11-18-2010

Buell v. Idaho Dept. of Transp. Respondent's Brief Dckt. 37404

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES KEVIN BUELL, Appellant, vs. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent.	SUPREME COURT DOCKET NO. 37404-2009

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District
Of the State of Idaho in and for the County of Benewah

HONORABLE FRED M. GIBLER
District Court Judge

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A. Nature of the Case

Petitioner, James Kevin Buell (hereinafter "BUELL"), appeals the disqualification of his commercial driving privileges by the Idaho Transportation Department (hereinafter "ITD"). Said disqualification followed an administrative hearing, requested by BUELL, before a hearing officer appointed by ITD. The hearing officer upheld the suspension as did the District Court and BUELL filed the instant appeal.

B. Course of Proceedings

Respondent agrees with the course of the proceedings outlined by the Petitioner.

II. STATEMENT OF FACT

On October 21, 2006, BUELL was cited for Driving Under the Influence (DUI) while driving a non-commercial vehicle. *Court's Exhibit 1, p. 7.* BUELL refused the breath test. As a result, his driver's license was seized and he was served with a Suspension Advisory and temporary non-commercial driving permit. *Id., R.p.68.*

On December 22, 2006, BUELL made a plea agreement with the prosecuting attorney. In exchange for a plea of guilty to the DUI, the prosecutor agreed to dismiss the administrative refusal proceeding and agreed to recommend back-dating the driver's license suspension to the date of arrest [October 21, 2006]. *Id., p. 8; R. p.24.* BUELL's driver's license is returned to him. R. ,p. 24. On February 27, 2007, the prosecuting attorney and BUELL (through his attorney) stipulate to re-schedule the sentencing to July of 2007. R., p. 25.

On July 10, 2007, BUELL is sentenced for the DUI. As part of the sentence, the judge suspended his non-commercial driver's license for 90 days, beginning on October 21, 2006 [and therefore ending on or about January 21, 2007). *R., p.35.*

On July 19, 2007, ITD sent BUELL a "Notice of Disqualification." *R., p. 51.* This Notice provided that, since BUELL had a CDL and had been convicted of a DUI, then pursuant to Idaho Code Section 49-335:

> By statute, the Idaho Transportation Department is withdrawing your driving privileges to operate a commercial vehicle for 366 days effective August 6, 2007 through August 6, 2008, Idaho Code 49-326(1)(E) and 49-335. No restricted driving privileges permit CMV operation.

Id., p. 51.

On August 1, 2007, BUELL appealed the action against his CDL. *R., p. 48.* The matter was set for hearing before an administrative hearing officer, which was held on August 31, 2007. *R., p.37.*

The hearing examiner upheld the disqualification for one year of BUELL's commercial driving privileges. *R., p. 37-41.* And, at the end of the decision, the hearing officer wrote that it is "recommended that his disqualification be made retroactive to November 21, 2006, that actual date he ceased having commercial driving privileges arising out of the same incident. His class D privileges shall not be affected." *R. p. 39.*

ITD disagreed with a retroactive suspension. On September 7, 2007, ITD wrote the hearing officer requesting reconsideration of the hearing officer's recommendation that the suspension be "back dated to November 21, 2006." R., p. 35. In this letter, the Driver Services Manager Edward Premble wrote, in part:

> On October 21, 2006 Mr. Buell refused to submit to BAC testing and at that time his license was seized and he was issued an unrestricted driving permit. On

> October 26, 2006, through his attorney Mr. Buell requested a hearing on the proposed suspension due to the refusal with the appropriate court. A hearing was set for November 17, 2006. On November 15, on behalf of Mr. Buell, his attorney filed a stipulation to vacate and continue the refusal hearing due to scheduling conflicts. In addition to the continuance of the hearing, the stipulation also agreed that Mr. Buell's driving privileges remain valid until a hearing was conducted. This stipulation agreed to by the court on November 16, 2006. On December 22, 2006 and [sic] order was signed by the court vacating and dismissing the license suspension proceedings on the refusal.
>
> On July 10, 2007 Mr. Buell was convicted of DUI and his license was suspended by the four to 90 days commencing Oct. 21, 2006, the day of the incident.
>
> At no time was Mr. Buell officially informed by the court, a law enforcement officer or by the Department that his CDL privileges were withdrawn until our notification letter was sent on July 19, 2007. In reality, the information provided by the court orders and stipulation would indicate that his license was not suspended and he was informed of that. Therefore, Mr. Buell has only served zero (0) days of suspension/disqualification. Thus, backdating the disqualification in this case would result in giving Mr. Buell credit for time he never served.

R. pp. 35-36.

On October 1, 2007, ITD sent BUELL a second "Notice of Disqualification" because of his DUI conviction. This Notice provided in part:

> By statute, the Idaho Transportation Department is withdrawing your driving privileges to operated a commercial vehicle for 366 days effective July 10, 2007 through July 10, 2008, Idaho Code 49-326(1)(E) and 49-335. No restricted driving privileges permit CMV operation.

On October 5, 2007, ITD wrote to the hearing officer and copied BUELL's attorney informing the hearing officer that ITD was withdrawing the motion to reconsider and that ITD had issued its notice withdrawing BUELL's CDL qualification to coincide with his conviction date of July 10, 2007. *R. p. 17.* A second letter was sent by ITD to BUELL's attorney on October 5, 2007. *R., p. 15-16.* In this letter, ITD stated in part:

> The department has determined that it is not bound to comply with the recommendation made by the hearing officer to backdate the CDL DQ action. The hearing officer ahs verbally concurred with the department's decision and

further indicated that a recommendation is not a ruling or order and as a result there is nothing for him to rule on regarding the motion for reconsideration.

The department has backdated Mr. Buell's non-commercial driving privileges suspension in accordance with the judge's order. However, based on the Federal Motor Carrier Safety Administration (FMCSA) rules and regulations, Mr. Buell's CDL DQ start date will coincide with the July 10, 2007 DUI conviction date. I have included a copy of our letter of October 1, 2007 to you client informing his of these amended DQ dates.

As indicated in this letter of October 1, 2007, an administrative hearing may be requested to ITD as to this action. Under the provisions of IC 49-326(4) a hearing will be held within 20 days upon receipt of a written request.

On or about October 10, 2007, BUELL filed a Petition for Judicial Review. R. p. 1-2. An Amended Petition for Judicial Review was filed on October 17, 2007. R., p. 3-4. And on October 17, 2007, the Court issued an exparte order staying enforcement of the disqualification action by ITD and reinstating BUELL's CDL.

On December 18, 2009 a hearing was held before the Honorable Fred Gibler on the Petition for Judicial Review. The Honorable Judge Gibler upheld the decision of the hearing officer and the one year suspension of BUELL's CDL. *R., p.71.* The Judge also ordered the "stay" on enforcement of the disqualification remain in place pending the appeal. *Tr., p. 13-14 (Hearing on Dec 18, 2009).*

III. ISSUES ON APPEAL

BUELL brings the following issues before this Court on appeal:

1. Does an administrative suspension of a commercial driver's license, pursuant to Idaho Code Section 49-335, violate the principles of double jeopardy?
2. Should BUELL'S commercial driver's license disqualification be retroactive to November 21, 2006?

III. ARGUMENT

A Standard of Review

The Idaho Administrative Procedures Act (IDAPA) governs the review of department decisions to deny, cancel, suspend, disqualify, revoke or restrict a person's driver's license. *See* I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270 and *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 155 P.3d 1176 (Ct.App. 2006). In an appeal from the decision of the district court acting in its appellate capacity under IDAPA, this Court reviews the agency record independently of the district court's decision. *Marshall v. Idaho Dep't of Transp.,* 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct.App.2002). This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. I.C. § 67-5279(1); *Marshall,* 137 Idaho at 340, 48 P.3d at 669. This Court instead defers to the agency's findings of fact unless they are clearly erroneous. *Castaneda v. Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998); *Marshall,* 137 Idaho at 340, 48 P.3d at 669. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. *Urrutia v. Blaine County, ex rel. Bd. of Comm's,* 134 Idaho 353, 357, 2 P.3d 738, 742 (2000); *Marshall,* 137 Idaho at 340, 48 P.3d at 669.

A court may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported

by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial right of that party has been prejudiced. *Price v. Payette County Bd. of County Comm'rs,* 131 Idaho 426, 429, 958 P.2d 583, 586 (1998). If the agency's decision is not affirmed on appeal, "it shall be set aside... and remanded for further proceedings as necessary." I.C. § 67-5279(3).

The constitutionality of a statute is a question of law, over which the Court exercises de novo review. In *State v Bennett,* 142 Idaho 166, 125 P.3d 522 (2005), the court explained:

> The constitutionality of a statute is a question of law, over which this Court exercises de novo review. The party challenging a statute on constitutional grounds bears the burden of establishing that the statute is unconstitutional and "must overcome a strong presumption of validity." An appellate court is obligated to seek an interpretation of a statute that will uphold its constitutionality. Additionally, "it is a general rule that 'a legislative act should be held to be constitutional until it is shown beyond a reasonable doubt that it is not so, and that a law should not be held to be void for repugnancy to the Constitution in a doubtful case.' "

Id., at 169 [citations omitted].

B. Discussion

1. Idaho Code Section 49-335 Do Not Violate Double Jeopardy Principles Because it is Civil In Nature.

BUELL argues that, under the double jeopardy analysis by the United States Supreme Court in *Hudson v. United States*, 522 U.S. 93 (1997) (hereinafter *Hudson*), Idaho Code Section 49-335, violates double jeopardy. His argument is without merit.

(1) *THE LAW*. The Fifth Amendment of the United States Constitution provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." The Double Jeopardy Clause protects against three abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple criminal punishments for the same offense. See *State v. McKeeth*, 136 Idaho 619 (2001). [1] The third of these protections is at issue in this case.

The United States Supreme Court has provided guidance in addressing issues of double jeopardy. In *Hudson*, the Court stated:

> The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." We have long recognized that the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, " 'in common parlance,' " be described as punishment. The Clause protects only against the imposition of multiple criminal punishments for the same offense and then only when such occurs in successive proceedings.
>
> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect".
>
> In making this latter determination, the factors listed in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963), provide useful guideposts, including: (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment - retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned." It is important to note, however, that "these factors must be considered in relation to

[1] The Petitioner does not contend that the Idaho Constitution affords any greater protections than the United States Constitution, therefore this analysis shall focus of the United States Constitution.

> the statute on its face," id., at 169, and "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty, Ward, supra, at 249 (internal quotation marks omitted).

Hudson, at 99-100 (citations omitted). In *Hudson*, the government had administratively imposed monetary penalties and occupational disbarment on the petitioners for violating federal banking statutes, later the government criminally indicted the petitioners for essentially the same conduct. The petitioners argued that the indictment was barred by the principles of Double Jeopardy. The Supreme Court disagreed. The Court, applying the analysis from *U.S. v Ward*, 448 U.S. 242 (1980), and rejecting the analysis applied in *U.S. v. Harper*, 490 U.S. 435 (1989), found that the criminal indictment did not violate the principals of double jeopardy. Initially, the Court held that the subject law which authorized the sanctions and disbarment was civil in nature. In discussing the other factors of the *Ward* test, the Court stated:

> Turning to the second stage of the Ward test, we find that there is little evidence, much less the clearest proof that we require, suggesting that either OCC money penalties or debarment sanctions are "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." Ursery, supra, at 290. First, neither money penalties nor debarment has historically been viewed as punishment. We have long recognized that "revocation of a privilege voluntarily granted," such as a debarment, "is characteristically free of the punitive criminal element." Helvering, 303 U.S., at 399, and n. 2. Similarly, "the payment of fixed or variable sums of money [is a] sanction which ha[s] been recognized as enforcible by civil proceedings since the original revenue law of 1789." Id., at 400.
>
> Second, the sanctions imposed do not involve an "affirmative disability or restraint," as that term is normally understood. While petitioners have been prohibited from further participating in the banking industry, this is "certainly nothing approaching the 'infamous punishment' of imprisonment." Third, neither sanction comes into play "only" on a finding of scienter. The provisions under which the money penalties were imposed, 12 U.S.C. §§ 93(b) and 504, allow for the assessment of a penalty against any person "who violates" any of the underlying banking statutes, without regard to the violator's state of mind. "Good

> faith" is considered by OCC in determining the amount of the penalty to be imposed, § 93(b)(2), but a penalty can be imposed even in the absence of bad faith. The fact that petitioners' "good faith" was considered in determining the amount of the penalty to be imposed in this case is irrelevant, as we look only to "the statute on its face" to determine whether a penalty is criminal in nature. Kennedy, 372 U.S., at 169. Similarly, while debarment may be imposed for a "willful" disregard "for the safety or soundness of [an] insured depository institution," willfulness is not a prerequisite to debarment; it is sufficient that the disregard for the safety and soundness of the institution was "continuing." § 1818(e)(1)(C)(ii).
>
> Fourth, the conduct for which OCC sanctions are imposed may also be criminal (and in this case formed the basis for petitioners' indictments). This fact is insufficient to render the money penalties and debarment sanctions criminally punitive, particularly in the double jeopardy context.
>
> Finally, we recognize that the imposition of both money penalties and debarment sanctions will deter others from emulating petitioners' conduct, a traditional goal of criminal punishment. But the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence "may serve civil as well as criminal goals." Ursery, supra, at 292; see also Bennis v. Michigan, 516 U.S. 442, 452 (1996) ("[F]orfeiture . . . serves a deterrent purpose distinct from any punitive purpose"). For example, the sanctions at issue here, while intended to deter future wrongdoing, also serve to promote the stability of the banking industry. To hold that the mere presence of a deterrent purpose renders such sanctions "criminal" for double jeopardy purposes would severely undermine the Government's ability to engage in effective regulation of institutions such as banks.

Hudson at 104-105 (citations omitted).

Two Idaho cases have discussed the analysis provided the U.S. Supreme Court in *Hudson*. In *State v. Gragg*, 143 Idaho 74, 137 P.3d 461 (Ct.App. 2005), the defendant was a convicted sex offender in 1989. In 1993, the Idaho legislature passed the Sexual Offender Registration Act. In 2003, after his release from prison, the defendant was charged with failing to register under the Act. Gragg moved to dismiss the charge on the grounds it constituted a retroactive punishment forbidden by the Ex Post Facto Clause of the United States and Idaho Constitutions.

Gragg argued that the effects of the Act were so punitive that it negated the Idaho Legislature's attempt to create a civil scheme. The Idaho Court of Appeals began its analysis by citing the factors most relevant to the analysis are whether the regulatory scheme in its necessary operation: has been regarded in our history and traditions as a punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to its purpose. See *Smith v. Doe*, 538 U.S. 84 (2003).

As to the punishment factor, Gragg argued that registering as a sex offender was humiliating and dissemination of the information created a state mandated "scarlet letter." The Idaho Court rejected this argument stating "widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation."

Gragg also argued that the Act was punitive in that dissemination of the information rendered him unable to get a job. Citing a case from Alaska, the Court was not persuaded and stated that "any negative impact on the sex offender is not the result of registration, be instead flows from the conviction itself."

Finally, Gragg argued that the imposition of a fee constituted a penalty. The Court disagreed and held that had failed to show that the effects of the sex offender registration were so punitive as to override the legislative intent to create a civil, regulatory scheme.

In *State v. McKeeth*, 136 Idaho 619, 38 P.3d 1275 (Ct. App. 2002), a professional counselor appealed his conviction for sexual exploitation by a medical provider. Prior to his trial, he had stipulated to a Consent Order by the Idaho State Counselor Licensing Board, where he was suspended from his practice and agreed to pay certain fines and

costs. He argued in part that the subsequent criminal charges violated double jeopardy. Applying the factors in *Hudson*, the Court of Appeals disagreed. After determining that the fines were civil in nature, the Court's analysis follows:

> Nevertheless, we must also inquire whether the statutory scheme governing the fine imposed upon McKeeth was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. First, the fine imposed by the ISCLB does not involve "an affirmative disability or restraint" as that term is normally understood. See Hudson, 522 U.S. at 104, 118 S.Ct. at 496, 139 L.Ed.2d at 462. Second, money penalties have not historically been viewed as punishment. Hudson, 522 U.S. at 104, 118 S.Ct. at 495, 139 L.Ed.2d at 462. The "payment of fixed or variable sums of money [is a] sanction[ ] which has been recognized as enforceable by civil proceedings since the original revenue law of 1789." Helvering v. Mitchell, 303 U.S. 391, 400, 58 S.Ct. 630, 633, 82 L.Ed. 917, 922 (1938); see also Hudson, 522 U.S. at 104, 118 S.Ct. at 496, 139 L.Ed.2d at 462.
>
> Third, the stipulation provided that McKeeth had violated certain provisions of the American Counseling Association (ACA) Code of Ethics, which had been adopted by the ISCLB. See IDAPA 24.15.01.360. Provision A.7.a of the ACA Code of Ethics provides that counselors "do not have any type of sexual intimacies with clients." Provision C.5.e provides that counselors "do not use their professional positions to seek ... sexual favors." These provisions prohibit conduct without regard to whether the perpetrator had knowledge of guilt. Thus, the fine imposed upon McKeeth does not come into play only on a finding of scienter.
>
> Fourth, we note that the conduct sanctioned in the instant case by the ISCLB is also criminalized by I.C. ss 18-919 and 54-3408. However, this is insufficient to transform the minor fine imposed upon McKeeth into a criminal punishment. See Hudson, 522 U.S. at 105, 118 S.Ct. at 496, 139 L.Ed.2d at 463. By itself, the fact that a statute has some connection to a criminal violation is far from the clearest proof necessary to show that a proceeding is criminal. Hudson, 522 U.S. at 105, 118 S.Ct. at 496, 139 L.Ed.2d at 463; Berglund, 129 Idaho at 757, 932 P.2d at 880.
>
> Fifth, we recognize that the imposition of monetary penalties will have a deterrent effect, which is a traditional goal of criminal punishment. However, the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals. Hudson, 522 U.S. at 105, 118 S.Ct. at 496, 139 L.Ed.2d at 463. Although the fines imposed by the ISCLB may be intended to deter future wrongdoing, the fines are deposited directly into the bureau of occupational licensing account in order to fund the ISCLB in its efforts to promote the integrity of the counseling profession as a whole. See I.C. ss 54-

> 3400; 54-3404; 67-2609(7). To hold that the presence of a deterrent purpose renders such sanctions criminal for double jeopardy purposes would severely undermine the state's ability to engage in effective regulation of the practice of counseling. See 58 I.C. s 54-3400 (Regulation and control of the practice of counseling is in the public interest.). Lastly, we cannot say that a maximum fine of $1,000 per violation of I.C. s 54-3407 is excessive in relation to the civil purposes underlying the fine. (fn4)
>
> Based upon the factors discussed above, McKeeth has failed to show by clearest proof that the fine imposed by the ISCLB was sufficiently punitive to override the legislative intent that the fine constituted a civil remedy. We hold, therefore, that the imposition of the $3000 fine upon McKeeth was not a criminal punishment. Consequently, McKeeth's subsequent criminal prosecution did not violate the Double Jeopardy Clause of the federal constitution.

McKeeth, at 620.

(2) APPLICATION OF THE LAW TO THIS CASE.

Here, BUELL argues that four of the factors discussed above are present in this case which results in a statute, Idaho Code § 49-335, which is sufficiently punitive to override the legislative intent that the suspension constitutes a civil remedy. The four factors cited by the BUELL are: (a) whether a driver's license suspension have been historically regarded as punishment; (b) whether the operation of a driver's license suspension promotes the tradition aims of punishment; (c) whether the behavior to which the driver's license suspension applies is already a crime; and (d) whether an alternative purpose to which it may rationally be connected is assignable for it and whether it appears excessive in relation to the alternative purpose assigned.

(a) FACTOR: The Suspension of a Driver's License Have Not Been Traditionally regarded as a Penalty.

BUELL argues that an Idaho driver's license is a right, not a privilege, and as such, taking of a driver's license is subject to due process restraints and "has a punitive

criminal element." Petitioner's Brief, page 12. BUELL argues the Idaho Supreme Court in *State v. Ankney,* 109 Idaho 1, 704 P.2d 333 (1985), recognized that a driver's license is a valuable property right and therefore cannot be taken away without being subject to due process constraints. *Id.* Then BUELL argues "because Idaho recognizes a driver's license as a right under Hudson, the suspension of a driver's license has a punitive criminal element." *Id, at 13* . BUELL also argues, apart from the suspension of a driver's license suspensions pursuant to Idaho Code §49-335, a driver's license suspension has long been a criminal punishment for driving under the influence of alcohol and/or drugs, driving without privileges, vehicular homicide, and minors being in possession of alcohol. *Id., p. 14.* BUELL's arguments are without merit.

BUELL's reliance on *Ankney* rests upon language in the concurring opinion of Justice Shepard. The majority opinion in *Ankney* recognizes that driver's license suspensions involve state action and adjudicate important interests of licensees, thus licenses may not be taken without due process. *State v. Ankney*, 109 Idaho 1, 3, 704 P.2d 333, 336. The majority of the court stated:

> Although an individual does have a substantial right in his driver's license, the state's interest in preventing intoxicated persons from driving far outweighs the individual's interest, particularly when the individual is entitled to the prompt post-seizure hearing mandated by I.C. § 49-352(2)(c).[2]

Id., at 5, 704 P.2d 333, 337. In his concurring opinion, Justice Shepard refers to a driver's license as a valuable property right, but only in the context of United States Supreme Court decision supporting the validity of a statute which would permit police officers to immediately size a driver's license upon arrest. There is no support in *Ankney* for

[2] I.C. § 49-352(2)(c) was repealed in 1984.

BUELL's contention that (1) Idaho recognizes a driver's license as a right, or (2) that suspension of a license has a punitive element.

Contrary to BUELL position, license suspensions have not traditionally been viewed as a punishment. Suspension of a CDL is similar to the disbarment action at issue in the *Hudson* case since both affect future employment opportunities. In *Hudson* the Court stated:

> First, neither money penalties nor debarment has historically been viewed as punishment. We have long recognized that "revocation of a privilege voluntarily granted," such as a debarment, "is characteristically free of the punitive criminal element."

Hudson, at 104. Similarly, disqualification of a CDL is the revocation of a privilege which was voluntarily granted and is therefore free of a punitive criminal element.

Further, in *Wheeler v. Idaho Dept. of Health and Welfare,* 147 Idaho 257, 207 P.3d 988 (2009), the Court stated:

> Although we have held the power to operate a motor vehicle upon the public streets and highways is a right or liberty that is afforded constitutional protections, we have never specifically recognized that a driver's license is a " property interest" in Idaho.

Id., at 263, 207 P.3d 988, 994 (upholding driver's license suspension under Family Law License Suspensions Act (FLLSA) for nonpayment of child support). Therefore, there is no authority to demonstrate that a punitive criminal element is at the basis of a driver's license suspension, either currently or historically.

(b) *FACTOR: The Suspension of a Driver's License Will Promote Traditional Aims of Punishment.* BUELL argues that "it is clear that a driver's license suspension

promotes retribution and deterrence." Petitioner's Brief, page 15. This argument also lacks merit.

Here, the conduct for which the license suspension was imposed (failure of an evidentiary test) was also criminal and formed the basis of a criminal DUI charge, however, that fact is not sufficient to render the license suspension criminally punitive. Again, *Hudson* is instructive. In *Hudson*, the Court stated:

> Fourth, the conduct for which OCC sanctions are imposed may also be criminal (and in this case formed the basis for petitioners' indictments). This fact is insufficient to render the money penalties and debarment sanctions criminally punitive, *Ursery*, 518 U.S., at 292, particularly in the double jeopardy context, see *United States v. Dixon*, 509 U.S. 688, 704 (1993) (rejecting "same-conduct" test for double jeopardy purposes).

Hudson, at 105. Further, in *Talvera,* the court held that the remedial purpose of Idaho Code §18-8002A (quickly revoking driving privileges from those who show themselves to be safety hazards by driving over the limit BAC) was not outweighed by the deterrent purpose of the same sanction. The court stated:

> Like the administrative license suspension statute at issue in Savard, the stated purpose of section 18-8002A is to "provide maximum safety." Id. This objective is accomplished by expediting the removal of drivers who fail the BAC evidentiary test from the public roads, thus avoiding the often time-consuming delays inherent in criminal prosecutions. Id. The remedial purpose of the suspension is apparent and very directly addresses the problems of removing drivers from the road who should not be driving. Further, a 90-day suspension with the possibility of a restricted permit being issued after 30 days is not disproportionate to the statute's legitimate remedial goal of expeditious protection of the public from drunk drivers. The prosecution for driving under the influence is not barred under the double jeopardy provision of the Fifth Amendment to the United States Constitution.

Id., at 705, 905 P.2d 633, 638. Therefore, the mere fact that BUELL's conduct led to criminal charges does not mean that a civil license suspension amounts to a criminal penalty.

(c) *FACTOR: Whether the Behavior to which the Sanction applies is already a Crime*. BUELL argues that the conduct sanctioned by the license suspension (the DUI) was also criminalized by Idaho Code Section 49-335. However, this is insufficient to transform the license suspension imposed upon BUELL by ITD into a criminal punishment. In *McKeeth*, the Idaho Court discussed this factor and stated:

> Fourth, we note that the conduct sanctioned in the instant case by the ISCLB is also criminalized by I.C. ss 18-919 and 54-3408. However, this is insufficient to transform the minor fine imposed upon McKeeth into a criminal punishment. See Hudson, 522 U.S. at 105, 118 S.Ct. at 496, 139 L.Ed.2d at 463. By itself, the fact that a statute has some connection to a criminal violation is far from the clearest proof necessary to show that a proceeding is criminal. Hudson, 522 U.S. at 105, 118 S.Ct. at 496, 139 L.Ed.2d at 463; Berglund, 129 Idaho at 757, 932 P.2d at 880.

McKeeth at 622. The Court in *Hudson* also discussed this factor and stated:

> Finally, we recognize that the imposition of both money penalties and debarment sanctions will deter others from emulating petitioners' conduct, a traditional goal of criminal punishment. But the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence "may serve civil as well as criminal goals." Ursery, supra, at 292; see also Bennis v. Michigan, 516 U.S. 442, 452 (1996) ("[F]orfeiture . . . serves a deterrent purpose distinct from any punitive purpose"). For example, the sanctions at issue here, while intended to deter future wrongdoing, also serve to promote the stability of the banking industry. To hold that the mere presence of a deterrent purpose renders such sanctions "criminal" for double jeopardy purposes would severely undermine the Government's ability to engage in effective regulation of institutions such as banks.

Hudson, at 105. Likewise, the license suspension in this case will serve to deter future wrongdoing but it will also serve to ensure that the roads and highways in Idaho are protected from unsafe drivers.

(d) *Whether an alternative purpose to which it may rationally be connected is assignable for it and whether it appears excessive in relation to the alternative purpose assigned.* BUELL combines the final two factors in the *Hudson* analysis and argues (1) the analysis

used by the *Talavera* Court improperly used the truncated Harper analysis and (2) in evaluating the sanctions in Idaho Code §49-335, "we must look at all potential suspensions provided for in the statute and all the possible circumstances under which they could be imposed." Petitioner's Brief, pages 17-18. BUELL's argument is without merit.

In essence, the criminal statute is retrospective, punishing for that which has already been done (driving under the influence), where the civil statute, while addressing the same behavior is prospective because it removes drivers from the road who should not be driving. The "remedial purpose of the suspension is apparent and very directly addresses the problems of removing drivers from the road who should not be driving." *Talavera*, 127 Idaho 700, 705, 905 P.2d 633, 638.

In *Talavera,* the Court noted that the fact that the sanction serves some deterrent purpose is not dispositive. The Court stated:

> Like the administrative license suspension statute at issue in *Savard,* the stated purpose of section 18-8002A is to "provide maximum safety." *Id.* This objective is accomplished by expediting the removal of drivers who fail the BAC evidentiary test from the public roads, thus avoiding the often time-consuming delays inherent in criminal prosecutions. *Id.* The remedial purpose of the suspension is apparent and very directly addresses the problems of removing drivers from the road who should not be driving. Further, a 90-day suspension with the possibility of a restricted permit being issued after 30 days is not disproportionate to the statute's legitimate remedial goal of expeditious protection of the public from drunk drivers. The prosecution for driving under the influence is not barred under the double jeopardy provision of the Fifth Amendment to the United States Constitution.

Talavera, at 705.

Finally, there is a contractual component to the license suspension statute that separates the civil suspension remedy from the criminal remedy. In discussing double jeopardy, the Court in *Talavera* stated:

> "The right of a citizen to operate a motor vehicle upon the public streets and highways, is subject to reasonable regulation by the state in the exercise of its police powers." *Adams v. City of Pocatello,* 91 Idaho 99, 101, 416 P.2d 46, 48 (1966). "When issued a license, the vehicle operator agrees to abide by certain conditions and rules of the road . . . and acknowledges that the continued use of the license to drive is dependent on compliance with the laws relating to vehicle operation." *State v. Savard,* 659 A.2d 1265, 1267-68 (Me.1995). Thus, "suspension of that privilege merely signifies the failure of the holder to comply with the agreed conditions." *Id.* at 1268. Obviously one of the agreed conditions of the driving privileges is that the driver shall not operate a motor vehicle while under the influence of alcohol.

Here, the remedial purpose of Idaho Code § 49-355 is to remove unsafe drivers from the road. Therefore, a license suspension is not disproportionate to the statute's legitimate goal of protecting the public from unsafe drivers.

(3) CONCLUSION: Petitioner's argument that Idaho Code § 49-335 violate the principle of double jeopardy lacks merit. As demonstrated above, revocation of a privilege voluntarily granted, such as a regular or commercial driver's license, is characteristically free of a punitive criminal element. Courts have long recognized primarily remedial sanction may serve some deterrent purposes without crossing the line to punishment for double jeopardy.

In sum, there is very little showing, to say nothing of the "clearest proof" as required by *Ward* and *Hudson,* that the license suspension is criminal. Therefore, the subsequent license suspension does not violate the Double Jeopardy clause.

2. The Commercial Driver's License Suspension Should Not Be Retroactive to November 21, 2006

BUELL argues that ITD should be estopped on due process grounds from imposing an additional disqualification against BUELL. Further, BUELL argues that he should receive a retroactive suspension of his CDL. This is not the law because the CDL suspension begins at the time of the conviction or when all appeals are exhausted.

(1) THE LAW. Idaho Code Section 49-335 provides for a mandatory suspension of CDL, and provides in pertinent part:

> (1) Any person who operates a commercial motor vehicle or who holds a class A, B or C driver's license is disqualified from operating a commercial motor vehicle for a period of not less than one (1) year if convicted in the form of a judgment or withheld judgment of a first violation under any state or federal law of:
>
> (a) Operating a motor vehicle while under the influence of alcohol or a controlled substance;

Pursuant to 49 CFR 383.51, the Federal Motion Carrier Safety Administration (FMCSA) requires that States *use the conviction date*, not the offense date, when calculating a driver disqualification period. The interpretation of 49 CFR 383.51 by FMCSA is as follows:

> *Question 7:* Must the State use the date of conviction, rather than the offense date, to calculate the starting and ending dates for the driver disqualification period specified in 49 CFR 383.51?
>
> *Guidance:* Yes, the State must use the date of conviction or a later date, rather than the offense date, as the basis for calculating the starting and ending dates for the driver disqualification period. The State may allow the driver additional time after the conviction date to appeal the conviction before the disqualification period begins. The use of the conviction date (or the date when all appeals are exhausted) ensures that the driver receives due process of law but (if the conviction is upheld) still serves the full disqualification period 49 CFR 383.51 requires. For example, a driver is cited for a disqualifying offense on May 1 and is

> convicted of the offense on July 1. If the offense date were used for the starting date of the disqualification, it would shorten the actual disqualification by 2 months. Using the conviction date or a later date when all appeals are exhausted ensures that the driver serves the full disqualification period.

Therefore, BUELL'S request that this Court back date his CDL suspension should be denied.

(2) THE NON-COMMERCIAL DRIVER'S LICENSE. Action taken against BUELL's non-commercial driver's license pursuant to Idaho Code Section 18-8002A was separate and distinct from action taken by ITD against BUELL's CDL endorsement. Here, until the Notice of Disqualification was issued on October 1, 2007, no action had been taken by ITD with respect to BUELL's CDL.

During the course of his DUI, certain actions *were taken* against BUELL's non-commercial driver's license. For example, on October 21, 2006, the night BUELL was arrested, his driver's license was seized and he was given a temporary license for thirty (30) days. *R., p. 68.* The temporary license was good for 30 days [November 21, 2006], when his driving privileges would end for one year because of his refusal to submit to alcohol testing. *R., p.68.* The refusal proceeding was dismissed on December 22, 2006 as part of a plea agreement and the court reinstated BUELL's non-commercial driving privileges. *R., p. 24.* Then when BUELL was sentenced on the DUI on July 10, 2007, he received a suspension of his non-commercial driver's license for 90 days beginning on October 21, 2006. *R., p. 35.* Pursuant to Idaho Code Section 18-8002(5), that suspension of BUELL's non-commercial driver's license was separate and apart from any other suspension. Specifically, the law states:

> (5) Any sustained civil penalty or suspension of driving privileges under this section or section 18-8002A, Idaho Code, shall be a civil penalty separate and

> apart from any other suspension imposed for a violation of other Idaho motor vehicle codes or for a conviction of an offense pursuant to this chapter, and may be appealed to the district court.

Because BUELL suffered no action against his CDL until October 1, 2007, there is simply no basis to order a retroactive suspension of his CDL.

(3) THE PLEA AGREEMENT. BUELL's beliefs about his plea agreement on his DUI and his belief about its effect on his CDL are not relevant. The hearing officer made findings of fact and conclusions of law on this issue and found that BUELL may not have made that agreement if he had been aware that ITD would disqualify him for one year. *See Findings of Fact, page 2.* However, the hearing officer concluded that:

> The driver must be held to know the laws of the State of Idaho, particularly as they apply to his commercial driving privileges. Further, the State Department of Transportation cannot be estopped by the alleged action of a prosecuting attorney. There is no estoppel against the state except in its proprietary capacity.

See, Findings of Fact, page 3. Judge Gibler agreed with the hearing officer. In making his ruling, Judge Gibler held:

> To the extent Buell argues that the Idaho Transportation Department is estopped by the State's actions in the criminal case, this argument is rejected. There is no showing that any representation was made to him by the Idaho Transportation Department or that he was misled in either the criminal case or the license suspension proceedings as to the status of his commercial license.

Tr., p.13 (Dec. 19, 2009 hearing).

BUELL also appears to argue that he believed that his CDL was suspended for nine months prior to the hearing on August 31, 2007. For the same reasons discussed above, his beliefs regarding the status of the CDL at any given time is not relevant.

(4) *NO AMBIGUITY.* Finally, BUELL argues that the relevant statutes are ambiguous and violate his right to due process. This argument is also without merit. The

test to determine if a statute is ambiguous is contained in *State v. Browning*, 123 Idaho 748, 852 P.2d 500 (Ct.App. 1993):

> A statute is ambiguous when the meaning is so doubtful or obscure that "reasonable minds might be uncertain or disagree as to its meaning." *Hickman v. Lunden,* 78 Idaho 191, 195, 300 P.2d 818, 819 (1956). "However, ambiguity is not established merely because different possible interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous. . . . [A] statute is not ambiguous merely because an astute mind can devise more than one interpretation of it." *Rim View Trout Co. v. Higginson,* 121 Idaho 819, 823, 828 P.2d 848, 852 (1992).

Id., at 749.

Here, the hearing officer specifically found that, as a conclusion of law, that "the *driver must be held to know that laws of the state of Idaho*, particularly as they apply to his commercial driving privileges". [emphasis added]. The hearing officer's conclusions of law are supported by the facts in the agency record, by the applicable law, and that his conclusions did not violate Idaho Code Section 67-5279 in any way.

Likewise, Judge Gibler was presented the argument about ambiguity relating to when his CDL suspension was to begin. In court, Judge Gibler ruled:

> I think Mr. Siebe's made some very good arguments in equity as to why the Department should have considered making it retroactive. However, when one is dealing with solely a question of statutory construction, I'm bound to follow those statutes. Buell was suspended pursuant to Idaho Code Section 49-335. His argument is that the statute is confusing because Section 1 suspends a license for one year following a conviction. And Section 2 suspends it for one year following a refusal to take a BAC.
>
> A review of the statute reflects no ambiguity. Two distinct periods of suspension are set forth in two distinct acts. While Buell may have been confused as to when the period of suspension began, his confusion does not mean the statute is ambiguous. It is not ambiguous.

Tr., p. 12-13 (Dec. 19, 2009 hearing). For the same reasons, this Court should uphold the ruling of the hearing officer and the District Court and find that BUELL's CDL suspension should not be retroactive.

V. CONCLUSION

Idaho Code Section 49-355 does not violate the Double Jeopardy Clause, nor is the statute ambiguous. Therefore the decision of the hearing officer and the District Court should be affirmed.

Dated this 15 day of Nov., 2010.

Susan K. Servick

Susan K. Servick, Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the **RESPONDENT'S BRIEF** were transmitted, November 15, 2010 by the following method, to:

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