9-13-2011

Fuchs v. Idaho State Police Appellant's Brief Dckt. 38714

IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL S. FUCHS, Licensee, dba AUBREY'S HOUSE OF ALE,

Petitioner-Appellant

v.

IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,

Respondent-Respondent.

DOCKET No. 38714-2011

District Court No. CV-2010-0005579

APPELLANT'S BRIEF

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I.
STATEMENT OF THE CASE

A. Nature of the Case

This is an Appeal from a Decision on Appeal of Petition for Judicial Review of a Final Order by the Director of the Idaho State Police ("ISP"), in which the Director denied Petitioner-Appellant Daniel S. Fuchs' ("Fuchs") motion for attorney fees pursuant to I.C. 12-117. The Director denied Fuchs' fees, though by any reasonable measure, Fuchs prevailed by obtaining a dismissal of the forfeiture and/or revocation proceedings with no sanction. And, Alcohol Beverage Control Bureau of Idaho State Police ("ISP/ABC") must be found to have pursued the action without a reasonable basis in fact or law.[1] The Director erroneously found that Fuchs was not a prevailing party avoiding awarding Fuchs attorney fees.

The District Court affirmed the Director's Final Order on appeal. The District Court held that Fuchs had no substantial right denied and that the Director had not abused his discretion in finding that Fuchs was not the "prevailing party." The District Court did not reach the issue of whether ISP/ABC acted without a reasonable basis in fact or law. The District Court erred as a matter of law.

First, if a prevailing party meets the requirements of I.C 12-117, the award of attorney fees is mandatory and is thus a substantial right. Further, the right to an impartial decision-maker is a fundamental right of due process. The District Court denied this right of due process, when it refused to review the Director's Final Order, holding that Fuchs had no substantial rights denied. Second, as a matter of law, Fuchs was a prevailing party, as he obtained the relief he sought in the administrative proceeding, a dismissal of the action.

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[1]ISP/ABC, a bureau within the Department of Idaho State Police, has been delegated by the Director, the "authority for the licensing of establishments which sell alcoholic beverages, as contained in Title 23, Chapters 9, 10, and 13, Idaho Code." IDAPA 11.05.01.011.02. The Director retains "supervisory authority for alcoholic beverage licensing." *Id.*

Finally, ISP/ABC acted without a reasonable basis in fact or law in pursuing forfeiture and/or revocation. It did so without any clearly articulated standard, based upon unlawful procedure, and in violation of the policies set forth in the Idaho Constitution.

This Court should reverse the District Court's Decision on Appeal, holding that Fuchs was the prevailing party and that ISP/ABC acted without a reasonable basis in fact or law. The case should be remanded for determination of the amount of fees to be awarded to Fuchs.

B. Course of Proceedings Below

On October 23, 2008, ABC filed its Complaint for Forfeiture or Revocation of Retail Alcohol Beverage License.[2]

On October 9, 2009, following extensive discovery, the parties filed cross motions for summary judgment.

On December 24, 2009, the Hearing Officer issued his Preliminary Order on Motions for Summary Judgment and Order on Complainant's Renewed Motion for Protective Order. The Hearing Officer granted summary judgment to Fuchs.

The parties moved for reconsideration. On January 28, 2010, the Hearing Officer denied the parties' motions for reconsideration.

On February 2, 2010, ABC timely filed a Petition for Review with the Director, Idaho State Police.

On June 8, 2010, the Director of the Idaho State Police issued the Director's Final Order. The Director dismissed the administrative action, "each side to bear their own attorney fees and costs." (Director's Final Order at 19).

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[2] The Agency Record was filed with the District Court on August 18, 2010. (R. at 2). All references to documents in the Agency Record shall refer to the name of the document and the date filed. As to exhibits attached to affidavits, exhibits identified with an "R" are attached to the affidavit of Brian Donesley in Support of Respondent Daniel S. Fuchs' Motion for Summary Judgment dated October 9, 2009. Exhibits identified as "R-DF" are attached to the Affidavit of Daniel S. Fuchs dated October 9, 2009.

On July 1, 2010, Fuchs timely filed his Notice of Appeal/Petition for Judicial Review in the District Court of the First Judicial District, Kootenai County (R at 6).

On February 10, 2011, the District Court, the Honorable Lansing Haynes presiding, issued its Decision on Appeal, affirming the Director's Final Order. (R. at 119).

On March 11, 2011, Fuchs filed his Notice of Appeal. (R. at 124).

C. Statement of Facts[3]

1. Statutory and Rulemaking Background

In 1980, the Idaho Legislature amended the Idaho Code, requiring new issue liquor licensees to put licenses into "actual use" at issuance and to keep them in "use" for at least six (6) months. I.C. 23-908 (4).

In 1993, ISP/ABC promulgated Rule 10.03, providing how a new issue liquor licensee off the priority lists may satisfy the "actual use" requirements of I.C. 23-908 (4). This rule states in relevant part:

> The requirement of Section 23-908(4), Idaho Code, that a new license be placed into actual use by the licensee and remain in use for at least six (6) consecutive months is satisfied if the licensee makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week.
>
> IDAPA 11.05.01.010.03

Prior administrators at Idaho State Police testified by affidavit that no specified number of "actual sales" had ever been required of new licensees. Major Thomas Thompson stated:

> During my tenure as major supervising the ISP Division of which the Alcohol Beverage Control Bureau was an administrative sub-entity, including part of the tenure of Lt. Clements as ABC Bureau Chief, the New License Rule was interpreted to require that new licensees secure a qualified premise and that liquor be made available for sale during the first six months after issuance of a priority

[3] The Statement of Undisputed Facts contained herein is a brief summary. For a complete recitation, Fuchs refers this Court to the Statement of Undisputed Facts set forth in Respondent's Brief on Review by Agency Head, pp. 6-15 filed with the agency on April 16, 2010.

list. There was no requirement that a new licensee make actual sales of alcohol.

(Affidavit of ISP Major Thomas C. Thompson (ret) dated October 9, 2009, hereinafter "Thompson Affidavit")

Captain Edgar Rankin stated:

> ISP did not require actual sales of alcohol in order to meet the actual use requirements of I.C. 23-908 (4), because requiring sales as a condition of maintaining a license would violate the policy of the State of Idaho by encouraging and requiring as a condition of licensure, increased consumption of alcohol.

(Affidavit of Captain Edgar Rankin (ret) dated October 9, 2009, hereinafter, "Rankin Affidavit," at ¶ 3).

Prior ABC administrator John Gould testified similarly:

> There was no requirement that a new licensee make actual sales during each of the eight (8) hours a day, no fewer than six (6) days a week during the first six (6) months after issuance of a new license. This was because ABC could not require a new licensee to produce customers or to sell liquor to customers who were not there.

(Affidavit of John Gould dated October 9, 2009, hereinafter "Gould Affidavit," at ¶ 4)

Relevant to this case is that previously, in 2003, ISP/ABC offered four new licenses off the priority lists to Fuchs in Nampa, Idaho. (**Exhibit R-DF-1** to Affidavit of Daniel S. Fuchs dated October 9, 2009, hereinafter "Fuchs Affidavit"). Fuchs was then told by ISP/ABC that he was not required to make actual sales, but that he was required to have liquor available for sale during at least eight (8) hours a day, no fewer than six (6) days a week. (Affidavit of Denise Rogers dated October 9, 2009, hereinafter "Rogers Affidavit" at ¶ 4). Fuchs was issued those four new licenses. (Fuchs Affidavit; **Exhibits R-DF-2, 3, 4, 5**). Of import is that Fuchs actually made fewer sales at these premises than at his Aubrey's House of Ale business in Coeur d'Alene

at issue here. ("Aubrey's") (**Exhibit R-4 to** Affidavit of Brian Donesley dated October 9, 2009, hereinafter "Donesley Affidavit"). Although ISP/ABC investigated how many sales Fuchs made at each of the four licensed premises, ISP/ABC did not issue an administrative notice of violation to Fuchs alleging that he had failed to make "actual sales," or pursue an administrative case pertaining to that issue. (Donesley Affidavit, **Exhibit R-4**; Fuchs Affidavit, **Exhibit R-DF-6**).

On May 19, 2008, Fuchs applied for a state liquor license for the City of Coeur d'Alene. (Fuchs Affidavit; **Exhibit R-DF-8**). On June 6, 2008, ISP/ABC issued Fuchs an Idaho Retail Alcohol Beverage License. (Fuchs Affidavit; **Exhibit R-DF-16**).

Fuchs leased space at 2065 West Riverstone Drive, # 207 in Coeur d'Alene and obtained all necessary licenses and permits required by state and local agencies. (Fuchs Affidavit; **Exhibits R-DF-7, 10-12**). Fuchs employed staff, obtained unemployment insurance and workers compensation insurance. (Fuchs Affidavit; **Exhibits R-DF-13, 14, 15**). Aubrey's House of Ale in Coeur d'Alene during all times relevant remained open each Monday through Saturday, from 10:00 am to 6:00 pm. (Fuchs Affidavit at ¶ 13).

On September 16, 2008, Lt. Clements, ISP/ABC Bureau Chief, conducted an unannounced inspection of Aubrey's. Lt. Clements met with Ruth Purvis, Fuchs' employee. He observed no customers. Purvis showed Lt. Clements the supply of liquor and beer available for sale to the public.

Upon request by Lt. Clements, Fuchs produced copies of sales records for Aubrey's for the months June 2008 through September 2008. Aubrey's had generated sales for each month. Fuchs reported sales of $598.11 to the Idaho Tax Commission for the period from July 1, 2008 to September 30, 2008. Fuchs Affidavit; **Exhibits R-DF-17-18).**

On October 14, 2008, ISP/ABC issued an administrative notice of violation, alleging the

license was not properly being used. (Complaint for Forfeiture or Revocation of Retail Alcohol Beverage License dated October 23, 2008).

2. Agency Proceedings

a. Proceedings before the Hearing Officer.

On October 23, 2008, ABC filed its Complaint for Forfeiture or Revocation of Retail Alcohol Beverage License. On October 9, 2009, following extensive discovery, the parties filed cross motions for summary judgment. On December 24, 2009 after oral argument, the Hearing Officer issued his Preliminary Order granting summary judgment to Fuchs.

The Hearing Officer ruled that IDAPA 11.05.01.010.03 unambiguously required a new licensee to make actual sales of liquor by the drink "sometime" while in operation for eight (8) hours a day/no fewer than six (6) days a week:

> The rule promulgated by the Complainant to satisfy the "actual use" language of Idaho Code 23-908 (4) unequivocally states that the requirement of Idaho Code 23-908 (4) that a new license be placed into actual use by a licensee and remain used for six consecutive months is satisfied if the licensee makes actual sale of liquor by the drink during at least eight hours per day and no fewer that six days per week. Contrary to the emphasis placed on other phrases and words within the regulation by the parties, it would appear that applying the plain, obvious and literal meaning to the word "during" would satisfy any inquiry into whether IDAPA 11.05.01.010.03 is ambiguous or unambiguous.
>
> *The definition of "during," inter alia, is "throughout the duration of." The definition of "duration" is "the time during which something exists or lasts." Thus, it would appear a licensee would be required to make actual sales of liquor by the drink sometime while it is in operation for eight hours a day/no fewer than six days a week.* Applying this interpretation to the undisputed facts, the evidence shows that while sales of liquor by the glass by the Respondent at Aubrey's are spotty at best, sales have nevertheless taken place. (underline in original, italics added).

Preliminary Order on Motions for Summary Judgment and Order on Complainant's Renewed Motion for Protective Order dated December 24, 2009 at 15-16 (hereinafter, "Preliminary Order").

The Hearing Officer also held that ABC was barred under the doctrine of quasi-estoppel, since "the Complainant is now taking inconsistent positions of its past practices regarding requirements of new liquor licensees." Preliminary Order at 18.

Fuchs also had moved for summary judgment on whether ABC's new policy was improper rulemaking and an arbitrary and unreasonable exercise of police power. The Hearing Officer held that, because his ruling on the interpretation of the rule was dispositive, the remaining issues "were moot." Preliminary Order at 19. n.6.

The Hearing Officer did not award attorney fees to Fuchs, as, based upon the law at the time, he had no authority to do so:

> Both parties have sought attorney fees in this matter pursuant to Idaho Code §12-117 and other applicable statutes and rules. Under Idaho Code § 12-117 only the court and not an administrative officer or agency can award attorney fees to a prevailing party. *See, Rammell v. Idaho State Department of Agriculture*, 147 Idaho 415 (2009). As such, no attorney fees are awarded.
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> Preliminary Order at 19.[4]

b. <u>ABC's Petition for Review by Agency Head</u>.

ISP/ABC appealed the Hearing Officer's Decision to the Director of the Idaho State Police. On June 8, 2010, the Director issued his Final Order, declaring that Rule 10.03 was ambiguous, as Fuchs had argued from the beginning[5], but announcing his own new

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[4] In *Rammell*, this Court overruled previous decisions and held, as the Hearing Officer observed, that only Courts were authorized to award attorney fees under I.C. 12-117 On March 3, 2010, the Idaho Legislature amended I.C. 12-117 expressly to provide that administrative officers and agencies could award attorney fees. House Bill 421, SIXTIETH LEGISLATURE, SECOND REGULAR SESSION, 2010. Following this legislative action, this Court has held that parties may only seek attorney fees in "administrative proceedings" but not in "administrative judicial proceedings." *Smith v. Washington County*, 150 Idaho 388, 392 (2010).

[5]From the beginning, Fuchs has maintained that Rule 10.03 was unambiguous in how it had been interpreted without exception as requiring no particular number of sales over any period of time to satisfy the "actual sales" requirements. *See,* Appellant's Brief in Support of Petition for Judicial Review, pp. 18-19 (R at 32-33). Alternatively, Fuchs argued from the beginning that, if ambiguity were found, the rule became unenforceable. In either case, Fuchs would prevail. Rather, the Director found ambiguity but attempted to cure it, ignoring that such finding fully supported Fuchs' challenge to the administrative revocation throughout the proceedings.

interpretation:

> The Hearing Officer's Interpretation of Rule 10.03 is clearly incorrect. However, this does not automatically dictate that ABC's interpretation is correct. Examining the language of the rule, reasonable minds can reach different conclusions regarding its precise meaning. In other words, it is ambiguous. The rule can reasonably be read one (1) of three (3) ways. A licensee must:
>
> a. sell at least one (1) glass of liquor every hour for at least eight (8) hours, six (6) days or more a week. (This would require at least forty-eight (48) sales a week and is how ABC is apparently interpreting the rule); or
>
> b. sell at least one (1) glass of liquor sometime during every day that the establishment is open. The establishment must be open for at least eight (8) hours per day, six (6) days or more a week. (This would require at least (6) sales a week); or
>
> c. sell at least one (1) glass of liquor sometime during a period of time during which the establishment is open at least eight hours a day, at least six (6) days a week (this would require only (1) sale a week).
>
> The proper interpretation of IDAPA 11.05.01.010.03 is that a new licensee must sell at least one (1) glass of liquor sometime during every day that the establishment is open. The establishment must be open for at least eight (8) hours per day, six (6) days a week.

Director's Final Order at 10-11.

Additionally, the Director overruled the Hearing Officer by holding that ISP/ABC was not barred under quasi-estoppel from taking inconsistent positions, stating incongruously that "there is no question that Fuchs violated Rule 10.03." Director's Final Order at 12.

And, the Director ruled that ABC did not engage in improper rulemaking, because "ABC's notifications to Fuchs (including the interpretation adopted by the Director and stated in this Final Decision) qualify as written statements from the agency to the licensee pertaining to how the agency is interpreting Rule 10.03." Director's Final Order at 15.

The Director held that ISP/ABC's actions were not arbitrary and unreasonable, because Rule 10.03 requires "actual sales," and "the only thing ambiguous about the rule was whether

those actual sales have to be hourly, daily or weekly." *Id.* at 16.

Despite such pronouncements, the Director did not order revocation or forfeiture of Fuchs' license, though, ostensibly, he had ruled against Fuchs on each issue:

> The record shows that Fuchs violated IDAPA 11.05.01.010.03 by failing to make the necessary sales on numerous days and even several entire weeks during the relevant six (6) month period. ***However, given the confusion over the proper interpretation of the rule and its misapplication by both parties and the Hearing Officer, Fuchs will not be sanctioned for this violation***, and the clarification of the proper interpretation of IDAPA 11.05.01.010.03 set forth in this Final Order shall have prospective effect only.
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> *Id.* at 18 (emphasis added).

The Director declined to award attorney fees to either party, stating that neither party had prevailed and that Fuchs had not acted without a reasonable basis in fact or law:

> Under Idaho Code 12-117, an administrative agency shall award attorney fees to the prevailing party, but only when the losing party "acted without a reasonable basis in fact or law." ***In this case, the Director has reversed the Hearing Officer's Preliminary Order and found that Fuchs violated the applicable rule. Therefore, Fuchs is not the prevailing party and is not eligible for attorney fees under Section 12-117. However, neither is ABC.*** While the Director has concluded that Fuchs violated IDAPA 11.05.01.010.03, it cannot be said that he acted without a reasonable basis in fact or law.
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> The rule at issue in this case is ambiguous. Prior ISP administrators, the Hearing Officer, and both parties misinterpreted what the rule requires. ***Although Fuchs was properly put on advanced notice that actual sales were necessary, there was still considerable confusion over the exact details of those sales.***
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> *Id.* at 17 (emphasis added).

On July 1, 2010, Fuchs filed a Notice of Appeal/Petition for Judicial Review with the District Court seeking costs and attorney fees (R. at 1-7).

II.
ISSUES PRESENTED ON APPEAL

A. Whether Appellant Fuchs' "substantial rights," contemplated by I.C. 67-5279 (4), were prejudiced. The District Court erred in applying an overbroad, discretionary standard to the

Director on appeal to him, in finding the Director's discretion excused the denial of Appellant Fuchs' "substantial rights" to costs and attorney's fees, due process of law, and freedom from the unreasonable exercise of police power.

B. Whether Appellant Fuchs was a "prevailing party," entitling him to seek costs and attorney fees pursuant to I.C. 12-117.

C. Whether Respondent ISP actions were without a reasonable basis in fact or law, because Respondent ISP's attempt to revoke Appellant Fuchs's license, without a clear standard as to how many "actual sales" were required, was:

- an unreasonable exercise of police power;
- arbitrary, capricious, and not based upon adequate determining principles;
- based upon unlawful procedure, and;
- in violation of the Idaho Constitution.

III
ARGUMENT

A. STANDARD OF REVIEW.

An agency's action may be set aside, if the agency's findings, conclusions or decisions: (a) violate constitutional or statutory provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence on the record as a whole; or, (e) are arbitrary, capricious, or an abuse of discretion. I.C. 67-5279 (3). In addition, Idaho courts will affirm agency action, unless a substantial right of the appellant has been prejudiced. I.C. 67-5279(4).

This Court freely and *de novo* reviews a district court's decision regarding attorney fees under I.C. 12-117. *Gardiner v. Boundary County Bd. of Com'rs*, 148 Idaho 764, 769 (2010). *Reardon and Magic Valley Sand & Gravel, Inc., v. City of Burley*, 140 Idaho 115, 118 (2004).

B. THE DISTRICT COURT ERRED WHEN IT RULED THAT FUCHS HAD NO "SUBSTANTIAL RIGHTS" TO ATTORNEY FEES.

Fuchs had "substantial rights" denied, when the Director held that Fuchs was not a "prevailing party" and declined to award costs and attorney fees to him. ISP/ABC had acted without a reasonable basis in fact or law. This Court has held that, under I.C. 12-117, an award of attorney fees is mandatory to a prevailing party and when the non-moving party acted without a reasonable basis in fact or law. Secondly, Fuchs' "substantial rights" prejudiced include the fundamental due process right to an impartial decision-maker in reviewing his request for fees and costs. The Director, the head of the agency, was not impartial. The District Court compounded this due process deprivation, when it deferred to the "substantial rights" have been prejudiced. This Court should reverse the District Court's Decision and Order on Appeal affirming the Director's Final Order.

This Court has held that a party must demonstrate that two requirements are met, before an agency decision will be overturned. *Dry Creek Partners, LLC v. Ada County Com'rs, ex rel. State,* 148 Idaho 11, 16 (2009). Initially, the party must show that the agency's decision violates I.C. 67-5279 (3). *Id.* This statute provides that the court shall affirm an agency decision, unless the court finds that the agency's finding, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) not supported by substantial evidence on the record as a whole; or
(e) arbitrary, capricious, or an abuse of discretion.

As the District Court noted, Fuchs "exhaustively" argued for costs and fees, submitting evidence in support of his argument that ISP/ABC:

- violated constitutional and statutory provisions;

- acted in excess of its statutory authority;
- based its decision upon unlawful procedure;
- acted in a manner not based upon substantial evidence;
- and/or was arbitrary, capricious and an abuse of discretion. (R. at 124).

Fuchs reasserts each and every such basis, upon which ISP/ABC violated I.C. 67-5279 (3).[6]

The District Court avoided ruling on the first step in the analysis, that ISP violated I.C. 67-5279 (3). Instead, the District Court held that the second step in the analysis was not satisfied, holding that Fuchs had no "substantial rights" prejudiced, as required by I.C. § 67-5279 (4).[7] The District Court held:

> Fuchs exhaustively analyzes and argues I.C. 67-5279 (3), the five findings upon which a reviewing court can set aside an agency action. This Court determines that it need not make findings or conclusions on the five criteria of I.C. 67-5279 (3); this determination is based upon I.C. 67-5279 (4), which provides that an agency action shall be affirmed unless the substantial rights of the appellant have been prejudiced. *See Lane Ranch Partnership v City of Sun Valley*, 145 Idaho 87, 175 P. 2d 776 (2007). Fuchs has failed to persuade this Court that costs and attorney fees are a substantial right contemplated by the statute. Fuchs, was not, in fact, sanctioned by the Director in his Final Order, and no substantial right of his has been denied.
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> Decision on Appeal at 3, R at 124.[8]

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[6]ISP/ABC's violation of each of these provisions is also a basis upon which Fuchs asserts that ABC has acted without a reasonable basis in fact or law. If this Court determines that ISP/ABC acted arbitrarily and capriciously or contrary to law, Fuchs necessarily shall have satisfied the requirements of I.C. 67-5279 (3). *See, Ater v. Idaho Bureau of Occupational Licensing*, 144 Idaho 281 (2007) (this Court affirmed District Court's decision that board acted arbitrarily and capriciously in underlying case and awarded attorney fees under I.C. 12-117); *County Residents Against Pollution From Septic Sludge (CRAPPS) v Bonner County*, 138 Idaho 585 (2007) (county violated ordinance and, thus, acted without a reasonable basis in fact or law); *Reardon and Magic Valley Sand & Gravel, Inc. v. City of Burley*, 140 Idaho 115 (2004) (county violated state constitution and, thus, acted without reasonable basis in fact or law).

[7] I.C. 67-5279 (4) requires that a court shall affirm an agency decision, unless the agency prejudiced the substantial rights of the appellant: "[n]otwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." *Id.*

[8] ISP/ABC did not argue that Fuchs' "substantial rights" had not been prejudiced. The District Court raised the issue, *sua sponte,* in its Decision on Appeal.

The District Court erred as a matter of law. Contrary to the District Court's ruling, it is because Fuchs was not "sanctioned" that Fuchs was the prevailing party whose' "substantial rights" were violated.[9] The Director did not "sanction" Fuchs and dismissed the administrative action with prejudice. Accordingly, Fuchs obtained the relief he sought and was a "prevailing party" within the meaning of Idaho Rule of Civil Procedure 54 (e) (1),[10] leaving him with no recourse for costs and fees in asserting his rights, under the District Court's result. Furthermore, Fuchs had a "substantial right" to due process violated, when the Director, responsible for the costs and fees award, fashioned an Order to avoid that mandatory costs and fees award.

I.C. 12-117 is a mandatory statute. Fuchs had a right to an award of costs and fees, if he satisfied its conditions. The Idaho Court of Appeals has held that a mandatory costs and fees statute creates a "right" or "entitlement." In *Myers v. Vermaas*, 114 Idaho 85 (Ct. App. 1988), the Court of Appeals held that a mandatory attorney fees statute could not be applied retroactively. Unlike a discretionary statute, it creates a right:

> When this classification scheme is applied to statutes authorizing ***discretionary*** awards of attorney fees, such statutes are generally held to be remedial or procedural. Consequently, they are given retroactive effect. . . . However, we think a different analysis is required for I.C. § 12-120. Unlike I.C. 12-121 and 61-617A, I.C. 12-120 provides for a ***mandatory***, not discretionary award of attorney fees to the prevailing party in commercial litigation. The automatic nature of an award under I.C. 12-120 makes it, in effect, an adjunct to the underlying commercial agreement between the parties. ***It establishes an entitlement. In this respect, an award under the statute is closely akin to other "contractual or vested" rights contained in the agreement itself.***

Myers, 114 Idaho at 87 (emphasis in original).

This Court has adopted the *Myers* analysis in *Griggs v. Nash*, 116 Idaho 228 (1989),

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[9] The proposed "sanction" here was not a license suspension or a fine. It was a license revocation, a prohibition of Fuchs selling retail alcohol beverages and disqualification from obtaining future liquor licenses. *See*, I.C. 23-910(3).

[10] *See*, *infra* at pp. 17-20.

quoting: "we think that the 1986 amendment to I.C. 12-120, which enlarged the scope of entitlement to mandatory attorney fee awards, is more accurately classified as ***substantive*** than as merely remedial or procedural." *Griggs*, 116 Idaho at 235 (*quoting Myers*, 114 Idaho at 87) (emphasis added). As Fuchs met the requirements of I.C. 12-117, he has a "substantial right" to costs and attorney fees. ISP/ABC does not challenge the principle that a party who meets the requirements of I.C. 12-117 has a "substantial right" to attorney fees. The District Court's ruling to the contrary was issued *sua sponte.* The District Court erred as a matter of law.

Fuchs' rights to due process were violated, because the Director was not an impartial decision-maker. The District Court's ruling that Fuchs had no substantial rights denied, deprived Fuchs of the right of review required by the APA under *State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1 (1989). This Court has held that "due process rights are substantial rights." *Eddins v. City of Lewiston*, 150 Idaho 30, 36 (2010) "Due process of law guarantees no particular form of procedure; it protects substantial rights." *Id. (quoting Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610 (1974)). This Court also has held that parties have a substantial right to a "reasonably fair decision-making process." *Hawkins v. Bonneville County Board of Commissioners*, 151 Idaho 228, 232 (2011). In short, there is an "overarching due process principle that everyone with a statutory interest in the outcome of a decision is entitled to meaningful notice and a fair hearing before an impartial decision-maker." *Id.*

In this case, the Director released Fuchs' license from the administrative sanction. Fuchs prevailed. Yet, since any award of costs and fees would have been paid from ISP funds, the Director fashioned a Final Order based upon an opinion, not the evidence, and he ruled that Fuchs did not prevail.

A purpose of judicial review, mandated by I.C. 67-5270 and 67-5279, is to guard against

bias by an administrative officer. In *State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1 (1989), this Court held that judicial review cures potential bias of an administrative officer. In *Pierandozzi,* a liquor licensee challenged the constitutionality of the procedure for choosing and compensating contested case hearing examiners by the Department of Law Enforcement (predecessor to ISP). Hearing Officers were chosen from departmental list and compensated by the Department on a case-by-case basis. The licensee argued that the system was analogous to the former justice of the peace system condemned by the U.S. Supreme Court in *Tumey v. Ohio*, 273 U.S. 510 (1927), in which the Court held that due process of law was denied to one tried before a judicial officer whose sole source of income was from fines collected from the accused. *Id.* at 4. This Court found in *Pierandozzi* that the APA's requirement of judicial review provided for a check on potential bias. "The potential for bias is cured by the fact that the parties have the right to judicial appeal of any administrative decision manifesting an abuse of discretion, arbitrary and capricious disposition, or findings which are clearly erroneous in light of the evidence presented at the hearing. *Id.* at 4. *See also, Staff of the Idaho Real Estate Commission v. Nordling*, 135 Idaho 630, 636 (2001) ("[a]lthough a potential conflict of interest is created by the statutory scheme enacted by the legislature," whereby the Real Estate Commission could award itself attorney fees against an agent upon a finding of guilt, "judicial review of the actions of the Idaho Real Estate Commission cures any such potential conflict").

Here, the District Court's review of the Director's Final Order could have provided Fuchs with protection from the Director's "arbitrary and capricious disposition" of this matter. Instead, the District Court held that "Fuchs was not sanctioned by the Director in his Final Order, and no substantial right of his has been denied." Decision on Appeal at 3, R. at 124. By this declaration, the District Court deprived Fuchs of the right of review. No oversight or "cure" of

the "potential bias" was in place. The Director's finding that Fuchs was not the prevailing party was arbitrary and capricious and an abuse of discretion, and, given that Fuchs was completely successful in his defense of the action, "clearly erroneous." Fuchs, consistent with due process, should have been entitled to bring his claim of attorney fees to an unbiased, impartial and disinterested tribunal. *Owsley v .Idaho Industrial Commission*, 141 Idaho 129, 135-136 (2005) ("'[t]he due process clause entitles a person to an impartial and disinterested tribunal.' The constitutional requirement that an adjudicator be free from bias applies equally to the courts and to state administrative agencies").

In *Johnson v. Bonner County School District No. 82*, 126 Idaho 490 (1994), this Court explained that, "[i]t is well established that 'actual bias of a decisionmaker is constitutionally unacceptable.'" *Id.* at 493 (*quoting Bowler v. Board of Trustees*, 101 Idaho 537, 543 (1980).

> Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." ***In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest*** in the outcome and in which [the adjudicator] has been the target of personal abuse or criticism from the party before [the adjudicator].
>
> *Id.* (*quoting Withrow v, Larkin*, 421 U.S. 35, 47 (1975) (emphasis added).

While the ISP Director did not directly have a personal pecuniary interest, costs and fees awarded would necessarily have been paid from the ISP budget. It is "constitutionally unacceptable" for such a decision be made by someone who could not be expected to act impartially. In *Ward v. Village of Monroeville, Ohio,* 409 U.S. 57 (1972), the United States Supreme Court reversed the petitioner's conviction, where the mayor before whom petitioner was compelled to stand trial for traffic offenses was responsible for village finances, and the

mayor's court, through fines, forfeitures, costs and fees, provided a substantial portion of the village funds. The United States Supreme Court held that the petitioner had been denied trial before a disinterested and impartial judicial officer, as guaranteed by the due process clause:

> Plainly that 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a 'situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.'
>
> *Ward*, 409 U.S. at 60 (*quoting Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

The District Court deferred to the Director on the issue of attorney fees, making this case indistinguishable from *Ward.* The District Court's deference eliminated the oversight which was what this Court in *Pierandozzi* said made the administrative process pass constitutional muster. This Court should remand this matter to the Director to determine the amount of the award of costs and fees.

C. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT AFFIRMED THE DIRECTOR'S CLEARLY ERRONEOUS FINDING THAT FUCHS WAS NOT THE "PREVAILING PARTY." THE DIRECTOR SUBSTITUTED HIS OPINION, RATHER THAN BASING HIS OPINION ON THE EVIDENCE IN THE RECORD. THE RECORD SUPPORTS A FINDING THAT FUCHS WAS THE "PREVAILING PARTY." ANY RULING TO THE CONTRARY WAS AN ABUSE OF DISCRETION.

An award of attorney fees and costs under I.C. 12-117 has been distilled into a two-part test. Fees must be awarded, if: (1) the Court finds in favor of the person; and (2) the agency acted without a reasonable basis in fact or law. *Reardon and Magic Valley Sand & Gravel, Inc v. City of Burley,* 140 Idaho 115, 118 (2004). Fuchs met the first part of this two-part test. He was the "prevailing party." Fuchs obtained the relief he sought in the administrative action in its entirety. The administrative action was dismissed with prejudice, and Fuchs' license not

revoked. Accordingly, the Director erred as a matter of law, when he determined that Fuchs was not the "prevailing party." The Director was required to apply the law to the facts of the case. This Court should reverse the District Court's Decision on Appeal and remand this matter to the Director for a determination of the amount of costs and attorney fees to be awarded.

The District Court held that the Director, perceiving the issue as discretionary, correctly denied attorney fees to both parties. According to the Director, neither party prevailed:

> The Director below, as previously stated, denied attorney fees to both parties on the basis that neither party was prevailing. This was a reasonable view of the proceedings by the Director given that Fuchs was found to have violated the requirements of a new licensee, but no sanctions were levied against Fuchs. This was also a discretionary call by the Director, and there is nothing in the record to support an argument that the Director abused his discretion. The record supports the conclusion that the Director viewed this decision as discretionary, acted within the perimeters of that discretion and acted in a reasonable manner.
>
> Decision on Appeal at 4, R. at 125.

The District Court erred as a matter of law for two reasons. First, by finding that Fuchs was not the "prevailing party," the Director disregarded the evidence and substituted his own opinion, declaring that neither party prevailed. Director's Final Order at 17. In *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281 (2007), this Court affirmed the district court's holding, *inter alia*, the Board "did not use its specialized knowledge and experience to evaluate the evidence but, instead, substituted that knowledge for the evidence presented. . . The district court also found that the Board acted arbitrarily and capriciously because it disregarded the evidence as presented... *Id.* at 284. Likewise, here, the Director disregarded the evidence and found that Fuchs "violated the applicable rule." Director's Final Order at 17. The evidence demonstrated that Fuchs did not violate Rule 10.03, as it had been interpreted for fifteen years by previous administrators. (Thompson, Rankin and Gould Affidavits). Fuchs did not violate Rule 10.03 as it had been interpreted by Lt. Clements in 2005, when Fuchs operated four bars in

Nampa. Preliminary Order at 12, 16. (Donesley Affidavit, **Exhibit R-4**, Fuchs Affidavit; **Exhibit R-DF-6**). It is undisputed that Fuchs made actual sales as the Hearing Officer so found. Preliminary Order at 12. (Fuchs Affidavit **Exhibit R-DF-17-18**). The Director announced a new, first impression interpretation of the rule in his Final Order. He then ruled, retroactively, that Fuchs had violated it. Director's Final Order at 12. As stated in *Ater*, the Director violated Fuchs' rights of due process, by substituting his unsupported opinion, and his new rule, for the evidence on the record.

Second, the Director's finding that Fuchs was not the "prevailing party" was an abuse of discretion and clearly erroneous. Fuchs obtained the relief he sought in the matter below in its entirety. In *Chadderdon v. King*, 104 Idaho 406, 411 (1983), the Idaho Court of Appeals explained the three factors to be considered when determining which party, if any, prevailed: (1) the final judgment or the result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. In *Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc*, 134 Idaho 259 (Ct. App. 2000), *abrogated on other grounds*, the Court of Appeals explained that the defendant was the prevailing party, as "the result obtained in this case was a dismissal of Daisy's action with prejudice, the most favorable outcome that could possibly be achieved by Paintball as a defendant." *Id.* at 262.

Here, as in *Daisy Manufacturing*, Fuchs received the "most favorable outcome that could possibly be achieved," dismissal. While the Director discussed issues before him, stating that quasi-estoppel did not apply, that there was no improper rulemaking, and that his department had not engaged in an unreasonable exercise of police power, his rulings on these issues are dicta. "There is a pronounced line of demarcation between what is *said* in an opinion and what is

decided by it." *Bashore v. Adolf*, 41 Idaho 84, 88 (1925) (*quoting Staet ex rel. Bixby v. City of St. Louis*, 145 S.W. 801 (1912) (emphasis in original)).

Moreover, the Director ruled against Fuchs on these issues to avoid paying attorney fees under I.C. 12-117. Any award of attorney fees would have been paid out of ISP funds. The Director fashioned a Final Order that decided, unreasonably, in light of the record, that Fuchs had not prevailed. As discussed, *supra,* one of the purposes of judicial review mandated by I.C. 67-5270 and 67-5279 is to guard against bias by an administrative officer. *See, State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1 (1989).

The District erred when it held that the Director was entitled to deference in his finding that Fuchs was not the "prevailing party." This Court should remand this matter to the District Court.

D. ISP/ABC ACTED "WITHOUT A REASONABLE BASIS IN FACT OR LAW": THE ACTION WAS ARBITRARY AND CAPRICIOUS, NOT BASED UPON AN ARTICULATED STANDARD; THE ADMINISTRATIVE ACTION WAS BASED UPON "RULES" NOT PROMULGATED IN ACCORDANCE WITH REQUIREMENTS OF LAW; AND, THE "RULE" UPON WHICH THE ADMINISTRATIVE ACTION WAS BASED VIOLATED ARTICLE III, § 24 OF THE IDAHO CONSTITUTION AND, ACCORDINGLY, THE ACTION IS *PER SE* WITHOUT A REASONABLE BASIS IN FACT OR LAW.

The District Court declined to address whether ISP/ABC acted without a reasonable basis in fact or law in affirming the Director's finding that Fuchs was not the "prevailing party." Decision on Appeal at 4; R. at 125). However, the Director's Final Order constituted sufficient findings from which the District Court should have ruled that ISP/ABC acted without a reasonable basis in fact or law. With this case, ISP chose to ignore fifteen years of agency interpretation of Rule 10.03 and required Fuchs to make multiple, hourly sales of alcohol enunciated first only in Lt. Clements' deposition. "Probably more than one drink. It's plural."

(See Donesley Affidavit; **Exhibit R-8,** Deposition of Robert Clements, pp. 35-36). This new first impression statement of policy exceeded statutory authority, was improper rulemaking, constituted an unreasonable exercise of police power, and violated the Idaho Constitution.

In *Bogner v. Dep't of Revenue and Taxation.* 107 Idaho 854, 859 (1984), this Court explained that the purpose of I.C. 12-117 "is two-fold: (1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never had made." In *Fischer v. City of Ketchum*, 141 Idaho 349, 356-357 (2005), the Court explained that "[t]he statute is not discretionary but provides that the court must award attorney fees where a state agency did not act with a reasonable basis in fact or law in a proceeding." The Court repeatedly has held that one of the purposes behind the statute is to remedy situations where persons have borne the financial costs resulting from groundless and arbitrary agency actions:

> The purpose of I.C. 12-117 is two-fold: First, it serves "as a deterrent to groundless or arbitrary agency action; and [second, it provides] a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should have made.

Reardon and Magic Valley Sand & Gravel, Inc. v. City of Burley, 140 Idaho 115, 118 (2004) (*quoting Rincover v. State, Dept. of Fin., Sec. Bureau,* 132 Idaho 547, 548-49 (1999) (quoting *Bogner v. State Dep't of Revenue and Taxation,* 107 Idaho 854, 859 (1984)).

An agency acts arbitrarily and capriciously when it acts without any clear standards or determining principles. In *Lane Ranch Partnership, v. City of Sun Valley*, 145 Idaho 87 (2007), the Court held that a government entity's "actions are considered arbitrary and capricious if made without a rational basis, or in disregard of the facts and circumstances, or without adequate

determining principles." *Id.* at 90. In *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281 (2007), this Court affirmed the district court ruling that the agency "acted arbitrary and capriciously because it disregarded the evidence as presented and failed to articulate clear standards" of an administrative violation. *Id.* at 284. This is consistent with this Court's standards for liquor licensing procedures. In *Crazy Horse, Inc. v. Pearce*, 98 Idaho 762 (1977), this Court explained that, the liquor licensing procedure "cannot be administered arbitrarily." *Id.* at 765. In *O'Connor v. City of Moscow*, 69 Idaho 37 (1949) and *Weller v. Hopper*, 85 Idaho 386, 392 (1963), this Court held that arbitrary liquor licensing statutes violated the licensee's fundamental rights of due process and were an unreasonable exercise of police power.

ISP has acted arbitrarily and capriciously and without a reasonable basis in fact or law. There was no articulation of standards by which Fuchs could have known how many sales were required to be compliant with Idaho law, other than what he was told previously and relied upon. New interpretations of Rule 10.03 surfaced throughout this proceeding. There was the original interpretation, relied upon by Fuchs, based on direction given by Lt. Clements' Administrative Assistant, that Rule 10.03 was not mandatory.[11] Then, there was the interpretation announced at Lt. Clements's deposition: multiple hourly sales, eight (8) hours a day, six (6) days a week. (Donesley Affidavit; **Exhibit 8,** Deposition of Robert Clements, pp. 35-36). Third, there was the interpretation by the Hearing Officer: "actual sales of liquor sometime while [the licensee] is in operation for eight hours a day/no fewer than six days a week." Preliminary Order at 15. Further, there was the interpretation announced by the Director: "sell at least one (1) glass of liquor sometime during every day that the establishment is open." Director's Final Order at 11. Fifth, there was the alternate interpretation announced by the Director, but then rejected: "sell at

[11] *See* Denise Rogers Affidavit at ¶ 4.

least one (1) glass of liquor sometime during every day that the establishment is open." *Id.* at 10. Amazingly, the Director did not refer to the prior administrators' long-standing interpretation and application of Rule 10.03 as one of the options. The Director admitted that his agency created "confusion" by not applying Rule 10.03 consistently. Each time ISP announced a new interpretation of Rule 10.03, it demonstrated its lack of "adequate determining principles." *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 90 (2007). Each time ISP announced a new interpretation, it demonstrated that there were no "clear standards" by which to judge Fuchs' actions. *Ater*, 144 Idaho at 284.

This "confusion" was a mistake that never should have been made. For fifteen years, ISP interpreted the rule one way. ISP did not require new licensees to make any number of sales to satisfy the "actual sales" requirement.[12] ISP/ABC ignored this long-standing agency interpretation and enforcement of Rule 10.03 in filing against Fuchs its administrative revocation proceeding, requiring multiple hourly sales eight (8) hours a day, six (6) days a week.

This Court has held that a basic rule of statutory construction is, first, to look at how an agency previously has applied a statute or rule, particularly if it has done so over a long period of time, to ascertain its meaning. The "application of the statute is an aid to construction, especially when the public relies on the application over a long period of time." *Hamilton v. Reeder Flying Services*, 135 Idaho 568, 571 (2001). ISP/ABC did the opposite. ISP/ABC disregarded the prior administrators' enforcement of Rule 10.03 and pursued revocation without having a clear standard. At his deposition, Lt. Clements stated the sales required was "[p]robably more than

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[12] Three past ISP administrators refused to interpret Rule 10.03 to require "actual sales" based upon public policy grounds. "Such a requirement would have been unlawful, in violation of public policy. Rankin Affidavit at ¶ 4. "[S]uch a requirement would be nonsensical, since, as a matter of common sense, a licensee cannot control how many people come into a licensed premise and buy drinks over any period of time." Gould Affidavit at ¶ 5. "A new licensee would also satisfy the requirements of I.C. 23-908 (4), if he or she secured a qualified premise and made liquor available at that premise, without making sales." Thompson Affidavit at ¶ 5.

one drink. It's plural." (Donesley Affidavit, **Exhibit R-8,** Deposition of Robert Clements, pp. 35-36). The Director admitted, at least in part, that his agency failed to articulate a clear standard:

> On its face, IDAPA 11.05.01.010.03 requires "actual sales." Fuchs' misreading of the rule to ignore this express term is a clearly wrong interpretation. The only thing ambiguous about the rule was whether those actual required sales have to be hourly, daily or weekly. The Director has now clarified that only one (1) sale per day is necessary to comply with the rule.

Director's Final Order at 16.

The Director conceded that the rule was ambiguous: "The rule can reasonably be read one (1) of three (3) possible ways." Director's Final Order at 10. Nevertheless, he concluded, incredibly, that Fuchs had violated Rule 10.03. "Fuchs has failed to meet his obligation of making at least one (1) sale per day as required by the Director's interpretation of the rule." Final Order at 11. The Director failed to acknowledge that Fuchs complied with the Hearing Officer's interpretation of the rule, with the prior administrators' interpretation and with historical enforcement practices. The Director in his Order states that the only thing ambiguous about the Rule was the amount of sales required, "hourly, daily, or weekly." *Id. However, the difference between what amount is required over what period is the difference between a revocation or not.* Fuchs could only follow what he knew and had been told by ISP, that no number of "actual sales" over any specific period was required. ABC pursued revocation, even though Fuchs had more sales at Aubrey's, the licensed premise involved here, than he did at four other licensed premises in the past. (See, Fuchs Affidavit and **Exhibits R-DF 1-5** attached thereto).

The Director disregarded this evidence. He stated that Fuchs "was notified in a February 25, 2008 letter from Nichole Harvey, ABC Management Assistant, that the license at issue in this

case (i.e. Aubrey's) would be subject to the actual sales requirement." Director's Final Order at 14. However, this letter was the same as the one Denise Rogers sent to Mr. Fuchs in 2003. (*Compare* ISP Correspondence to Fuchs dated May 3, 2003 **Exhibit R-DF-1** *with* ISP Correspondence to Fuchs, dated August 27, 2007, **Exhibit R-DF-7).** Consequently, the logic of the Director's ruling that Fuchs should have known that he could disregard that language in 2003, but not in 2008, is arbitrary, capricious and an abuse of discretion.[13]

In *Ater,* this Court explained that "judicial review is impractical, where this Court is left with no clear standard upon which to judge the alleged bad conduct and the Board's subsequent disciplinary decision." *Id.* at 285 (*citing H & V Engr., Inc. v. Idaho St. Bd. of Prof. Engrs. and Land Surveyors,* 113 Idaho 646, 656 (1987) ("without clearly articulated standards as a backdrop against which the court can review discipline, the judicial function is reduced to serving as a rubberstamp for the Board's action. In *Ater*, the Board sanctioned an occupational licensee, disregarding the hearing officer's recommendations, disregarding the evidence, and without clear standards. The Board of Professional Counselors and Marriage and Family Therapists (the "Board") brought disciplinary proceedings against Ater for allegedly violating certain provisions of the American Counseling Association Code of Ethics, ("ACA"). The Board found violations and suspended Ater's license for one year. The District Court set aside the Board's order, concluding that the Board violated Ater's due process rights, because:

> (1) it did not use its specialized knowledge and experience to evaluate the evidence but, instead, substituted that knowledge for the evidence presented: (2) it failed to articulate the standard Ater was alleged to have violated or to make findings as to how Ater violated any particular standard and; (3) the record did not

[13] Before the Hearing Officer and Director, Fuchs had urged that ISP was barred from taking inconsistent positions under the doctrine of quasi-estoppel. The Hearing Officer so ruled. The Director, however, stated that the elements of quasi-estoppel had not been met. Director's Final Order at 12-15. For the purposes of this appeal, it is sufficient to note that ISP has enforced two different standards on two separate occasions without any change in the law. This is evidence of arbitrary and capricious decision making without "adequate determining principles. *Lane Ranch Partnership*, 145 Idaho at 90.

> disclose the knowledge and experience upon which the Board based its decision and therefore the record did not contain substantial evidence to support the Board's decision.

Ater, 144 Idaho at 284

The District Court in *Ater* also found that the Board acted arbitrarily and capriciously, as it disregarded the evidence presented and "failed to articulate clear standards" regarding what was meant by terms used in the ACA. The District Court awarded attorney fees to Ater under I.C. 12-117, based on its finding that the Board acted arbitrarily and capriciously. *Id.* This Court affirmed:

> The Board's action against Ater was largely based upon its perception that Ater was serving his personal needs in following R.H. into the hall. However, it failed to define "personal needs" or explain how Ater was serving such needs. Rather, it chose to disregard a contrary finding by the hearing officer and made its own finding without explaining why. Thus, the Board's decision was without basis in fact or law. Ater was required to incur attorney fees in correcting a mistake the Board should not have made. Attorney fees pursuant to Idaho Code 12-117(1) are appropriate and we affirm the district court's award.
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> *Ater*, 144 Idaho at 286.

In our case, the Director rejected the recommendation of the Hearing Officer.[14] The Director disregarded evidence of Fuchs' sales at four licensed premises in Nampa. The Director ignored that Fuchs was given no notice of a change in policy. The Director gave no weight to the testimony of prior administrators. Instead, the Director substituted his own "expertise," as in *Ater.* He announced a new legal standard of what "actual sales" would be required, a standard only announced in his Final Order. Fuchs had not been given the opportunity to comply with the Director's new standard, before ISP filed the action to revoke his license. Applying this new, unpromulgated "rule," retroactively, to deprive Fuchs of costs and fees is irrational.

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[14] In *Ater*, a hearing was held. In this case, the parties submitted cross-motions for summary judgment. However, the Director's disregard of the evidence should result in the same "scrutiny" from this Court, because the agency head "disregarded a critical finding" of fact. *Ater,* 144 Idaho at 285.

Further, ISP/ABC's pursuit of revocation, without first announcing the legal standard it sought to enforce, was based upon unlawful procedure. For ISP to depart from its longstanding practices, and begin requiring "actual sales," required that it first promulgate a new or amended rule. *Asarco Inc. v. State*, 138 Idaho 719, 723 (2003). In *Asarco,* this Court explained that "an agency action characterized as a rule must be promulgated according to statutory directives for rulemaking, in order to have the force and effect of law. *See* I.C. 67-5231 (declaring rules void unless adopted in substantial compliance with the requirements of the IAPA)" *Id.* at 723. There is no dispute that ISP did not promulgate a new or amended rule. Rather, the Director stated that ISP was not required to do so, citing the last paragraph of I.C. 67-5201 (19), exempting an agency's written interpretations of a rule:

> The term [rule] includes the amendment, repeal, or suspension of an existing rule, but does not include: any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule." Idaho Code 67-5201 (19 (b) (iv). In this case, ABC's notification to Fuchs (including the interpretation adopted by the Director and state in this Final Decision) qualify as written statements from the agency to the licensee pertaining to how the agency is interpreting Rule 10.03. As such, the interpretations are not rules and, therefore, are not subject to the formal rulemaking process.

Director's Final Order at 15-16.

The Director's reading of "written statements ... pertaining to a rule" is so broad that no agency action would ever be a rule, unless the agency declared it so. Such reading was rejected by this Court in *Asarco,* where DEQ made a similar, circular argument:

> It is undisputed that DEQ did not comply with formal rulemaking requirements. Rather than arguing it had substantially complied with the rulemaking requirements, DEQ argued it did not have to do so. Thus, the district court held that the TMDL is void for failure to comply with state administrative law.

Asarco, 138 Idaho at 725.

There is no dispute that, prior to this case, ISP did not require a specified number of

"actual sales." (*See*, Thompson, Rankin and Gould Affidavits). The Director says that everyone involved just got it wrong: "[p]rior administrators, the Hearing Officer, and both parties misinterpreted what the rule requires." Director's Final Order at 17. The Director stated that he would be "reviewing this matter for possible rulemaking in the near future." Director's Final Order at 11, n. 4. Yet, ISP did not require a specified number of actual sales from Fuchs at his four Nampa bars. Further, the Director rejected Lt. Clements' multiple, hourly sales requirement as well. Director's Final Order at 10-11. The Director conceded that ISP/ABC had not interpreted the rule correctly when it filed this action. ISP/ABC acted arbitrarily and capriciously in pursuing this action. If a state agency fails to follow its own laws, it acts arbitrarily and capriciously, without a reasonable basis in fact or law, and is subject to costs and fees under I.C. 12-117. *County Residents Against Pollution From Septic Sludge (CRAPSS) v. Bonner County*, 138 Idaho 585 (2003) (county that failed to follow its ordinance acted arbitrarily and capriciously and without a reasonable basis in fact or law).

Finally, ISP's "actual sales" requirement violates the IDAHO CONSTITUTION, ARTICLE III, § 24, which provides that

> The first concern of all good government is the virtue and sobriety of the people, and the purity of the home. The legislature should further all wise and well directed efforts for the promotion of temperance and morality.
>
> *Id.*

ISP's new requirement, pursued by ISP in the revocation case, first enunciated in Lt. Clements' deposition. (Donesley Affidavit; **Exhibit R-8,** Deposition of Robert Clements, pp. 35-36, now abandoned even by the Director, Director's Final Order at 11), of multiple, hourly sales did not promote "temperance and morality," but alcohol consumption. Previous ISP administrators explained in affidavits that this state constitutional provision was important in explaining why each had not required a specified amount of actual sales of liquor when they oversaw ABC.

(Thompson Affidavit at ¶ 6, Rankin Affidavit at¶ 4). A state agency that violates terms of the state constitution has acted without a reasonable basis in fact or law. *Reardon and.Magic Valley Sand & Gravel, Inc. v. City of Burley*, 140 Idaho 115 (2004) (county did not act with reasonable basis in fact or law when it enacted ordinance because ordinance violated terms of state constitution and local land use planning act. I.C. 12-117).

ISP/ABC pursued license revocation without having first promulgated a legal standard of how many "actual sales" was required to comply with Rule 10.03. In this case, this failure violated Fuchs' fundamental rights of due process, exceeded ISP's statutory authority and was based upon unlawful procedure. ISP requiring a specified number of "actual sales" is contrary to the state constitutional requirement that the government promote "temperance and morality." And, ISP acted without "adequate determining principles." Accordingly, the Director erred, not only by failing to rule that Fuchs was the "prevailing party," but also by failing to rule that his agency had acted without a reasonable basis in fact or law. The District Court erred in not addressing the issue on judicial review.

IV.
CONCLUSION

The District Court erred when it held that Fuchs failed to show that his "substantial right" to attorney fees, as prevailing party, was prejudiced when ISP/ABC acted without a reasonable basis in fact or law, arbitrarily and capriciously, in violation of Fuchs' due process, based upon unlawful procedure, and in a manner contrary to the Idaho Constitution. This Court should exercise free review of this request for costs and fees and decide the issue, even though the District Court did not reach whether ISP/ABC acted without a reasonable basis in fact or law. This Court should remand this matter to the Director for a determination of the costs and attorney fees that should be awarded pursuant to I.C. 12-117. Further, Fuchs requests costs on appeal

before this Court to Fuchs based upon I.A.R. 41.

DATED this 13 day of September, 2011.

Respectfully submitted

Brian Donesley
Attorney for Petitioner-Appellant, Daniel S. Fuchs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of September, 2011, I caused an accurate copy of the foregoing document to be delivered as noted below to:

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