicial review proceeding.

Allen makes a claim for costs and fees pursuant to both I.C. §12-117(1) and (2) and I.A.R. 40 and 41. At the outset, the Court would note that the appellate rules and I.C. §12-117 contradict each other in some respects.<sup>6</sup> This Court concludes that I.C. §12-117 is the applicable statutory basis for the award of fees and costs in a judicial review proceeding, not the Idaho Appellate Rules.

I.R.C.P. 84(a) provides, in relevant part, that "the procedure and standards of review applicable to judicial review of state agency and local government actions shall be as provided by statute." In this case, I.C. §54-1220 is the applicable statutory procedure and authority for the Board to mete out discipline. This statute provides that administrative proceedings relative to disciplinary action shall be handled in accordance with the Idaho Administrative Procedures Act. Finally, I.C. §12-117 states clearly and without ambiguity that "unless otherwise provided by statute, in **any administrative proceeding** ... involving as adverse parties a state agency or political subdivision and a person, the state agency, or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in

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<sup>6</sup>An example of this contradiction is the different manner they deal with costs. Under I.A.R. 40 costs are awarded "as a matter of course to the prevailing party." However, pursuant to I.C. §12-117, costs are lumped into the same category as attorney fees and are awarded only if a finding is made that the nonprevailing party "acted without a reasonable basis in fact or law."

fact or law.” [Bold Emphasis Supplied by the Court]. Therefore, as contemplated by I.R.C.P. 84(a) the procedures and standards for this judicial review, including requests for attorney fees and costs are provided by the statutory scheme outlined above.<sup>7</sup>

Further, there is no application or need to resort to I.A.R. 40 or 41. I.R.C.P. 84(r) provides, in relevant part, that “any procedure for judicial review not specified or covered by these rules shall be in accordance with the appropriate rule of the Idaho Appellate Rules to the extent the same is not contrary to this Rule 84.” In the present case, as outlined above, there is a procedure outlined under I.R.C.P. 84 for dealing with attorney fees and costs. Additionally, application of the Idaho Appellate Rules would be contrary to the process outlined in I.R.C.P. 84. Therefore, Allen’s claims for attorney fees and costs, pursuant to I.A.R. 40 and 41, are hereby **DENIED**.

In applying the standard set forth in I.C. §12-117, the Court will **DENY** Allen’s request for attorney fees and costs in this judicial review proceeding for two (2) reasons. First, the Court concludes that although it has remanded this matter to the Board, based upon a denial of due process, the Court does not find that the Board’s arguments and position asserted in this judicial review proceeding was without a reasonable basis in fact and law. *See Hillcrest Haven v. Health and Welfare*, 142 Idaho 123, 126, 124 P.3d 999, 1002 (2005). Second, because the Court is remanding this matter to the Board for further proceedings, this Court is not able to determine at this stage of the proceedings whether Allen is the prevailing party, in full or in part, or not. It is certainly conceivable that upon remand and re-hearing, that the Board could find Allen’s conduct to be below the applicable standard of care. Therefore, consistent with the Supreme Court’s

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<sup>7</sup>For the same reasons articulated above, the Court concludes that I.C. §12-121 is not the appropriate statutory provision for an award of attorney fees in this judicial review proceeding. Therefore, Allen’s request for attorney fees pursuant to this statute is **DENIED**.

action in *Home Farms v. Board of Com'rs*, 141 Idaho 855, 862, 119 P.3d 630, 637 (2005), given the nature of these proceedings and the fact that this Court is remanding the case to the Board for further proceedings consistent with this opinion, the Court will **DENY** Allen's request for attorney fees pursuant to I.C. §12-117.

### CONCLUSION

Based upon the foregoing and pursuant to I.C. §67-5279(3) the Court hereby **VACATES** the determination of the Board finding that Allen violated the applicable standard of care as it related to Counts 10 and 11 of the Second Amended Complaint and **REMANDS** this matter to the Board for further proceedings consistent with the Court's Memorandum Decision and Order, both in respect to a re-hearing and a determination of attorney fees and costs pursuant to I.C. §12-117.<sup>8</sup>

The parties are also notified pursuant to I.R.C.P. 84(t)(2)(a) that this Memorandum Decision and Order will become final in forty-two (42) days if no appeal is taken to the Idaho Supreme Court.

Dated this 15<sup>th</sup> day of May, 2013.



  
MITCHELL W. BROWN  
District Judge

<sup>8</sup>Because the Court has concluded that the Board's decision is contrary to due process requirement in this matter, the Court need not address the remaining substantive issues raised by Allen in this judicial review proceeding.

**CERTIFICATE OF MAILING/SERVICE**

I hereby certify that on the 15th day of May, 2013, I mailed/served/faxed a true copy of the foregoing Memorandum Decision and Order on Petition for Judicial review on the attorney(s)/person(s) listed below by the method indicated:

Attorney(s)/Person(s):

Method of Service:

Reed W. Larsen  
Counsel for Petitioner

Faxed: 235-1182

Michael J. Kane  
Counsel for Respondents

Faxed: (208) 342-2323

Idaho Board of Licensure of Professional  
Engineers and Professional Land Surveyors

Faxed: (208) 373-7213

SHAUNA T. GEDDES, Clerk

BY: Linda Hampton, Deputy Clerk

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**MITCHELL W. BROWN**  
District Judge  
Sixth Judicial District  
State of Idaho

**MAY 15 2013**  
MICHAEL KANE &  
ASSOCIATES, PLLC

Franklin County Courthouse  
39 West Oneida  
Preston, ID 83263  
(208) 852-0877  
Fax: (208) 852-2926  
Linda Hampton, District Court Clerk

Resident Chambers  
Caribou County Courthouse  
159 South Main  
Soda Springs, ID 83276  
(208) 547-2146  
Fax: (208) 547-2147  
Sharon Wells, District Court Clerk



May 15, 2013

To: Reed W. Larsen	235-1182
Michael J. Kane	(208) 342-2323
Idaho Board of Licensure of Licensure of Professional Engineers and Professional Surveyors	(208) 373-7213

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