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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CANYON COUNTY,)	
)	
Petitioner - Appellant,)	CASE NO. CV-2012-0724
)	
vs.)	
)	MEMORANDUM DECISION
IDAHO DEPARTMENT OF)	AND ORDER ON APPEAL
ENVIRONMENTAL QUALITY)	
)	
Respondent.)	
_____)	

This is an appeal from the Board of Environmental Quality's entry of a Final Order on December 28, 2011, affirming the Recommended Order entered by the hearing officer, finding that because Canyon County's vehicles failed to comply with the emissions testing requirements established by Idaho Code § 39-116B, the vehicle registrations may be revoked by the Idaho Transportation Department. The Respondent, Idaho Department of Environmental Quality, requests the Petition for Judicial Review, filed by Appellant, Canyon County, be dismissed for failing to serve the statutorily-designated parties pursuant to Idaho Code § 39-107(6) and IDAPA 58.01.23.791. Appellant responds that regardless of whether service was made at the time of filing the petition, the petition was timely filed pursuant to Idaho Rules of Civil

Procedure (IRCP) 84(b) and service has since been completed; thus, the petition should not be dismissed.

Based on the analysis presented in this Memorandum Decision, the appeal filed by Appellant, Canyon County, is **dismissed** and the decision of the Board of Environmental Quality is **affirmed**.

I. **FACTUAL AND PROCEDURAL BACKGROUND**

On March 24, 2011, Appellant filed a Petition Initiating a Contested Case to challenge the Idaho Department of Environmental Quality/Board of Environmental Quality/Director of Idaho Department of Environmental Quality's (the Agency) determination that Canyon County's vehicle registrations could be revoked by the Idaho Department of Transportation for failing to comply with the emissions testing requirements established by Idaho Code § 39-116B. The basis for the petition was that the Agency did not properly promulgate the rules that enacted the emission testing, the Agency was impermissibly exercising legislative authority, the Agency's implementation of I.C. §39-116B rendered the legislation unconstitutional and attached a new disability to past transactions in the absence of a clear expression of legislative intent that it may do so and that the Agency's internal procedures regarding notification are subject to critical failure.

Following briefing and a hearing, the hearing officer recommended granting Summary Judgment to the Respondent pursuant to IRCP 56(c), finding that there was no genuine issue of material fact and thus, Respondent was entitled to judgment as a matter of law. The Appellant took exception to the Recommended Order and after additional briefing and argument; the Board issued a Final Order on Review of

Recommended Order on December 28, 2011. In that Final Order, the Board unanimously affirmed the Recommended Order, granting Summary Judgment to the Respondent.

On January 25, 2012, Appellant timely filed a Petition for Declaratory Judgment and Judicial Review (*hereinafter*, Petition), contemporaneously serving both the Deputy Attorney General for the Idaho Department of Environmental Quality (*hereinafter*, DEQ) and the Hearing Coordinator for DEQ. Those were the only two parties served at the time of the filing of the petition. On April 25, 2006, 91 days later, Appellant served copies of the Petition for Judicial Review on the Director of the Department of Environmental Quality (*hereinafter* Director) and the Chairman of the Board of Environmental Quality (*hereinafter*, Chairman). Thereafter, Respondent filed a motion to dismiss the petition on the grounds that pursuant to I.C. §39-107(6), at the time of filing the Petition, Appellant was required to contemporaneously serve the Attorney General, the Chairman and the Director. Because the Chairman and the Director were not served contemporaneously with the filing of the Petition, and because such service is jurisdictional, pursuant to I.C. § 39-107(6), Respondent asserts that the petition must be dismissed regardless of whether service was later made on April 26, 2012.

II. ISSUES ON APPEAL

1. Does I.C. § 39-107(6) create a jurisdictional restraint upon the power of the court and deprive the court of the authority to entertain an otherwise timely petition if service is not contemporaneously made on the parties identified in Idaho code section § 39-107(6)?
2. Did the Board err in affirming the Hearing Officer's Decision that no genuine issue of material fact existed and thus, Respondent was entitled to summary judgment as a matter of law?

III. PRELIMINARY ISSUES

- A. I.C. § 39-107(6) Creates A Jurisdictional Restraint Upon The Power Of The Court And Deprives The Court Of The Authority To Entertain An Otherwise Timely Petition If Service Is Not Contemporaneously Made On The Parties Identified In Idaho Code § 39-107(6).

Idaho Code § 39-107(6), when read in conjunction with IRCP 84, requires service to be made on the Chairman of the Board of Environmental Quality, the Director of the Department of Environmental Protection, and upon the Idaho Attorney General, contemporaneously with the filing of the Petition. Because service was not made upon the Chairman or the Director until approximately 90 days after the filing of the Petition, the court has no jurisdiction to hear the petition and thus, the petition must be dismissed.

- i. I.C. § 39-706, IRCP 84 and Idaho Admin. Code r. 58.01.23.791 must be read together, establishing that judicial review is commenced by both the filing of the petition and concurrent service on the statutorily-designated parties.

The Idaho Administrative Procedures Act (IAPA) governs contested cases involving state agency action. Pursuant to IAPA, this court freely reviews questions of law in contested cases involving state agencies but must defer to the agency's findings on questions of facts.

The IAPA provides the standard of review as follows:

[T]he 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.

I.C. § 67–5279(3). Even if one of these conditions is met, this Court will still affirm the agency action “unless substantial rights of the appellant have been prejudiced.”
Id. § 67–5279(4). *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011.)

In order to obtain judicial review of a final order issued by an agency, there must be a statutory right to judicial review, and there must be a contested case involving a state agency. Judicial review is granted pursuant to I.C. § 39-107(6). The Board of Environmental Quality is a state agency because it is a “state board, commission, department or officer authorized by law to make rules or to determine contested cases, but does not include the legislative or judicial branches, executive officers listed in section 1, article IV, of the constitution of the state of Idaho in the exercise of powers derived directly and exclusively from the constitution, the state militia or the state board of correction.” I.C. §§ 67-5201, 39-107.

Whether the case is a contested case depends on whether the proceeding is one that may result in the issuance of an order. I.C. § 67-5201. An order is “an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.” I.C. § 67-5201. Deciding whether the agency “determine[d] the legal rights, duties, privileges, immunities or other legal interests” of specific persons,” involves a two part question.

“First, has the legislature granted the agency the authority to determine the particular issue? If an agency does not have the authority to resolve a particular issue, then the agency cannot determine a party's legal rights, duties, privileges, immunities, or other legal interests regarding that issue.

Hoppe v. Nichols, 100 Idaho 133, 594 P.2d 643 (1979). Second, does the agency decision on the issue determine “the legal rights, duties, privileges, immunities, or other legal interests” of one or more persons?

Westway Const., Inc. v. Idaho Transp. Dept., 139 Idaho 107, 112, 73 P.3d 721, 726 (2003). This is a contested case because the Legislature granted the Board the authority to

adopt, amend or repeal the rules, codes and standards of the department that are necessary and feasible in order to carry out the purposes and provisions of this act and to enforce the laws of the state of Idaho. The rules and orders so adopted and established shall have the force and effect of law and may deal with any matters deemed necessary and feasible for protecting the environment of the state.

I.C. § 39-107(7). Thus, the Board was statutorily granted the authority to decide whether emission testing was mandatory, which individuals or municipalities would be subject to the mandatory emission testing, and the consequences for failing to comply with the testing.

The Board made these decisions and issued a Final Order on December 28, 2011, vis a vis Appellant’s decision not to comply with the mandatory emission testing. The Board’s Final Order determined that any vehicles not obtaining the mandated emission testing would be subject to a registration revocation, thereby determining the legal rights, duties, or other legal interests of specific persons. Thus, the Board’s determination that Canyon County must either emission test its vehicles or have the registration for those vehicles be revoked absent a qualifying exemption constitutes the basis of a contested case and can be reviewed.

Appellant contends that judicial review is obtained by the filing of the petition, not the service of the petition, that I.C. § 39-107(6) does not proscribe a different procedure for the filing of the petition and therefore, the relevant rule is IRCP 84(b), with which the

county complied. Alternatively, the Appellant argues no prejudice inures to the Respondent because Appellant self-identified the deficient service and service was made substantially before the motion to dismiss. As another alternative argument, Appellant argues that even if I.C. § 39-107(6) provides a different procedure, then the Legislature acted unconstitutionally in limiting the general jurisdiction of the courts by imposing a service requirement different from the service requirement in IRCP 84. Further, the Appellant argues that even if service was not contemporaneously made, because the agency decision was in violation of constitutional or statutory provisions, in excess of the statutory authority of the agency, and/or made upon unlawful procedure, the Court should not affirm the decision of the Board.

Respondent asserts that because Appellant didn't comply with the jurisdictional service requirements, the petition must be dismissed, but even if the petition is not dismissed, the rule-making process utilized by the Respondent complied with constitutional, statutory, and administrative rule requirements and therefore, the petition should be denied on the merits.

This Court must first determine whether it has jurisdiction to address the merits of the case. Idaho Code § 39-107(6) provides:

Any person adversely affected by a final determination of the board, may secure judicial review by filing a petition for review as prescribed under the provisions of chapter 52, title 67, Idaho Code. The petition for review **shall** be served upon the chairman of the board, the director of the department, and upon the attorney general of the state of Idaho. **Such service shall be jurisdictional** and the provisions of this section shall be the exclusive procedure for appeal.

(emphasis added.) Similarly, Idaho Rule of Civil Procedure 84 states:

(a) Judicial Review of State Agency and Local Government Actions.

(1) *Scope of Rule 84.* **The procedures and standards of review applicable to judicial review of state agency and local government actions shall be as provided by statute.** When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court's judicial review...**Actions of state agencies. . . are not subject to judicial review unless expressly authorized by statute.**

(b) Filing Petition for Judicial Review.

(1) **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. **Judicial review is commenced by filing a petition for judicial review with the district court, and the petitioner shall concurrently serve copies of the notice of petition for judicial review upon the agency whose action will be reviewed and all other parties to the proceeding before the agency (if there were parties to the proceeding).** Proof of service on the agency and all parties shall be filed with the court in the form required by Rule 5(f).

(n) **Effect of Failure to Comply With Time Limits.** The failure to physically file a petition for judicial review or cross-petition for judicial review with the district court within the time limits prescribed by statute and these rules shall be jurisdictional and shall cause automatic dismissal of the petition for judicial review upon motion of any party, or upon initiative of the district court. Failure of a party to timely take any other step in the process for judicial review shall not be deemed jurisdictional, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the petition for review.

(emphasis added). Finally, Idaho Admin. Code r. 58.01.23.791 provides as follows:

01. Filing and Service. The petition for judicial review **must be filed** with the hearing coordinator as set out in Section 008 and with the district court **and served on**

all parties. Pursuant to Section 39-107(6), Idaho Code, the petition for judicial review shall also be served upon the Chairman of the Board, the Director of the Department, and upon the Attorney General of the State of Idaho.

02.

(emphasis added.)

Statutes and rules must be read together and failure to comply with the service deadlines is jurisdictional. In *Harrisons v. Board of Prof'l Discipline*, 145 Idaho 179, 177 P.3d 393 (2008), the Appellant filed a complaint against the State Board of Medicine (*hereinafter*, Board). The statute required both the Attorney General and the Secretary of State be served at the time of filing the complaint. The Appellant timely served the Attorney General but not the Secretary of State. The Board moved to dismiss the case on the ground that the Secretary of State had not been properly served pursuant to I.R.C.P. 4(a)(2). The Appellant argued that the statute did not require service to be made on the Secretary of State within six months but even if the statute so required, Appellants established good cause for the non-compliance with the service requirement. 145 Idaho at 181, 177 P.3d at 395.

The court, in reviewing the relevant portions of the Idaho Tort Claims Act and the Idaho Rules of Civil Procedure, held that the rules must be read together and when read together, they required service upon the Secretary of State within the six (6) month time period and that because service was not made, the case should be dismissed. 145 Idaho at 182, 177 P.3d at 396. Although Appellants argued good cause existed to excuse the late service, the Court, specifically noted that, “[l]ack of prejudice is irrelevant to the good cause analysis,” and found there was no attempt to serve the Secretary of State within the six-month timeframe. The Court then rejected the good

cause argument and affirmed the dismissal ordered by the district court. 145 Idaho at 182-183, 177 P.3d at 396, 397.

In *Lindstrom v. Dist. Bd. of Health Panhandle Dist. I*, 109 Idaho 956, 957, 712 P.2d 657, 658 (Ct. App. 1985), the Appellants applied to the District Board of Health, Panhandle District I (the Board), for a permit to replace their damaged sewage system with another filtration system on their property. Relying upon state regulations the Board, through a specialist, denied the permit, ruling that the Appellants could contract to connect their sewer to an adjacent, privately-owned sewer system which was connected to the city sewer system. Following the specialist's decision, the Appellants did not seek a hearing before the Board or judicial review of the denial pursuant to code.

The Appellants later filed a motion for declaratory judgment in district court pursuant to I.C. § 67-5207. Alternatively, the Appellants sought a writ of mandamus commanding the Board to issue a permit to the Appellants and declaring that the Board's regulations involving the issuance of permits to be without force and effect as applied to the Appellants. *Id.* The district court denied their motions.

In determining whether the court had jurisdiction to entertain the declaratory judgment action, the court cited Idaho Code § 39-418, which provided in pertinent part, "The petition for review shall be served upon the district health director and the director of the department of health and welfare of the state of Idaho. The director may appear in any such hearing as a matter of right. Such service shall be jurisdictional and *the provisions of this section shall be the exclusive procedure for appeal or review.*" (emphasis in original). The court then reasoned, "Where applicable, requirements of I.C. § 39-418 for timely filing and service of a petition for review are jurisdictional.

Absent compliance with this section a district court has no jurisdiction to review “a final determination of the district board.” *Id.* Finding that the Appellants were not seeking review of a final decision of a Board, but rather seeking relief pursuant to a different statute, the Court nonetheless affirmed the district court’s denial of the Appellants’ motion on other grounds. *Id.*

Both of these cases make it clear: judicial review is commenced not just by the filing of the petition, as asserted by the Appellant, but by *both the filing* of the petition *and concurrent service* upon “the agency whose action will be reviewed and all other parties to the proceeding before the agency.” Additionally, the plain language of IRCP 84 makes it clear that if there is a different procedure proscribed by statute, the statutory process controls. I.C. § 39-107(6) requires service on additional, different parties than are required to be served pursuant to IRCP 84(b), and therefore, requires a “different procedure” than the service requirement of IRCP 84(b). Because there is a “different procedure provided by statute,” the service requirements of I.C. section 39-107(6) govern and control.

By the plain language of IRCP 84, the provisions of I.C. § 39-107(6) govern both the time for filing¹ and the service requirements. The service requirement mandates that the statutorily designated parties be served concurrently with the filing of the Petition. That was not done in this case and therefore; the failure to serve the Chairman and the Director within the statutorily defined timeframe constrains the court’s jurisdiction to hear the matter.

¹ Although the time for filing is the same under both IRCP 84(b) and 39-107(6), the statute could designate a different time frame and has done so for petitions from final agency actions other than a rule or order. See I.C. §§ 39-107(6) and 67-5273(3).

- ii. The Legislature has the constitutional authority to establish the nature, scope and process for any appeal not specifically secured by the Idaho Constitution. Therefore, the creation of filing and service requirements in I.C. § 39-107(6) is a proper exercise of Legislature's constitutional authority pursuant to art. V, sec. 13 of the Idaho Constitution.

The question of whether the Legislature or the Supreme Court can proscribe rules of legal procedure is a question of which branch of government has the authority to promulgate procedural rules involving appeals. In short, procedural rule making is neither exclusively legislative nor judicial.

Originally, "Idaho Constitution article V, section 13 simply continued the principle which prevailed during the territorial period: providing procedural rules for the lower courts was a legislative power." Dennis C. Colson, Divided Powers and Court Rules in the Idaho Constitution, 31 Idaho L. Rev. 461, 471 (1995). Idaho courts operated under legislatively-created statutory procedural rules until the passage of Senate Bill 69 in 1941, in which the legislature recognized "the inherent power of the Supreme Court to make rules governing procedure in all the Courts of Idaho is hereby recognized and confirmed. *Id.* at 484. Prof. Colson notes,

The Idaho Bar Association proceedings during these years provide a unique and rich source of information about what those who sponsored the 1941 legislation thought to be its significance. While these sponsors thought the courts better able to provide rules of procedure, none doubted that the legislature had the constitutional power to enact rules. Even though some doubted it, most thought the Supreme Court had an inherent power to adopt rules of procedure. However, this inherent power was not by itself sufficient. A statute acknowledging the power was necessary. The inherent power of the court was sufficient to prevent this acknowledgement from being an unconstitutional delegation of the power to proscribe rules of procedure. It was understood that the statute would not vest permanent and supreme power over rules of proceeding in the Supreme Court, and that the legislature could at a future date enact statutes which would prevail over rules.

Id. at 486.

Over time, the rule of law has developed such that in the event of a conflict between court rules and statutes, the court rule prevails on issues of procedure and the statute prevails on issues of substantive rights. See I.C. § 1-213. However,

It is well established that except where the right of appeal is secured by the constitution, so as to have become a constitutional right, it is dependent entirely upon statute, and is subject to the control of the legislature, which may, in its discretion, grant or take away the remedy and prescribe in what cases, under what circumstances, in what manner, and to and from what courts appeals may be taken. This legislative power is granted by the provision of Art. V, § 13 of the State Constitution, and in the event the legislature sees fit to provide a method of appeal the legislative decision is final and conclusive.

Striebeck v. Employment Sec. Agency, 83 Idaho 531, 537, 366 P.2d 589, 591-92 (1961) (internal citations omitted). Moreover, the Court “has repeatedly held that the statutory requirements as to the method and manner of taking an appeal are mandatory and the filing and service of notice of appeal within the time and in the manner prescribed by statute are jurisdictional.” *Id.*, citing *Kimzey v. Highland Livestock & Land Co.*, 37 Idaho 9, 214 P. 750; *Patrick v. Finch*, 51 Idaho 538, 8 P.2d 776; *McMillan v. Sproat*, 47 Idaho 724, 278 P. 224; *State v. Paris*, 58 Idaho 315, 72 P.2d 865; *Farmers Equipment Co. v. Clinger*, 70 Idaho 501, 222 P.2d 1077.

The right to appeal from a state agency decision is not a right secured by the Idaho Constitution (See art. V, sec. 9); therefore, any basis for an appeal must be found in I.C. § 39-107(6). IRCP 84(a) and (b) expressly recognizes the Legislature’s power, established in art. V, sec. 13, to define the nature, scope and process for appeals from actions of state agencies, which are not appeals specifically secured by the Idaho Constitution. See art. V, sec. 9.

The language of IRCP 84 makes clear that the Legislature is not limiting the jurisdiction of the Court. Rather, the Court is deferring to the Legislature’s constitutional

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authority to promulgate both substantive and procedural rules for those appeals not secured by the Constitution. IRCP 84(a)(1) provides “actions of state agencies or officers or actions of a local government, its officers or its units are not subject to judicial review unless expressly authorized by statute.” This reflects the Court’s recognition that the right to appeal from a final order issued by a state agency is a statutory right, not a constitutional right, and therefore, pursuant to art. V, sec. 13, the Legislature has the authority to define the nature and scope of that appeal, as well as the time of filing and the service requirement.

IRCP 84 further reflects the Legislature’s constitutional authority to also define and establish the time of and procedure for filing judicial review petitions. IRCP 84(b). As such, the Appellant’s argument fails, as the Legislature is not “limiting the broad general jurisdiction of the district court,” but rather, appropriately exercising its constitutional authority “to provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all courts below the Supreme Court...” Idaho Constitution, art. V, sec. 13.

Thus, the jurisdictional limits in I.C. § 39-107(6) are constitutionally valid and apply both to the filing of the petition and to the timely service of the parties; failure to comply with both aspects of the statute inexorably lead to the conclusion that the court does not have the authority to hear the petition and that the petition must be dismissed. Because the petition must be dismissed on jurisdictional grounds, this Court has no authority to, and therefore, will not, address the underlying merits of the decision by the Board.

IV. CONCLUSION

Based on the above, the Respondent's Motion to Dismiss the Petition for Review on the grounds that Appellant did not timely serve the parties designated in I.C. § 39-107(6) is **GRANTED** and the petition is **DISMISSED** with prejudice. The decision of the Board is **AFFIRMED**.

DATED this 3rd day of July, 2012.


Molly J. Huskey
District Court Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3 day of July, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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