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# Williams v. Idaho State Board of Real Estate Appraisers Respondent's Brief 2 Dckt. 41193

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IN THE SUPREME COURT OF THE  
STATE OF IDAHO



TIMOTHY WILLIAMS, an individual,

Petitioner-Appellant,

vs.

IDAHO STATE BOARD OF REAL ESTATE  
APPRAISERS, a department within the State of  
Idaho,

Respondent.

Docket No. 41193

Ada County District Court  
Case No. CV OC 2012-03455

**RESPONDENT'S/CROSS  
APPELLANT'S REPLY BRIEF IN  
SUPPORT OF CROSS APPEAL**

**APPEALED FROM THE DISTRICT COURT OF THE  
FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO  
IN AND FOR ADA COUNTY**

**THE HONORABLE KATHRYN A. STICKLEN, PRESIDING**

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**I.**  
**INTRODUCTION**

The Board cross-appealed the sole issue regarding the Board's statutory authority to recover the attorney fees it incurred in investigation and prosecution of Williams's violations of the laws and rules regulating his profession, which the Board has a statutory duty to enforce. The Board presented its opening briefing in its Respondent's Brief filed January 2, 2014.

As a brief overview of the events leading up to the Board's Memorandum and Decision and Order on Costs and Fees, the Board filed its initial Complaint in November 2007, a hearing officer was appointed, and after initial pleadings and motions, in November 2008 Williams filed a petition for judicial review that this Court found was outside its jurisdiction to review in September 2010.

Subsequently, on March 7, 2011, the Board filed an Amended Complaint and an Evidentiary Hearing was held over four days in August 2011. At the hearing both sides presented several witnesses, including expert witnesses from each party. On November 15, 2011, the hearing officer entered his Findings of Fact, Conclusions of Law and Recommended Order. Williams filed a motion for reconsideration and a motion for involuntary dismissal. The prosecutor responded to these motions. On February 27, 2012, the Board entered its Final Order adopting the hearing officer's findings and imposing discipline for Mr. Williams' misconduct and ordered, among other things, that Mr. Williams pay the attorney fees and costs associated with his violations. An Affidavit of Costs and Fees, including a statement of the prosecutorial attorney fees, was filed. Williams filed an objection and a supplement in opposition, a briefing schedule was set, and briefs by both parties were filed. Finally on August 2, 2012, the Board entered its Memorandum Decision and Order on Costs and Fees addressing the issues before it and ordering Williams to pay the costs and fees incurred in the investigation and prosecution of his violations of the Board's law and rules.

**REPLY BRIEF - 1.**

## **II.** **ARGUMENT**

### **A. A Fair Reading of the Statute and Rule Allowing Recovery of Prosecutorial Fees Demonstrates the Board's Authority to Recover the Prosecutors' Attorney Fees.**

The controlling law at issue is straightforward. Agencies act pursuant to statutory grants of authority. *Abbot v. State Tax Commission*, 88 Idaho 202, 205 (Idaho 1965). In doing so, agencies create rules for the operation and enforcement of the law in accordance with the expressed general purpose of those statutes. *Id.*

Here, Idaho Code § 67-2609(a)(6) directly grants the Board the authority to promulgate rules to "recover costs and fees incurred in the investigation and prosecution of a licensee." Accordingly, the Board did just as the statute envisioned and promulgated IDAPA 24.18.01.525.02, which states that the Board may recover "the costs and fees incurred by the Board in the investigation and prosecution of a licensee for violation [of its laws and rules]." Thus, the laws and rules governing the Board explicitly authorize the Board to recover the prosecutorial costs and fees associated with a licensee's violations of the laws and rules that the Board is charged with enforcing. Simply stated, the Board has the requisite authority to recover prosecutorial fees, and the Board acted pursuant to that authority to recover from Williams the attorney fees incurred in prosecuting Williams' violations.

Williams attempts to inject ambiguity into this grant of authority to recover prosecutorial fees by proposing that an unexplained "distinction" exists between the kinds of fees under the rule he feels a violator may be responsible to pay and the kinds of fees, namely attorney fees, that he feels the violator should not be responsible to pay under the rule.

Williams tries to create his "distinction" in the Board's rule by referring to terms in other agencies' statutes; although, these statutes do not have the legal effect of eliminating, modifying, or diminishing this agency's statutory authority. It is the language of this Board's statute and rule that establish its authority.

Williams also attempts to support his argument by citing to *Sanchez v. State Dept. of Correction*, 143 Idaho 239 (Idaho 2006). However, *Sanchez* does not work to support his claim here. The *Sanchez* court determined that the statutory phrase, "such other remedy as may be determined to be appropriate," was too broad to authorize an award of attorney fees in a wrongful termination case in front of the Personnel Commission. *Id.* at 243-244. In its analysis, the court did not solely focus on the absence of the word "fees." Rather, the court also looked to the rest of the statute which read, the Commission "shall order the reinstatement of the employee..., with or without loss of pay for the period of discharge, ... or may order such other remedy as may be determined to be appropriate." I.C. § 67-5316(4). *Id.* at 244.

Specifically, the court examined the other remedies allowable in the statutory provision to determine whether attorney fees were a contemplated remedy. The court analyzed the statute stating:

Where general words of a statute follow an enumeration of persons or things, such general words will be construed as meaning persons or things of like or similar class or character to those specifically enumerated. *State v. Kavajecz*, 139 Idaho 482, 486, 80 P.3d 1083, 1087 (2003). The statute specifically mentions reinstatement, with or without loss of pay. Nothing in that phrase would lead to the conclusion the legislature also intended to include an award of attorney fees as a possible "other remedy." A fair reading of I.C. § 67-5316(4) leads to the conclusion *Sanchez* is not entitled to an award of attorney fees."

*Id.* Thus, the court's analysis did not stop at the fact the terms "fee" or "attorney fees" were not used; rather, it looked at the full context of the statute to determine whether attorney fees were authorized.

Here, the language of the statute does not contain the ambiguity or broad language of the statute in *Sanchez* or of those in the cases cited by the district court and discussed in the Board's/ Respondent's Cross-Appeal Brief. (*See* pp. 35-36.) The language of the rule at issue states in full: "Board may order a licensee or certified real estate appraiser to pay the costs and fees incurred by the Board in the investigation or prosecution of the licensee." First, the language unambiguously and specifically grants the Board the authority to recover its fees. Second, the term "fees" does not stand alone. The rest of the sentence further illuminates that the recoverable costs and fees are those incurred in the investigation and *prosecution* of the licensee. Prosecutorial fees commonly and necessarily include the attorney fees of the prosecutor. This is the only limiting language of the type of fees that the violator may be ordered to pay. Thus, a fair reading of the statute and rule at issue shows that the allowable costs and fees are those that are incurred in the investigation and prosecution of a violation; attorney fees are certainly not excluded from the prosecutorial fees that the Board is authorized to recover.

In short, the language of the laws and rules governing the Board specifically authorizes the recovery of prosecutorial fees, which fairly includes the attorney fees expended in prosecuting a licensee for his violations of the laws and rules governing his license.

**B. The Board's Determination of the Fees Ordered Was Not an Abuse of Discretion.**

Williams attempts to assail the Board's Memorandum Decision and Order on Costs and Fees as an abuse of its discretion on several matters underlying its ultimate decision ordering Williams to pay the costs and fees incurred in the investigation and prosecution of his violations. He re-hashes and re-argues the issues presented to the Board asking this Court to re-decide those issues. However, he misses the mark when examined under the Court's applicable standard of review, which is

whether the Board abused its discretion in making its decision. Ultimately, Williams' claims do not establish an abuse of discretion by the Board in considering, apportioning, and ordering attorney fees and costs.

1. **The Board's Decision Was in Compliance With the Directives of *Haw*.**

An agency's decision will be upheld by a reviewing court when the agency "perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to available choices, and reached its own decision through an exercise of reason." *Haw v. Idaho State Board of Medicine*, 143 Idaho 51, 54 (Idaho 2006). As discussed by the Board in its opening brief on cross-appeal on this issue, the Board followed the *Haw* court's guiding principles in its determination of how to award fees and costs in this case. (Respondent's Brief, pp. 37-39.)

In objecting to the Board's conclusion on this matter, Williams is asking this Court to engage in what the *Haw* court found to be unnecessary: adding up the claims and calculating with mathematical precision who won the most claims. 143 Idaho at 54. To the contrary, *Haw* requires the Board to engage in a "meaningful analysis" and to take into account its overall success in apportioning fees and costs. As thoroughly discussed in the Respondent's Brief, the Board engaged in such an analysis (pp. 37-38 (referencing the Board's Memorandum Decision and Order on Costs and Fees (*R. Agency Cert., Second Supplement*, Attachment H))).

The Board has complied with the directions in *Haw*, and the apportionment of fees is not an abuse of discretion. As explained in its brief, the Board here perceived that its decision with respect to fees and costs was discretionary. The Board acted within the outer limits of its discretion and consistent with legal standards applicable to the available choices. And, the Board undertook an

exercise of reason in reaching its decision, as evidenced by the analysis in the Memorandum Decision itself. Williams has not established otherwise.

2. **The Board Did Not Abuse its Discretion in Determining That the Prosecutorial Hours Were Reasonable as Requested.**

Williams argues that because the cumulative hours claimed by the prosecution counsel is greater than the number incurred by his own counsel, that the prosecution hours are excessive and unreasonable. Specifically, Williams contends that because prosecution counsel for the Board changed during the pendency of the proceeding, that this turnover and the necessary time it took new counsel to become familiar with the case should reflect some sort of discount in the award of fees.

The Board declined to adjust its award based on these factors. Instead, the Board determined that it did not believe "the total number of hours given the nature of the case are unreasonable, especially considering the hourly rate charged by the State's attorneys, the nature and complexity of the case, and the fact that [Williams] is only responsible to pay less than 50 percent of the total amount due." (*R. Agency Cert., Second Supplement, Attachment H*, p. 10.) More so, with respect to Williams' arguments regarding turnover in prosecution counsel, the Board found that "considering the fact that the State's attorneys did contribute to the prosecution of this matter; that the significant delay in the case resulting from Respondent's appeal<sup>1</sup> would have required some additional case review by counsel; and since the amount of their fees constitute less than 12 percent of attorneys' fees sought, said amounts are deemed reasonable and appropriate." *Id.*, at 11.

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<sup>1</sup>This appeal was the first judicial review in this case with Judge McKee, with a subsequent appeal to the Idaho Supreme Court, which found the appeal premature given the posture of the case.

The Board's analysis and conclusions are reasonable. Turnover of counsel is not uncommon in cases that span seven years, particularly where it is the Idaho Attorney General's office that handles the prosecution. In this present case, attorneys Michael Gilmore and Melissa Moody initially handled the case and spent a total of 97.87 hours, whereupon attorneys Rob Adelson and Kathy Takasugi assumed responsibility and spent a combined 738.47 hours on the case. (*See R. Agency*, Vol. II, Tab No. 97, Affidavit of Cost and Fees, Exh. A, p. 40 of 40.) As the Board duly noted, the time spent by the initial two attorneys is very small in comparison to the time spent by the final two attorneys who eventually handled the case. Williams does not assert how much time he believes should be deducted based on this turnover, nor does he explain a basis for such. More so, the delay in this case caused by Williams' own initial petition for judicial review and subsequent appeal cannot be penalized against the Board. Thus, the Board's findings and decision must be upheld.

**3. The Board's Consideration of the Affidavit of Costs and Fees Was Not an Abuse of Discretion.**

Williams disagrees with the Board's decision to consider the Affidavit of Costs and Fees that was provided six days after the original deadline given by the Board to do so. Williams argues this was an abuse of the Board's discretion. Yet, the Board's decision and reasoning meet the standard of review and therefore were not an abuse of discretion. *See Haw*, 143 Idaho at 54.

IDAPA 04.11.01.741.02(d) provides: "The agency may exercise its discretion to consider and grant an untimely filing for costs and/or fees for good cause shown." Upon analyzing Williams' objections to the late filing, and in the discretion afforded it, the Board determined there was good cause shown for the untimely filing, and allowed it to be considered. Williams may have a different opinion on what circumstances constitute good cause, but the determination is firmly committed to the discretion of the Board and the Board properly exercised that discretion.

First, the Board found that Williams had suffered no actual prejudice by having the late filing considered. Williams was allowed to fully brief his objections, and he was given full and timely notice of the Affidavit of Katherine Takasugi before the deadline expired. The delay in filing was only six days, and the Board found that the reason for the delay—an error in calendaring due to the Board's not utilizing the typical 45-day period normally used for such orders—was excusable. And significantly, the Board found that to deny the costs and fees because of the missed deadline would be unjust given the nature of the Board's disciplinary authority and the licensees it serves. (*See R. Agency Cert., Second Supplement, Attachment H*, pp. 11-12.)

Here again, the Board did not abuse its discretion in allowing the untimely filing for fees and costs, where it: (1) understood that its decision on this matter was one of discretion (relying upon IDAPA 04.11.01.741.02(d), which specifically identifies this as an issue of discretion); (2) acted within the outer limits of its discretion and consistent with legal standards applicable to the available choices (where the Board was permitted by rule to allow the untimely filing for fees and costs based on a finding of good cause); and (3) the Board clearly undertook an exercise of reason in reaching its decision, as evidenced by the analysis in the Memorandum Decision.

4. **The Board's Consideration of the Peel and Stevenson Affidavits Was Appropriate.**

Finally, Williams objects to the Board having considered the Affidavits of Lori Peel and Dennis Stevenson, claiming that because they were filed beyond the 30-day deadline<sup>2</sup> for filing for

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<sup>2</sup> Williams' briefing misstates or misunderstands the applicable rule, stating that "it is particularly noteworthy that the 30-day deadline set by the Board. . . was far in **excess** of the default 14-day deadline set forth in IDAPA 04.11.01.741.02(a)." Petitioner's Reply Brief on Appeal, p. 27 (emphasis in original). The rule actually states, "the agency must allow no fewer than fourteen (14) days from the service date of the final order." IDAPA 04.11.01.741.02(a). The rule does not set a default deadline and only prevents an agency from giving *less* than 14 days. Hence, allowing 30 or

fees and costs they should not have been considered. Such a contention is without merit. The Peel and Stevenson affidavits were specifically filed in support of the State's response to Williams' objections to attorney fees and costs. (*See R. Agency Cert., Second Supplement, Attachments D and E.*) Both affidavits were filed in response to Williams' objections that were based on the untimeliness of the filing for fees and costs. As such, to say that these affidavits, which were submitted to establish a good cause for the untimeliness of the application for fees and costs, should have been filed before the application became untimely, is illogical.

More so, Williams was given more than adequate opportunity to address the substance of these affidavits, and he did so through a Reply in Support of Objection to Award of Attorney Fees and Costs (*R. Agency Cert., Second Supplement, Attachment F*), and his Objection to the State's Motion to Extend Time to File the Affidavit of Costs and Fees (*R. Agency Cert., Second Supplement, Attachment G*). Thus, there can be no error in the allowance of the Peel and Stevenson affidavits.

**5. The Board Properly Fulfilled its Prosecutorial and Adjudicatory Functions.**

Throughout his briefing, Williams appears to attempt to raise an inference of bias or impropriety in the Board's fulfillment of its adjudicatory role and of its prosecutorial role and at times conflates these two distinct functions.<sup>3</sup> However, Williams has not produced any evidence of actual bias, and the statutory framework under which the Board fulfills its many roles does not make its decisions suspect.

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more days is in keeping with the tenets of the rule.

<sup>3</sup> Examples of such language include "its decision to award itself the entirety of its own claimed attorney fees" (Petitioner's Reply Brief, p. 20) and "the Board requested, and not surprisingly the Board granted to itself. . . ." (Petitioner's Reply Brief, p. 29.)

The Board was legislatively created as a self-governing, self-supporting agency to regulate the profession of real estate appraisers for the purpose of "safeguard[ing] life, health and property and to promote the public welfare." I.C. §§ 54-4102, 54-4106. In creating the agency, the legislature assigned the Board duties that include those of a prosecutorial nature—necessary to the enforcement of the Board's laws and rules—as well as those of an adjudicatory nature, such as considering and entering a final order. Williams does not dispute that the Board has been properly entrusted with these powers and is authorized to carry out these functions.

Moreover, this Court has expressly addressed this same statutory structure in this same issue finding that it does not create any bias, suspicion, or violation of due process. *Staff of Idaho Real Estate Com'n v. Nordling*, 135 Idaho 630, 636-637 (Idaho 2001). The Court found that an agency's decision to award itself attorney fees upon its own determination that a licensee violated its laws and rules was not suspect or improper and that any potential for a conflict of interest was removed by the opportunity for judicial review. *Id.* at 637.

Here, the Board has fulfilled its separate duties by utilizing a prosecutor and the administrative services of the Bureau and also carried out its adjudicatory functions as a Board by making a final decision after considering the submissions of Williams and the prosecutor, and its decisions are subject to judicial review. Any implication that the Board acted improperly, or its decision is suspect because it fulfilled these statutorily created roles, is unfounded and has previously been rejected this Court.

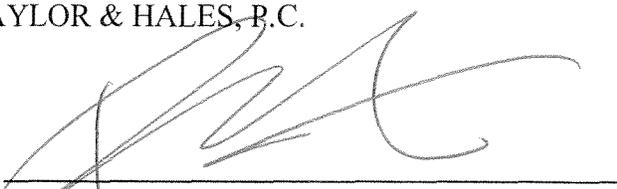
**III.**  
**CONCLUSION**

For the reasons set forth herein, this Court should reverse the District Court's decision regarding the Board's recovery of the attorney fees it incurred in the prosecution of Williams' violations of the Real Estate Appraisers Act and uphold the Board's Memorandum Decision and Order on Costs and Fees because the Board had the authority to recover its fees and did not abuse its discretion in determining and ordering the award of costs and fees.

DATED this 19th day of February, 2014.

NAYLOR & HALES, P.C.

By

  
\_\_\_\_\_  
Bruce J. Castleton  
Attorneys for Respondent

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 19th day of February, 2014, I caused to be served, by the method(s) indicated, two true and correct copies of the foregoing upon:

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