8-3-2011

Arambarri v. Armstrong Appellant's Reply Brief Dckt. 38351

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**

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Sixth Judicial District for Bannock County

Honorable Peter D. McDermott, District Judge presiding

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I. INTRODUCTION

Respondent has taken a different tact in this round of briefing, choosing to downplay the obvious problem with the Director not following the requirements of the statute concerning Regional Directors. The case law, legislative history, and meaning of the statute remain essentially unrefuted, that the Director did not have the power or authority to eliminate Regional Director positions, which elimination resulted in Arambarri's termination.

Instead the Respondent now tries to assert that as Arambarri could have been properly terminated, the fact that the Director's actions did not follow the statute has no meaning and therefore Arambarri cannot complain.

After review of the statute and the actual facts of what happened, this court should find for Arambarri and grant the relief requested.

II. DIRECTOR ARMSTRONG'S ACTIONS IN ELIMINATING THE POSITION OF REGIONAL DIRECTOR FOR REGION 6 WAS ILLEGAL.

A. Idaho law requires seven separate Regional Directors located in each region, heading the Region.

Respondent argues that part of the statute creating the Department of Health and Welfare gives the Regional Director complete autonomy to determine the number of Regional Directors and the role they serve, whether they are to be located in the region or not. That is far too broad a reading of Idaho Code §56-1002(3) and is contrary to the law, and the clear processes that led

to that law being created.

Respondent ignores the substantial legislative history which emphasized the need for Regional Directors to be located in the region, accessible to the public, and to head the region.

Idaho Code §56-1002(3) begins with a recitation of the purpose of the law, as contained in the legislative history submitted in Appellant's Brief. The first sentence reads "In order to provide more effective and economical access to the state of health and social services by the people of Idaho, the Governor is hereby authorized to establish substate administrative regions." In fact Governor Andrus, shortly after the law was created, established seven regions. Those regions are still in effect today. Governor Otter has not eliminated those regions or reduced them to three.

The second sentence of that code section reads: "In the designation of these regions specific consideration shall be given to the geographic and economic convenience of those citizens included therein."

Again, this language completely reflects the entire legislative history.

The code then goes on to state: "Each substate administrative region shall be headed by a Regional Director." It would be a strange reading of that language to believe that the Director of Health and Welfare could appoint just one Regional Director, located in Boise, and claim that he headed each substate administrative region. However, that is the logical continuation of Respondents' argument, that the Director can eliminate regions, can combine regions, can have all the regions headed by one central Administrator. Such power is not contained in the statute. In fact is completely contrary to what the statutes means, requires and demands.

Respondent defends the lower court who found "that there is no provision requiring a specific number of Regional Directors." That is a misreading of the statute. The statute requires the Governor to create the regions. He created seven of them. Those regions are still in existence. Certainly the Director of Health and Welfare cannot reverse the Governor's order.

The law creating the Department of Health and Welfare proscribes a decentralized administrative structure. It is contained with regions established by the Governor, not regions

established by the Director. It requires the Regions to be administrative units, each headed by a Regional Director. This legislative language proscribing this organizational structure is unique in the Idaho Code.

Certainly there are other state agencies where the Directors are given broader discretion in how they organize their administrative units.

Idaho Code §39-104(2) which creates the Department of Environmental Quality reads "The department shall be organized in such administrative divisions or regions as may be necessary in order to efficiently administer the department." Idaho Code §20-503(3) reads: "The department of juvenile corrections shall be composed of such administrative units as may be established by the director for the proper and efficient administration of the powers and duties assigned to the director or the department."

In this case, the legislature did not give the Department or the Director the authority to create those substate regions, or administrative units. This Court can only find that the legislature did not use that type of language in creating the Department of Health and Welfare as an intentional act on the part of the legislature, to limit the Director's authority.

The Respondent argues that it is really irrelevant about heading the region, as it is up to the Director to determine what the Regional Directors do. Importantly, Respondent admits that there "may be a technical difference between those two concepts [heading a region and serving a region], that discussion does not have any bearing on the issue before the Court at this time." Respondent's Brief P. 25.

In fact, that comment is part of the very issue before this Court. The law requires a Regional Director to head the region, and not serve the region.

The argument about the difference between "heading" the region and "serving" the region is a real one. Again, the whole context of the statute requires Regional Administrators to "head" the region. Any other reading is completely contrary to the statute. Further there is

strong support for the role of Regional Administrators heading the region found in the extensive legislative history submitted. It simply cannot be ignored as the Director wishes.

It is specifically this type of ambiguity or disagreement that has resulted in this suit. Arambarri contends, and the statute and the legislative history clearly support his contention, that the legislature limited the ability of the Director to centralize regional administration or to limit the ability of the Regional Directors to head their regions. Again, the Affidavit of Nick Arambarri is uncontested in this regard. R 104.

Currently the new, centralized "Regional Directors" do not head any region. They do not supervise managers and staff, they do not make personnel decisions, they do not allocate resources, and on and on. The remaining "Regional Directors" have no authority in these administrative matters and thus do not head the region as envisioned by the statute and as explained by the legislative history.

In fact this is acknowledged by Director Armstrong in the Minutes of the board where he explains that "maintaining the three will ensure some support at the local level". R 56 (emphasis added).

This is completely contrary to the statute and the design of the law that created the department, as explained. The law does not require any Regional Directors to provide some support at the local level, the whole purpose of the law, as stated by the law, is to have a maximum level of authority at the local level. Regions no longer operate as administrative units. Staff working in the regions report to six different Division Administrators in Boise rather than all staff reporting to the Regional Director.

Director Armstrong, on his own, has eliminated the role of Regional Directors heading the regions. Respondent asserts that the Director can ignore the statute or change its meaning, on his own.

B. Respondent did not terminate Nick Arambarri.

Respondents arguments seem to coalesce into one, that as Nick Arambarri was a Regional Director as envisioned by Idaho Code §56-1002(3) and as he serves at the pleasure of the Director with the concurrence of the Board, no matter what Respondent did in eliminating Regional Director positions, if he followed the proper procedures Armstrong could terminate Nick. Respondent then goes through a lengthy argument of "so what, the end result is the same, Nick does not have a job."

The facts indicate to the contrary. As Respondent points out in their brief, Nick Arambarri was informed of his termination on April 24, 2009. Respondent's Brief P. 1. Director Armstrong did not even present his decision to eliminate four Regional Director positions to the Board of Health and Welfare until a meeting on May 21, 2009, or almost a month following notifying Arambarri that his position was being eliminated.

In the portion of the Board of Health and Welfare meeting of May 21, 2009, the Director gave his report. The Minutes state: "In an effort to reduce the personnel budget, the decision has been made to hub responsibilities of the Regional Directors. The positions will be cut to three, which will reduce the personnel by $500,000." R. 56.

Nothing in the Minutes reflects the fact that the position of the Regional Director for Region 6 was eliminated. There is no indication as to which positions were eliminated, which individuals were retained and which were dismissed. It must be remembered that this report happened almost a month after the Director's representative told Nick that his position had been eliminated.

The concurrence requirement of Idaho Code §56-1002(3) is intended to be a restriction on the Director's authority. It requires the Director to share the authority to appoint and terminate Regional Directors with board members, who represent the seven Department of Health and Welfare Regions.

It is important to note that other agency Directors have complete authority over appointments and terminations of at-will Administrators. Idaho Code §39-104(2), which addresses the creation of the Department of Environmental Quality reads: "Each division shall be headed by an administrator who shall be appointed by and serve at the pleasure of the director."

Likewise Idaho Code §20-503(3) which addresses the creation of the Department of Juvenile Corrections reads: "The Director shall appoint an administrator for each administrative unit within the department." Both of these agencies have Boards.

The uniqueness of the concurrence requirement under Idaho Code §56-1002(3) shows that a different intention exists. The intention to have the board formally concur with the Director's decision to terminate an appointed Regional Director serving at the joint pleasure of the Director and the board certainly is not met by the actions of the department here.

When presented with this obvious problem of a lack of concurrence, Respondent sought out Affidavits of Board members who said even though they were not asked to concur, as they did not object, you can presume their concurrence. This is after the fact speculation, is neither reliable nor legally relevant.

The Affidavit of Stephen Weeg, who was also a Board member, stated: "At that meeting we were not asked to concur in the decision of the Director, no vote was taken. The board did not take any action or give any indication that we concurred in the decision of the Director. It was just reported to us as a fact that he had made the decision to eliminate four Regional Director positions. In the past when the Director has nominated someone to be a Regional Director, that came before the board and a formal vote was taken consenting with the appointment." R. 102.

If all the Director wanted to do was terminate Nick's appointment as Regional Director, he could go before the board and recommend that, and ask their concurrence. At a minimum this would give the opportunity for discussion of that issue. The board may or may not have agreed. However, none of this ever happened.

Certainly Idaho Code Sections vary greatly in the authority of the Governor to appoint Directors of agencies, the authority of the Directors of those agencies to set up their agency or appoint board members and the like. For example, the Administrator of the Commission on Aging, Idaho Code §67-5004 is appointed by the Governor, subject to confirmation by the Senate, but removable by the Governor at will. The same is true with the Administrator of the Division of Human Resources, Idaho Code §67-5308. Under Idaho Code §67-4221, which creates the Parks and Recreation board, the board is appointed by the Governor with the advice and consent of the Senate, then the board alone appoints the Director.

It can only be recognized by the judiciary that the specific language creating the Department of Health and Welfare was understood by the legislature and they specifically intended to limit the authority of the Director of Health and Welfare concerning the creation of Regional Director positions and the appointment and service of Regional Directors.

In fact nothing in the board Minutes indicates that Director Armstrong was requesting the board to concur in his decision to terminate Nick Arambarri's appointment as Director of Region 6. To try and extrapolate that argument after the fact is a tacit recognition that Director Armstrong's actions, the way he went about eliminating the Regional Director positions, was contrary to the law.

III. ARAMBARRI'S APPEAL IS NOT MOOT

Respondent argues that as Arambarri was properly terminated, as he served at the pleasure of the Director, the case is moot and Arambarri cannot win or recover any benefit from a decision. Again, this argument ignores the plain facts of the case. Arambarri has argued that Armstrong did not have the power or authority to eliminate the Regional Director position. If the Court agrees, Arambarri's appointment as Regional Director will be reinstated and he will be awarded damages. Armstrong has never followed the procedures required under Idaho Code

§56-1002(3), to terminate Arambarri's appointment. Nothing in the Minutes of the Board of Health and Welfare, indicate that Armstrong was seeking the concurrence of the Board in terminating the appointment of Nick Arambarri as Regional Director. The Affidavit of Stephen Weeg is unchallenged in that regard. R. 102.

Certainly Nick does not feel the case is moot, he has not been reinstated, he has not received his pay, his benefits or other damages.

This appeal seeks reinstatement, lost benefits, lost wages, and the like. That certainly is a request for relief that the Court can grant.

IV. ARAMBARRI HAS STANDING TO BRING THIS ACTION

The Complaint filed by Arambarri in this matter alleges that he was the Regional Director of Region 6 until the Respondent unilaterally eliminated that position, resulting in his termination. R. 1

The Complaint further alleges that this action by the Director of eliminating the Regional Director for Region 6 was illegal. R. 2.

The Complaint also alleges that the Director violated the law by rescinding Arambarri's appointment as Region 6 Director position without the concurrence of the Board of Health and Welfare. R. 2.

The Complaint alleges that Arambarri has been damaged in lost salary, lost benefits and the like. Furthermore the Complaint seeks a declaration that the actions of the Director in eliminating separate, local Regional Directors and eliminating the role of Regional Directors as head of the region is illegal and must be reversed.

The prayer for relief by Arambarri seeks those declarations as well as reinstatement and damages for lost wages and benefits.

Respondent argues that Arambarri's only role in this is as a concerned citizen and taxpayer and he has no personal stake in the outcome of this case. That argument ignores the obvious fact that Nick Arambarri's position was eliminated and he was terminated by the illegal

actions of the Director.

The case cited by Respondent, *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157 (2002), outlines the requirements for standing. That suit involved Appellants who admitted that they were solely concerned citizens and taxpayers and had no personal stake in the event. The Idaho Supreme Court stated:

> To satisfy the case or controversy requirement of standing, a litigant must "allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury." *Id.* (citations omitted). This requires a showing of a "distinct palpable injury" and "Fairly traceable causal connection between the claimed injury and the challenged conduct." *Miles* at 639, 788 P. 2d at 761 (internal quotations omitted).

Arambarri's allegations concerning this termination of his job are obvious and admitted by Respondents. "In 2009 when Director Armstrong eliminated four of the seven Regional Director positions, Arambarri's appointment was rescinded and he lost his employment with IDHW." Respondents Brief, P1.

Arambarri was terminated as Regional Director effective June 16, 2009, and lost those wages and benefits since that time. That is obviously an injury in fact. The relief requested is that he be compensated for the consequences of the illegal action by the Director.

It is hard to imagine a more direct impact. If Arambarri does not have standing to pursue a lawsuit challenging the illegal actions of the Director, which actions resulted in his losing his job, then no one could ever file suit.

In the case of *Miles v. Idaho Power*, 116 Idaho 635, 778 P.2d 757, the Appellant survived a standing challenge when he alleged that the actions of Idaho Power Company and the Public Utilities Commission impacted him as a ratepayer. The District Court held that was not a particular grievance to himself, but shared alike with the public. The Idaho Supreme Court overturned that finding and pointed out that the central foundation of the Idaho Declaratory Judgment Act is the requirement of adverse parties. Id at 641, 778 P.2 at 764. The Idaho

Supreme Court found that *Miles* has alleged an injury that is not suffered by the general populace of the State of Idaho, was not a generalized grievance, but was a specialized and peculiar injury. Certainly Arambarri's allegations meet all the requirements of the Declaratory Judgment Act.

Respondent asserts that Arambarri could properly be discharged, pursuant to the statue, as he serves at the pleasure of the Director with the concurrence of the Board. Respondent then argues that if the Director had followed the proper procedures and simply terminated Arambarri, rather than eliminating the entire Regional Director position, the end result would be the same and Arambarri would be without a job. The Respondent then argues that as Arambarri is not entitled to damages for this termination, he cannot seek a declaration concerning the statute because he is a mere citizen and taxpayer. This argument is not correct on either ground, nor is the assumption correct that as Arambarri will lose this appeal, then he cannot bring this appeal.

This ignores the facts of the case. The Director did not terminate Arambarri's appointment, he eliminated the Regional Director positions, then later he reported this action to the Board. There was no request to the board for concurrence of Director Armstrong's decision to rescind Arambarri's appointment. That was never even brought up with the Board. Four Appointments were rescinded and three were maintained, all at the discretion of the Director, without the concurrence of the Board. What Arambarri is challenging is that the Director did not have the power or authority to do what he did, and he did not have the power or authority to harm Arambarri as he has done. Arambarri's lost salary is not an indirect injury suffered by everyone in the State of Idaho. It is very real to him.

The issue before the District Court below as framed by the District Court after questioning at oral argument was:

> The parties are further in agreement that resolution of this matter can be found through determination of the following, single issue: Whether the Respondent, as the Director of the Idaho Department of Health and welfare, had the statutory authority to abolish the regional director positions. R. 166.

It is difficult to believe that Respondent honestly thinks that "Arambarri is not in a position to seek relief since he has not alleged, nor demonstrated that he is in a class of individuals harmed by Director Armstrong's actions." Respondent's Brief at 12.

In fact Arambarri has alleged he was personally harmed by the Director's illegal actions. Curiously on Page 10 of Respondent's Brief, Armstrong argues that there can be no liability "because there is no allegation that the termination of Arambarri violated any public policy." That is not true. There can be no more direct expression of public policy than the language of a statute which establishes that public policy. Arambarri has alleged that Armstrong violated the statue and therefore violated the public policy expressed by that statute. Certainly the legislature can define public policy by a statute.

The public policy of the state is found in the Constitution and statues. *Edmonson v. Schearer Lumber Products*, 139 Idaho 172, 75 P.3 733 (2003); *Boise-Payette Lumber Company v. Challis Independent School District No. 1*, 46 Idaho 403, 268 P. 26 (1928).

It is hard to imagine a more direct violation of public policy than the actions of the Director, who intentionally decided he would ignore the statute and act contrary to its specific requirements.

Arambarri's allegation and prayer for declaratory judgment also gives him standing to bring this action.

Idaho Code §10-1202 states:

> Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or under legal relations thereunder.

Obviously Arambarri is a person interested in a statute and the interpretation of that

statute by the Respondents. This is more than just a generic allegation of being a taxpayer and a citizen. *Ciszek v. Kootenai County Board of Commissioners*, 37562 (IDSCCI slip opinion, 2001 No. 60, May 26, 2011), *Butters v. Hauser*, 131 Idaho 498, 960 P.2 181 (1998), *Brewster v. City of Pocatello*, 115 Idaho 502, 678 P.2 765 (1988).

V. CONCLUSION

Nick Arambarri had been an employee of the Department of Health and Welfare since that department was created in 1974. A review of how and why that department was created can leave no misunderstanding concerning the requirements of the Idaho Code, that decentralized, localized administration is what the legislature demanded and what Governor Andrus created. Without changing that law or even seeking authority from the legislature to modify it, the Director of the Department of Health and Welfare decided, on his own, to ignore the law. He hoped no one would contest him.

DATED this 26 of July, 2011.

Douglas J. Balfour

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of July, 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:

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