

4-18-2011

# Arambarri v. Armstrong Transcript Dckt. 38351

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT NICHOLAS ARAMBARRI, )  
 )  
 Plaintiff-Appellant, )  
 )  
 vs. )  
 )  
 RICHARD ARMSTRONG, DIRECTOR )  
 OF IDAHO DEPARTMENT OF )  
 HEALTH AND WELFARE, )  
 )  
 Defendant-Respondent. )

Supreme Court Docket  
No. 38351-2010

Bannock County District  
Court No. CV-2010-347-OC

2010 APR 18 10:05  
District Court

TRANSCRIPTIONISTS TRANSCRIPT ON APPEAL  
VOLUME ONE OF ONE  
PAGES 1 THROUGH 39

Appeal from the District Court of the Sixth Judicial District of the  
State of Idaho, in and for the County of Bannock,  
HONORABLE PETER D. McDERMOTT  
District Judge, Presiding.

APPEARANCES:

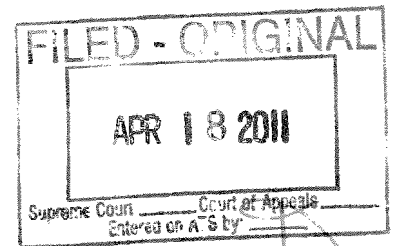
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## CHRONOLOGICAL INDEX

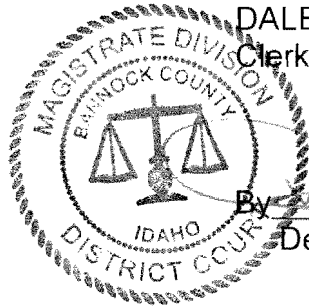
THURSDAY, SEPTEMBER 30, 2010

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LODGED at the Bannock  
County Courthouse in  
Pocatello, Idaho,

this 20<sup>th</sup> day of  
January, 2011,  
\_\_\_\_\_ o'clock \_\_\_\_\_ m.

DALE HATCH  
Clerk of the Court



By [Signature]  
Deputy

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

ROBERT NICHOLAS ARAMBARRI,	)	<u>T R A N S C R I P T</u>
	)	
Plaintiff,	)	<u>OF</u>
	)	
vs.	)	<u>HEARING ON MOTION</u>
	)	<u>FOR SUMMARY JUDGMENT</u>
RICHARD ARMSTRONG, DIRECTOR	)	
OF IDAHO DEPARTMENT OF HEALTH	)	
AND WELFARE,	)	
	)	CASE NO. CV-10-347-OC
Defendant.	)	

The above-entitled matter came on for hearing on the 30th day of September 2010, at the Bannock County Courthouse, Pocatello, Idaho.

BEFORE: The **HONORABLE PETER D. McDERMOTT.**

APPEARANCES:

DOUGLAS J. BALFOUR, Attorney at Law, appeared for and in behalf of Plaintiff, ROBERT NICHOLAS ARAMBARRI.

MARK V. WITHERS, Deputy Attorney General, appeared for and in behalf of Defendant, RICHARD ARMSTRONG, DIRECTOR OF IDAHO DEPARTMENT OF HEALTH AND WELFARE.

**ORIGINAL**

**TRANSCRIPT OF HEARING ON MOTION FOR SUMMARY  
JUDGMENT**

**CASE NUMBER CV-10-347-OC**

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IN THE DISTRICT COURT FOR THE SIXTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

ROBERT NICHOLAS ARAMBARRI,	)	<u>T R A N S C R I P T</u>
	)	
Plaintiff,	)	<u>OF</u>
	)	
vs.	)	<u>HEARING ON MOTION</u>
	)	<u>FOR SUMMARY JUDGMENT</u>
RICHARD ARMSTRONG, DIRECTOR	)	
OF IDAHO DEPARTMENT OF HEALTH	)	
AND WELFARE,	)	
	)	CASE NO.CV-10-347-OC
Defendant.	)	

COURT: This is the time and date set for oral argument in Robert Nicholas Arambarri, Plaintiff, being represented by Mr. Balfour versus Richard Armstrong as Director of the Idaho Department of Health and Welfare being represented by Mr. Withers and we have up today the Defendant's Motion for Summary Judgment or Alternative Motion to Dismiss. The Defendant's Motion to Strike the Affidavit of Mr. Arambarri and Carolyn Ruby and Plaintiff's Motion to Strike the Affidavits of Richard Armstrong and David Taylor and I think first thing here is the Court will shorten time and allow the reply brief of the Defendant be lodged and I don't know, Mr. Balfour, if you want some time to respond

1 or not because I read the reasons for the delay and I think  
2 it's a good cause to give him, let it be filed.

3 BALFOUR: That's fine, Your Honor.

4 COURT: Okay. Now, because this is a Motion for Summary  
5 Judgment or an Alternative Motion to Dismiss, I'll take the  
6 case under advisement and hopefully issue a decision within  
7 30 days after the arguments. I guess Mr. Withers you may  
8 proceed on your Motion for Summary Judgment.

9 WITHERS: Thank you, Your Honor.

10 COURT: I think and also, excuse me a minute, I didn't  
11 mean to cut you off, but also, you can argue your Motion to  
12 Strike and Mr. Balfour when you respond, you can argue your  
13 Motions to Strike, okay?

14 Now, it seems to me, and I don't know, in reading the  
15 file and this is one good reason why counsel give oral  
16 arguments, the main issue to be decided is whether or not  
17 Mr. Armstrong had the authority to terminate the position  
18 of regional director. I don't think, at this point I'm just  
19 talking to you fellows, but it seems to me whether Mr.  
20 Arambarri retired or didn't retire, it isn't all that  
21 important to the issue the Court has to decide what  
22 precipitated him leaving the position, was it was abolished  
23 by the Director, so it seems to me the main issue to be  
24 decided here is if the Director had the authority and if he

25



1 exercised it properly. But I'm certainly open to listening  
2 to you fellow's arguments. Okay, Mr. Withers.

3 WITHERS: Thank you.

4 **ARGUMENT-MOTION TO STRIKE AFFIDAVITS - WITHERS**

5 Your Honor, with respect and may it please the Court,  
6 with respect to the Motion to Strike the Affidavit of  
7 Richard Arambarri and the Motion to Strike the Affidavit of  
8 Carolyn Ruby, they speak for themselves. As I implied in my  
9 response and also in the striking motions, they were  
10 basically in response to the Motion to Strike that I  
11 received, which in my response I indicated that virtually  
12 any affidavit is going to have a mixture of "here is what I  
13 saw," and "by the way this is my understanding of what I  
14 saw," or "this is my understanding of the responsibilities  
15 I had," or "this is my understanding of the law that I had  
16 responsibilities under," and as I indicated in my written  
17 response, in my opinion that's relatively deminimis to be  
18 disputing over the finer meanings of the wording of an  
19 affidavit. If the matter were to go to trial, in my  
20 opinion, based on what I saw, most of what they said, David  
21 Taylor and Richard Armstrong, most if not all of what they  
22 had in their affidavits would come before the Court in  
23 their testimony. And by definition an affidavit is  
24 relatively cryptic and relatively short. It's not really  
25 able to be compared to two to three hours of testimony. So

1 my argument, Your Honor, is simply that you should be  
2 allowed as the Court to take a look at all the evidence and  
3 not have be dissecting whether what an affidavit said is a  
4 mixture of opinion, a mixture of conclusion, a mixture of  
5 what they saw. If it has a degree of personal knowledge and  
6 observation in the affidavit or in the paragraph, that  
7 should be enough to be able to consider the whole  
8 paragraph. Otherwise, it becomes somewhat of a juvenile  
9 dispute over the meaning of words whether that's personal  
10 knowledge or whether that's a conclusion. My Motions to  
11 Strike are somewhat similar in that I noticed that there  
12 were some conclusory portions of the Plaintiff's Affidavit,  
13 Mr. Arambarri's Affidavit, so I pointed those out very  
14 similar to the Motions to Strike I received with respect to  
15 David and Richard Armstrong. With respect to Carolyn Ruby,  
16 that was in my mind a relatively deminimis issue as to  
17 whether or not the library was going to charge the AG's  
18 office or not. I frankly don't think that is germane to the  
19 Court, but I felt obligated to respond to that particular  
20 affidavit and that was the basis for that Motion to Strike.  
21 I frankly don't think the affidavit makes a difference  
22 whether or not it comes in or not, but I did feel obligated  
23 to respond to that particular affidavit. So, that's my  
24 input as to the Motions to Strike, Your Honor. As I  
25 indicated in my conclusions in both of those responses, I

1 really don't think this case should hang on that. It should  
2 not matter. The affidavits are sufficient based on my  
3 review, frankly, on both sides to be able to come before  
4 the Court and have the Court consider them as part of the  
5 overall picture.

6 ARGUMENT - SUMMARY JUDGMENT - WITHERS

7 As to the Summary Judgment itself, I agree that in my  
8 initial motion, I did bring up nine separate potential  
9 bases for summary judgment and I agree that some of those  
10 are larger or smaller than others including the concept of  
11 whether he was voluntarily or forced to retire. I agree  
12 that really does not matter and I'll explain why. First of  
13 all the overview was the Director is requesting that this  
14 Court find that he is entitled to judgment as a matter of  
15 law. Given that and as I will corroborate in terms of what  
16 I have already written, there is no genuine issue of  
17 material fact. One way to verify that, Your Honor, is to  
18 take a look at what would happen if this went to court. As  
19 far as I can tell, there are no new facts that you would  
20 have in a three week trial that are material to your  
21 decision that you don't already have. This is such an issue  
22 of law that a trial would not only be a severe  
23 inconvenience to all the board members and all of the  
24 former and current regional directors and any other

25

1 witnesses, but in my opinion, it would not shed any more  
2 light on what you already have on the issue.  
3 As you have seen in the documents on June 15<sup>th</sup> 2009, the  
4 appointment of Mr. Arambarri as a Regional Director in the  
5 Department ended. How that came about, interestingly  
6 enough, in what I've been able to tell is there's a lot of  
7 weeds, a lot of background noise in this case and, Your  
8 Honor, 56-1002(3), did not handcuff the Director to have to  
9 choose his words on how he either removed or terminated or  
10 laid off or cut a regional director. That statute simply  
11 does not get into that type of knit-picky requirements as  
12 to Director, "You have to choose your words wisely when you  
13 let a regional director go." A regional director served at  
14 the pleasure of the Director period, and the argument of  
15 the Plaintiff would completely eviscerate that particular  
16 part of the code. So I think what the judge has to do is  
17 figure out, okay, how does the last part of the code giving  
18 the complete authority to the Director with the concurrence  
19 of the Board, how is that able to be compatible with the  
20 rest of the statute and I'll go into that briefly.

21       There is no evidence, Your Honor, with respect to  
22 anything negative about Mr. Arambarri during his 19 years  
23 of service. That's one reason this case is unfortunate  
24 because there might be an implication that there is some  
25 kind of issue the Department has with the Regional

1 Director, with Mr. Arambarri and that's not an issue before  
2 the Court. Frankly, he did serve many faithful years and  
3 it's unfortunate that he was caught up in the economic  
4 downturn. But as an at-will employee, as an at-will  
5 employee serving at the discretion of the Director, that  
6 was a risk that he had those entire 19 years, Your Honor.  
7 And I did not dwell on this much in my initial brief. I  
8 think it was point number nine. I have some question about  
9 whether he even has standing to bring this law suit because  
10 since he was an at-will employee once that at-will employee  
11 or once he suffered the result of being an at-will  
12 employee, being let go, he was not in the position to come  
13 back and say, "I'm a member of the community. I'm being  
14 hurt by the number of RD's that here right now," or "I'm  
15 somehow an ongoing member of the Department that is being  
16 hurt by this change." He is in effect bringing this as a,  
17 even though they deny it in their reply, as a terminated  
18 employee seeking to be re-appointed. Well, worst case  
19 scenario, Your Honor, even if the Director was forced in  
20 the end to cut the time where there's a gap between the  
21 number of RD's that have been let go versus appointed. Even  
22 if he were required to reappoint RD's at some point,  
23 there's no basis that I can find, no legal basis where Mr.  
24 Arambarri would have a right to be one of those people to  
25 be appointed and that being the case, it follows that there

1 could not be any damages and there could not be any other  
2 reason to pursue this case and I think that's the very  
3 definition of whether a person has standing or not. Are  
4 they in a position where they can say, "I have damages that  
5 there is a legal basis for me to be able to recover." I  
6 know there's lots and lots of going into the legislative  
7 history in the defendant's memorandum and there's a lot of  
8 focusing on this word of "abolishment of position" or  
9 "cutting the position," and I go back to my first point,  
10 Your Honor. It doesn't matter what the Director, what words  
11 he uses to determine whether or not that position should be  
12 filled by Mr. Arambarri or by anyone else. The legislature  
13 did not include that in their statute as to, if you  
14 terminate a Regional Director, you will need to reappoint  
15 another one within 30 days or within a year or ever. That  
16 was not written in the statute. I know the plaintiff wants  
17 that to be in the statute and that's understandable, but  
18 it's not there. He filed his law suit on January 27<sup>th</sup> of  
19 this year and as you know in the law suit, he does see  
20 reappointment. He seeks reappointment of the other three  
21 directors, Regional Directors, who have not joined this law  
22 suit and he's not in a position to represent their  
23 interests. His law suit also seeks to return the job  
24 description of a Regional Director of how it existed before  
25 2002. Your Honor, as I indicated in my reply, this case

1 pertains to Mr. Arambarri in 2009. It does not pertain to  
2 something eight years ago. We're long past a statute of  
3 limitation period for that. We are dealing with what  
4 authority did the Regional Director or did the Director of  
5 Health and Welfare have over the Regional Director in 2009.  
6 I would suggest, Your Honor, that Mr. Arambarri's basis for  
7 his law suit, though it's very personal on his part and I  
8 know that and I understand that, but it is relatively  
9 philosophical to asserting how many Regional Directors  
10 there should be at any one time. Although there are general  
11 discussions in the lengthy legislative history you have  
12 been provided, there's nothing in there that I can find  
13 that specifically addresses this issue. It's new to the  
14 Judge today and it's not something that the 37 year old  
15 legislative history answers. It does talk about general and  
16 I would say philosophical concepts of decentralization and  
17 you can extrapolate what they might have meant 37 years ago  
18 by how many regions, how many Regional Directors, how would  
19 the authority of the Director be limited by that  
20 decentralization concept? But, Your Honor, this is not the  
21 time to speculate what the legislature meant 37 years ago.  
22 The plain language clearly gives the authority to the  
23 Director to do what he did. If Mr. Arambarri's argument was  
24 enacted, it would gut the meaning and the purpose of the  
25 extent of that authority, namely his authority to appoint

1 or to remove or lay off or deappoint the remaining or any  
2 Regional Directors. The only limitation, the only  
3 limitation put in that statute is, "you need to obtain the  
4 concurrence of the Board." And in the memorandum for  
5 opposition, the Plaintiff did bring up the argument that  
6 well, this matter was presented to the Board, but you did  
7 not obtain the concurrence of the Board. To answer that  
8 question, a majority of the Board have provided affidavits  
9 to you and they are attached to the reply brief and those  
10 affidavits are very clear as to what the Board members  
11 intents were. In fact, all five of those affidavits say  
12 that my concurrence with the director's decision to cut the  
13 positions of four Regional Directors, occurred during the  
14 board meeting on May 21, 2009, and I continue to concur  
15 with that decision. They also, all five of them also  
16 indicate, "I did not object to the Director's action nor  
17 did any of the other members," and I would add that would  
18 include Steven Legg, who provided an affidavit to you in  
19 the plaintiff brief, "None of the members of the board  
20 objected to this action. None of the members of the Board  
21 called for a vote on the proposed action. It is the  
22 practice of the Board for members to express objections or  
23 concerns if they do not concur with an action or plan  
24 promulgated by the Director. I did not feel it was  
25 necessary to vote on the director's action in this matter



1 to show my concurrence." So, it's clear there is nothing to  
2 litigate as to concurrence. That matter is clearly  
3 established by a majority of the Board and for that matter,  
4 Your Honor, even if it hadn't been, even if it hadn't been,  
5 the Board itself is legislatively advisory only. So, even  
6 if they had not concurred as they, in fact, had, but if  
7 they had not concurred, they are not a veto board. They do  
8 not have veto authority. Now to some extent that might  
9 weaken the meaning of concurrence, what does that even mean  
10 in 56-1002, but if you juxtapose that to 56-1005(10)  
11 indicating that the Board is simply advisory, there's some  
12 question about whether or not the Director had to do  
13 anything other than simply inform the Board of his action  
14 and that's what he, in fact, did, but he obtained their  
15 concurrence perhaps as safety or insurance just to insure  
16 that this Judge or this Court is aware that concurrence did  
17 occur. The general authority of the Director of Health and  
18 Welfare...

19 COURT: Excuse me, Mr. Withers, are you saying under  
20 your theory that the director didn't even need to present  
21 this matter to the Board at all?

22 WITHERS: No, I'm saying, Your Honor, that there's some  
23 question based on the fact that the Board is advisory about  
24 whether or not, some question about the definition of

25

1 "concurrence," Your Honor. Some question about whether or  
2 not if the Board...

3 COURT: What does concurrence mean to you?

4 WITHERS: Well, to me it would be, I think the plain  
5 meaning would be a majority agreed. A majority agreed with  
6 the decision and how do they indicate that agreement.

7 COURT: It means approval doesn't it?

8 WITHERS: Approval, yes. I'm just saying and it's not  
9 germane to this case, Your Honor. I'm just saying from an  
10 academic standpoint, why would the legislature on one hand  
11 say that the Board is mere advisory and on the other hand  
12 in 1002, say but this decision has to get the concurrence  
13 of the Board. I'm just saying there's some inconsistency  
14 there, but that doesn't matter because the concurrence was  
15 obtained and the issue was presented to the Board, so, to  
16 me it's not an issue because the concurrence did become  
17 manifest. Your Honor, Idaho Code 56-1002(1) the director is  
18 vested with the general executive and administrative power  
19 over the Department. Then in 56-1004(b), he is vested with  
20 the authority to employ such personnel as may be deemed  
21 necessary and prescribe their duties. So that combined with  
22 1002 (3), clearly indicates what the Director's authority  
23 was. He had the authority over these employees and he had  
24 the authority, clearly in 56-1002 to keep them or to let  
25 them go. Maybe it's unfortunate, Your Honor, his choice of

1 words when he presented to the Board where he said he was  
2 cutting the positions, but it really should not matter  
3 whether he said, "I'm hubbing. I'm laying off. I'm cutting.  
4 I'm ending the appointment. I'm removing an RD." I just  
5 don't see how a choice of words would make a difference.  
6 The fact of the matter is, the result is the same. The  
7 result is that the appointment which was at-will of Mr.  
8 Arambarri ended on June 15<sup>th</sup>. How that came about should not  
9 matter. Interestingly enough the statute itself does not  
10 clarify and require the Director to immediately reappoint  
11 RD's. It does not clarify whether or not he ever needs to.  
12 It does not clarify whether he needs to do it in any  
13 particular way. I would say, Your Honor, that what the  
14 Plaintiff is trying to write into the statute is a  
15 requirement that the director not use the word, "cut  
16 position" or "abolish position" or that he have his hands  
17 tied at least in some ways and that should not be the basis  
18 for this action. If this argument were to be enacted, it  
19 would really neuter the meaning of the Director's  
20 authority. And that, as far as I can tell from the  
21 legislative history, would not be consistent with the  
22 intent of the legislature.

23 Now, I do get to this issue that may be the issue at  
24 heart here. It seems to me that the Plaintiff is spending  
25 most of the time in their argument on the one part of the

1 statute and the Director is spending most of the time on  
2 the other part of the statute and I would say, "Okay, how  
3 do they come together?" and really the focus of the  
4 Plaintiff seems to be, "Well, the director has to have a  
5 certain number of Regional Directors at all times in place  
6 or he violates the statute." Whereas the Director comes  
7 back and says, "How can that be when I have the authority  
8 to remove Regional Directors without limitations other than  
9 the concurrence of the Board?" and the Board itself, Your  
10 Honor, did not provide any advice or any information  
11 objecting to the Director's action. They did not indicate  
12 to the Director, "You need to make sure you reappoint some  
13 RD's with X number of times," or "within some many months  
14 after the economy gets this point when you're in a better  
15 position financially as a State." The Board did not do  
16 that. Maybe they will in the future, but they have not done  
17 that to this point. So, Mr. Arambarri wants to focus on the  
18 number and authority of Regional Directors, but this point  
19 cannot be used to strip the Director of his authority, Your  
20 Honor. The point has to be, "What is the Director's  
21 authority under 56-1002 over a Regional Director?" The  
22 language in the statute, simply does not address the  
23 concept of gaps. Does not address, okay, just because there  
24 are seven regions, does that mean there has to be 100% of  
25 the time seven Regional Directors or can there be a fewer

1 number who are heading those seven regions? That's  
2 interesting discussion, but, Your Honor, it's not what this  
3 case should hang on, yet that's what the Plaintiff is  
4 focusing on. Perhaps the statute would have had to have  
5 read something like this to clarify it, "Each Regional  
6 Director shall be appointed and serve at the pleasure of  
7 the Director with the concurrence of the Board and subject  
8 to the following limitation to ensure that a separate  
9 individual Regional Director is heading each sub-state  
10 administrative region at all times. The Director shall  
11 appoint a replacement Regional Director within X number of  
12 days." I mean, perhaps that would have been a clearer way  
13 to support the Plaintiff's position. But that's not what  
14 the statute says, Your Honor. Nor is the legislative  
15 history worded that way. It's clear there are no  
16 limitations. There's no restrictions. There's no hampering  
17 of any sort, no restriction on the Director other than to  
18 simply obtain the concurrence of the Board.

19 I would just mention, Your Honor, I think both sides  
20 agree, this is not an Idaho Personnel System Act case. This  
21 is not a case where the Plaintiff has claimed he has any  
22 rights under the PSA. I think it's also clear that the  
23 State of Idaho has had requirements of cost-cutting. That  
24 did come up in both of our briefs as to some of the  
25 underpinnings of why, the background of the economy, how it

1 led up to this in the first place and I did mention in my  
2 brief that the proper party under IRCP 3(b) would have been  
3 the State of Idaho or the Department of Health and Welfare  
4 and not the Director. Plaintiff called that a facetious  
5 argument. I might say it's a deminimis argument, but I  
6 wouldn't call facetious. It is a fact that, I do believe,  
7 that the wrong party was named, but we all knew that they  
8 were coming after the Department. So, whether or not that's  
9 something germane as to how the Court needs to address  
10 this, I don't know. It was something I felt obligated to  
11 bring up.

12 Another point I mentioned briefly in my first brief  
13 was it's unclear to the Department what the Plaintiff is  
14 actually asking in terms of where the burden should fall.  
15 Both parties would agree that there's an economic burden on  
16 the State. The legislature imposed an economic burden on  
17 the Director. The Director used, as he indicates in his  
18 affidavit, many tools including leaving positions unfilled,  
19 including furloughs, including reducing wages, but he used  
20 the tool of removing four Regional Directors to satisfy the  
21 legislature's cost cutting measures. It's unclear to the  
22 Defendant who the Plaintiff is asking this burden fall on  
23 because money does not grow on trees and if the Plaintiff  
24 were to be reappointed, someone would have to have that  
25 burden shifted to them. Somebody would have to be

1 terminated or the cost would have to be cut somewhere. Your  
2 Honor, I would agree that whether the Plaintiff chose to  
3 retire in lieu of lay-off or whether he was forced to  
4 retire ultimately does not matter. There's plenty of back-  
5 and-forth on that, but it really does not matter. As to the  
6 party of the action, Your Honor, I would just simply  
7 indicate again that I'm not sure if the Plaintiff even has  
8 standing. I think that's something that the Judge, we would  
9 request that you look at.

10 In conclusion, I just would have to indicate that,  
11 again, the facts are largely undisputed and undisputable.  
12 The facts are clear that the appointment ended on June 15,  
13 2009, of Mr. Arambarri. The facts are clear that he had  
14 served for approximately 19 years as an RD. The facts are  
15 clear that an RD is at at-will employee. That he began  
16 drawing retirement benefits. That the Director presented  
17 this to the Board and that the Board members concurred.  
18 Those facts, after many days of trial would not change,  
19 Your Honor. So, I would request again that a Summary  
20 Judgment is appropriate, especially when it becomes clear  
21 that it is a question of law that can be answered based on  
22 what's before the Court and where a trial itself would not  
23 change anything. Whether or not this ends up in the Supreme  
24 Court either after this hearing or after a trial, even the  
25 matter placed before the Supreme Court would be the same

1 question, it would be a legal question as to the authority  
2 of the Director to remove a Regional Director and does he  
3 have to choose his words as to how he is removing them and  
4 is he limited in any way by the previous language  
5 discussing multi-regions and whether or not there needs to,  
6 at all times, an RD at the head of each of those regions.  
7 That issue is what is before this Court and that same issue  
8 would be what would be before the Supreme Court. The  
9 statute is what it is and it's pretty clear, Your Honor. I  
10 would just request at this time that judgment be given to  
11 the Defendant as a matter of law. Even though we're  
12 requesting that, Your Honor, that does not and should not  
13 take away from the personal impact of what has happened on  
14 Mr. Arambarri and perhaps, and this is not something that  
15 is discussed in the briefs, but perhaps there were issues  
16 as to how he was notified. Perhaps there were issues as to  
17 the procedure that were factors in his decision to bring  
18 this action. If that's the case, that's unfortunate, but  
19 what's before the Court at this time is a simple  
20 interpretation of what the statute meant and what the  
21 authority is. We would rest with that information at this  
22 time, Your Honor.

23 COURT: Thank you Mr. Withers. I want to thank both  
24 counsel at this time for the excellent job you've done  
25 briefing this matter. Mr. Balfour, if Mr. Arambarri were to



1 prevail here and we had a trial, would it be your position  
2 your client would be entitled to damages other than lost  
3 wages at a certain point? In other words, if the Court were  
4 to order the Director to reinstate these positions or his  
5 position, there's nothing in the law that would require the  
6 Director to continue to employ Mr. Arambarri is there?

7           BALFOUR: Your Honor, I think the Director clearly  
8 could terminate Mr. Arambarri's appointment as Regional  
9 Director if he followed the proper procedures. We're saying  
10 that's not what he did here.

11           COURT: I understand that.

12           BALFOUR: But, right.

13           COURT: If he, I'm speaking of damages here. If he  
14 prevailed, he wouldn't have a claim for anything passed  
15 maybe the day of the Court's decision for lost wages would  
16 he?

17           BALFOUR: Well, right or to do through the proper  
18 process if you reinstated him then the Director could  
19 assemble a meeting of the Board of Health and Welfare and  
20 ask their concurrence to terminate that appointment. That's  
21 the way it would work.

22           COURT: The Court couldn't even order the Director to  
23 reinstate Mr. Arambarri could it?

24           BALFOUR: Yeah, the Court. What we are seeking.  
25

1 COURT: Maybe if I did that, the next day he could  
2 terminate him again.

3 BALFOUR: Right. But he would be reinstated  
4 retroactively back to the point where he was improperly  
5 terminated, but, yeah.

6 COURT: So, would you have a claim for any more damages  
7 other than the lost wages?

8 BALFOUR: No, not for specific monetary damages, no,  
9 Your Honor. I don't believe so. We're also asking the Court  
10 though to declare the actions of the Director to be illegal  
11 in abolishing those positions.

12 COURT: Right, I understand that.

13 **RESPONSE - MOTION TO STRIKE and SUMMARY JUDGMENT - BALFOUR**

14 May it please the Court, counsel, I am happy to  
15 respond to the arguments of counsel for the Department  
16 concerning these issues and as the Court has requested and  
17 the Supreme Court has clearly indicated, we need to briefly  
18 touch on the Motion to Strike Portions of the Affidavits  
19 prior to ruling on and addressing the substantive issues  
20 here.

21 Initially, I will point out, and as I think the  
22 Department recognizes on a Motion for Summary Judgment,  
23 every inference is given to the non-moving party when  
24 there's a possible inference to be garnered from the facts.

25

1 COURT: Let me interrupt you and I apologize, Mr.  
2 Balfour. What dispute of facts are in issue? Are there any  
3 facts in dispute or is this just a question of law?

4 BALFOUR: I think this is mostly a question of law,  
5 Your Honor, interpretation. Now, I don't know how the Court  
6 would consider, for instance, the facts. We have the  
7 minutes of the Board of Health and Welfare meeting. There  
8 is no indication of any concurrence. Whether you can come  
9 back retroactively and say, "Well, had we asked for your  
10 concurrence at that time would you have given it," I don't  
11 know how the Court would treat that as to whether that's a  
12 fact or whether that's an issue of law? But I don't believe  
13 there are. I think the Court can address those issues.

14 COURT: Okay.

15 BALFOUR: That's part of the reason why I filed that  
16 Motion to Strike the Affidavit. It's very clear from the  
17 law, Your Honor, that affidavits can only state facts  
18 within the personal knowledge of the person making that  
19 statement. There are all sorts of portions of the  
20 affidavits and I tried to point those out specifically in  
21 my motion. For instance, Richard Armstrong says, "I  
22 understand that the governor of the State of Idaho  
23 supported the reduction." That's not the personal knowledge  
24 of Richard Armstrong. If he had an affidavit or if he had  
25 some document from the governor of the State of Idaho, then

1 that possibly would be admissible, but he can't give his  
2 understanding.

3 COURT: It doesn't matter anyway, does it?

4 BALFOUR: No.

5 COURT: Okay.

6 BALFOUR: That's why I was pointing it out to the  
7 Court. I believe that's correct.

8 Unfortunately, there appears to be a disconnect  
9 between the Complaint that Nick filed in this matter and  
10 what the State wants that Complaint to be. Nick filed a  
11 Complaint alleging that the Director acted illegally  
12 against the clear requirements of the law when he abolished  
13 the positions of Regional Directors for four of the seven  
14 regions. This is not a wrongful termination of Nick. This  
15 isn't what this action is about and that's not what the  
16 Complaint alleges. It doesn't allege a wrongful  
17 termination. It alleges an illegal act by the Director in,  
18 on his own, unilaterally, just abolishing Regional Director  
19 positions that had been created by the law. I mean, Nick  
20 understands that he serves at the pleasure of the Director.  
21 We're not talking about that. The Idaho Code as we have  
22 shown the Court and as implemented by Governor Andrus when  
23 it was created, requires the Department of Health and  
24 Welfare to have sub-state administrative regions each  
25 headed by a separate Regional Director. The whole purpose

1 of the law is clear from the legislative history was to  
2 decentralize the delivery of services for Health and  
3 Welfare recipients. The actions of the Director in  
4 eliminating those Regional Director positions and  
5 centralizing those positions into administrative hubs is  
6 what we're asking this Court to declare illegal. Now, in  
7 the clear language of all the documents in here, the State  
8 admits that the Director abolished the positions of four of  
9 the seven Regional Directors. Point six on their memorandum  
10 admits he abolished those positions. On the next page of  
11 their memorandum, their argument is that, well there are  
12 three remaining Regional Directors who serve the seven sub-  
13 state regions. The Regional Directors by the clear language  
14 of the statute are not to "serve" the sub-state regions.  
15 They are to "head" the sub-state regions. That's what the  
16 language specifically says, Idaho Code 56-1002(3). The  
17 State argues that the Director's choice of words does not  
18 matter. It does matter. He cannot violate the State law.  
19 Sure, Regional Director will serve at the pleasure of the  
20 Director with the concurrence of the Board. It does not  
21 state that the Director can unilaterally eliminate those  
22 positions. If the Director had simply terminated Nick and  
23 appointed someone else to fill his role in Regional  
24 Director here in the region in Pocatello, we would not be  
25 here. That's not what happened. He abolished that position

1 and three other positions. We chose to challenge the  
2 Director's actions in eliminating the position of Regional  
3 Director, but only the legislature can eliminate a  
4 position. The Director doesn't have that power.

5       Now, the real issue is whether the law requires'  
6 Regional Directors and regions to be headed by a Regional  
7 Director located in that region. The Plaintiff has not  
8 disputed that Governor Andrus created seven regions.  
9 Governor Otter has not taken any action to change that  
10 administrative order creating those seven regions. He has  
11 not taken any action authorizing the Director to  
12 consolidate those seven regions into three central  
13 administrative hubs. The Director was not given that power  
14 under the legislation. As we pointed out in our Memorandum  
15 in Opposition, with substantial reference to the  
16 legislative history, the entire purpose of creating  
17 Regional Directors was to provide a decentralized  
18 administrative structure with strong local administrators.  
19 Now, if the Health Department contends that, well the  
20 statute is a little ambiguous on that point that is when  
21 you look at the legislative history. As Governor Andrus  
22 said when he created this law, "We must trim the highly  
23 paid administrators in Boise and put the talent out in the  
24 State where the people are." As Dr. Bax testified  
25 concerning the legislation, good administrators ought to be

1 out in the districts not centralized. Once this legislation  
2 was passed, Dr. Bax was appointed to be Director. The State  
3 does not seem to dispute that the law requires localized  
4 administrators in the region. They just argue that Nick  
5 could be fired, so why are we here? What we are alleging is  
6 the Director did not have the power by himself to abolish  
7 those positions. The Regional Directors are to "head" the  
8 regions. They are not to serve the regions. The law did not  
9 provide for central administration from Boise or  
10 administrative hubs. To the contrary, it is clear it did  
11 not what that. The State argues that the Director had the  
12 ability to terminate Nick's appointment as Regional  
13 Director so, therefore, it does not matter that he  
14 abolished the position. That is what we complained of in  
15 this suit. It was the specific purpose and I'm reading from  
16 the Complaint, that Idaho Code 56-1002, "Each  
17 administrative region be headed by separate Regional  
18 Directors located in the region to provide effective and  
19 economical access to services provided by the Department of  
20 Health and Welfare. Plaintiff seeks a declaration that the  
21 actions of the Defendant in eliminating separate local  
22 Regional Directors, eliminating the role of Regional  
23 Directors as the head of the region, failing to maintain  
24 each region as an administrative unit and not receiving the  
25 concurrence of the Board of Health and Welfare is illegal

1 and must reversed." The State argues that the Board of  
2 Health and Welfare is merely advisory to the Director and  
3 has no real power to do anything. This is completely  
4 contrary to the plain language of the code. Concurrence is  
5 not the same as advice. Furthermore, if you look at the  
6 affidavits of those Board members and the minutes of the  
7 meeting, they do not deal with the termination of any of  
8 the people who are Regional Directors. The Director just  
9 showed up there and said, "I've abolished the positions of  
10 four regional directors." The affidavits the State has  
11 submitted and the minutes of the board meeting indicate  
12 exactly that. The Director did not come to the board and  
13 say that he wanted to terminate Nick Arambarri's  
14 appointment as Regional Director. Furthermore, there is  
15 nothing in the minutes that indicates the Board concurred  
16 in any of these actions. The State's arguments are not  
17 supported by the facts.

18       The public and the Courts expect the Department of  
19 Health and Welfare and its employees to follow the law.  
20 They expect child protection workers to follow the law.  
21 They expect mental health workers to follow the law. They  
22 expect eligibility workers to follow the law. The Court  
23 should expect the Director of Health and Welfare to follow  
24 the law. Thank you, Your Honor.

25



1 COURT: Mr. Balfour, thank you very much. Just one  
2 question, there were seven Regional Directors, correct?

3 BALFOUR: Correct.

4 COURT: Why couldn't there have been eight or six of  
5 them?

6 BALFOUR: There could have been. That's what the  
7 governor created. Governor Andrus created the seven regions  
8 by an Administrative Order.

9 COURT: I know but the legislature didn't create the  
10 number.

11 BALFOUR: No, they gave that job to the governor and  
12 the governor created it and so until that creation of those  
13 seven regions is done differently by the governor, those  
14 regions still exist. The legislature gave that option to  
15 Governor Andrus is what he requested. He issued an  
16 Administrative Order creating seven regions and then Dr.  
17 Bax appointed Regional Directors for those seven regions.  
18 That's the status of the law. Governor Otter hasn't changed  
19 that at all.

20 COURT: So you're saying that in order to reduce the  
21 number of Regional Directors, Governor Otter would have had  
22 to do it?

23 BALFOUR: Yes. Governor Otter would have to issue an  
24 Administrative Order changing Governor Andrus's order that  
25 created those seven regions.

1 COURT: But the legislature didn't create seven  
2 regions.

3 BALFOUR: No, they said, "You're going to create the  
4 regions and each region has to be headed by a Regional  
5 Director."

6 COURT: And they left it up to, I don't want to say,  
7 "Someone smarter than them," but they left it up to  
8 somebody else to say how many regions.

9 BALFOUR: Yeah, they left it up, in that case, to the  
10 governor. That's in the law and he issued the order  
11 creating seven regions and that order is still in place.

12 COURT: Okay. Thank you.

13 BALFOUR: You're welcome.

14 COURT: Do you need additional time to reply to Mr.  
15 Withers' stuff he filed here recently?

16 BALFOUR: No, Your Honor. I think I've covered that  
17 today. I believe the Court understands my arguments and the  
18 position, if the Court has any more questions, but.

19 COURT: Okay. Thank you, Mr. Balfour.

20 BALFOUR: Thank you.

21 COURT: Mr. Withers.

22 WITHERS: Thank you, Your Honor.

23 **RESPONSE - WITHERS**

24 On that last issue, may it please the Court, Your  
25 Honor. On that last issue, it's true that the legislature

1 gave the governor the authority and the power and the right  
2 to set up the number of regions, but that does not  
3 necessarily connect the next dot that the governor was  
4 given the authority to set up the number of Regional  
5 Directors. In fact, to the contrary, the statute itself  
6 addressed the Director having authority over the Regional  
7 Directors and so it's somewhat of a stretch to say that  
8 there always has to be seven regional directors even though  
9 the governor has the authority over regions themselves. The  
10 authority over Regional Directors was not given to the  
11 governor. In fact, reading between the lines, the authority  
12 to appoint the number of Regional Directors was not given  
13 to the governor. That was simply put in the hands of the  
14 Director even though that's one of those somewhat ambiguous  
15 issues that this Court is needing to determine.

16 COURT: So, you're saying that without Governor Otter's  
17 permission or approval, the Director could just say, "Well,  
18 we're not going to have seven regions anymore, we're just  
19 going to have three."

20 WITHERS: No, the regions themselves are set up by the  
21 governor, but the Regional Directors themselves - that's  
22 why we're here today. At least, is there...

23 COURT: So, you're saying that there has to be seven  
24 regions until Governor Otter says there is a different  
25 number?

1           WITHERS: Yes. But...

2           COURT: But there's not seven regions now are there?

3           WITHERS: Yes, there are.

4           COURT: But you have somebody else taking care of  
5 multiple regions right, instead of a director in each  
6 region?

7           WITHERS: Yes. There are three remaining Regional  
8 Directors, at least at this point. I mean, the Director  
9 still has the authority to come back next week and present  
10 to the Board, here are two, three, four additional names.  
11 We're going to have more regional directors or eight or  
12 nine or ten. We're going to have more people.

13          COURT: So you agree with Mr. Balfour that the seven  
14 regions that were established cannot be changed without an  
15 order signed by the governor.

16          WITHERS: That's correct.

17          COURT: But you're saying that it doesn't necessarily  
18 follow that each region has to have a regional director?

19          WITHERS: At all times, correct, Your Honor. There  
20 might be an issue as to a gap period. Perhaps there is, I  
21 mean, if the Director comes back in a year or six months or  
22 two years and establishes additional Regional Directors,  
23 the legislature didn't point that out as to how to do that,  
24 but each region at this point, Your Honor, does have a  
25 Regional Director. That person just happens to be the same

1 person as a Regional Director in two other regions or at  
2 least in the case of Regions VII, VI and V, it's John  
3 Hathaway who had formerly been the Regional Director just  
4 over Region V.

5 COURT: So, you're saying that each Region has a  
6 Regional Director even though one individual might have two  
7 Regions under his supervision?

8 WITHERS: Correct.

9 COURT: His or her supervision.

10 WITHERS: Correct, and even though that point is  
11 somewhat dismissed by the Plaintiff, the statute does not  
12 clarify that separate individuals, separate people need to  
13 be physically in each Region. You can make that  
14 extrapolation, but taking into account economic stresses  
15 that the legislature would not have seen 37 years ago and  
16 taking into the account the authority of the Director that  
17 the legislature gave to him 37 years ago, taking that all  
18 together, the authority is there to do what the Director  
19 did and whether it's permanent or temporary, the Director  
20 did have the authority to say, "This is the Regional  
21 Director of this Region, but he's also the Regional  
22 Director of this other Region." The Regional Director for  
23 Regions, the northern part of the State is over I and II  
24 and then there's a Regional Director who is the same

25

1 Regional Director of III and the same Regional Director  
2 over IV.

3 COURT: Do you agree the legislature did make it  
4 mandatory that each division would be headed by a division  
5 administrator.

6 WITHERS: Well, that's what the statute says, but then  
7 there is some dispute as to what that means and that's part  
8 of...

9 COURT: Well, how can it mean anything but that?

10 WITHERS: Well, what the Director is saying, what the  
11 Defendant is saying is that the Regions are currently  
12 headed by Regional Directors in compliance with that  
13 statute.

14 COURT: So that's what you're saying. Your position is,  
15 you don't need seven Regional Directors. You could have two  
16 or four or five and one person could be assigned Regional  
17 Director of two regions.

18 WITHERS: And that's what the Director's understanding  
19 is, Your Honor, and that's what he was alluding to in his  
20 affidavit that regarding his conversations with the  
21 governor's office that that was acceptable to the  
22 governor's office as well. As long as there was plural, as  
23 long as there was more than one Regional Director in the  
24 State regardless of the number of responsibilities they

25

1 head, they felt that was complying with the statute in that  
2 each Region was headed by a Regional Director.

3 COURT: So you think - let's say you had one person  
4 heading Region VII and Region VI. Do you think that  
5 complies with the code that says, "Each division shall be  
6 headed by a division administrator?"

7 WITHERS: Are you looking at paragraph two or three?

8 COURT: Two.

9 WITHERS: Yeah, because division administrators are  
10 separate individuals. Those are, that's a separate  
11 structure. Paragraph three, what this case is dealing with  
12 simply indicates that the Regional Directors are those who  
13 head the regions. I mean, you could go down either  
14 direction, but the Director himself heads many things and  
15 it's just one person, but he's the head of many things. You  
16 don't need a separate individual to be the head of each  
17 thing, which is the Plaintiff's argument that you do, but  
18 that's putting, in our argument, putting words into the  
19 legislature that just aren't there.

20 COURT: Well, Idaho Code 56-1002(2) is mandatory isn't  
21 it? It says, "Each division shall," it doesn't say, "May,"  
22 it says, "Shall be headed by a division administrator."

23 WITHERS: Yes, and they are. The division  
24 administrators head the divisions. That's separate from

25

1 Regional Directors. That's a whole separate group of  
2 people.

3 COURT: Okay.

4 WITHERS: Your Honor, as to this concept of  
5 concurrence, the affidavits from the Board members makes  
6 clear that this is not retroactive. They are saying that as  
7 of May 21<sup>st</sup> 2009, we concurred and if we had objected, if we  
8 had not concurred, we would have done X, Y, Z. We would  
9 have called for a vote. We would have objected. Standard  
10 practice is to do something different if we are not in  
11 concurrence; and reading throughout those affidavits,  
12 there's plenty of language explaining how that's standard  
13 procedure. Concurrence does not necessarily mean taking a  
14 vote. It means agreement and agreement occurs through  
15 silence occasionally, as it did here and as it often does.  
16 In fact, if testimony were to occur in a trial someday on  
17 this, the Board members would testify to that. Several of  
18 the Board members would say that if we ever had any  
19 objection to what the Director was doing, we would speak  
20 up. We would ask questions. We were very active. There was  
21 a lot of interplay. They make it very clear in their  
22 affidavits that what the Director reported was accepted and  
23 they still accept it to this day. So that's not  
24 retroactive. That's on-going concurrence, but it was also  
25 concurrence that occurred on May 21<sup>st</sup>. I would just....



1 COURT: I apologize for interrupting you again, but  
2 just to clarify something according to your argument, in  
3 the Code 56-1002(2), it says, "Each division shall be  
4 headed by a division administrator," that's synonymous with  
5 Regional Director isn't it?

6 WITHERS: No, Your Honor.

7 COURT: It isn't?

8 WITHERS: It's, historically, they were treated  
9 somewhat similarly as at-will employees, but division  
10 administrators are separate individuals and divisions in  
11 the State government are complete separate entities than  
12 the Regions throughout the State. So, they are not  
13 synonymous, they are separate people. They are separate  
14 issues.

15 COURT: So, who are these folks?

16 WITHERS: Well, we have divisions such as, you know, we  
17 have the Behavioral Health Division, Kathleen Allen. We  
18 have the Children Family Services Division, which is  
19 Michelle Brittan.

20 COURT: You say they serve under the Regional Director  
21 then.

22 WITHERS: No, Your Honor, they serve under the Director  
23 himself, the Director of Health and Welfare. So,  
24 structurally, there are basically two bureaucracies that

25

1 are mixed together. Regional Directors are a separate  
2 animal completely from division administrators.

3 I would add, Your Honor, that the outcome of this case  
4 really should not hang on whether the Director came in  
5 front of the Board and said, "I am removing four Regional  
6 Directors," versus, "I am cutting the position of four  
7 Regional Directors." The outcome was the same and it did  
8 not strip the authority of the Director to reappoint or to  
9 appoint other people. How could this hang on his choice of  
10 words and that's part of the Defendant's concern and  
11 argument. The outcome is what it is and if he used any of  
12 those ten or so optional ways of saying the same thing, the  
13 outcome was the same. The appointment of Mr. Arambarri  
14 ended. No matter what it was called, no matter how the  
15 Director addressed it, it ended and a case like this should  
16 not hang on his choice of words. I don't think the  
17 legislature intended that. When they said he serves at the  
18 pleasure of the Director, unless he uses the words "cut" or  
19 "abolish," they didn't do that. They simply said, "He  
20 serves at the pleasure of the Director," period, and if he  
21 chooses to say it a different way, that's fine. It might  
22 cause confusion as it did here to some extent, but the  
23 result was the same, Your Honor. That's really all I had in  
24 response to Plaintiff's argument, Your Honor.

25

1 COURT: Do you agree, sir, that the precipitating  
2 factor here was the abolishment of Mr. Arambarri's  
3 position, not whether he elected to retire or not?

4 WITHERS: Yes. That is a red herring, Your Honor. It  
5 did come up in our briefs, but the fact is, he was the  
6 only, at the time, I believe, the only retirement eligible  
7 of the four and so he elected to take retirement benefits,  
8 well, he was without a job and he was retirement eligible  
9 so that's really not an issue. It doesn't make any  
10 difference.

11 COURT: Okay. Thank you Mr. Withers. Mr. Balfour, do  
12 you agree with that?

13 BALFOUR: Yes, yeah, that was our position.

14 COURT: Okay, so, we'll just figure whether it's a red  
15 or blue herring, the retirement issue is out the window.  
16 Right?

17 BALFOUR: Thank you, Your Honor.

18 COURT: Now, Mr. Balfour, do you have any other  
19 comments you'd like to make and if you do then we'll let  
20 Mr. Withers make some final comments.

21 BALFOUR: Your Honor, I believe we have provided the  
22 Court with the arguments and citations and the statutes and  
23 I have nothing further to add.

24 COURT: Okay. Thank you. I'll take it under advisement  
25 then. Thank you very much.

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WITHERS: Thank you.

COURT: Court's in recess.

END

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REPORTERS CERTIFICATE

STATE OF IDAHO,                    )  
  ) SS:  
COUNTY OF BANNOCK,              )  
  )

I, SHERRILL L. GRIMMETT, Do hereby certify:

That I am a Deputy Clerk of the Sixth Judicial District Court of Bannock County, State of Idaho: That I am the person designated to transcribe the Hearing on Motion for Summary Judgment as recorded on the mechanical recording device at the foregoing Hearing; That the above proceedings and evidence is a full, true and correct transcript of the Hearing as taken down by the mechanical recording device at said Hearing, as reported by me to the best of my ability.

DATED this 20<sup>th</sup> day of January, 2011.

Sherrill L. Grimmitt  
SHERRILL L. GRIMMETT  
DEPUTY CLERK

Reporter's Certificate