

4-27-2009

In re Board of Psychologist Examiners' Final Order  
Case No. PSY-P4B-01-010-002 ex rel. Wright  
Appellant's Reply Brief Dckt. 35647

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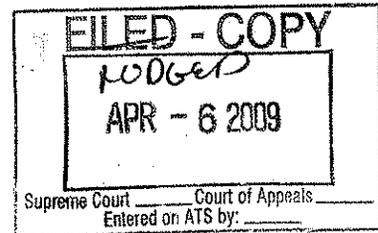
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IN THE SUPREME COURT OF THE  
STATE OF IDAHO

IN THE MATTER OF THE BOARD OF )  
PSYCHOLOGIST EXAMINERS' FINAL )  
ORDER CASE NO. PSY-P4B-01-01-002 )  
RE: DR. EILEEN WRIGHT. )

----- )  
DR. EILEEN WRIGHT, )

)  
Petitioner-Appellant, )

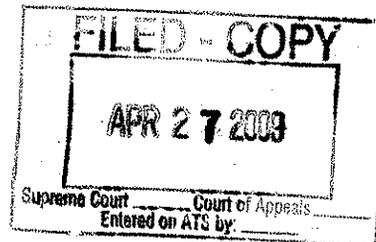
)  
v. )

)  
THE BOARD OF PSYCHOLOGICAL )  
EXAMINERS, )

)  
Respondent. )  
----- )

DOCKET NO. 35647-2008

APPELLANT'S REPLY BRIEF



APPEALED FROM THE DISTRICT COURT OF THE  
SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR NEZ PERCE COUNTY

THE HONORABLE JEFF M. BRUDIE, PRESIDING

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## I. INTRODUCTION

This is the reply brief of Dr Wright. The Reply Brief's organization returns to the organization of the issues as set out in Dr. Wright's original brief and responds to the argument of the Board in context of the originally identified issues. The Board's additional issues are addressed in that same context. The Board of Psychologist Examiner's is identified as the "Board". I.C. §54-2301 through 54-2315 is referred to generally as the Act.

## II. ARGUMENT

### ISSUE I

#### **The action of the Board prejudices a substantial right of Dr Wright.**

There is no argument, analysis or authority presented by the Board that Dr. Wright's license to practice psychology is not a substantial right. The right to practice psychology is clearly a substantial right as contemplated by I.C. §67-5279 and as identified by the Court in *Cooper v. Board of Professional Discipline of the Idaho State Board of Medicine* 1341 Idaho 449, 545, 4P.3d 561 (2000).

### ISSUE II

**The Board exceeded its statutory authority by imposing additional discipline in its Order of April 19, 2006 for Dr. Wright's alleged noncompliance with a prior order of the Board.**

The Board pursuant to I.C. §54-2302 has authority to license and discipline licensed psychologists. The Nez Perce County Prosecutor is given the authority to bring actions for the unlicensed practice of psychology. Dr. Wright is not an unlicensed psychologist. Dr. Wright's license to practice psychology is suspended.

When reading I.C. §54-2303 in context with the remainder of the Board's statutory authority, there is no authority for the Board to prosecute someone who is practicing without a license. The legislature simply provides the Board with the authority to sanction someone who is already licensed.

Even more clearly here, the Board does not have the statutory authority to sanction someone who violates a prior Order of the Board. In spite of the Board's spirited arguments to the contrary, the Board in its April 19, 2006 order did not find that Dr. Wright violated the Act. The Board only finds that Dr. Wright violated the Board's prior Order (R. p. 1266).<sup>1</sup> The Board and the District court's analysis here is correct, only a violation of the Act is the basis for discipline not a prior Order of the Board. Since the Board did not find that Dr. Wright violated the Act and only found that the prior Order was violated, there is no statutory basis for the 2006 Final Order. The 2006 Final Order is arbitrary and capricious and in excess of the Board's statutory authority. I.C. §67-5279(3).

In its Memorandum Decision and Order, the District Court found that the Board had authority to further suspend Dr. Wright's license upon its finding that she continued to practice psychology without a license. Memorandum and Decision, p. 10, R., p. 20. The District Court supported its finding by noting that Dr. Wright "offered no defense or challenge to the allegation. . . ." This is incorrect. Dr. Wright argued to the Board then and to the Court now that there was no statutory authority to further discipline her for a violation of the Board's prior Order.<sup>2</sup>

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<sup>1</sup> In fact the Boards Hearing Officer's Recommended Order, concludes that the only basis for additional discipline was the alleged violations of the Boards April 2005 order. Ex. R.p.1284. "Based on the foregoing, the hearing officer concludes that the Board of Psychologist Examiners' has the factual and legal basis to enforce the terms of the Final Order and impose additional discipline upon Dr. Wright based her non-compliance with the Final Order."

<sup>2</sup> Even in the Board's Order to Show Cause to Dr. Wright the basis of the additional discipline was her alleged failure to comply with the prior order of the Board. (Ex R. p. 1305.)

Additionally she defended herself by contending that the Order of Dismissal filed in Nez Perce County, Case No. CR05-6505, in which the Nez Perce County Prosecutor dismissed the criminal charge of practicing without a license brought as a matter of law should end the proceedings commenced by the Board for her non-compliance with the Board's Order. Dr. Wright argued that the Board did not have the statutory authority to pursue an Order to Show Cause in light of the State's Motion to Dismiss. This is not an argument suggesting that there cannot be concurrently an administrative procedure and a criminal procedure to address particular behavior. This Court has so held in the administrative suspension of driver's license, cases. see for example, *State v. Talavera* 127 Idaho 700, 905 P.2d 633 (1995). Instead, Dr. Wright's argument that the Board as a creature of statute only has particular powers, the exercise of which are reviewed by this Court. None of those powers include the ability to impose additional discipline based on a violation of the Board's orders particularly based on an Order to Show Cause. When the Board acts in excess of those powers, Judicial Review requires that the Board's decision be set aside. I.C. §67-5279(3).

### ISSUE III

#### **Judicial Review of the 04-22-05 Order of the board is appropriate**

The Board does not respond to any of the substantive arguments submitted in Dr. Wright's original brief. Instead the Board simply suggests to the Court that if the 2005 Order is appropriate for judicial review, then the matter should be remanded to the District Court.

However, if this Court finds that the 2005 Order is appropriate for judicial review, this Court has the authority to determine whether of the 2005 Final Order meets the standards of I.C. §67-5279, particularly in light of the Board's failure to respond to any of the arguments made as to the appropriateness and validity of the Board's 2005 Final Order.

Since de novo review of the action of the agency is appropriate, this Court's authority should specifically extend to the determining that the Board's 2005 Final Order is not based upon the record, is arbitrary and capricious and is in excess of its statutory authority. The 2005 Final Order should be set aside and remanded to the Board not the District Court for further proceedings. I.C. § 67-5279.

Upon Judicial Review being filed, the Board submitted the entire record of the proceedings to the District Court for review, as was proper under IRCP 84(e)(1) ("judicial review of agency action shall be based upon the record created before the agency") Pursuant to I.C. § 67-5277, ". . . , judicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this chapter, . . . ."3

Both the 2005 and 2006 Final Orders in Paragraph 3.b. ("any party aggrieved by this Final Order, or orders previously issued in this case, may appeal this Final Order **and all**

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3 "Agency Record" is defined as follows:

(1) **An agency shall maintain an official record of each contested case** under this chapter for a period of not less than six (6) months after the expiration of the last date for judicial review, unless otherwise provided by law.

(2) **The record shall include:**

- (a) all notices of proceedings, pleadings, motions, briefs, petitions, and intermediate rulings;
- (b) evidence received or considered;
- (c) a statement of matters officially noticed;
- (d) offers of proof and objections and rulings thereon;
- (e) the record prepared by the presiding officer under the provisions of section 67-5242, Idaho Code, together with any transcript of all or part of that record;
- (f) staff memoranda or data submitted to the presiding officer or the agency head in connection with the consideration of the proceeding; and
- (g) any recommended order, preliminary order, final order, or order on reconsideration.

.....  
I.C. § 67-5249 (emphasis added).

previously issued orders in this case to the District Court . . . .”) Ex R., p.1323 and 1266 (emphasis added).

The language regarding orders previously issued by the Board is based on IDAPA 04.11.01.740. Despite Respondent’s contention, Appellant has not abandoned any arguments on her appeal in regard to the language required by the IDAPA rules. There is only one issue raised by this analysis, and that is whether the 2005 Final Order is appropriately before the Court on review. Reserving a different way of analyzing that issue for a reply brief does not constitute an abandonment of the general issue.

IDAPA 04.11.01.720.02(b) is either in conflict with the provisions of 04.11.01.720.02(c) or the specific language of the Attorney’s Generals Rule in contested cases permits Judicial Review of an earlier order integrated and referred to in a subsequent “Final Order”. The language must mean something or it would not have been include in the Rule.

The Board, if it did not believe the language in its own orders, could have simply forwarded to the Court as the Agency Record everything that had occurred after the entry of the April 2005 Final Order. The Board would have acted consistent with the arguments now supplied the Court for Judicial Review of the 2006 Final Order. But the Board instead consistent with Dr. Wright’s analysis supplied the entirety of the Board’s record of proceedings. There is no way that the court can conduct the judicial review contemplated by the Administrative procedures act of the Second Final Order without reviewing the 2005 Final Order.

The additional discipline meted out as a result of the 2006 Final Order amended the Board’s 2005 Final Order, which had already suspended Dr. Wright’s license. Again, while the Board clearly has authority to commence a new action for an alleged ethical violation, the Board cannot reopen the original case without subjecting the entire record, including the 2005 Final

Order and the adopted Findings, to judicial review.<sup>4</sup>

While an argument can be made that judicial review of the April 2005 Final Order may appear untimely, it is appropriate for this Court to review the entire record of the Board's proceedings in connection with the 2006 Final Order, inclusive of the record of proceedings for the 2005 Order. I.R.C.P. 84(e)(1).

While this issue has not been directly addressed in Idaho, other jurisdictions offer support for a review of the "whole record." See *Watkins v. N.C. State Bd. of Dental Examiners*, 358 N.C. 190, 199, 593 S.E.2d 764 (2004)(holding that under the whole record test, the superior court must "examine all the record evidence -- that which detracts from the agency's findings and conclusions as well as that which tends to support them -- to determine whether there is substantial evidence to justify the agency's decision.") See also *Mississippi State Board of Examiners for Social Workers v. Anderson*, 757 So.2d 1079, 1084 (2000)("a circuit court must look at the full record before it. . . . While the circuit court performs limited appellate review, it is not relegated to wearing blinders. The court must determine if the evidence is legally adequate to support the lower body's factual findings."); *Cogan v. Board of Osteopathic Medicine & Surgery*, 200 Mich.App. 467, 469, 505 N.W.2d 1 (1993)(further citation omitted); *Department of Community Health v. Risch*, 274 Mich.App. 365, 733 N.W.2d 403, 408 (2007); *Arizona State Board of Medical Examiners v. Clark*, 97 Ariz. 205, 398 P.2d 908 (1965).

The Board's Record resulting in the 2005 Final Order is also appropriately reviewed based on the Board incorporating the Board's 2005 Final Order into the 2006 Final Order. Ex. R., p. 1266, ¶ (b) and conditions Dr. Wright's eligibility for reinstatement on her full compliance

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<sup>4</sup> Of course had the Board of Psychologist Examiners believed its decisions were only subject to Judicial Review of actions following the 2005 Final Order, it would only have submitted the agency record from the time period after the 2005 Final Order.

with the terms in the Board's 2005 Final Order.

Reopening Dr. Wright's case and imposing additional discipline in the 2006 Final order required the Board to review the record made as part of the 2005 Final Order, and consequently that supporting record is subject to review in regard to the 2006 Final Order.<sup>5</sup>

Similarly, the standard of judicial review in Idaho necessitates review of the entire record of the proceedings leading to the findings and conclusions adopted by the Board in both the 2005 and 2006 Final Orders. *Kuna Boxing Club Inc ., v. Idaho Lottery Commission*, ---P.3d ---, 2009 WL 129669 Idaho (2009).

#### ISSUE 4: ATTORNEYS FEES

- A. Dr. Wright maintains that this is a matter appropriate for an award on attorneys fees on appeal should she prevail pursuant to I.C. §12-117(1) and (2) and the cases cited earlier.
- B. The Board sets out no analysis or specific authority other than I.C. §12-117 for an award of attorneys fees. The nature of Judicial Review and the decisions of the Court have previously indicated that the role of this Court is to engage in de novo review of the issues raised on the Petition for Judicial Review not just a review of what the District Court did. See for example, *Cooper v. Board of Professional Discipline of Idaho State Board of Medicine*, 1341 Idaho 449, 4P.3d 561 (2000)
- C. Finally Dr. Wright's arguments are not frivolous and are based upon appropriate legal analysis.

#### CONCLUSION

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<sup>5</sup> For example: the collapse of any upper floors of a building would necessitate an evaluation of the supporting structures beneath to determine their effect on what was built above them. Such is the case for reviewing the prior findings and order as is required under the I.C. §67-5249 et. seq. and the Attorney Generals Administrative rules.

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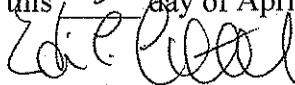
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on this 3 day of April, 2009.



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Edwin Litteneker

Dr. Wright has demonstrated that the Board's 2005 and 2006 Final Orders are before the Court for review. She has further demonstrated that the 2006 Order is in excess of the Board's statutory authority and must be remanded to the Board. Finally the Board's 2005 Order is not supported by the Record and must be remanded to the Board.

Dr. Wright is entitled to an award of attorneys fees upon her prevailing in this matter.

DATED this 3 day of April, 2009.



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Edwin L. Litteneker  
Attorney for Dr. Eileen Wright