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Wheeler v. Idaho Dept. of Health and Welfare Certificate Dckt. 34426

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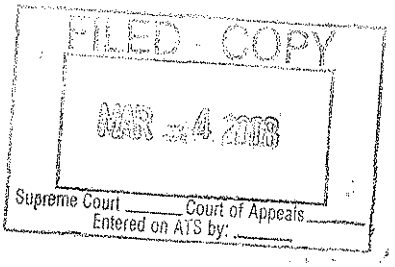

IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS N. WHEELER,

Petitioner,

vs.

IDAHO DEPARTMENT OF HEALTH AND WELFARE,

Respondent.

Supreme Court Docket No. 34426

CERTIFICATE OF COMPLIANCE
(I.A.R. 34.1)

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy on CD media, together with a copy of this certificate was served on each party at the following address(es):

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS N. WHEELER, Appellant, v. IDAHO DEPARTMENT OF HEALTH AND WELFARE, Respondent.	)	Supreme Court No: 34426

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho
In and for the County of Ada

D. Duff McKee – District Judge

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This appeal arises from the decision of the District court upholding the suspension of Petitioner-Appellant Dennis Wheeler's (hereinafter "Wheeler") Idaho motor vehicle driver's license for failure to pay court ordered child support for his three children. The District court, sitting in its appellate capacity, found that the suspension of Wheeler's driver's license was appropriate based upon the record established at the administrative level, and that the application of Idaho's Family Law License Suspension Act, Title 7, Chapter 14 IDAHO CODE (hereinafter "the Act") to Wheeler did not violate any of the constitutional protections espoused by Wheeler's private counsel. Furthermore, the District court specifically found Wheeler failed to offer any evidence to the hearing officer in support of his claim that he had good cause to prevent the suspension of his driver's license either as established by existing administrative rule or otherwise.

B. Statement of Facts.

On October 31, 1995, Magistrate Judge John F. Dutcher entered an *Order Establishing Support* pursuant to a Stipulation signed by Wheeler's then attorney requiring Wheeler to pay support for his daughter, [redacted] in the amount of One Hundred Thirty-Six Dollars ($136.00) per month. R, Exhibit 1- Agency Record on Appeal, Exhibit 15-E. As of October 27, 2007, Wheeler owed a balance of $5,063.85 on that order. R, Exhibit 1- Agency Record on Appeal, Exhibit 15-F.

On November 20, 1995, Magistrate Judge Michael Dennard entered a *Judgment and Order* requiring Wheeler to pay support for his son, [redacted] n the amount of Ninety-Eight

Dollars ($98.00) per month. R, Exhibit 1- Agency Record on Appeal, Exhibit 15-A. As of October 27, 2005, Wheeler owed a balance of $8,895.21 on that order. R, Exhibit 1- Agency Record on Appeal, Exhibit 15-B.

On October 1, 1996, Magistrate Judge James C. Morfitt entered a *Judgment and Order* requiring Wheeler to pay support for his son [redacted] in the amount of One Hundred Fifty-Three Dollars ($153.00) per month. R, Exhibit 1- Agency Record on Appeal, Exhibit 15-C. As of October 27, 2005, Wheeler owed $9,483.92 on that order. R, Exhibit 1- Agency Record on Appeal, Exhibit 15-D.

On the date of the evidentiary hearing in this matter, Wheeler's total child support balance had grown to $20,904.32 for all three cases. R, Exhibit 1- Agency Record on Appeal, Exhibit 1, p. 8 LL. 2-9. Prior to the hearing, the previous payment on Wheeler's behalf was only $25.64 received on June 30, 2005. R, Exhibit 1- Agency Record on Appeal, Exhibit 1, p. 8 LL. 4-5. As of the date of the evidentiary hearing, Wheeler had not entered into any repayment agreement or made any attempt to resolve his child support obligations and avoid the suspension of his driver's license. R, Exhibit 1- Agency Record on Appeal, Exhibit 1, p. 8 LL. 10-14.

As specifically allowed by IDAHO CODE § 7-1416, the Idaho Department of Health and Welfare (herein "Department") and the Idaho Department of Transportation have entered into a cooperative arrangement whereby the Idaho Department of Transportation requests the Department pursue license suspension proceedings in all instances involving administrative proceedings under the Act. R, Exhibit 1- Agency Record on Appeal, Exhibit 11.

C. Course of Proceedings.

On September 25, 2005, the Department instituted administrative proceedings to suspend Wheeler's driver's license by personally serving Wheeler with a "NOTICE OF INTENT TO SUSPEND YOUR LICENSE" (hereinafter "the Notice"). R, Exhibit 1 - Agency Record on Appeal, Exhibits 15-G and 15-H. In response to the Notice, Wheeler hired private counsel and requested a hearing as authorized by IDAHO CODE § 7-1409. R, Exhibit 1 - Agency Record on Appeal, Exhibit 15-I.

The requested hearing was held before the designated hearing officer, Edward C. Lockwood, on December 14, 2005. R, Exhibit 1 - Agency Record on Appeal, Exhibit 1, p. 1. At the time of the hearing, the Department presented its evidence in support of its request that Wheeler's driver's license be suspended, including the financial records for Wheeler's three child support cases showing a combined cumulative balance of $20,904.32 owed as of the date of the hearing. R, Exhibit 1 - Agency Record on Appeal, Exhibit 1, p. 8, LL. 2-9. At the conclusion of the Department's case, the hearing officer specifically offered Wheeler the opportunity to cross-examine the Department's witness or to present any evidence he may have on the matter. However, Wheeler declined to take advantage of those opportunities. R, Exhibit 1 - Agency Record on Appeal, Exhibit 1, p. 8, LL. 16-24 see also, R, pp. 24-25.

Following completion of the evidentiary hearing, the hearing officer afforded Wheeler an additional opportunity to submit a written brief to address specific legal challenges to the Act. R, Exhibit 1 - Agency Record on Appeal, Exhibit 1, p. 9, LL. 8-10. Wheeler's *Memorandum and Motion to Vacate and Dismiss Hearing Conducted in the Proposed License Suspension of the Licensee* was received by the hearing officer on January 9, 2006. The motion sets forth four

legal challenges to the application of the Act to Wheeler. R, Exhibit 1 - Agency Record on Appeal, Exhibit 1, p. 8, LL. 2-9. The arguments presented by Wheeler in that document were:

> a. That the definition of "good cause" set forth in Notice and derived from IDAPA 16.03.03.604 was too restrictive;
>
> b. That Wheeler's driver's license was exempt from suspension because it constitutes a property right;
>
> c. That the Act was void because it was claimed to be an ex post facto enactment that did not define a duration for the suspension of the license in question; and
>
> d. That the Act could only be enforced by a court and the Department did not meet the requirements of the Act because there was no documentation in the record of the Department's cooperative agreement with the Idaho Department of Transportation for the Department to handle all license suspension proceedings under the Act.

R, Exhibit 1 - Agency Record on Appeal, Exhibit 14. Wheeler chose not to submit any evidence, or offer any type of proof to support of any of the arguments set forth in his memorandum. R, Exhibit 1 - Agency Record on Appeal, Exhibit 14.

On January 30, 2005, the Department filed its *Memorandum in Opposition to Motion to Dismiss* with the hearing officer, addressing the specific arguments set forth in Wheeler's memorandum. R, Exhibit 1 - Agency Record on Appeal, Exhibit 12. In conjunction with its memorandum, the Department filed 1) an *Affidavit of Jerold W. Lee*, submitting documentation of the promulgation of IDAPA 16.03.03.604 and two District court Decisions; R, Exhibit 1 - Agency Record on Appeal, Exhibit 13; and, 2) an *Affidavit of Kristy White*, which discussed evidence of a cooperative arrangement between the Department and the Idaho Department of Transportation, in which the Idaho Department of Transportation has referred all administrative license suspension proceedings under the Act to the Department for the initiation of suspension proceedings. R, Exhibit 1 - Agency Record on Appeal, Exhibit 11.

After being granted an extension of time, Wheeler submitted his Reply Memorandum to the hearing officer on February 17, 2006. R, Exhibit 1 - Agency Record on Appeal, Exhibits 8, 9 and 10. On February 24, 2006, the hearing officer issued his *Findings of Fact, Conclusions of Law and Preliminary Decision*, which, among other things, sets forth the following:

> The hearing officer perceives no authority to invalidate the Department's rules regarding the definition of good cause, enact standards of good cause the supercede [sic] or expand on promulgated rules, or the authority to invalidate any aspect of the Act on constitutional or other grounds. Rather, administrative hearing officers must develop the facts of the particular case and apply the promulgated rules and statutes, as those rules and statutes exist, to the facts of the matter.

R, Exhibit 1 - Agency Record on Appeal, Exhibit 7, p. 7. The hearing officer's decision goes on to say:

> The Department has established that the Petitioner owes a delinquency in unpaid child support, as that term is defined in the FLLSA. The hearing officer concludes that the Petitioner presented no evidence of good cause, as that term is defined in the Department's rules, nor any evidence to support any other defense provided by Idaho Code § 7-1410.

R, Exhibit 1 - Agency Record on Appeal, Exhibit 7, p. 7.

Wheeler sought review of the hearing officer's decision. On April 5, 2006, Wheeler submitted an additional *Brief in Support of Petition for Review* to the Director of the Department, which, once again, presented the same arguments as had been previously proffered to the hearing officer. R, Exhibit 1 - Agency Record on Appeal, Exhibits 4 and 5. The Department's attorney declined the opportunity to submit additional briefing and on June 8, 2006, the Director's designee issued the *Final Decision and Order* affirming the hearing officer's preliminary decision. R, Exhibit 1 - Agency Record on Appeal, Exhibits 2 and 3.

On July 6, 2006, Wheeler filed a *Petition for Judicial Review* with the Ada County District court seeking judicial review of the Departments *Final Decision and Order* which had adopted the hearing officer's decision. R, pp. 4-9. The Petition for Judicial Review was assigned to Senior Judge D. Duff McKee. On July 18, 2006, Judge McKee issued an *Order Governing Judicial Review*, which set forth the procedure and timeframes for briefing, as well as other deadlines. R, pp. 10-12. Wheeler filed *Petitioner's Opening Brief* on January 8, 2007. R, pp. 13-21, and R, Exhibits 2, 3, and 4. Although Wheeler had requested and obtained two extensions of time to file that brief, the content the brief was actually taken verbatim from the prior two memoranda Wheeler had submitted to the hearing officer over eight months earlier. R, Exhibit 1 – Agency Record on Appeal, Exhibits 8 and 14, and R, Exhibit 2, 3, and 4. On February 8, 2007, Respondent filed its *Brief on Appeal* with the district court. R, Exhibit 5. Wheeler chose not to file a reply brief with the district court and on June 6, 2007, the matter proceeded to oral argument before Judge McKee. R, p. 41 & Tr, p.1.

At oral argument, Wheeler claimed he was not afforded an opportunity to offer evidence of good cause in the administrative proceeding, despite the fact he was offered the opportunity to present any evidence he might choose, and specifically declined that opportunity. Tr, p. 6 LL.14-18. At the close of oral argument, the district court allowed the Department to provide limited supplemental authority covering the legislative review and the history of the promulgation of IDAPA 16.03.03.604. Tr, p. 15 L. 1 through p. 17 L. 5; and R, Exhibit 6.

On June 13, 2007, the district court issued its *Memorandum Decision* affirming the Department's decision in all respects. R, pp. 22-26. In its decision the district court stated:

> The administrative rule on "good cause" to avoid suspension of a license is not significantly different from the judicial standard for

> avoidance of a civil contempt – i.e., a contempt where action to purge the contempt is exclusively within the control and discretion of the actor. The argument presented by the petitioner, that some component of willful disobedience is required, would apply to a criminal contempt – where a contempt sanction is imposed punitively – which is not applicable here. Suspension orders under the Act are not punitive, but are akin to enforcement through civil contempt orders . . .

R, p. 23.

> With respect to the constitutional requirement of due process, there is ample demonstration in the record that the petitioner was afforded layers of due process in this case, as well as layers of opportunities to be heard and to show any cognizable reason he might have to avoid application of the act. As found by the hearing officer and the Director in the Final Order, "he [Petitioner] has failed to do so. . . ." It is significant to Respondent that no evidence of the Petitioner's financial condition, status of employment, ability to pay current support, inability to pay back support, or any other indication of cause at all, let alone any element of "good cause" as enumerated by rule, was offered to the hearing officer.

R, pp. 24-25.

On July 25, 2007, Wheeler filed a *Notice of Appeal* setting forth six specific issues on appeal. R, pp. 27-33. Thereafter, this Court issued its *Order* dated July 30, 2007, requiring Wheeler to file an amended notice of appeal, as Wheeler's initial notice had failed to comply with the requirements of IDAHO APPELLATE RULE 17. On August 14, 2007, Wheeler filed his *Amended Notice of Appeal*. R, pp. 34-40.

Following the settlement of the record and after two 30-day extensions, Wheeler submitted *Appellant's Opening Brief* on February 4, 2008.

II. RESTATED ISSUES AND REQUEST FOR ATTORNEY FEES ON APPEAL

1. Whether the Department and the district court correctly found that Wheeler failed to meet his burden of proof to show good cause why his license should not be suspended as required by IDAHO CODE § 7-1410(1)(c).

2. Whether the Department and the district court correctly determined that the exclusion of licenses that constitute a "property interest" does not exclude the specifically identified license to operate a motor vehicle.

3. Whether the Act survives constitutional review where Wheeler has at every stage of the suspension proceeding been afforded the opportunity to present evidence which might be considered and has never taken advantage of those opportunities, where the Act is rationally related to the legitimate goal of improving collection of overdue child support, and where the provisions of the Act are civil and not criminal in nature.

4. Whether the Act's provisions allowing for administrative license suspension proceedings are meaningless as argued by Wheeler.

5. Whether the Department should be granted attorney fees and costs, pursuant to IDAHO CODE § 12-117 and IDAHO APPELLATE RULE 41, since Wheeler has so egregiously disregarded the Idaho Appellate Rules and has failed to support any of his arguments with any facts and little or no legal authority.

III. STANDARD OF REVIEW

The standard of appellate review over an action taken by an administrative agency is established by IDAHO CODE § 67-5279. The appellate court, "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." IDAHO CODE § 67-5279(1). *See also, Chisholm v. Idaho Dep't of Water Resources*, 142 Idaho 159, 162, 125 P.3d 515 (2005). The appellate court will, "defer to the agency's findings of fact unless those findings are clearly erroneous and unsupported by evidence in the record." *Young Electric Sign Co. v. State, ex rel., Winder*, 135 Idaho 804, 807, 25 P.3d 117 (2001). An agency's decision must be affirmed unless it (a) violates constitutional or statutory provisions; (b) exceeds the agency's statutory authority: (c) is made upon unlawful procedure; (d) is not supported by substantial

evidence in the record as a whole; or (e) is arbitrary, capricious, or an abuse of discretion. IDAHO CODE § 67-5279(3). "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." IDAHO CODE § 67-5279(3). "A strong presumption of validity favors an agency's actions." *Young Electric Sign Co.*, 135 Idaho at 807.

The party contesting the agency decision must first show how the agency "erred in a manner specified in IDAHO CODE § 67-5279(3), and then establish that a substantial right has been prejudiced." *Barron v. Idaho Dep't of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219 (2001). Even if the agency violated a provision of IDAHO CODE § 67-5279(3), the appellate court must affirm the agency decision "unless substantial rights of the appellant have been prejudiced." IDAHO CODE § 67-5279(4); and *Brett v. Eleventh St. Dockowner's Ass'n, Inc.*, 141 Idaho 517, 521, 112 P.3d 805 (2005).

The Idaho Supreme Court reviews an agency decision independent of the district court decision. *Employers Resource Management Co. v. Department of Ins.*, 143 Idaho 179, 182, 141 P.3d 1048 (2006). However, the Court can give "*serious consideration* to the district court's decision." *Bonner Gen. Hosp. v. Bonner County*, 133 Idaho 7, 9, 981 P.2d 242 (1999) (emphasis added).

IV. ARGUMENT

A. Both The Department And The District Court Correctly Found That Wheeler Failed to Establish Good Cause Why His Driver's License Should Not be Suspended Under The Act.

The specific statutory language of the Act, governing the issuance of an order suspending a license states:

> The court, licensing authority or department shall issue an order suspending a license unless:

> (a) After notice and hearing, the licensee is found to have paid the delinquency and the current month's support in full, or complied with the subpoena;
>
> (b) The department or obligee files a certification that the obligor has paid current support and has entered into a reasonable schedule for repayment of any child support delinquency; or
>
> (c) At a hearing, the licensee shows other good cause why the request for license suspension should be denied or stayed.

IDAHO CODE § 7-1410(1). Under that section, it is clear that the burden of proof is on the licensee if he or she wishes to show "good cause" as to why his or her license should not be suspended.

Wheeler's principal argument is that the suspension of his driver's license under the Act is tantamount to a criminal contempt proceeding under Title 7, Chapter 6, IDAHO CODE. As a result, Wheeler is attempting to rely on caselaw that deals with the requirements of criminal contempt proceedings to stand for the proposition that an element of willfulness or deliberate disregard must be shown by the Department. This argument completely disregards the plain language of the Act.

1. The Department's interpretation of the Act as established in IDAPA 16.03.03.604 should be afforded considerable weight.

In implementing the provisions of the Act, the Department sought to provide a concrete basis for the consideration of claims for good cause which would arise in the handling of administrative license suspension proceedings as specifically authorized under IDAHO CODE § 7-1407. To that end, the Department promulgated an administrative rule setting forth a test for good cause in license suspension proceedings. The resulting administrative rule is set forth at

IDAPA 16.03.03.604, and was specifically quoted in the hearing officer's decision. R, Exhibit 1 – Agency Record on Appeal Exhibit 7, pp. 4-5.

Though they are subordinate to statutory enactments, properly promulgated administrative rules are afforded the force and effect of law. *Mead v. Arnell*, 117 Idaho 660, 664, 791 P.2d 410 (1990). The rule governing good cause was initially issued as a temporary rule that became effective July 1, 1997. *Idaho Administrative Bulletin*, Volume No. 97-8, pp. 53-63. It was later published as a pending rule in January 1998, and was reviewed by the legislature and adopted by Senate Concurrent Resolution 133 during the 1998 Session of the Idaho Legislature. *Idaho Administrative Bulletin*, Volume No. 98-5, pp. 13-15. Wheeler has never challenged either the promulgation or the legislative approval of the rule in question.

In *Mason v. Donnelly Club*, 135 Idaho 581, 21 P.3d 903 (2001), this Court evaluated whether a Department of Labor rule was reasonably related to the legislation it was being promulgated to carry out. In conducting its analysis, the *Mason* Court utilized the test for deference, which has been termed the *Simplot* test after *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991). Under the *Simplot* test, an agency's interpretation of a statute is given varying levels of deference (from mere persuasive force to considerable weight) based on a four-part analysis. 120 Idaho at 862-63.

First, the Court looks at whether the agency in question has been entrusted with the responsibility of administering the statute being interpreted. The provisions of the Act are replete with charges to the Department to initiate, administer, and process license suspension proceedings under the Act. Clearly, the first prong of the *Simplot* test is present here.

Second, the Court will look at whether the agency's interpretation of the statute in question is reasonable. This Court has previously held, "An agency's interpretation is reasonable if it is not 'so obscure and doubtful that it is entitled to no weight or consideration.'" *Canty v. Idaho State Tax Comm'n*, 138 Idaho 178, 183, 59 P.2d 983 (2002) (internal citations omitted). In the case at bar, IDAPA 16.03.03.604 is neither obscure nor doubtful, but rather attempts to establish a reasonable balance between allowing for instances when the ability to pay is truly outside of the obligors' hands, and requiring obligors to proactively find ways to either pay their obligations or seek court modification of those obligations if they are experiencing a true economic downturn.

Third, the Court looks to whether the statutory language expressly addresses the issue, which the agency is seeking to interpret. As acknowledge by Wheeler, the Act does not have a statutory definition for the term "good cause." As such, the statute is silent on the issue, and the Department was within its authority in establishing a definition.

Finally, the Court will look to the rationales that underlie the concept of deference. "If one or more of the rationales underlying the rule are present and no "cogent reason" exists for denying the agency some deference, the court should afford "considerable weight" to the agency's statutory interpretation." *Simplot*, 120 Idaho at 862. In this case, the Court has evidence of legislative acquiescence in light of the fact that the rule in question was properly approved by the legislature in accordance with title 67, chapter 52, IDAHO CODE, as evidenced by the adoption of the Senate concurrent resolution making the rule final. The rule also presents a practical interpretation of the term "good cause" so that it can be implemented through the administrative process in a uniform and concrete manner. Additionally, the Department as the

child support enforcement arm of the State has significant expertise in the field of both child support collection and the social and economic hardships that the children of Idaho face when they are denied their necessary financial support.

For the foregoing reasons, the Department's interpretation of the term "good cause" as utilized in the Act meets the first three of the *Simplot* criteria. Furthermore, three of the five rationales underlying the concept of deference weigh in favor of the Department interpretation as set forth in IDAPA 16.03.03.604. As such, the Department's interpretation is entitled to great weight and this Court should uphold the rule as it did in *Mason*, 135 Idaho at 583-85.

2. The definition of "good cause" found in IDAPA 16.03.03.604 does not contradict any clear judicial definition of that term in Idaho.

Wheeler's unsupported proclamations to the contrary, it does not appear that any Idaho appellate decision has ever established a judicial definition of "good cause," which could apply in the context of the Act. In fact, even in criminal contempt, the area of jurisprudence on which Wheeler attempts to rely, has never been tied to an analysis of "good cause" in any Idaho appellate case.

The only Idaho case the Department has been able to identify that potentially links the term "good cause" with a contempt proceeding is *Butler v. Goff*, 130 Idaho 905, 950 P.2d 1244 (1997). In that decision, the Court states, "Based on this, Judge Goff determined that Butler had not established good cause for his failure to appear, found Butler in contempt, and fined him forty dollars." 130 Idaho at 907. Nowhere else in the decision is the term "good cause" discussed. Although the case does go on to discuss "willfulness," that discussion is very closely tied to the facts of the case with the only affirmative statement on the issue being, "We agree

with the California courts that an indifferent disregard of a duty is a proper standard for determining willfulness when an attorney fails to appear in court, and that the burden of producing exculpatory facts rests on the attorney." 130 Idaho at 909.

There is nothing in *Butler* that would indicate that the Court was adopting a universal rule equating "good cause" with willfulness and deliberate disregard in the manner that Wheeler is urging. The California cases, to which Wheeler cites, deal with the exact same factual pattern (attorneys who are found in contempt for missing court appearances) and bear no rational relationship to the analysis of the Act.

Furthermore, the analysis that Wheeler is urging completely ignores the plain language of the Act. Had the Legislature intended to require a showing of willfulness or either deliberate or indifferent disregard, as Wheeler urges, it could easily have written that language into the statute. Instead, the legislature, in no uncertain terms, stated that the licensee was required to show good cause, and then a year later, approved IDAPA 16.03.03.604, which clearly defined that term.

In essence, Wheeler is arguing that the hearing officer, the Department, and the District court should all have ignored a duly promulgated rule that directly addressed the subject matter being considered, and instead, applied an analysis used to evaluate whether an attorney should be held in contempt for failing to appear for the call of the Court. This analysis is tortured at best and is utterly without legal basis in any Idaho appellate opinion.

3. Wheeler failed to preserve any factual record on which this Court could evaluate any alleged "good cause" excluding his driver's license from suspension under Act.

Idaho case law has long held that in appellate proceedings that it is the responsibility of the appellant to establish and ensure that the record on appeal contains all items necessary to

establish the appellant's right to the relief sought through the appeal. *Van Velson Corp. v. Westwood Mall Ass'n*, 126 Idaho 401, 406, 884 P.2d 414 (1994). This position correlates with one of the most important maxims of judicial review that an appellate court will not consider issues presented for the first time on appeal. *See, Viveros v. State Dep't of Health and Welfare,* 126 Idaho 714, 716, 889 P.2d 1104 (1995).

In the instant case, Wheeler has failed at every stage to offer a single fact into evidence. At the evidentiary hearing held in this matter, Wheeler was offered the opportunity to cross-examine the Department's only witness and chose not to do so. Thereafter, Wheeler was specifically given the opportunity to offer any evidence he might have. Again, Wheeler made the conscious decision to refrain from presenting any evidence, either for consideration or as an offer of proof that could later be considered on appeal.

As a result, the record in this case is completely devoid of any facts on which this Court can evaluate the arguments presented by Wheeler. Without some factual framework on which to analyze Wheeler's arguments, this appeal seeks nothing more than an advisory opinion.

It was Wheeler's obligation to insure that the record contained both the legal arguments, and the *facts* to support a showing of error on appeal. In that, he completely failed to establish any facts whatsoever, he has failed in that obligation. At this point, Wheeler's arguments about potential good cause are akin to the arguments presented only during closing argument by the attorney in *Viveros* 126 Idaho at 716. This Court should not consider any alleged challenge that Wheeler could have shown "good cause" under some other analysis since Wheeler has absolutely failed to offer any facts to support such a claim.

B. Both The Department and The District Court Correctly Found That The Act Specifically Authorizes The Suspension of a License to Operate a Motor Vehicle.

Wheeler also argues that the license to operate a motor vehicle is not one of the types of licenses that can be suspended under the Act. Wheeler bases this argument on the definition of "license" set forth in the Act which states:

> "License" means a license, certificate, permit or other authorization that:
>
> (a) Is issued by a licensing authority pursuant to any provision of Idaho Code;
>
> (b) Is subject to suspension, withdrawal, revocation, forfeiture, termination, or an action equivalent to any of these, by the issuing licensing authority; and
>
> (c) A person must obtain to practice or engage in any business, occupation or profession, operate a motor vehicle, carry a concealed weapon, or engage in any recreational activity, including hunting or fishing, for which a license or permit is required; and
>
> (d) Does not constitute a property interest.

IDAHO CODE § 7-1402(5). Specifically, Wheeler asserts that a driver's license is a "property interest" and thus, is excluded from suspension by subsection (d) set forth above. In coming to this conclusion, Wheeler relies on this Court's decision in *Adams v. City of Pocatello*, 91 Idaho 99, 416 P.2d 46 (1966). Wheeler's reliance on *Adams* for this proposition is misplaced.

As an initial matter, nowhere in *Adams* did this Court declare a driver's license to constitute a "property right." The specific finding in *Adams* was, "The right to operate a motor vehicle upon the public streets and highways is not a mere privilege. It is a right or liberty, the enjoyment of which is protected by the guarantees of the federal and state constitutions." 91 Idaho at 101. Wheeler is taking that language and making a two-step transformation. First, he is taking the statement above and changing the language, "right or liberty" to "property right."

Then, he is taking the constitutional term, "property right" and equating that with the statutory term, "property interest." This is a two-step quantum leap of logic, and a tortured construction of the statutory language. It is only this twisted analysis which creates any ambiguity in the language of § 7-1402(5).

In interpreting a statute. the Court must strive to give force and effect to the legislature's intent in passing the statute. *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 336, 870 P.2d 1292 (1994). If a statute is unambiguous, the Court has no call to engage in statutory construction, and simply gives the language its plain and ordinary meaning. *Sweeny v. Otter*, 119 Idaho 135, 138, 804 P.2d 308 (1990). When reviewing a statute, the Court, "must construe a statute as a whole, and consider all sections of applicable statutes together to determine the intent of the legislature." *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho at 336 (internal citations omitted). "The Supreme Court will not construe a statute in a way which makes mere surplusage of provisions included therein." *Sweitzer v. Dean*, 118 Idaho 568, 572, 798 P.2d 27 (1990).

The Department believes that the Act unambiguously specifies that the license to operate a motor vehicle is a license subject to suspension. However, any foray into statutory construction only serves to stress further the intent of the legislature that driver's licenses should be subject to suspension under the terms of the Act.

The Act was enacted by the 1996 term of the Idaho Legislature and became effective January 1, 1997. 1996 IDAHO SESS. LAWS 429. The Act is comprised of the 17 sections of Title 7, Chapter 14, IDAHO CODE. A significant impetus for the enactment of the Act was to bring Idaho into compliance with 42 U.S.C. § 666(a) (16), which required Idaho and the other states to enact laws providing the authority to withhold or suspend certain licenses, specifically including

driver's licenses, if the States wished to receive their share of the federal block grant under the Temporary Assistance to Needy Families Program (TANF).

The Act, as passed by the Idaho Legislature, includes a specific statement of legislative intent.

> The legislature of the state of Idaho finds that the remedy of suspension of a wide variety of licenses is needed to increase the effectiveness of enforcement of child support orders, compliance with subpoenas in paternity and child support cases, and compliance with orders for visitation with minor children. *The legislature intends that there be no exceptions to the licenses, as defined in this chapter, that are the subject of suspension, in order to promote the well-being of Idaho's children.*

IDAHO CODE § 7-1401 (emphasis added). In addition, there was a Statement of Purpose which accompanied the Act when it was proposed to the Idaho Legislature which stated, "The purpose of this legislation is to create a mechanism to suspend business, occupational, *motor vehicle* and recreational licenses, certificates or permits for failing to comply with child support orders . . ." See, Addendum A (Statement of Purpose for RS 05473) (emphasis added).

In evaluating the legislative intent in the passage of the Act, the clearest evidence available to the Court is the language of the enacted Statement of Legislative Intent found in § 7-1401. That Statement of Legislative Intent corresponds with the language of the Statement of Purpose, which accompanied the legislation when presented to the legislature for consideration. Neither of those statements supports the interpretation that Wheeler is urging the Court to adopt.

Further enlightenment into the intent of the Legislature can be gleaned from looking at the circumstances surrounding the proposal of the amendment by the Idaho House of Representatives, which added the subsection Wheeler is attempting to rely upon. See,

Addendum B (House Amendment to Senate Bill No. 1304). Subsection (d) of § 7-1402(5) was added by a House Amendment developed while the Act was being considered by the House Judiciary, Rules and Administration Committee. *See*, Addendum C (Minutes – House Judiciary, Rules & Administration Committee – March 11, 1996 together with Committee Exhibits). It is easy to see the impetus for the House Amendment by looking at the Memorandum from Karl Dreher (then with the State of Idaho Department of Water Resources) to Jeremy Pisca (then with the Office of Governor Batt), which was attached as an exhibit to the Committee Minutes. The specific question addressed in that memorandum was concern over whether the Act could apply to licenses or permits that ran with real property such as water rights. *See*, Addendum C. If the Court considers Department of Water Resource's concern that the suspension provisions of the Act not extend to licenses, permits and certificates tied to the ownership, occupation and use of land, the meaning of the exception contained in the House amendment to § 7-1402(5) becomes clear.

The clear and unambiguous language of § 7-1402(5) (c) indicates that the license to drive a motor vehicle is a license that would be subject to suspension under the provisions of the Act. While the opportunity to operate a motor vehicle on public roads is a right in the constitutional sense, it does not necessarily follow that it is a "property interest" as that term is used in § 7-1402(5) (d). Furthermore, should this Court choose to engage in statutory construction, it becomes even clearer that the legislature intended the Act to allow for the suspension of an Idaho driver's license of an individual who owes in excess of $20,000.00 in back support for the three children he has left destitute.

C. Wheeler's Constitutional Rights of Due Process and Protection From Ex Post Facto Legislation Were at Every Stage of The Proceedings Protected By The Department.

Wheeler has alleged the provisions of the Act as supplemented by the provisions of IDAPA 16.03.03.604 violate his due process rights under the Idaho and U.S. Constitutions. Wheeler has also argued that the suspension of his driver's license under the Act constitutes *ex post facto* legislation since the child support orders entered against him were entered prior to the enactment of the Act. These arguments completely fail when analyzed in light of the facts present in the case at bar.

When analyzing the constitutionality of a statute, this Court has stated, "When a statute's constitutionality is challenged, this Court will presume the statute is constitutional unless the party challenging the statute proves otherwise." *Luttrell v. Clearwater County Sheriff's Office*, 140 Idaho 581, 585, 97 P.3d 448 (2004). Additionally, it is well-settled that administrative rules are subject to the same principles of construction and interpretation as statutes. *Bingham Memorial Hosp. v. Idaho Dep't of Health and Welfare*, 112 Idaho 1094, 1096, 739 P.2d 393 (1987). "Accordingly, when faced with a constitutional challenge, this Court makes every presumption in favor of the constitutionality of the challenged regulation, and the burden of establishing unconstitutionality rests upon the challengers." *Rhodes v. Industrial Comm'n*, 125 Idaho 139, 142, 868 P.2d 467 (1993).

1. Wheeler has been afforded layers of procedural due process of which he repeatedly declined to avail himself.

Wheeler is correct that the suspension of his driver's license is an action that triggers the due process provisions of both the Idaho and U.S. Constitutions. However, the record reflects

that Wheeler was afforded more than sufficient procedural due process in the administrative proceeding that led to the suspension of his driver's license.

Wheeler received written notice of the proposed suspension. Wheeler has never challenged receipt of notice. The notice in question contained all of the required elements set forth in IDAHO CODE § 7-1406. That was not the case in the two cases involving notices to which Wheeler cites. Both *In re Griffith's License*, 113 Idaho 364, 744 P.2d 92 (1987) and *Matter of Beem*, 119 Idaho 289, 805 P.2d 495 (Id. Ct. App. 1991), involved factual situations in which the notice given to the individuals whose licenses were being suspended did not meet the *statutory* notice requirements under the implied consent law, which was the basis on which the trial courts had attempted to impose the suspensions in question. That is simply not the factual scenario present in the case at bar.

Following receipt of the notice, Wheeler requested a hearing to contest the suspension of his license. At that hearing, Wheeler failed to offer even a scintilla of evidence to oppose the suspension of his license. Following the evidentiary hearing, the hearing officer afforded Wheeler and the Department the opportunity to submit written briefs prior to the issuance of the hearing officer's decision. The hearing officer then issued his decision.

Following the issuance of the hearing officer's decision, Wheeler was able to take advantage of his opportunity to appeal the hearing officer's decision to the Director of the Department. Again, Wheeler was given the opportunity to provide any factual propositions or legal authority that might show why his license should not be suspended.

Wheeler also argues that due process demands a specific duration for a suspension imposed pursuant to the Act. However, Wheeler could, at any time, avoid the suspension of his

license; or, following the suspension of his license, obtain reinstatement of it by - 1) entering into an agreement to pay the full current support due and make reasonable payments toward the arrearages that have accumulated in his case, or 2) paying the full amount of the support due in his three cases, something he has never endeavored to do.

Other states have addressed similar challenges to similar license suspension statutes. In *Amunrud v. Board of Appeals*, 143 P.3d 571 (Wash. 2006), cert denied, --U.S.--, 127 S. Ct. 1844, 167 L. Ed. 2d 324 (U.S. 2007), the Washington Supreme Court upheld WASH. REV CODE § 74.20A.320 against a claim by a 20-year old taxi driver that he was not afforded the opportunity at hearing to present the reasons he felt would show his inability to pay the accumulated support against him. 143 P.3d at 575 – 576. *See also*, *Thompson v. Ellenbecker*, 935 F. Supp. 1037 (D.S.D. 1995) (upholding South Dakota license suspension statute against procedural due process, substantive due process, and equal protection claims where South Dakota demanded every obligor sign a stipulation agreeing to pay current and past support as condition of reinstatement of their license); *State of Alaska, Dep't of Revenue, Child Support Enforcement Div. v. Beans*, 965 P.2d 725 (Alaska 1998) (upholding Alaska license suspension statute that did not even draw a distinction between obligors who were unwilling to pay and those who were unable to pay); George L. Blum, J.D., Annotation, *Validity, Construction, and Application of State Statutes Providing for Revocation of Driver's License for Failure to Pay Child Support*, 30 A.L.R.6th 483 (2008).

Wheeler received the full due process afforded him under the duly enacted provisions of the Act. He received the statutory notice, was afforded a pre-suspension evidentiary hearing, has had two intermediate appeals, and has been represented by private counsel at every step of the

way. Where Wheeler has failed to present any evidence whatsoever in the administrative proceeding, despite the specific opportunity to do so, he has, to paraphrase the District court, received layers of due process.

2. *There is a rational relationship between the Act and the legitimate state interest of insuring that obligors, like Wheeler, meet their court ordered child support obligations, as well as complying with the requirements of 42 U.S.C. § 666(16).*

Wheeler also argues that the suspension of his driver's license is not rationally related to the legislative goal of increasing support collections because the loss of his license would impair his earning ability. If Wheeler intends to simply sit home once his license is suspended that might be the case. However, Wheeler fails to take into account the other provisions of the Act and the fact that the actual suspension of his license is not the Department's end goal in pursuing a license suspension.

The goal of pursuing a license suspension is to create an incentive for a child support obligor to work toward reducing and eventually eliminating his or her overdue support balance. To that end, both IDAHO CODE §§ 7-1410 and 7-1413 allow for the Department and a child support obligor to negotiate a repayment agreement covering current support and some payment towards arrears, in exchange for dismissing or vacating a license suspension action or order. The *significant* incentive of avoiding or ending a license suspension demonstrates the rational relationship between the Act and the legislative goal of reducing overdue child support obligations owed by Idaho citizens.

This very argument was addressed head on by the Washington Supreme Court in *Amunrud*.

> Here, the condition attached to Amunrud's commercial license, which he needs in order to pursue his occupation as a taxi driver, is compliance with a lawful court order of child support. It is reasonable for the legislature to believe that Washington's license suspension scheme will provide a powerful incentive to those in arrears in their child support payments to come into compliance. Moreover, the legislature has concluded that if an individual wishes to continue to receive the financial benefit that flows from possessing a professional license granted by the State, that individual must not be permitted to burden the State by shifting the financial obligation to support his or her children to the State.

143 P.3d at 578.

The license suspension provisions of the Act bear a clear rational relationship to the goal of increasing collection of past due child support. The Act is also rationally related to the additional legitimate interest of insuring compliance with the mandates of Congress set forth in 42 U.S.C. §666(16). The incentive created in obligors to avoid suspension is exactly what Congress and the Idaho Legislature intended in respectively requiring, and enacting the Act.

3. The constitutional prohibition against ex post facto laws does not preclude the application of the Act to Wheeler.

Wheeler has argued that since his actual child support orders were entered in 1995 and 1996 and the Act did not become effective until January 1, 1997, that the suspension of his driver's license is an *ex post facto* punishment. This argument mischaracterizes the *ex post facto* doctrine and is not supported by any cited legal authority.

It has long been acknowledged that the constitutional prohibition against *ex post facto* laws is limited to the context of the criminal law. Over 200 years ago, Justice Samuel Chase stated,

> The prohibition, in the letter, is not to pass any law concerning, and after the fact; but the plain and obvious meaning and intention

> of the prohibition is this; that the Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition considered in this light, is an additional bulwark in favour of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. *I do not think it was inserted to secure the citizen in his private rights, of either property, or contracts.*

Calder v. Bull, 3 U.S. 386, 390, 1 L. Ed. 648 (U.S. 1798). *See also*, *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (U.S. 1990).

The Act simply cannot be considered an *ex post facto* law as it does not invoke criminal jurisprudence. Rather it simply involves Wheeler's private right to operate a motor vehicle, a private right which, as specifically stated by Justice Chase, is not the type of right intended to be secured by the prohibition against *ex post facto* laws.

If Wheeler's intent was to argue that there is an improper retroactive application of the Act prohibited by IDAHO CODE § 73-101, his argument still fails. The Act did not create any new obligation for Wheeler; he was already required to support his children before the enactment of the Act. The Act just gave the Department a new tool to utilize in its attempts to collect the support Wheeler was already under court order to provide. Additionally, as noted in the *Final Decision and Order*, well more than Ten Thousand Dollars ($10,000) of Petitioner's arrears accrued *after* the enactment of the Act in 1997. R. Exhibit 1 – Agency Record on Appeal, Exhibit 2.

Under the Act, a delinquency is defined as support owing for at least ninety (90) days or Two Thousand Dollars ($2,000.00), whichever is less. Each of Petitioner's three (3) cases had accrued more than Two Thousand Dollars ($2,000.00) individually from July 1, 1997 until

October 27, 2005. Therefore, even if the calculation for a delinquency began on July 1, 1997, Petitioner would have been delinquent in each case at the time of initiation of the administrative procedure in October of 2005.

The Idaho Supreme Court addressed a similar argument in *Stonecipher v. Stonecipher,* 131 Idaho 731, 963 P.2d 1168 (1998). In 1988, IDAHO CODE § 5-245 was enacted, changing the statute of limitations for enforcing arrearages accrued under a child support judgment. The Court determined that child support arrears that were not already barred by the existing statute of limitations would be evaluated under the new statute. In so holding, this Court recognized that applying the new statute to the *Stonecipher* child support arrearages was consistent with promoting the public policy of enforcing a parent's obligation to provide financial support for their children and the legislative intent of the new statute. 131 Idaho at 735-36.

Wheeler has failed to meet his burden of showing either the statutory provisions of the Act or IDAPA 16.03.03.604 are constitutionally infirm. Wheeler was afforded notice and the opportunity to be heard prior to the decision being issued suspending his license, even though he failed to avail himself of any of those opportunities. The provisions of the Act are rationally related to the legislative goal of improving collection of unpaid child support. Furthermore, the Act cannot be considered an *ex post facto* law as it is entirely civil in nature, and the application of the Act to Wheeler does not even violate the prohibition against retroactive legislation set forth in IDAHO CODE § 73-101.

D. The Department Was Authorized to Pursue The Suspension of Wheeler's License Under The Act and The Cooperative Agreement it Has Developed With The Idaho Department of Transportation.

Wheeler is arguing that the Department did not have jurisdiction to pursue the suspension of his license based on a very narrow reading of IDAHO CODE § 7-1404. Section 7-1404 sets forth the jurisdictional basis for the pursuit of a license suspension under the Act. The portion applicable to this matter states, "Upon referral, or *if the licensing authority takes no action within* thirty (30) days after notification of the delinquency by the department, the department is authorized to commence a license suspension proceeding under this chapter." IDAHO CODE § 7-1404. In addition, the Department is authorized under the Act to enter into certain cooperative agreements with the various licensing authorities of the state in order to administer the Act in a cost-effective manner. IDAHO CODE § 7-1416(2).

Contrary to Wheeler's assertion, there is testimonial evidence in the record that the Department has entered into a cooperative agreement with the Idaho Department of Transportation in which the Department of Transportation has requested that the Department conduct *all* administrative license suspension proceedings under the Act. *See, Affidavit of Kristy White*, R, Exhibit 1- Agency Record on Appeal, Exhibit 11. This agreement is exactly the type of agreement envisioned by § 7-1416(2). The Department had jurisdiction pursuant to § 7-1404 to initiate the license suspension proceeding against Wheeler.

Wheeler also asserts that IDAHO CODE § 7-1405's allowance for judicial suspension proceedings precludes the administrative procedure specifically authorized by IDAHO CODE § 7-1407. This argument renders significant portions of the Act absolutely meaningless, and is without any cited authority for support.

This Court has long held that an Idaho appellate court will not consider issues presented on appeal if they are not properly supported. "When issues presented on appeal are not supported by propositions of law, citation to legal authority, or argument they will not be considered by this Court." *Huff v. Singleton*, 143 Idaho 498, 500, 148 P.3d 1244 (2006). "A party waives an issue cited on appeal if either authority or argument are lacking, not just if both are lacking." *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966 (1996). While Wheeler does present abstract argument on this proposition, there is no reference to any citation to legal authority or any generally accepted propositions of law. As such this Court should refrain from addressing this issue, as it did in *Huff* and *Zichko*.

The Department had proper jurisdiction to pursue the license suspension against Wheeler under the unambiguous authority granted by the Act. In addition, the cooperative agreement between the Department and the Idaho Department of Transportation implements the provisions of the Act in a cost-effective manner by referring all driver's license suspensions to the Department as specifically allowed by the Act. Furthermore, Wheeler's position that the Act should only be enforced judicially seeks to invalidate wholesale provisions of the Act, and is presented without any legal authority.

E. The Balance of Wheeler's Arguments Were Not Presented to Either The Department or The District Court and Should Not be Taken up For The First Time on Appeal.

Wheeler has woven several other arguments throughout his brief, which were never presented to either the Department or the District court. The most prominent of these issues which are raised for the first time on appeal is the argument that that the Act is void for vagueness.

Idaho appellate courts have repeatedly addressed the concern they have when issues are presented for the first time on appeal.

> Even though the pleadings are sufficient to raise the issue regarding the building code, we cannot conclude that the Hecks provided adequate authority to support the issue they raised. Having reviewed both parties' briefs on the motion for summary judgment, we conclude that the district court correctly held that the Hecks failed to apply cited authority to their argument. It is well established in Idaho that an appellate court is not required to review issues unless they previously have been presented to the district court for determination. Where issues arguably were raised in the pleadings, but were not supported by a factual showing or by the submission of legal argument, they were not presented for decision.

Heck v. Commissioners of Canyon County, 123 Idaho 842, 850, 853, P.2d 587 (Ct. App. 1992). These arguments, which were not adequately supported or presented to either the Department or the district court, should not be entertained by this Court for the first time on appeal.

F. This Court Should Award The Department its Attorney Fees in Appeal in Light of The Complete Lack of Any On-Point Authority or Reference to Any of The Facts of The Case in Wheeler's Brief.

The Department requests this Court award it the costs and attorney fees incurred in defending this appeal. An award of attorney fees is appropriate in this matter pursuant to IDAHO CODE § 12-117 and IDAHO APPELLATE RULE 41 and, as a result of Wheeler's extensive failures to comply with the remaining provisions of the Idaho Appellate Rules.

Section 12-117 provides that attorney fees may be awarded whenever one of the parties to a legal action is a political subdivision or administrative agency and where the court finds, "that the party against whom the judgment was rendered acted without a reasonable basis in fact or law." In essence, an award of attorney fees is appropriate where a legal proceeding has been brought or pursued in a frivolous manner.

Wheeler has failed to present any coherent argument based on the facts of his case to support the relief that he is requesting. Furthermore, Wheeler has not included any solid legal authority in support of any of his arguments but instead simply urges the Court to ignore clear and unambiguous statutory language, and draw standards from other unrelated fields of law that bear no logical relationship to the standards established in the Act. This is analogous to the situation faced by the Court in *Anson v. Les Bois Race Track, Inc.*, 130 Idaho 303, 939 P.2d 1382 (1997), in which the Court awarded attorney fees on appeal where the appellant argued issues on appeal that had not properly been presented to the trial level court. 130 Idaho at 305. *See also*, *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979).

Additionally, this Court has previously held that repeated and egregious violations of the Idaho Appellate Rules can justify an award of attorney fees on appeal under IDAHO APPELLATE RULE 41 and the provisions of IDAHO CODE § 12-121. *Sprinkler Irr. Co. v. John Deere Ins. Co.*, 139 Idaho 691, 698, 85 P.3d 667 (2004); *see also, Jensen v. Doherty*, 101 Idaho 910, 911, 623 P.2d 1287 (1981). Section 12-121 is similar to Section 12-117 in that awards of attorney fees under both sections are based upon the unreasonableness or lack of legal merit of the arguments or positions presented by the non-prevailing party.

Wheeler has repeatedly failed to follow even the most basic provisions of the Idaho Appellate Rules in an unreasonable and frivolous manner. As an initial matter Wheeler's Notice of Appeal filed in this matter did not contain the basic required specification of the transcript being requested as required by the rules. I.A.R. 17.

Then, when Appellant's Opening Brief was finally filed (after two 30-day extensions) it failed to comply with the formatting and content requirements set forth in the rules. I.A.R. 35.

Most notably, Appellant's Opening Brief does not contain a single reference to either the record or the transcript in either the Statement of the Case or the Argument which it presents. The failure to conform to the content requirements established in the Idaho Appellate Rules is wholly unreasonable and frivolous.

Wheeler has demonstrated a pattern of repeated failures to comply with the established procedures of the Idaho Appellate Rules. Wheeler's appeal asks this Court to do no more than disregard the clear and unambiguous statutory language of the Act without a reasonable basis in fact or law. As a result, this Court should grant the Department its attorney fees pursuant to IDAHO CODE § 12-117 and IDAHO APPELLATE RULE 41.

V. CONCLUSION

As set forth above, the *Final Order* of the Department affirming the hearing officer's decision should be affirmed. The administrative rule defining "good cause" for the purposes of the Act, was duly promulgated, is entitled to significant deference from this Court and does not contradict any established legislative or judicial definition of that term, which would apply to the Act. Furthermore, Wheeler has failed to preserve any factual record on which this Court could even evaluate his arguments concerning an alternative standard.

Additionally, Wheeler's proposed interpretation of the Act directly contradicts the clear and unambiguous language of the Act in an obvious attempt to create confusion while trying to make the legislation say what it was never intended to say in order to obtain his desired result. Wheeler has likewise failed to meet his burden of establishing any constitutional shortcoming within the Act.

As a final matter, the Department should be awarded its attorney fees incurred in defending this appeal due to Wheeler's absolute failure to support his arguments to ignore the provisions of the Act with either legal authority or facts. Attorney fees are further appropriate due to the total and unreasonable disregard that Wheeler and his counsel have shown the Idaho Appellate Rules, particularly in light of Mr. Smith's previous involvement in the *Sprinkler Irrigation* case.

DATED: March 4, 2008

OFFICE OF THE ATTORNEY GENERAL

M. Scott Keim

M. SCOTT KEIM

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March 2008, I caused to be served a true and correct copy of the foregoing RESPONDENT'S BRIEF by the method indicated below, and addressed to the following:

Vernon K . Smith
Attorney at Law
1900 West Main Street
Boise, ID 83702

X U.S. Mail
_____ Overnight Mail
_____ Hand Delivery
_____ Fax

Terry Hancock
Terry Hancock
Legal Secretary

STATEMENT OF PURPOSE

RS 05473 C1

The purpose of this legislation is to create a mechanism to suspend business, occupational, motor vehicle and recreational licenses, certificates or permits for failing to comply with child support orders, complying with paternity/child support subpoenas or complying with visitation orders. This proposal would allow suspension when child support is three months or $2,000 in arrears. This legislation is also to authorize implementation of the recommendation of the Governor's Welfare Reform Advisory Council.

FISCAL IMPACT

Enactment of this proposed law would result in an estimated $11,041,558 increased collections in the first year. Enactment of this legislation would cost approximately $15,000 annually for hearings.

Contact
Name: Teresa Kaiser
Agency: Department of Health and Welfare
Phone: 334-5710

51304

Addendum A

LEGISLATURE OF THE STATE OF IDAHO

Fifty-third Legislature

Second Regular Session – 1996

Moved by Sali

Seconded by Kjellander

IN THE HOUSE OF REPRESENTATIVES
HOUSE AMENDMENT TO S.B. NO. 1304

AMENDMENT TO SECTION 1

On page 2 of the printed bill, in line 10, delete "and"; in line 14, delete "." and insert: "; and

(d) Does not constitute a property interest.".

Addendum B

Minutes

HOUSE JUDICIARY, RULES & ADMINISTRATION COMMITTEE

DATE: March 11, 1996

TIME: 2:30 p.m.

PLACE: Room 406

MEMBERS: Representative Gould, Chairman; Representative Stubbs, Vice Chairman; Representatives King, Jones (9), Tippets, Sali, Kempton, McKeeth, Kjellander, Field, Hofman, Judd, Jaquet

ABSENT/ EXCUSED: None

GUESTS: Bob Aldridge, Attorney; Judy Brooks, Dept. Health & Welfare; Senator Ipsen; Senator Crow; Alan Stroud; Paul Pugmire; Chris Brewer; Representative Loertscher; Senator Sweeney; Dave Leroy, Attorney; Freeman Duncan, AG's Office

MINUTES: It was moved by Representative King, seconded by Representative Field, that the minutes of the meeting held on March 7, 1996, be approved as written. Motion carried.

SB 1337a The first item on the agenda was **SB 1337a** and the Chair said the sponsor had requested that it be held over until the meeting held on Wednesday, March 13th. There being no objection, the **SB 1337a was held for two days**.

The next item on the agenda was **SB 1526** and Bob Aldridge was recognized.

SB 1526 Mr. Aldridge said this bill would allow the court appointing a conservator for a minor to extend the time of such conservatorship to age 21 of the minor. The minor is allowed, upon reaching the age of 18, to show that said minor can adequately manage his or her own financial affairs and sets forth the factors to be considered by the court in deciding whether to shorten, modify, or terminate the conservatorship.

MOTION It was moved by Representative Sali, seconded by Representative Judd, **to send SB 1526 to the floor with a Do Pass recommendation. Motion carried.** Representative Jaquet will carry the bill on the floor.

The next item on the agenda was **SB 1534** and, in the absence of Senator Kerrick, Representative Stubbs was recognized to explain.

SB 1534 Representative Stubbs said this legislation is a validation of all rules. The bill continues the Administrative Procedures rules in full force and effect until July 1, 1997. Any rules that have been modified and amended will be continued in that form and any rules that have been rejected by concurrent resolution shall be null and void.

MOTION It was moved by Representative Stubbs, seconded by Representative King, **to send SB 1534 to the floor with a Do Pass recommendation. Motion carried.** Representative Stubbs will carry the bill on the floor.

The next item to be presented was **SB 1304** and the Chair recognized Judy Brooks,

Addendum C

Administrator, Department of Health & Welfare, to explain.

SB 1304 Ms. Brooks said the purpose of this legislation is to create a mechanism to suspend business, occupational, motor vehicle and recreational licenses, certificates or permits for failing to comply with child support orders, complying with paternity/child support subpoenas or complying with visitation orders. This proposal would allow suspension when child support is three months or $2,000 in arrears. This legislation is also to authorize implementation of the recommendation of the Governor's Welfare Reform Advisory Council. Ms. Brooks said it was not the intention of the Department of Health & Welfare to suspend a large number of licenses. The people most impacted by the legislation will be those that are self-employed. She concluded by saying this bill is a cornerstone piece of the Welfare Reform Package.

PRO After a brief question and answer session, Senator Grant Ipsen was recognized to testify. Senator Ipsen said he chaired the subcommittee on child support. He said this bill is very important as it has an effect on 7 or 8 other proposals before the Legislature. He said the Department of Health & Welfare is currently collecting only 28% of what is owed in child support. There are over 30 states that suspend drivers' licenses if child support is not paid. He said this treats all people fairly and evenly. In answer to a question regarding guarding against frivolous law suits, the Senator pointed out that would still be decided by the courts. If the courts became clogged with these cases, that problem could be resolved next year.

PRO The next person recognized to testify was Senator Crow. The Senator said he sensed some resistance from the Committee to the bill with regard to the intrusive nature of the Department of Health & Welfare. He pointed out if these people are not paying child support, then the citizens are paying it. In conclusion, the Senator asked the Committee to present all of their concerns regarding the legislation, so answers could be given.

CON The next person called on was Alan Stroud. Mr. Stroud said he was a citizen and was representing himself. He said he was fed up with regulations and bureaucracy. He said a career should not have an infringement placed upon it. The bill at hand represents hardships on the citizens.

PRO Paul Pugmire was the next person recognized. Mr. Pugmire said he is from Rexburg. He is before the Committee on his own time. He spoke with many members of the Committee about some concerns that he has with the language of the bill and how people who are trying to do the right thing would be treated. However, he felt those concerns could be dealt with at a later date. He expressed support for the concept of the bill and encouraged its passage.

CON Chris Brewer was called on. Mr. Brewer said the bill would take away a person's ability to find work if he were 3 months in arrears on child support payments. Once employment is lost, it is often difficult to find work within the 3-month period. How should one explain to a prospective employer that a license has been suspended. He concluded by saying he felt the bill was being misrepresented.

PRO Trisha Wells was recognized. She said she was appearing before the Committee on behalf of custodial parents who do not receive their child support payments. She said her ex-husband is in the real estate business and is self-employed. He has successfully circumvented the system. He is able to hide his assets and he does not pay any child support. This bill provides the recourse that is needed. In conclusion, she asked that the

legislation be passed.

PRO — Representative Loertscher was recognized. He said he served on the Governor's committee which was extremely interesting. He heard many people say they wished their ex would pay child support. Then they wouldn't have to be on welfare. He said the Department of Health & Welfare is not interested in taking licenses away. The Department will work with those required to pay child support in every way possible.

MOTION — It was moved by Representative Sali, seconded by Representative Field, **to send SB 1304 to General Orders with Committee amendments attached. Motion carried. The Chair and Representative Tippets asked to be recorded as voting No on the Motion.** Representative Sali will carry the bill on the floor.

The next item to be presented was **SB 1298** and Judy Brooks was recognized to testify.

SB 1298 — Ms. Brooks said the purpose of this legislation is to establish a requirement for parents of each minor parent to pay an amount reasonable or necessary for the support of the child born to minor parents until the minor parent is eighteen years of age. It also authorizes implementation of the recommendation of the Governor's Welfare Reform Advisory Council.

MOTION — It was moved by Representative Sali, seconded by Representative Kjellander, **to send SB 1298 to General Orders with Committee amendments attached.** Representative Sali said the amendments strike redundant language. **Motion carried. Representative Tippets asked to be recorded as voting No.** Representative King will carry the bill on the floor.

The next item on the agenda was **SB 1305** and Judy Brooks was recognized to explain.

SB 1305 — Ms. Brooks said the purpose of this legislation is to provide that aiding and abetting the nonpayment of child support is a misdemeanor on the first conviction and a felony upon subsequent convictions. It requires the individual aiding or abetting the nonpayment of child support to provide restitution to taxpayers or the custodial parent.

MOTION — It was moved by Representative Tippets, seconded by Representative Sali, **to hold SB 1305 in Committee. Motion carried.**

The next item to be presented was **SB 1438** and Judy Brooks was recognized.

SB 1438 — Ms. Brooks said this bill provides that state, county and city employees forfeit public employment if they are subject to the suspension of a license.

MOTION — It was moved by Representative Kjellander, seconded by Representative Jaquet, **to hold SB 1438 in Committee. Motion carried.**

The next item on the agenda was **SB 1520** and Senator Sweeney was recognized.

SB 1520 — Senator Sweeney said this amendment provides reciprocity for anyone holding a valid concealed weapons permit from another state. The House Amendment inserts language saying a permit issued in another state will only be considered valid if the permit is in the licensee's physical possession and it recognizes reciprocity for concealed weapons

permits. The Senator said the House Amendment should be included in the passage of the bill. He said 28 other states have this law. There is a proposal in the United States House of Representatives to recognize these permits in each state once a proper background check is done.

MOTION It was moved by Representative Stubbs, seconded by Representative Jones, **to send SB 1520 to General Orders with Committee amendments attached. Motion carried.** Representative Sali will carry the bill on the floor.

The next item to be discussed was **SB 1521** and Senator Sweeney was recognized.

SB 1521 Senator Sweeney said this legislation clarifies the transfer of a handgun for those persons who possess a license to carry a concealed weapon. They must have a permit that was issued after July 1, 1995, in order to be exempt from the instant check process.

MOTION It was moved by Representative King, seconded by Representative Jones, **to send SB 1521 to the floor with a Do Pass recommendation. Motion carried.** Representative King will carry the bill on the floor.

The last item on the agenda was **SB 1409** and Dave Leroy was called on to explain.

SB 1409 Mr. Leroy said this bill revises eight sections of the Idaho Code dealing with bail in criminal cases to eliminate archaic language and to conform the sections to current procedure.

MOTION It was moved by Representative Jones, seconded by Representative Judd, **to send SB 1409 to the floor with a Do Pass recommendation. Motion carried.** Representative Jones will carry the bill on the floor.

SB 1394 The Chair called on Freeman Duncan to explain the proposed amendments to **SB 1394** which had been sent to General Orders for amending. Mr. Freeman explained that the amendments make it clear that a prisoner may be subject to disciplinary action only if the false information or evidence was known to be false when it was given. Also, the definition of frivolous is refined. There being no objections, the amendments were sent to General Orders.

There being no further business to come before the Committee, the meeting was adjourned at 4:40 p.m.

Respectfully submitted,

Celia Gould
Representative Celia Gould, Chairman

Betty Baker
Betty Baker, Secretary

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PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

MEMORANDUM

To: Jeremy P. Pisca
Office of Governor Batt

Date: February 2, 1996

From: Karl J. Dreher

Subject: S.B. 1304 Provisions Revoking Licenses and Potential Application to Water Right Licences & Permits

I have reviewed the legislation proposed in S.B. 1304, together with the letter from Freeman Duncan of the Attorney General's Office to Senator Ipsen, regarding whether a water right permit or license issued by the Idaho Department of Water Resources could come under the definition of license in S.B. 1304. I have also had one of the Deputy Attorney Generals assigned to the Department of Water Resources, John Homan, review this matter as well.

John Homan and I concur with the assessment provided to Senator Ipsen by Freeman Duncan that a water right permit or license would not be included by the part of the definition for "license" proposed for Idaho Code § 7-1402(5)(c) in S.B. 1304. However, a water right permit or license would certainly fall within the remaining parts of the definition proposed in §§ 7-1402(5)(a) and (b), and a creative attorney might at least attempt the argument that a water right permit or license is necessary to engage in businesses such as farming, aquaculture, etc. John Homan points out that a water right license, and to a lesser extent a water right permit, constitute a type of property interest than can not be taken (revoked) without just compensation. Therefore, if a court made a determination to apply the license revoking provisions of S.B. 1304 to water right permits and licenses, it would likely be construed a regulatory taking as described under Idaho Code, title 67, chapter 80.

While such an outcome may be remote, it would seem a simple revision to S.B. 1304 to clarify that water rights and permits are excluded. Revising § 7-1402(5)(c) similar to the following may be appropriate if this legislation remains viable otherwise:

> (5) "License" means a license, certificate, permit or other authorization other than a water right license or permit that: ...

Please call me if you need further clarification.