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Posaid v. State Outfitters and Guides Licensing Bd. Respondent's Brief Dckt. 41397

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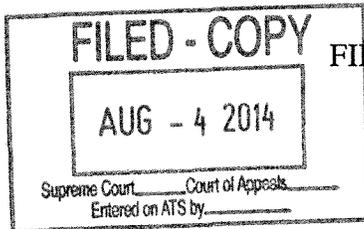
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IN THE SUPREME COURT OF THE STATE OF IDAHO

A. T. "SANDY" PODSAID,)
)
Petitioner/Appellant,) CONSOLIDATED APPEALS
)
vs.) Supreme Court Docket No. 41397-2013
) Shoshone County No. #CV-2008-807
STATE OF IDAHO OUTFITTERS AND)
GUIDES LICENSING BOARD, a state)
agency.) Supreme Court Docket No. 41398-2013
) Shoshone County No. #CV-2009-440
Respondent.)
_____)

RESPONDENT'S BRIEF



APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF SHOSHONE

HONORABLE FRED M. GIBLER
District Judge

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I.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the district court's decision in two cases, which this Court has consolidated on appeal. In Shoshone County Case No. CV-08-807 ("2008 Case"), the district court upheld the State of Idaho Outfitters and Guides Licensing Board's ("Board") determination that Petitioner's ("Podsaid") guide license expired on December 31, 2008. In Shoshone County Case No. CV-09-0440 ("2009 Case"), the district court upheld the Board's decision that Podsaid's 2009 application was a new application and remanded the matter for a hearing in front of the Board. This appeal followed.¹

B. Course of Proceedings Below/Statement of Facts.

1. 2008 Case.

On August 10, 2007, the Board approved a Settlement Agreement between Podsaid and the Board to resolve four (4) specific disciplinary complaints filed against Podsaid. 807 R. 018-023. Pursuant to the Settlement Agreement and the Board's Order, the Board specifically dealt with Podsaid's outfitter and guide license. Podsaid's guide license associated with Bitterroot Mountain Outfitters would terminate under the stipulation as of October 1, 2007. 807 R. 020A-021. Pursuant to the Settlement Agreement and the Board's Order, Podsaid was issued a restricted and probationary sole-proprietor outfitter license, which included a guide license. 807

¹ The citations in this brief to the agency records will follow the same format as set forth in Appellant's Opening Brief, p. 1-2.

R. 021. The terms of Podsaid's restricted outfitter and guide license provided that he could not book clients for outfitting or guiding services for the calendar year 2009. 807 R. 021. Further, the Settlement Agreement allowed Podsaid to seek licensure as an outfitter from April 1, 2008, through December 31, 2008. 807 R. 022. The Settlement Agreement specifically provided it was the intent of the Board that if AW-Outfitters was not sold on or before December 31, 2008, the license would terminate and the Board would treat the area as vacated and would open the area for a prospectus in accordance with applicable law. 807 R. 022. If Podsaid sought an extension of the outfitter license beyond December 31, 2008, the Board would only grant the extension if it was for the sole purpose of the selling the outfitter business and if Podsaid provided good cause for the extension. 807 R. 022.

On June 26, 2008, the Board considered Podsaid's request to approve the sale of his outfitting business to Darren Thorne. Pursuant to the application for an outfitter license by Darren Thorne, together with the proposed sale agreement for Podsaid's outfitting business to Mr. Thorne, the Board adopted the following motion:

DARREN THORNE APPLICATION - MSC (MOTION, Korell; SECOND, Long; AYES – All in favor; NAYES – None) Motion to: 1. Approve Sales Agreement between Podsaid and Thorne –Require both Podsaid & Thorne to jointly notify in writing all currently booked clients of the sale and identify Thorne as the new outfitter for their booked hunt and of their right to reimbursement – Require the name of all clients submitted to Board by August 1, 2008; 2. Approve Thorne for Outfitter license; 3. Terminate Podsaid's Outfitter license based upon sale; 4. **Allow an amendment to Podsaid's guide license to allow guiding for Thorne with Podsaid's guide license to terminate December 31, 2008, consistent with prior disciplinary Board order.**

807 R. 063. (emphasis added).

Podsaid was notified of the Board's decision to terminate his guide license as of December 31, 2008, and Podsaid requested the Board reconsider its decision. 807 R. 068-069.

A hearing was held on December 8, 2008, where Podsaid stated numerous times that all he was asking for was to have his license valid until March 31, 2009. 807 R. 111.

On December 18, 2008, the Board affirmed its prior decision that Podsaid's guide license would terminate on December 31, 2008. 807 R. 081-084. Podsaid filed a Petition for Judicial Review. R. Vol. I, pp. 7-14. On January 7, 2009, Podsaid filed a motion to stay the Board's order, which the Board opposed. R. Vol. I, pp. 15-16, 21-37. On January 21, 2009, the court issued an Order Granting Petitioner's Motion for Temporary Stay. R. Vol. I, pp. 86-87.

On May 21, 2009, the Board filed a Motion to Dismiss and a hearing was held on July 20, 2009. R. Vol. I, pp. 104-109. The court issued an order denying the Board's motion on July 31, 2009. R. Vol. I, pp. 131-137.

On April 25, 2011, Podsaid filed a motion to lift the stay and proceed with the appeal, and a stipulation to lift the stay was filed on May 2, 2011. R. Vol. I, pp. 178-181. The court filed an order lifting the stay on May 3, 2011. R. Vol. I, pp. 182-184.

On December 31, 2012, the court issued an Order Setting Briefing Schedule. R. Vol. I, p. 248. The parties filed briefing and a hearing was held on April 8, 2013, at which time the court upheld the Board's decision regarding the expiration date of Podsaid's license. R. Vol. I, pp. 250-261. On May 15, 2013, Podsaid filed a petition for rehearing, which was denied. R. Vol. I, pp. 262-267. He then filed the present appeal. R. Vol. I, pp. 268-274.

2. 2009 Case.

On December 12, 2008, Podsaid requested licensure as a guide for Mr. Scott Boulanger. 440 R. 1-2. On or about March 30, 2009, the Board office received an amended application for Podsaid to guide for Mr. Boulanger. 440 R. 3-6. The application submitted for Podsaid to guide

for the 2009-2010 license year was for a different operating area, a different employing outfitter, and included an activity for which Podsaid was not licensed in 2008 (snowmobiling). The Board provided Podsaid with notice of its decision to hold a hearing on his guide license application approximately six (6) weeks prior to the hearing. 440 R. 7-10.

Podsaid was further provided with a copy of the Executive Director's analysis and recommendation on the license request approximately six (6) weeks prior to the hearing. 440 R. 11-197. Podsaid was given an opportunity to be present, either by himself or with counsel, and to provide the Board with any written material he wished the Board to consider in his application request. Podsaid refused to participate in the Board meeting, and instead submitted a letter from his attorney two (2) days before the Board meeting, accusing the Board of circumventing Idaho law and engaging in a "witch hunt". R. Vol. II, pp. 327-329. Podsaid did not provide the Board with any written material to consider in evaluating his license application. The Board reviewed the license application and Podsaid's history during its Board meeting held June 17, 2009, and determined that Podsaid's guide license should be treated as a new application. 440 R. 204-205.

In a June 24, 2009, letter, Podsaid requested a hearing on the Board's decision from the June 17, 2009, meeting. 440 R. 212. In the letter, Podsaid requested copies of all exhibits admitted at the June 17, 2009, meeting. The Board's action was detailed by Mr. Roger Hales, counsel for the Board, in a letter sent to Podsaid on June 24, 2009. Mr. Hales' letter also included copies of the Board exhibits and a record of the hearing. 440 R. 213-435.

Podsaid filed a Petition for Judicial Review of Final Order on July 22, 2009. 440 R. 448-451. There was no Board "order" that was appealed, rather a letter from the Board's attorney. 440 R. 448-451. The Board office did not receive a copy of the faxed Petition, nor was it personally

served on the Board, or served by mail on the Board or its legal counsel. The Board's enforcement attorney did not receive a copy of the Petition and, therefore, sent Podsaid a letter dated August 31, 2009, discussing the case and informing Podsaid that a notice of hearing would be forthcoming. Podsaid was given notice of a hearing scheduled for September 18, 2009, with an opportunity to present argument before the Board on its denial of his application. 440 R. 436-438. Rather than attend the hearing that Podsaid requested, he chose to file an appeal.

On September 4, 2009, Podsaid filed a Motion for Stay as to the September 18, 2009, hearing. Also on September 4, 2009, Podsaid filed an Amended Petition for Judicial Review of Final Order, stating that "proper service is being made forthwith upon all parties required to be served pursuant to I.A.R. 20. It has been determined that service of the original petition filed July 23, 2009, did not properly transmit to the parties listed in the certificate of service." The Board filed a Motion to Dismiss Appeal on September 11, 2009. At Podsaid's request, the hearing was rescheduled to December 4, 2009. 440 R. 640, 644-646. Subsequently, the Board agreed to vacate the hearing and the parties agreed to attempt mediation. The court stayed the action pending mediation.

On May 3, 2011, an Order to Lift Stay and Proceed with Appeal was filed. R. Vol. I, pp. 182-184. However, Podsaid failed to proceed with the appeal for nearly a year and then finally filed a Motion to Set Briefing Schedule on Appeal and Notice of Hearing on February 2, 2012. The parties agreed to a hearing date in April 2012, but Petitioner failed to file the appropriate documents with the court to schedule the hearing.

On December 31, 2012, an Order Setting Briefing Schedule and Notice of Appeal Hearing was filed. R. Vol. II, p. 248. The hearing was held on April 8, 2013, and the court upheld the

Board's decision that Podsaid's 2009 application was a new application and remanded the matter for a hearing in front of the Board. Tr. p. 38, l. 22 – p. 46, l. 7. On May 15, 2013, Podsaid filed a petition for rehearing, which was denied. R. Vol. III, pp. 536-540, 543-547. He then filed the present appeal. R. Vol. III, pp. 543-547.

C. Standard of Review.

“The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” Idaho Code § 67-5279(1). The court shall affirm the agency action unless the court finds “that the agency’s findings, 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.”

Idaho Code § 67-5279(3).

In reviewing the discretionary decision of a lower court, the appellate court must review the lower court's decision for an abuse of discretion. In its review, the appellate court must determine: “(1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason.” *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). If these factors are met, the lower court's decision should be upheld.

II.

ISSUES PRESENTED ON APPEAL

A. Whether the district court exercised sound judicial discretion in upholding the Board's decisions with respect to Podsaid's outfitter and guide licenses.

B. Whether the district court exercised sound judicial discretion in upholding the Board's decision to treat Podsaid's 2009 guide license application as a new application.

III.

ARGUMENT

A. 2008 Case.

Podsaid argues that the Board violated Idaho law and his due process rights by amending his guide license without providing him notice and a hearing. He also claims that the Settlement Agreement contained "no express term...provid[ing] that Podsaid's separate guide license would terminate concurrent with the outfitter license." Appellant's Opening Brief, p. 25. Podsaid sites to various Idaho statutes which are only relevant to contested cases and the required notices and procedures required for such cases. Specifically, the main statute at issue in this case as cited by Podsaid is Idaho Code § 67-5254(1), which states that "[a]n agency shall not revoke, suspend, modify, annul, withdraw or amend a license, or refuse to renew a license of a *continuing nature* when the licensee has made timely and sufficient application for renewal, unless the agency first gives notice and an opportunity for an appropriate contested case" (emphasis added).

Podsaid's guide license was not a license of a continuing nature. It was a new application, a new outfitter, and a new area. As stated in the Settlement Agreement, Podsaid was issued a "restricted probationary sole proprietorship outfitter license (*a sole proprietor outfitter*

license is also a guide license) ... Respondent may seek licensure as an outfitter from April 1, 2008 through December 31, 2008.” 807 R. 021 (emphasis added). Podsaid was licensed as a sole proprietor, and a sole proprietor outfitter license includes a guide license. 807 R. 021, 137. When the sole proprietor outfitter license or any outfitter license is terminated, all the licenses are terminated. 807 R. 138. Once Podsaid entered into the Buy and Sell Agreement with Mr. Thorne and the Board approved the agreement, it terminated Podsaid’s outfitter license based upon the sale and permitted an amendment to his guide license to allow him to guide for Mr. Thorne until December 31, 2008. Podsaid’s outfitter license for AW-Outfitters (and therefore, his guide license as well) terminated upon the sale. Consequently, the Board’s decision to issue the guide license for Podsaid to guide for Mr. Thorne was a separate action because it was a license to guide for a different outfitter in a different area. 807 R. 063, 141.

In the *negotiated* Settlement Agreement, Podsaid specifically agreed, and the Board ordered, that Podsaid was not to outfit or guide in the calendar year 2009. His guide license and outfitter license expired on December 31, 2008, by the terms of the Settlement Agreement. Because Podsaid’s license is not of a continuing nature, the statutes, cases, and arguments made by Podsaid relating to the procedural requirements of contested cases are irrelevant.

It should also be noted that in reality, Podsaid got what he wanted regarding his guide license. The court ordered a temporary stay of the Board’s modification of the expiration of Podsaid’s guide license. This allowed Podsaid to guide until March 31, 2009, which is what he was seeking from the Board all along.

Whether an appeal is moot is a question of this Court's jurisdiction and may be raised at any time. *Arambarri v. Armstrong*, 152 Idaho 734, 738, 274 P.3d 1249, 1253 (2012). A case is moot if the party lacks a legally cognizable interest in the outcome or “if it does not

present a real and substantial controversy that is capable of being concluded through judicial decree of specific relief.”

Wade v. Taylor, 156 Idaho 91, 320 P.3d 1250, 1255 (Idaho 2013) (quoting *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 851, 119 P.3d 624, 626 (2005)). Consequently, the issue of whether his guide license expired on December 31, 2008, is moot. It should also be noted that at the hearing on December 8, 2008, Podsaid stated numerous times that all he was asking for was to have his license valid until March 31, 2009. 807 R. 111. Podsaid did not seek a continuing license, but instead answered the question of whether he was asking for his license to be considered a continuing license by stating, “No, at this time, I’m asking that the one that’s in force stay in force...to go to March 31st.” 807 R. 135. So, the only question at issue was on which of the two dates his license would terminate. Again, Podsaid’s license was extended until March 31, 2009, so he got what he was arguing for.

B. 2009 Case.

Podsaid argues that the Board’s decision to treat his March 2009 guide license application as a new application was in error. The real issue here must not be lost among the various irrelevant facts and arguments made by Podsaid. He is appealing a *letter* from the Board’s attorney in which the Board’s action at the June 17, 2009, meeting was detailed and which granted him a hearing. The Idaho Administrative Procedure Act provides judicial review of *final agency action* or *final orders in contested cases*. Idaho Code § 67-5270(2), (3). A letter discussing a Board meeting is not a final agency action or final order. As a result, there is no right of review and no basis for appeal.

Even assuming a right to appeal the letter, Podsaid is incorrect in assuming that his 2009 guide license application is a renewal and not a new application. Podsaid's guide license application sought licensure with Scott Boulanger for snowmobiling and hunting. Podsaid's prior guide license was to guide for Mr. Thorne, who purchased Podsaid's outfitter business. Mr. Thorne did not seek to employ Podsaid as a licensee for 2009-2010. The license Podsaid held (which expired on either December 31, 2008, or March 31, 2009, depending on the court's ruling in the case) did not include guiding for Scott Boulanger, did not include providing guided snowmobiling excursions, and did not include guiding in Mr. Boulanger's operating area. It was clearly a new application.

With respect to the Board's reliance upon the prior conduct of Podsaid, the issuance of licenses has been delegated to the Board's Executive Director and these licenses are then approved by the Board when approving the consent agenda at an official meeting. Only when concerns of staff, partnering agencies, individual Board members, or the public are brought to the attention of the Executive Director is the Board asked to consider particular licensure. As permitted by IDAPA 25.01.01.064(d), the Executive Director of the Board deferred the decision of whether to issue Podsaid a guide license to the Board.

Idaho Code § 36-2101 makes it clear that the intent of the Idaho Legislature is to safeguard the safety, health, welfare, and freedom from injury or danger through the use of licensing and regulation of outfitters and guides. Idaho Code § 36-2108(c) specifically provides that the Board "in its discretion, may make such additional investigation and inquiry relative to the applicant and his qualifications as it shall deem advisable" A license *must* be refused if the Board finds that the applicant is "not a competent person of good moral character" Idaho

Code § 36-2109(c). A license *may* be refused “for violation of any of the provisions hereinafter specified in this chapter as grounds for revocation or suspension of an outfitter's or guide's license.” Idaho Code § 36-2109(c). Further, “[n]o license shall be issued by the board until a majority thereof has reported favorably thereon; except, an application for a license identical to a license held during the previous year may be issued on approval by one (1) board member *providing there is no adverse information on file regarding the applicant.*” Idaho Code § 36-2109(d) (emphasis added). The Board’s responsibilities with respect to issuing new licenses are outlined in Idaho Code § 36-2107(a), Idaho Code § 36-2108(c), and Idaho Code § 36-2109(c).

Idaho Code § 36-2107(a) states that the Board has the following duties and powers: “[t]o conduct examinations to ascertain the qualifications of applicants for outfitter's or guide's licenses, and to issue such licenses to qualified applicants, with such restrictions and limitations thereon as the Board may find reasonable.”

Idaho Code § 36-2108(c) provides:

The board, in its discretion, may make such additional investigation and inquiry relative to the applicant and his qualifications as it shall deem advisable, provided that final decision by the board upon an application submitted by an applicant who has held during the preceding license year a license of the same kind for which application is made, and upon an application submitted by an applicant not holding during the preceding license year a license of the same kind or embracing the same activity(ies) or area for which application is made, shall be made not later than the end of the license year in which the board receives all materials required to be submitted in order to complete a license application or ninety (90) days from the date the board receives all such materials, whichever is later.

In addition, Idaho Code § 36-2109(c) provides:

The Board shall refuse to issue any license to any applicant for an outfitter's or guide's license who the board finds is not a competent

person of good moral character, less than eighteen (18) years of age and does not possess a working knowledge of the game and fishing laws of the state of Idaho and the regulations of the United States Forest Service...The board may also refuse to grant an outfitter's or guide's license to any applicant for violation of any of the provisions hereinafter specified in this chapter as grounds for revocation or suspension of an outfitter's or guide's license. If the application is denied, the board shall notify the applicant, in writing, of the reasons for such denial within ten (10) days and if the applicant shall correct, to the satisfaction of the board, such reasons within thirty (30) days of receipt of such notice and if, thereafter, a majority of the board concur, the board may issue a license to the applicant.

Idaho Code § 36-2109(c).

Podsaid has a long history with the Board as both an outfitter and a guide. Of particular note during this relevant time period was an Administrative Complaint Seeking Denial of 2009 Guide License that was filed alleging that Podsaid was holding himself out as an outfitter when he was not a licensed outfitter. R. 407-414. This is clearly in violation of Idaho law and the regulations regarding outfitters and guides. As a result, when considering Podsaid's 2009 guide license application, the Board was required to follow Idaho Code § 36-2109(c) and to take into account his entire past history, including the Administrative Complaint.

IV.

ATTORNEY'S FEES

Podsaid requests attorney fees pursuant to Idaho Code § 12-117 for the case below and requests attorney fees on appeal pursuant to I.A.R. 35 and I.A.R. 41 because he claims the Board acted without a reasonable basis in law or fact. In *Rincover v. State, Dep't of Fin., Sec. Bureau*, the Department of Finance relied upon specific provisions of a statute that had not yet been interpreted by the courts. *Rincover v. State, Dep't of Fin., Sec. Bureau*, 132 Idaho 547, 550, 976

P.2d 473, 476 (1999). The Idaho Supreme Court found that even though the “district court below disagreed with the Department’s interpretation and application” of the statute, the Department’s action was not unreasonable. *Id.*

Here, there is no appellate case interpreting Idaho Code § 67-5254 as it applies to outfitter or guide licenses. As discussed above, the Board’s position that it acted in accordance with Idaho law by not considering Podsaid’s license as one of a continuing nature is a legitimate and valid argument based on the circumstances of this case. Therefore, the Board has not acted without a reasonable basis in fact or law and Podsaid is not entitled to costs and/or attorney’s fees.

Because Podsaid has acted without a reasonable basis in fact or law by filing an appeal from a letter and not a final order or other final agency action as required by Idaho law, the Board requests this court award it attorneys’ fees pursuant to Idaho Code § 12-117, I.A.R. 35 and I.A.R. 41.

V.
CONCLUSION

In light of the above, the Court should uphold the Board’s decisions with respect to Podsaid’s outfitter and guide licenses and find that Podsaid’s licenses expired on December 31, 2008. The Board also respectfully requests that the Court uphold the Board’s decision to treat Podsaid’s 2009 guide license application as a new application.

DATED this 4th day of July, 2014.

MICHAEL KANE & ASSOCIATES, PLLC

BY: Michael Kane
MICHAEL J. KANE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of Aug, 2014, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

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