

6-6-2011

Arambarri v. Armstrong Appellant's Brief Dckt. 38351

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/
idaho_supreme_court_record_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

Recommended Citation

"Arambarri v. Armstrong Appellant's Brief Dckt. 38351" (2011). *Idaho Supreme Court Records & Briefs*. 2874.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/2874

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

Mark V. Withers
Deputy Attorney General
150 Shoup Ave, Suite 3
Idaho Falls, ID 83402
Attorney for Respondent

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF CASES AND AUTHORITIES	ii
I. STATEMENT OF THE CASE	1
II. COURSE OF PROCEEDINGS AND DISPOSITION	1
III. STATEMENT OF THE FACTS	2
IV. ISSUES PRESENTED ON APPEAL	3
V. ATTORNEY FEES ON APPEAL	3
VI. ARGUMENT	
A. The Director's Abolition of the Seven Positions of Regional Director is Illegal.	3
B. Legislative History	4
C. The Director Does Not have the Authority to Abolish the Position of Regional Director	8
D. Subsequent Laws Recognize the Requirements of a Regional Director	9
E. The Current "Regional Directors" do not Head their Region, Contrary to the Law	10
F. The Board of Health and Welfare is not Merely Advisory and has no Authority to Approve or Concur with an Action of the Department When it is Contrary to Law	11
G. The Board Did not Give Concurrence to the Termination of Arambarri's Appointment	12
H. The District Court Erred in its Evidentiary Rulings	13
VII. CONCLUSION	14

TABLE OF CASES AND AUTHORITIES

<u>LEGISLATIVE HISTORY</u>	<u>Page(s)</u>
House Bill 187 (1973)	2, 5, 6
Idaho Session Law, Chapter 86, House Bill 1114, 1973	6
Legislative audit report - Department of Health and Welfare, fiscal years ending June 30, 1975, 1975 - 1976 R. P. 216-217	8
Minutes, joint meeting, Idaho Senate Health Education and Welfare Committee and Idaho House Health and Welfare Committee, January 16, 1973	7
Senate Journal of the Idaho State Legislature, the 1 st Reg. Sess., 42 nd Legislature, January 8, 1973 located in the Public Archives as ID Document L 4000.33	7

<u>STATE CASES</u>	<u>Page(s)</u>
Casey v. Highlands Ins. Co., 100 Idaho 505, 600 P.2d 1387 (1979)	14
Cates v. Albertsons, Inc., 126 Idaho 1030, 895 P.2d 1223 (1995)	14
Hayden Lake Fire Protection District v. Acorn, 141 Idaho 388, 111 P.3d 73 (2005)	5
Hellar v. Cenarrusa, 106 Idaho 571, 682 P.2d 524 (1984)	3
Ivey v. State, 123 Idaho 77, 844 P.2d 706 (1992)	14
Posey v. Fort Motor Credit Co, 141 Idaho 477, 111 P.3d 162 (Ct. App. 2005)	14
Sammis v. MagneTek, Inc. 130 Idaho 342, 941 P.2d 314 (1997)	14
State v. Rhode, 133 Idaho 459, 988 P.2d 685 (1999)	4
State v. Doe, 147 Idaho 326, 208 P.3d 730 (2009)	5
Tri State Land Co. v. Roberts, 131 Idaho 835, 965 P.2d 195 (Ct. App. 1998)	14

<u>STATUTES</u>	<u>Page(s)</u>
Idaho Code §12-117	3
Idaho Code §16-108	9, 10
Idaho Code §39-303	10
Idaho Code §39-3130	10
Idaho Code §56-1002	4, 7, 9, 10, 12

<u>IDAHO RULES OF CIVIL PROCEDURE</u>	<u>Page(s)</u>
IRCP 56	14

I.

STATEMENT OF THE CASE

Delivery of services by the Idaho Department of Health and Welfare, to those in need, is a complicated and sometimes confusing task. To make that task more efficient, the Idaho Legislature has required the Department of Health and Welfare to have a strong local presence in the community. Whether it is dealing with ensuring that mothers get their child support, or ensuring that low income families get proper medical services, the delivery of those services was determined to be the best accomplished at the local level.

In 1974 the Idaho State Legislature created the Department of Health and Welfare consolidating multiple state agencies to form a single state agency with a decentralized administrative structure, providing for local involvement for the planning, evaluation and coordination of services. The statute and subsequent action by the Governor created seven regions for Health and Welfare, each headed by a local, Regional Director.

On April 24, 2009, the Director of the Department of Health and Welfare, Richard Armstrong, ignored the law requiring the Department provide access to services for the people of the State of Idaho, by abolishing four Regional Director positions. On that day, contrary to the clear requirements of the law, the Director eliminated four Regional Director positions and consolidated the seven Regional Directors into three central administrators. This action was illegal and this suit resulted.

II.

COURSE OF PROCEEDINGS AND DISPOSITION

Plaintiff filed a tort claim with the State of Idaho on June 12, 2009, which claim was denied on September 18, 2009. Thereafter Plaintiff filed this Complaint on January 27, 2010. The parties engaged in substantial discovery, mostly concerning the legislative history of certain laws creating the Department of Health and Welfare and the Regional Director positions.

Defendant filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment on August 2, 2010. On September 15, 2010, Defendant filed their Memorandum in Opposition to Motion to Dismiss/Motion for Summary Judgment which is part of the Clerk's record herein. On September 29, 2010 Appellant received a copy of Defendant's Reply to Appellant's Memorandum in Opposition to Motion to Dismiss/Motion for Summary Judgment and on the same day, Appellant filed their Objection to Respondent's Reply Brief. All motions were heard by the Court on September 30, 2010, and the Court issued its Memorandum Decision and Order on November 12, 2010, granting summary judgment in the favor of the Respondent. Plaintiff filed a Notice of Appeal on December 2, 2010.

III.

STATEMENT OF THE FACTS

In 1973 the Idaho Legislature passed House Bill No. 187, creating the Department of Health and Welfare. That law set up the infrastructure for the Department.

After the Legislature passed this legislation Governor Cecil Andrus appointed Dr. James Bax the director of the new agency and designated seven regions based on the geographic and economic

convenience of the citizens of the state. Dr. Bax appointed seven Regional Directors with the concurrence of the Health and Welfare Board. The department was then organized around these regional administrative units.

On April 24, 2009, the Director of the Department of Health and Welfare, Defendant in this case, abolished the position of the Regional Director of District 6, and three other Regional Director positions. Nick Arambarri had been employed with the Department and had been the Regional Director for Region 6 for 19 years. This action of abolishing the position of the Regional Director was taken by the Director of the Department without any authority from either the Legislature or the Governor, and contrary to the law which created the Department and those Regional Director positions. Only the Governor could modify the system of seven Regional Directors. Furthermore, neither the Governor nor the Director of the Department could modify the law and eliminate Regional Director positions. That could only be done by the Legislature.

Thereafter the Director of Health and Welfare informed the Board of Health and Welfare that he had eliminated those Regional Director positions and consolidated the seven Regional Directors into three Administrators.

This suit resulted.

The position of Regional Director of Region 6, was created by the Legislature and Governor Andrus and it is not within the power of the Director of the Department of Health and Welfare to abolish that position. The Legislature did not give the Director that power. The law, and particularly the legislative history establish clearly that the Legislature required Regional

Directorships to be maintained in each region, headed by a single Director.

IV.

ISSUES PRESENTED ON APPEAL

A. The law creating the Department requires decentralized administration, contrary to the Court's finding;

B. Contrary to the Court's finding, the Department of Health and Welfare has failed to maintain regional administrative units as required by law.

C. Contrary to the Court's finding the Department of Health and Welfare has failed to maintain Regional Directors as heads of the regions as required by law.

D. Contrary to the Judge's decision, the law creating the Department of Health and Welfare created Regional Administrative Units, each to be headed by a local, separate Regional Director;

E. Contrary to the Court's findings, the Director of Health and Welfare did not comply with the requirement of concurrence from the Board of Health and Welfare for the decision to terminate Nick Arambarri's appointment as Regional Director.

V.

ATTORNEY FEES ON APPEAL

Plaintiff requests attorneys fees be awarded on appeal pursuant to Idaho Code §12-117 as the actions of the State were without a reasonable basis in fact or law. In addition, Plaintiff requests attorneys fees under the Private Attorney General doctrine. *Hellar v. Cenarrusa*, 106 Idaho 571, 682 P.2d 524 (1984).

VI.

ARGUMENT

A. The Director's Abolition of the Seven Positions of Regional Director is Illegal.

The District Court found that the Director of the Department of Health and Welfare had the statutory authority to, by himself, abolish the position of Regional Director. This is a clear error of law. It is illogical that the Court would accept the Defendant's argument that there is no required number of Regional Directors.

The Regional Director positions were created by the Legislature in the organic law that created the Department of Health and Welfare. Idaho law requires a Regional Director in each of the seven regions, to be the head of the region, to be located in that region. That is a specific and clear requirement of the law establishing those Regional Director positions.

Idaho Code §56-1002 created Health and Welfare and the system of Regional Directors. Subsequently seven administrative regions were created under Idaho Code §56-1002 in 1973.

B. Legislative History

The law that created the Department of Health and Welfare created the positions of separate, individual Regional Directors, and required them to be located in the region. This law was ignored by the Director, and missed by the District Court in its decision.

The District Court below found that analysis of the issues in this suit required reference to the legislative history of the law creating Regional Directors. R.p. 169-170. When a Court engages in statutory construction, it has the duty to ascertain the legislative intent and give effect to that

intent. *State v. Rhode*, 133 Idaho 459, 988 P.2d 685 (1999).

“To ascertain the intent of the Legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history.” *Id. at 462, 988 P.2d at 688.*

The Code involved here establishes regions as administrative units, establishes Regional Directors to head the regions, determines that each region shall be headed by a single Regional Director.

Idaho Code §56-1002(3) provides:

“In order to provide more effective and economical access to the state health and social services by the people of Idaho, the governor is hereby authorized to establish substate administrative regions. In the designation of these regions specific consideration shall be given to the geographic and economic convenience of the citizens included therein. Each substate administrative region shall be headed by a regional director who shall be appointed by, and serve at the pleasure of the director with the concurrence of the board.”

The plain meaning of this statute is that, as it applies to this case, there is a requirement to be a separate and distinct Regional Director for Region 6 of Health and Welfare, officed within the region, providing access to local citizens. Factually Governor Andrus created seven regions and those seven regions still exist, as required by law.

The District Court got confused concerning this argument and found that as Regional Directors serve at the pleasure of the Director with the concurrence of the Board of Health and Welfare, it was within the Director’s authority to “fire” a Regional Director.

This ignores the facts of this case, and what the Director actually did. He did not terminate Nick Arambarri’s employment, he abolished four Regional Director positions. The actions of the

Director have not only violated the requirement of a Regional Director to be in each region, they have taken away the Regional Directors' powers to head the region. This is established by the Affidavit of Nick Arambarri. R.p. 103-106.

The literal words of the statute provide the best guide to legislative intent and therefore the interpretation of a statute must begin with the literal words of the statute. *State v. Doe*, 147 Idaho 326, 208 P.3d 730 (2009).

Even if the state is arguing that this language is capable of more than one reasonable construction and, therefore it is ambiguous, it must be construed to mean what the Legislature intended it to mean. To determine that legislative intent, the Courts will look at the legislative history and the public policy behind the statute. *Id. at 732, Hayden Lake Fire Protection District v. Acorn*, 141 Idaho 388, 111 P.3d 73 (2005).

The legislative history was admitted in this case pursuant to Requests for Admission. For convenience, to this memorandum Appellant will quote from only the relevant portions of those documents admitted in the Requests for Admissions, to establish the point made.

An overview of the legislative history of the statutes creating the Department of Health and Welfare emphasize several items. First of all there is a strong legislative and gubernatorial preference for a decentralized administrative structure. Similarly there is a requirement for a strong local administration which includes effective and economical access to the Regional Director by the people in the region. It is emphasized in the legislative history that the law is to place the problem solving mechanism closer to the people and to give local people a role in program planning and

evaluation. All of this legislative history was ignored by the District Court in its decision.

On March 6, 1973 the Idaho State Legislature passed Idaho Sessions Law Chapter 87 (H.B. No 187). This legislation provided for the “merger of the Department of Environmental Protection and Health, the Department of Social and Rehabilitation Services and the State Youth Training Center into a single state agency to be known as the Department of Environmental and Community Services. Section 2(3) authorizes the governor to establish substate administrative regions and directed the appointment of regional deputies to head each region. The regional deputies were to be “appointed by and serve at the pleasure of the administrator with the concurrence of the board.”

Idaho Session Law, Chapter 86, House Bill 1114, 1973. R. p. 203.

Thus the language that is currently in the statute was in the original Bill passed establishing the Department of Health and Welfare. The original legislation creating the Department of Environmental Community Service, which in 1974 become Department of Health and Welfare, created administrative regions, to be headed by Regional Directors, those Regional Directors serve at the pleasure of the Director with the concurrence of the board. The legislative intent of this law to prescribe a decentralized administrative structure with strong local administrators is clear.

The Statement of Purpose states “The purpose and intent of this legislation is to improve the delivery of health, environmental, and social services to the people of Idaho. In keeping with this goal this bill proposes the integration of the department of environmental protection and health, the department of social and rehabilitative services and the state youth training center, into a single state agency. This act is directed at eliminating duplication, unnecessary spending, and disorganization.

Hence, this legislation proposes a decentralization of the current delivery system, thus placing the problem solving mechanisms of these three governmental units closer to the people.”

The Statement of Purpose for RS566, which became House Bill 187, of the 42nd Legislature, first session, 1973 (emphasis added) R. p. 207.

The proposal to merge state agencies with common missions, to decentralize administration of the current delivery systems, and to place strong administrators in the regions close to the people was introduced to the Idaho State Legislature by Governor Cecil Andrus in his 1973 State of the State Address. As he addressed Health-Social and Rehabilitation Services in Idaho he stated “I propose that we stop appropriating millions of dollars to an antiquated social delivery system impregnated with disorganization, duplication and centralized bureaucracy. We cannot justify these programs unless the people in all parts of Idaho have access to these services. This burdensome system must be decentralized and regionalized. In summary we must trim the highly paid administrators in Boise and put the talent out in the State where the people are.”

Senate Journal of the Idaho State Legislature, the 1st Reg. Sess., 42nd Legislature, January 8, 1973 located in the Public Archives as ID Document L 4000.33. R. p. 208.

Thus the very person who proposed the legislation made it clear in addressing the Idaho Legislature that the purpose of what was to become Idaho Code §56-1002 was to have decentralized Regional Directors for Health and Welfare, directors located in the regions. This is what Governor Andrus envisioned and what the Legislature created.

The legislative record further supports the legislative intent of Regional Director being in

the regions, for each region created. Representing the Governor, Dr. John R. Marks, Commissioner of the Department of Social and Rehabilitation Services and Dr. James A. Bax, Administrator of the Department of Environmental Protection and Health, testified before a joint meeting of the Senate Health, Education, and Welfare Committee and the House Health and Welfare Committee on January 16, 1973. In discussing the purpose of this legislation they explained the following as recorded on the minutes of this meeting.

“In order to do a better job of sharing responsibility, Dr. Bax said we have to have a mechanism for handling decisions across lines. We have to have a better mechanism of decentralized administration.”

Minutes, joint meeting, Idaho Senate Health Education and Welfare Committee and Idaho House Health and Welfare Committee, January 16, 1973. R. p. 213.

“Dr. Bax stated that the No. 1 benefit of consolidation would be improvement of services. The No. 2 benefit will be having a vehicle for decentralizing –to give local people a better handle on review, on program planning and evaluation; to make what are now state programs an indigenous part of the community.” *Id. At 214.*

Dr. John Marks, also testified at the hearing, and the minutes reflect his point:

“The whole essence of the reorganization here is all based on the effect of a delivery system on the people on a community level—not the effect on the bureaucracy in Boise. State offices should be merely for technical assistance, consultation, monitoring and evaluation. We can’t have a bunch of people maintaining positions, or we haven’t gained anything. The delivery system is at the local, regional level. Its effectiveness depends on people at that level, not people sitting in Boise.” *Id.*

“Dr. Bax stressed that we don’t need all these administrators; good administrators ought to be out in the districts.” *Id.*

Once this legislation was passed, Governor Andrus appointed Dr. Bax as the Director and

the Board was established. Governor Andrus created seven regions and seven Regional Directors were appointed and confirmed. An administrative structure was developed to implement the legislative intent of this new agency.

The administrative and organizational structure of the Department of Health and Welfare, as it was set up under this new law is described in the official documents of the Department of Health and Welfare, the legislative audit report of the Department of Health and Welfare. That document explains Health and Welfare as follows:

“Overall policies and regulations for the department are set by the Board of Health and Welfare. The Board consists of seven members who are appointed by the Governor.

DWH (The Department of Health & Welfare) is headed by a Director who is appointed by the Governor and is confirmed by the Senate. The Department is organized into seven geographic regions for delivering services to Idaho’s citizens. The Department also has seven divisions that are used to provide staff support. The District Health Departments operate independently but coordinate programs and activities with the Department to avoid duplication.”

“The heavy black dots on the accompanying organizational chart designate members of the executive staff who meet monthly to discuss and set specific policies and procedures, to review and determine program priorities. Decisions of the Executive Staff form a framework within which the Regional Directors may independently operate their programs. The Regional Directors appoint program managers to oversee each of the regional functions shown on the organizational chart. In carrying out the programs, the regional personnel receive management and program support from the Central Office in Boise.”

Legislative audit report - Department of Health and Welfare, fiscal years ending June 30, 1975, 1975, 1976. R. p. 216-219.

**C. The Director Does Not have the Authority to
Abolish the Position of Regional Director.**

If anything is clear from the language of the statute itself, as bolstered by the extensive legislative history, the law establishing the Department of Health and Welfare and the Regional Director's position requires a separate Regional Director, located within the Region, heading the administration for each of the Regions. This provides the decentralized administrative structure with problem solving mechanisms close to the people within the region, pursuant to the statement of purpose. Although the Director of the Department of Health and Welfare certainly has discretion in running his Department, he cannot act directly contrary to the legislation that has established that Department. That can only be done in a proper manner, by the Legislature and the Governor and it cannot be done by administrative fiat, the unilateral action of the Director.

The Department contends it still maintains seven regions, however they are not headed by separate Regional Directors located within the regions, but are centralized. Division Administrators and not the Regional Directors serve as administrative 'heads' of regional programs, services and staff. The purpose of the legislation was to decentralize the operation of Health and Welfare.

This law can only be read as a limit on the administrative authority of the Director of Health and Welfare. The Governor, not the Director, is authorized to establish regions. The Legislature mandated a decentralized organizational structure. The Director cannot undo this without a change in the law. The Director's appointments and terminations of Regional Directors must receive concurrence from the Board of Health and Welfare.

The State, in its Motion for Summary Judgment below, argued that the three remaining Regional Directors currently serve the seven “substate” administrative regions. This is untrue. In fact the action of the Director and the Department fails to meet any reasonable interpretation of Idaho Code §56-1002, particularly (3) which creates regions. First, while the Department maintains seven regions throughout the state, these regions are no longer administrative regions. All administrative authority, direction, and control come from central office in Boise. Each region is not headed by a Regional Director.

This action is not about the Director’s authority to terminate an individual assigned to be a Regional Director. It is about the Director of Health and Welfare’s authority to abolish positions created by the Legislature and the Governor.

D. Subsequent Laws Recognize The Requirements of A Regional Director.

Following the creation of the Department subsequent laws were passed to allow citizens participation in the design and delivery of community services. These laws recognize the administrative structure of the department as intended by IC §56-1002. Idaho Code §16-108 creates Regional committees as part of Idaho’s early intervention system. This law clearly establishes the intent of Idaho Code §56-1002 to have Regional Directors in each of the seven administrative regions of Health and Welfare with the authority to assign staff to address community needs. That section of the Idaho Code §16-108 reads:

“(1) The Regional Director of each of the seven administrative regions of the lead agency shall appoint a local interagency coordinating committee to assist the regional lead agency and all other appropriate agencies in the planning and

coordination of services for infants and toddlers with disabilities and their families who reside within the region served by the regional committee. With recommendations from the regional committee, the Regional Director shall appoint staff to support regional committee activities and early intervention services. Staff will report to the Regional Director.”

Under the system that has resulted from Defendant’s illegal actions, Regional Directors no longer have the authority to assign staff or other resources to support regional committee activities and early intervention services per this law. Staff no longer report to the Regional Directors, contrary to this law.

Similar laws are Idaho Code §39-3130 which creates Regional Mental Health Boards to address community mental health issues at a regional level and Idaho Code §39-303(A) which creates Regional Advisory Committees to address community substance abuse issues at a regional level.

E. The Current “Regional Directors” Do Not Head their Region, Contrary to the Law

The statute requires each region be headed by a Regional Director. By shifting the duties of the Regional Director away from heading the region and giving those to Division Administrators, again, the law has been violated. In this case below, the Director of Health and Welfare argues that this statute does not require each substate administrative region be headed by a Regional Director, it allows him to have three central administrators to govern multiple regions. Not only is this contrary to the plain meaning of the statute, it is directly contrary to all of the legislative history behind that statute.

There are several distinctions here.

The Department argued below that Idaho Code §56-1002(3) does not require separate individuals to serve as Regional Directors in the seven regions. Throughout their briefing below the Department argued that the three remaining Regional Directors “serve” the seven regions. It is important to note that the current administrative structure has centralized authority with no regional administrative leadership or structure. Regional Directors “serve” multiple regions through community development activities but no longer have administrative authority. They do not provide direction to regional programs, Regional Program Managers no longer report to them, they have no role in supervising regional staff, and they cannot allocate or assign resources.

They truly can not be said to head the region. This is contrary to the law. They have no budget responsibility. They have no role or authority in personnel matters.

**F. The Board of Health and Welfare is Not Merely Advisory
and Has no Authority to Approve Or Concur with an Action of the Department when it is
Contrary to Public Law.**

The Court below held that basically all the State Director for Health and Welfare did was terminate Nick Arambarri as a Regional Director. The Court went on to state that the Director of Health and Welfare has the ability to terminate a Regional Director, as they serve at his pleasure. The Court went on to state that the Board of Health and Welfare’s role is merely advisory. R.p. 171-172. Furthermore the Court held that the State Director obtained the concurrence of the Board as when he announced the Regional Director positions had been abolished, as no one objected. R.p. 172-173.

The Court’s decision completely misses the point, is contrary to the law, and is not what

factually occurred.

The factual scenario of the abolition of the Regional Directorship is established through the Affidavit of Nick Arambarri and related exhibits. The Respondent admits, in several instances, that Nick's position was abolished, by the unilateral action of the Director of the Department of Health and Welfare. *See Affidavit of Richard Armstrong, R. P 24*. The Director claimed that he had the authority to abolish the position of Regional Director because the Legislature required him to cut his budget.

Contrary to the Department's claim and the Court's finding, the Health and Welfare Board is not merely advisory. A complete reading of Title 56 Chapter 10 shows that the Board is authorized different roles and levels of authority. Idaho Code §56-1002(3) assigns the Board the duty to approve the appointments and terminations of Regional Directors through concurrence. Nothing in that statute could be read to reduce the Board's role to "advisory" on the appointment of Regional Directors. Their concurrence is required. If they do not concur, the Director does not have the authority to appoint Regional Directors. Approving rules is always done through a formal voting process. Concurrence for appointments as Regional Director is also given by vote. Appointments are not valid until concurrence of the Board is given. This is established by the Affidavit of Stephen Weeg, a member of the Board of Health and Welfare. Th Court's finding that the Board actually concurred with the Director's decision regarding the elimination of Plaintiff's position, is also contrary to the Affidavit of Stephen Weeg. R.p. 102.

G. The Board did not Give Concurrence to the Termination

of Arambarri's Appointment.

The concurrence requirement contained in Idaho Code §56-1002(3) is related to the Directors' decision to terminate Nick Arambarri's appointment as Region 6 Director, not the decision to abolish the Regional Director positions. *R. p. 56.*

The language of the statute itself is clear on this point. The statute concerning Regional Directors reads: "Each substate administrative region shall be headed by a regional director who shall be appointed by and serve at the pleasure of the Director with the concurrence of the Board." Idaho Code §56-1002(3).

The first decision made by the Director was to eliminate four Regional Director positions and to have the remaining three Directors serve seven regions. Director Armstrong made this decision. Nothing in the Minutes of the meeting of the Board of Health and Welfare can be said to provide the Director requesting concurrence or the Board giving concurrence. Furthermore, the Department of Health and Welfare can not reorganize or eliminate Regional Director positions contrary to Idaho Code.

The second decision made by the Director was which Regional Directors would continue to serve at his pleasure and which would not. He maintained the appointments of Tanya McElfresh, Ross Mason and John Hathaway. He terminated the appointments of Nick Arambarri, Karen Cotten, Landis Rossi and Michelle Osmond. When the Director wishes to appoint a new Regional Director he presents the person to the Board for a formal vote to show concurrence. The appointment is not valid if formal concurrence is not obtained. To comply with the law the same standard should be

met when an appointment is terminated. When the Director presented his decision to the Board he discussed the elimination of four Regional Director positions, he did not ask for concurrence from the Board to terminate Nick's, or anyone else's, appointment. R. p. 102. The Director advised the Board of his decision to eliminate four of the seven Regional Director positions. In fact the minutes reflect that the Director just advised the Health and Welfare Board that he had already made the decision and it had been done. This specific language states "the decision has been made." This cannot be said to be a request for concurrence. R. p. 56.

Defendant's Affiants testified that "my concurrence with the Director's decision to cut the positions of four Regional Directors occurred during the meeting on May 21, 2009, and I continue to concur with that decision." This sort of after-the-fact speculation, requested and received from the Board of Health and Welfare by the Director, is neither admissible nor trustworthy. There is a huge difference between being told that the Director has done something like abolish the position of Regional Directors, or the Director coming before the Board and requesting their permission to terminate a specific Director's appointment.

Again, this does not even speak to the difference between abolishing a position created by the Legislature and terminating a Regional Director. As the Director did not ask for any concurrence, he received none, and thus his action is illegal. Concurrence was not sought or given to terminate Nick as an employee, serving at the joint pleasure of the Director and the Board. If the Board had been asked to give concurrence to the termination of Nick's employment there would have been the opportunity for discussion with a vote and the decision may have been different.

H. The District Court Erred in its Evidentiary Rulings.

In support of Defendant's Motion for Summary Judgment, it submitted several affidavits, including the Affidavit of David Taylor, the Affidavit of Richard Armstrong and the Affidavits of several members of the Board of Health and Welfare.

Plaintiff moved to strike those Affidavits as not being in compliance with Idaho law, in a Motion dated September 15, 2010. The basis for the Motion to Strike was that in the Affidavits of Armstrong and Taylor, in particular, contained hearsay or information and allegations not within their personal knowledge. The cases interpreting evidence under IRCP 56 track Idaho evidentiary rules concerning reliability, hearsay and the like. *Sammis v. MagneTek, Inc.*, 130 Idaho 342 , 941 P.2d 314 (1997).

Hearsay is not admissible *Posey v. Ford Motor Credit Co*, 141 Idaho 477. Conclusions are not competent. *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 600 P.2d 1387 (1979). Personal knowledge must be established in the Affidavit for a statement to be admissible. *Tri State Land Co. v. Roberts*, 131 Idaho 835, 965 P.2d 195 (Ct. App. 1998). Affidavits are not the appropriate place to make legal arguments, they must be limited to facts within the competence and knowledge of the Affiant. IRCP 56(e) *Ivey v. State*, 123 Idaho 77, 844 P.2d 706 (1992). Affidavits which contain or refer to other documents that contain nothing to establish personal knowledge of the Affiant are inadmissible. *Cates v. Albertsons, Inc.*, 126 Idaho 1030, 895 P.2d 1223 (1995).

The Affidavit of Richard Armstrong fails under the above standards in many instances. Paragraphs 3, 4 and 5 have nothing to do with Armstrong's personal knowledge concerning creation

or intent of code sections. Paragraphs 6, 7 and 8 concerning budget cuts must be stricken as there is no personal knowledge or competency of the Affiant, merely conclusions. Paragraph 9 is conclusory without any personal knowledge. Paragraph 10 and 11 are inadmissible, particularly paragraph 11 attempts to put in the Affiant's understanding of the Governor's state of mind. Paragraphs 12, 15, 16 and 17 of the Armstrong Affidavit contains Armstrong's legal conclusion rather than fact.

The same problems exist with the Affidavit of David Taylor as being without personal knowledge, containing legal conclusions or legal opinion, or opinions concerning the actions of someone else.

VII. CONCLUSION

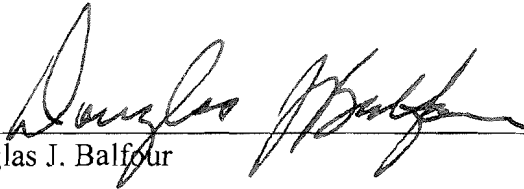
In summary, the Respondent's Motion for Summary Judgment below in most cases misses the point. The Respondent admits that the Director abolished Nick Arambarri's position, along with three other positions of Regional Director.

The point of this action is that the law does not allow the Director of the Department of Health and Welfare to unilaterally take the action he did. The Director intentionally did not seek to amend the law to allow him to take the action he did. The Court must declare the actions illegal, contrary to the law and reinstate Nick to the position of Regional Director.

The Court should declare that the actions of Respondent in eliminating separate, local Regional Directors, eliminating the role of Regional Directors as the head of the regions, failing to maintain each region as an administrative unit, and not receiving concurrence of the Board of Health

and Welfare is illegal.

DATED this 3 of June, 2011.



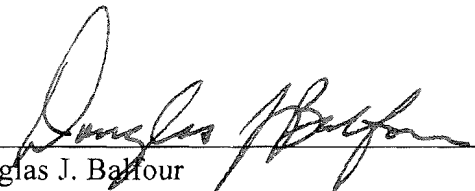
Douglas J. Balfour

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of June, 2011, I caused to be served two true copies of the foregoing document by the method indicated below, and addressed to each of the following:

Mark V. Withers
Deputy Attorney General
150 Shoup Ave., Suite 3
Idaho Falls, Idaho 83402

☒ U.S. Mail, Postage Prepaid
☐ Facsimile (208) 528-5770
☒ E-Mail withersm@dhw.idaho.gov



Douglas J. Balfour

