4-19-2018

Erickson v. Idaho Board of Licensure of Professional Engineers and Professional Land Surveyors Respondent's Brief Dckt. 45205

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHAD R. ERICKSON, Respondent-Appellant, vs. THE IDAHO BOARD OF LICENSURE OF PROFESSIONAL ENGINEERS AND PROFESSIONAL LAND SURVEYORS and KEITH SIMILA, in his capacity as Executive Director of the Idaho Board of Licensure of Professional Engineers and Professional Land Surveyors, Complainant-Respondent.	)	Supreme Court No. 45205-2017 D.C. Case No. CV 2016-45061

RESPONDENT'S BRIEF

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

HONORABLE GREGORY FITZMAURICE
District Judge

CHAD R. ERICKSON
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COMPLAINANT-RESPONDENT

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I. STATEMENT OF THE CASE

This appeal has its origins in a disciplinary hearing by a licensing board. Notice of the scheduled three day hearing was sent to the licensee months before the hearing. The licensee, appearing *pro se*, raised numerous procedural challenges prior to and during the hearing. Licensee sought district court interim review without success. During the hearing, the licensee cross-examined the complainant's expert based upon the charges brought against him.

At the beginning of the third day of the hearing, the complainant was preparing to shortly rest its case; thereafter, the board would hear the licensee's defense. Instead, the licensee renewed his motion for a mistrial / motion to dismiss, and subsequently made a motion to continue based upon newly discovered evidence. Board counsel addressed both issues, explaining the duality of an Idaho agency tasked with both investigation and determination of disciplinary issues and suggested a method of handling the continuance request. Thereafter, the licensee made a vague reference concerning his health.

After a recess for the licensee to confer with opposing counsel concerning the latest issue raised, the presiding board returned to learn the licensee had left the hearing. The presiding board was made up of individuals from throughout the state who had cleared their calendars to preside over the three day hearing in Boise. Complainant completed presentation of its case. The presiding board made its findings, conclusions and decision based upon the information that had been presented.

Licensee appealed to the Idaho County district court, requesting actions to be taken outside the scope of review set forth in Idaho Code § 67-5279(3). The court found that the

agency's findings and conclusions were within the statute and that Erickson's due process rights were not violated. The district court returned the matter back to the presiding board for further consideration of the discipline to be imposed upon the licensee.

The licensee has now appealed the district court's *Substituted Judicial Review Order* to this appellate body.

A. Procedural History.

On August 17, 2016, the Idaho Board of Licensure of Professional Engineers and Professional Land Surveyors ("Board" or "Complainant") issued its *Findings of Fact, Conclusions of Law and Order*, In the Matter of Chad R, Erickson, PLS, Respondent ("Board Decision"). Chad R. Erickson ("Erickson" or "Appellant") filed a Motion for Reconsideration and Emergency Stay on August 30, 2016. The Board's *Order on Motions for Reconsideration* was issued on September 15, 2016.

On October 11, 2016, Erickson filed an *Immediate Review and Granting of Petition for Stay Pending Completion of Judicial Review* ("Petition for Judicial Review") with the district court of Idaho County.

The district court filed its initial *Judicial Review Opinion* on April 19, 2017, and later its *Substituted Judicial Review Opinion* on May 11, 2017.

Respondent filed a Notice of Appeal to the Idaho Supreme Court on June 20, 2017.

B. Statement of the Facts.

Erickson is licensed as a professional land surveyor in the State of Idaho and subject to the laws and rules imposed upon such licensees. The Idaho Board of Licensure of Professional

Engineers and Professional Land Surveyors is a self-governing agency and charged by the Idaho legislature with administering the provisions of Chapter 12, Title 54, governing the professions of licensed engineers and professional land surveyors. Idaho Code § 54-1203.

On October 28, 2015, a Complaint was filed against Erickson by the Complainant (Board staff) pursuant to Idaho Code § 54-1220(1). (R. 3-23). Erickson sought a time extension for his response (R. 24-28), which was granted. (R. 31-33). An Answer was filed (R. 36-58). Complainant moved to compel discovery on January 19, 2016 (R. 59-60), which was granted and a discovery schedule was established on February 9, 2016 (R. 76-78). A *Scheduling Order* was entered on March 11, 2016, setting a hearing date for June 20 through June 22, 2016. (R. 83-85). On May 3, 2016, a *Supplemental Scheduling Order* was entered (R. 122-124), which required the parties to serve upon each other the party's witness list and exhibit list no later than June 8, 2016. (*Ibid*).

While the administrative matter was proceeding, Erickson filed a *Petition for Judicial Review* in Second Judicial District Court for the State of Idaho, which was dismissed on June 13, 2016. The court cited lack of subject matter jurisdiction and prematurity. (R. 149-152). Complainant sought to exclude Erickson's witnesses and exhibits (R. 153-154) due to Erickson's failure to comply with the *Supplemental Scheduling Order*. Ultimately, the Board allowed Erickson to proceed, directing that he provide a list of exhibits and witnesses to the Complainant. (Tr. 27-29).

At the scheduled date for the administrative hearing to begin, Erickson orally requested a continuance, in part due to the district court's order being entered one week previously. (Tr. 16).

Complainant's counsel provided Hearing Exhibit 53 to the Board which was an offer dated June 3, 2016, to vacate the administrative hearing scheduled for June 20, 2016, and not reset earlier than July 20, 2016, in return for Erickson agreeing to the date set by the Board. Erickson recognized the letter and offered no objection. (Tr. 21). Erickson did not object to opposing counsel's claim that he had declined the offer. (Tr. 20).

Also on June 20, 2016, Erickson moved to disqualify the entire Board, claiming prejudice. (Tr. 23-28). The Board denied the motion although one board member recused himself from the proceedings. (Tr. 28). Erickson also moved to disqualify Complainant's expert witness, John Elle ("Elle"), who served as a member of the Board, but had recused himself from presiding over the hearing. (Tr. 33-34). Erickson's motion to disqualify Elle was denied. The remaining Board members presided over the hearing.

Erickson did not object to Elle's qualifications as an expert. Complainant elicited testimony from Elle concerning his investigation of the complaints lodged against Erickson from an adjacent property owner and a former client concerning a survey he performed in 2010 for the former client. It was that that Erickson came to question his own 2010 survey results. In December of 2011, Erickson described the monument he established for his client in 2010 as "bogus". (Ex. 3.2).

At the end of the Complainant's presentation, it appeared that Erickson had: (1) violated several Idaho statutes governing surveying and recording of surveys; (2) failed to secure available information concerning relevant information associated with the Section 24 area he had been engaged to survey; (3) brushed off what information he had in his possession concerning

the BLM surveyor who had completed the Section 24 survey with a comment concerning the BLM surveyor's inexperience; (4) brushed off a rock, which an earlier local surveyor believed was the Section 24 corner monument, by asserting that the markings on the basalt rock were nothing more than a chance encounter with farm machinery; (5) failed to consider other sources of information concerning where the Section 24 corner monument had been denoted in earlier official recordings and unofficial documents or photographs; (6) failed to interview an adjacent property owner who in fact had information concerning where the Section 24 corner monument had been located in the past; and (6) failed to correct his perceived error unless compensated. The expert testified that these missteps constituted a failure to meet the relevant standard of care for an Idaho professional land surveyor. Erickson's cross-examination of the expert took six (6) hours. (Tr. 386).

In addition to Erickson's missteps as noted by the expert, the expert testified that Erickson's recorded Record of Survey (Hearing Exhibit 1.2**)** failed to denote property owned by the Grangeville Highway District. The recorded Record of Survey made it appear that Walker owns this property, a violation of the standard of care again. The recorded Record of Survey also violated several statutory requirements of Idaho law.

The Survey Report (Hearing Exhibit 1.3**),** which accompanied the Record of Survey stated that adjoining neighbors encroached upon the Walker property by building fences. The 2011 complaint from the adjacent land owner claims that Erickson never spoke with them. If he had spoken with them, he would have been informed that the senior Mr. Walker (not they) had built those fences.

As of the time he left the hearing, Erickson failed to dispute the claims made by the adjacent land owner that he failed to speak to them and the presence of an untruthful statement contained in a document that he prepared and recorded. Complainant's expert testified that these actions fell below the standard of care imposed upon an Idaho professional land surveyor, as well as affected public welfare.

Erickson recorded his Section 24 survey results in 2010. In December of 2011, Erickson prepared another document that he presented to his client in an effort to receive additional monies from his client to perform further work. (Hearing Exhibit 3.2). His report identified his re-traced Section 24 SW corner monument as "bogus". Walker declined to provide him with additional funds and instead engaged yet another local land surveyor to again resurvey her Section 24 property.

Complainant's expert testified that Erickson's presentation of his report to Walker in an attempt to be paid additional monies was a report that either needed to be identified as preliminary or it needed to both be signed and sealed, according to Idaho law. Because the report was neither marked preliminary nor signed and sealed, the document itself violated Idaho law.

The second issue noted by the expert regarding the 2011 report regarded the standard of care for a professional land surveyor in Idaho who believes that he made an error in an earlier survey. According to the expert, if the land surveyor later learns that his survey results were incorrect, it is incumbent upon the professional land surveyor to correct the problem, regardless

whether additional compensation is received. To not act to correct his earlier mistake is a violation of the standard of care imposed upon a professional land surveyor licensed in Idaho.

In 2015 Erickson wrote an article for a magazine, the American Surveyor. (Hearing Exhibit 26d.1) He wrote about the client and his work concerning a corner monument. His article justified his placement of the Section 24 SW corner monument, relying upon photographs of the old school, as well as wet drum scanning imagery. Neither of these efforts to re-trace the corner monument was mentioned in his 2010 Survey Report as supporting his Section 24 SW corner position.

In the article, Erickson identified his client as someone who believed any surveyor she hired should come up with a survey to her satisfaction, regardless of the information acquired. He also wrote about the client's latest hired surveyors, describing them as paladins.

To ensure that his former client and her latest surveyors were aware of his article and his statements regarding them, Erickson rewrote the article to include both the client's name and the surveyors' names. He had his article recorded at the local Idaho County courthouse. (Hearing Exhibit 17c.1).

Shortly after the article was recorded, Walker filed her complaint with Board staff. After being unable to resolve the matter informally, Board staff (now Complainant) filed the Complaint against Erickson.

After Erickson left the hearing on the third day, Complainant completed its presentation and the matter was taken under advisement. The Board Decision dismissed a number of charges brought against Erickson, but the Board Decision determined that Erickson specifically violated

Idaho Code §§ 54-1215, 54-1604 and 55-1906. The Board Decision also determined that Erickson violated the standard of care required of a licensed professional land surveyor in Idaho by violating Idaho Code § 54-1220(1), as well as IDAPA 10.01.02.004.04, IDAPA 10.01.02.005.01 and IDAPA 10.01.02.005.02.

Erickson thereafter appealed to the district court, which analyzed the agency actions within the scope of Idaho Code § 67-5279(3). The district court issued its Substituted Judicial Review Opinion on May 11, 2017, which Erickson appealed on June 20, 2017.

II. ISSUES ON APPEAL

Respondents request to reframe and restate the issues as follows:

A. Whether Appellant Chad Erickson received all process due him by the administrative agency;

B. Whether there was substantial and competent evidence in the agency record to support the Board's decision;

C. Whether Erickson waived additional claims by failing to present them to the District Court; and

D. That the issue of the presiding Board revoking Erickson's license has been remanded and is not presently before this Court.

Issues A and B have numerous subparts to deal with Erickson's plethora of claimed wrongdoings against the administrative agency and the process in general.

Issue C is to ensure that any issue that Erickson may have newly raised at this appellate level is not considered by this Court.

Finally, Issue D demonstrates what is not currently before the Court.

III.

ARGUMENT

A. Chad Erickson received all process due him by the administrative agency.

1. Idaho Code § 54-1220(2) did not prohibit Complainant from filing against Erickson in 2015.

Idaho Code § 54-1220 states in part:

> All charges, unless dismissed by the board as unfounded or de minimis, or unless settled informally, shall be heard by the board within six (6) months after the date they were received at the board office ***unless such time is extended by the board for justifiable cause.***

Idaho Code § 54-1220(2) (emphasis added).

Additionally, IDAPA 10.01.02.011.01 requires that the "Board will not accept an affidavit more than two (2) years after discovery of the matter by the complainant."

Two (2) complaints concerning Erickson's actions on a survey he completed in 2010 were received by the licensing board staff. The first complaint was filed by Diane Badertscher on February 1, 2011. (Hearing Exhibit 1.4) Badertscher was an adjacent property owner who did not hire Erickson, but who was affected by his survey. The second complaint received by staff was from Dorothy Walker ("Walker"). Mrs. Walker and her husband hired Erickson to survey their property, which survey was recorded on July 27, 2010, in Idaho County. Walker's complaint was received on March 31, 2015. (Hearing Exhibit 1.5).

On February 13, 2015, Erickson had recorded a document entitled "Survey Report" identified as "Perspective, Corrections & Summation" concerning Section 24, Township 30N. The

document specifically referenced the work he had performed for Walker in 2010. This document is Hearing Exhibit 17c.1.

The Agency Record reflects that on May 5, 2011, and June 15, 2015, Orders were entered by the Board to extend the six month statutory deadline for each complaint based upon the matter being in litigation at the time, the complexity of investigation, and the possibility of alternative dispute resolution. (R. 1A-2C). Respondents acted in accordance with Idaho Code § 54-1220 to allow the Board continuing jurisdiction over the complaints until the matter was fully investigated and alternate resolutions did not resolve the matters. The statute specifically allows for extension of time based upon justifiable cause.

Erickson's argument that the complaints made against him in 2011 (adjacent property owner) and 2015 (owner who hired Erickson for a re-survey in 2010 and later was the subject of a recorded writing) should have been dismissed is unfounded.

2. Erickson does not have an established constitutional right to counsel before the administrative agency.

Erickson provides no support for this claim other than a reference to an Alaska Supreme case dealing with child support. Erickson neglects to inform this Court that the Alaska law establishing the Office of Public Advocacy specifically provides in part, that "[t]he office of public advocacy shall ... provide legal representation ... to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency." (Alaska Stat. § 44.21.410(a)(4)). See *In re Alaska Network on Domestic Violence and Sexual Assault*, 264 P.3d 835 (2011). No such statute exists in Idaho that covers representation before an administrative agency.

IDAPA 04.11.01.202 deals with representation of parties at an administrative hearing and allows **"**[a] natural person may represent himself or herself or be represented by a duly authorized employee, attorney, family member or next friend." Erickson chose to represent himself although there was some reference to consulting counsel: "Last night I had an opportunity to talk with my pro bono and limited counsel." (Tr. 373).

As earlier noted by this Court in *H & V Eng'g, Inc. v. Idaho State Bd. of Prof'l Eng'rs & Land Surveyors,* 113 Idaho 646, 649, 747 P.2d 55, 58 (1987), "[t]he right to practice a chosen profession is a valuable property right which cannot be deprived unless one is provided with the safeguards of due process." Neither the courts nor the Idaho legislature has determined that an aspect of due process for licensees requires the right of counsel without charge. Erickson has no inherent due process right to free legal representation. This Court should not find one.

3. Erickson's prehearing requests for continuance were within the discretion of the presiding Board.

Erickson complains that he had requested continuances from the Board which were denied. He points out that as he was preparing his response to the Complaint, he received another inquiry from the agency concerning another matter. The letter required a timely response.

Respondents concede that a letter was sent to Erickson requiring a timely response. However, when Erickson sought a continuance based upon the second matter, the Board quickly ruled that "[Erickson] is specifically relieved from responding to inquiry until the Board gives [Erickson] notice that a response is requested." (*Order Denying Request for Extension*, R. 102). Later, the Board again tells Erickson that he "is specifically relieved from responding to inquiry

until the Board gives [Erickson] notice that a response is requested." (*Order Upon Reconsideration*, R. 112).

A second raised issue is the refusal of the Board to grant a continuance due to the entry of a judicial determination, a week prior, dismissing his Petition for Judicial Review. However, it became clear based upon Hearing Exhibit 53 that Erickson was offered a stipulation to vacate the hearing and he chose not to agree to the terms.

Requests for continuances are within the discretion of the presiding authority and are reviewed to determine whether the discretion has been abused. As earlier noted by case law, an appellant claiming denial of a motion to continue "must show that his or her substantial rights were prejudiced by denial of the motion." *Everhart v. Washington Cty. Rd. & Bridge Dep't*, 130 Idaho 273, 275, 939 P.2d 849, 851 (1997). Erickson fails to carry his burden.

4. Erickson's right to a fair tribunal was not violated.

Erickson sought to disqualify the entire board based upon an email sent by a board member. (Affidavit of Board's Prejudice dated June 20, 2016, R. 155-173). He also sought to disqualify a board member who recused himself from participating as a decision maker in this matter and acted as an investigator and an expert witness for Complainant. Neither of these conditions is sufficient to determine Erickson failed to be judged by a fair tribunal.

Glenn Bennett is a member of the Board. In 2014 the Board participated in a nationwide effort to modify the definition of "land surveying". *See*, R. 164-165. Erickson wrote an article critic of the effort in late 2014. (R. 167-169). In an email concerning whether to respond to

Erickson's article, Glenn Bennett paraphrased George Bernard Shaw's famous observation, "Never wrestle with pigs. You both get dirty and the pig likes it." R. 171.

When Erickson sought to disqualify the entire Board (Tr. 23), Mr. Bennett recused himself from participating. (Tr. 27-28). The balance of Erickson's motion to disqualify was denied.

The Idaho Supreme Court addressed the issue of a fair tribunal in an administrative hearing in *Williams v. Idaho State Bd. of Real Estate Appraisers*, 157 Idaho 496, 337 P.3d 655, (2014), saying:

> A decision maker will not be disqualified absent "a showing that the decision maker is 'not capable of judging a particular controversy fairly on the basis of its own circumstances.' " *Eacret*, 139 Idaho at 785, 86 P.3d at 499 (quoting *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976)). When a governing board sits "in the seat of a judge ... [,]" due process applies "in the same way that it applies to judges." *Turner, L.L.C.*, 144 Idaho at 209, 159 P.3d at 846.

Williams v. Idaho State Bd. of Real Estate Appraisers, 157 Idaho at 505, 337 P.3d at 664.

Williams relied upon the U.S. Supreme Court case of *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) and its progeny.

While not controlling on this court, the Idaho federal case of *Byers v. New Plymouth Sch. Dist. No. 372*, No. 1:12-CV-00230-EJL, 2013 WL 5943938 (D. Idaho Nov. 5, 2013), may be helpful in determining what may be considered as bias of a decision maker.

The Idaho district judge addressed the issue of actual bias of a decision maker, saying:

> Policy makers with decision-making power, such as the School Board in this case, enjoy a presumption of honesty and integrity. *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 497 (1976). Mere prior involvement in or familiarity with the events involving a contested decision is insufficient to

> overcome this presumption. *Id.; see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (the combination of investigative fact gathering and adjudicatory functions, without more, does not result in unconstitutional bias). To rebut an administrative board's presumption of honesty, a plaintiff must demonstrate that the tribunal was actually biased, or that there was an impermissible appearance of bias. *Withrow*, 421 U.S. at 47, 55. Unconstitutional appearance of bias can be established by evidence of personal animosity between the party and the decision-maker. *Id.*

Byers v. New Plymouth Sch. Dist. No. 372, 2013 WL 5943938, at *7.

Erickson can neither establish actual bias of the remaining Board members who presided after Mr. Bennett recused himself nor a probability that the actual decision maker would unfairly decide any issue. *Johnson v. Bonner Cty. Sch. Dist. No. 82*, 126 Idaho 490, 493, 887 P.2d 35, 38 (1994). The fact that a majority of the allegations were dismissed can be viewed as an effort by the presiding Board to meticulously ensure any violation was clearly established by evidence.

Erickson also claims that the presence of a Board member who served both as investigator and expert witness violated his right to due process. *Withrow v. Larkin, supra,* similarly addressed the issue of an agency which serves to both investigate a claimed violation and to render a decision, stating "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation … ." *Withrow v. Larkin*, 421 U.S. at 58, 95 S. Ct. at 1470; *accord, Williams v. Idaho State Bd. of Real Estate Appraisers, supra,* which acknowledged the authority of a board to both investigate and discipline.

Morongo Band of Mission Indians v. State Water Res. Control Bd., 45 Cal. 4th 731, 199 P.3d 1142 (2009), which also relied upon *Withrow v. Larkin, supra,* held:

> By itself, the combination of investigative, prosecutorial, and adjudicatory functions within a single administrative agency does not create an unacceptable risk of bias and thus does not violate the due process rights of individuals who are

> subjected to agency prosecutions. (*Withrow v. Larkin, supra,* 421 U.S. 35, 54, 95 S.Ct. 1456, 43 L.Ed.2d 712; see *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 880–884, 42 Cal.Rptr.2d 606, 897 P.2d 544; *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 833–835, 264 Cal.Rptr. 100, 782 P.2d 239; Pierce, Administrative Law Treatise (4th ed.2002) § 9.9, pp. 688–689.) Thus, "[p]rocedural fairness does not mandate the dissolution of unitary agencies, but it does require some internal separation between advocates and decision makers to preserve neutrality." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10, 50 *Cal.Rptr.3d 585, 145 P.3d 462.)*

Morongo Band of Mission Indians v. State Water Res. Control Bd., 45 Cal. 4th at 737, 199 P.3d at 1146.

Finally, IDAPA 04.11.01.420.01 clearly provides that:

> [M]embers of the agency head shall not participate in the prosecution of a formal contested case hearing for a complaint issued by the agency unless the agency head or that member does not participate in the adjudicatory function.

IDAPA 04.11.01.420.01.

In other words, a board member may assist in the investigation and prosecution of a formal complaint so long as the board member does not participate in the decision making.

Erickson's due process rights were not violated. Board member John Elle could assist in investigation and prosecution so long as he did not participate in the adjudicatory function.

5. The Board did not commit error regarding Erickson's discovery issues.

Discovery matters are in the discretion of the presiding authority. Discovery in an administrative proceeding is governed by IDAPA 04.11.01.521, which provides:

> Parties may agree between or among themselves to provide for discovery without reference to an agency's statutes, rules of procedure, or orders. Otherwise no party before the agency is entitled to engage in discovery unless discovery is authorized before the agency, the party moves to compel discovery, and the agency issues an order directing that the discovery be answered. The presiding

> officer shall provide a schedule for discovery in the order compelling discovery, but the order compelling and scheduling discovery need not conform to the timetables of the Idaho Rules of Civil Procedure. The agency or agency staff may conduct statutory inspection, examination, investigation, etc., at any time without filing a motion to compel discovery.

IDAPA 04.11.01.521.

On February 9, 2016, a discovery schedule was established. (R. 76-78). Erickson filed no motion to compel Complainant to provide discovery after that date. Any claim now that Erickson's discovery requests went unanswered is not the fault of the presiding Board.

Erickson also claims that the presiding Board members had knowledge of an earlier investigation that was not discovered to Erickson, the "Russell investigation." The following exchange, which occurred on the third day, is relevant:

> [Board Counsel] While you are looking for it. It starts, "Chad Erickson, To John." Who is John, for example?
> [Complainant Witness] Let me find the exhibit. (Witness complying.) This information came from a person by the name of John Russell. John Russell was a land surveyor that I hired to assist -- he asked who John is?
> **[**Complainant Counsel] Yeah.
> **[**Complainant Witness] John Russell is a land surveyor that I hired. So this email, the context of this email is a communication between Mr. Ketcham and Mr. Erickson. It's another one of these communications of communicating a material discrepancy.

Tr. 404.

> [Presiding Board Member] Is Mr. Russell's investigation admitted?
> [Complainant Counsel] No, it is not. And he is not a witness to this action.
> [Presiding Board Member] Can I ask, why?
> [Complainant Counsel] Yes. And the Board cannot draw any conclusion as to why, because of the Rules of Evidence, and the rules of consultants who may not be called as witnesses.

Tr. 405.

The rules governing an administrative proceeding are generally more relaxed than a courtroom proceeding. However, Idaho Rule of Civil Procedure 26(b)(4)(D) allows parties to hire experts for trial preparation who will not be called as a witness, and prohibits the opposing party from discovering the retained expert's opinions or known facts. *Ibid*. Erickson never moved the Board to compel information concerning Russell, as an expert witness hired to assist in pretrial preparation, but not appearing as a witness. Erickson did not seek to compel Complainant to produce this information; the presiding Board did not have an opportunity to decide whether such information was discoverable.

Erickson failed to timely request the Board's involvement in compelling discovery once the discovery schedule was propounded. The issue was not raised before the Board. Erickson has waived his right to complain that Complainant was required to provide him discovery when he did not request the Board to compel discovery.

6. Erickson's voluntary departure prior to the end of the administrative hearing did not constitute a known request for accommodation by the Board.

On the scheduled third day of the hearing, Erickson made several motions, the first for a mistrial, (Tr. 373), and second for a continuance (Tr. 379), which he ended by stating, "and now we will be leaving." (Tr. 380).

After Board counsel addressed Erickson's request for a continuance, which would have granted Erickson additional time to prepare for information offered in the hearing, Erickson stated, "Frankly, I can't take anymore. I need a break," (Tr. 388). Erickson explained his lack of sleep and his age as factors. *Ibid*. Board counsel asked Erickson, "[a]re you suggesting that this would adversely affect your health if we continue today?" (Tr. 389) Erickson reiterated, "If I

don't get a break today -- it was already affecting me last night." (Tr. 390). The Board recessed, asking counsel and Erickson to confer. When the Board returned, Erickson had left the hearing. (Tr. 391).

On June 27, 2016, Erickson filed a Motion for Continuance. (R. 193-207). In the body of his motion, Erickson discusses his difficulty in finding lodging, his fatigue (in part due to his age) and his belief that the hearing was scheduled for two (not three) days. There is no indication that Erickson suffered from a medical condition which required the Board to accommodate his medical issues.

Respondents agree that a three day hearing is physically taxing, regardless of age. The Board notified Erickson in March that the hearing was scheduled for June 20-22, 2016. There is no evidence that Erickson sought medical assistance after leaving the hearing and there was no medical statement accompanying Erickson's Motion for Continuance informing the Board that Erickson suffered a serious medical issue that necessitated him leaving the hearing on the third day.

Board counsel tried to explain to Erickson the consequences of simply leaving the hearing. "If you waive the ability to cross-examine, if you waive the ability to put on your own case, you are making a tremendous, tremendous mistake. I can't say it strongly enough." Tr. 384.

In short, the presiding Board was informed that Erickson was tired, had had difficulty sleeping, and had believed the hearing was scheduled for two days. It recessed, asking the parties to confer. When the presiding Board returned, Erickson was gone. His later Motion for

Continuance gave no evidence that his departure was the result of a medical condition which required accommodation.

Respondents did not violate any substantial rights Erickson has by failing to halt the hearing on the third day or failing to grant his post hearing request for continuance.

B. Substantial and competent evidence exists to support the Board's decision.

It should be preliminarily noted that the bulk of the charges alleged against Erickson have their basis in his Record of Survey recorded July 27, 2010 and his accompanying Survey Report of the same date, as well as his later Survey Report to Walker in December of 2011. The presiding Board carefully considered the laws and rules in effect at the time of the actions which gave rise to the charges. Erickson was not required to comply with a rule or law that did not exist at the time of his action.

1. Substantial evidence supports the presiding Board's determination that Erickson violated Idaho Code § 54-1215.

Idaho Code § 54-1215(3)(b), which has not been amended since 2008, directs a licensee that a "seal, signature and date shall be placed on all … reports … whenever presented to client … Any such document that is not final … shall be clearly marked as "draft" … or contain the word 'preliminary' ."

At the hearing, Elle testified regarding Hearing Exhibit 3.2, a document drafted by Erickson and presented to Mrs. Walker in late December of 2011. The document is entitled "Report on the Southwest Corner of Section 24". The document sets forth errors that Erickson had made in his 2010 survey for his clients, as well as discoveries that he had made since 2010. Based upon the information presented, the report concludes, in part, that Erickson's 2010 locations of the

true SW corner of Section 24, as well as the true West ¼ corner of Section of 24, were incorrect. Erickson specifically uses the phrase "bogus monument" to describe his 2010 survey results.

Elle testified that Hearing Exhibit 3.2 violated Idaho law because it was not signed, sealed nor dated, nor did it contain the word "draft" or "preliminary." (Tr.44). Erickson cross-examined Elle on whether Walker was his client. Elle replied that he understood that Erickson had previously claimed that he had been relieved a few days before the report was delivered. However, Elle went on to state that he was unable to confirm that Mrs. Walker believed that Erickson was no longer representing her. (Tr.195). Elle ended by saying:

> Mr. Erickson had Ms. Walker for a client for something close to two years prior to this report being written. It's unclear whether Mr. Erickson had been terminated or not at the time. I believe that given the circumstances, the charge is warranted.

(Tr.197).

At the end of the hearing, no evidence was presented to rebut Elle's testimony that Erickson had a long-term client relationship with Mrs. Walker, which may or may not have been clearly terminated by both parties when Erickson presented his 2011 report concerning the errors of his earlier survey, seeking additional monies. Substantial evidence exists to support the Board finding Erickson violated Idaho Code § 54-1215.

2. <u>Evidence supports the presiding Board's determination that Erickson violated Idaho Code § 55-1604 and Idaho Code § 55-1906 as they existed in 2010.</u>

Chapter 16 of Title 55 is entitled "Corner Perpetuation and Filing". Idaho Code § 55-1604, which has not been amended since 1993, requires that:

> A professional land surveyor shall complete, sign, and file with the county clerk and recorder of the county where the corner is situated, a written record of the establishment or restoration of a corner. This record shall be known as a "corner

> record" and such a filing shall be made for every public land survey corner and accessory to such corner which is established, reestablished, monumented, remonumented, restored, rehabilitated, perpetuated or used as control in any survey.

I.C. § 55-1604.

Prior to 2015, Idaho Code § 55-1906 required, in part, that:

> The records of survey shall show:
>
> (1) All monuments found or set or reset or replaced, or removed, describing their kind, size, location using bearings and distances and giving other data relating thereto;
> (2) Evidence of compliance with chapter 16, title 55, Idaho Code, including instrument numbers of any corner records which have been recorded previously and corner records of any corners which are set in conjunction with the survey being submitted related to the survey being submitted . . .

I.C. § 55-1906(1) and (2).

During direct examination, Elle was asked to view Hearing Exhibit 1.2, Erickson's 2010 Record of Survey, and he was questioned about his familiarity with Idaho Code §§ 55-1604 and 55-1906. Elle testified in response to direct questions that Hearing Exhibit 1.2 violated these laws. (Tr.56- Tr. 57; Tr. 58- Tr. 59).

In his cross-examination, Erickson questioned Elle concerning his opinion that Hearing Exhibit 1.2 violated the statutory requirements. The exchange can be found at Tr.224 through Tr.229. At the end of the exchange, Elle reiterated that Hearing Exhibit 1.2 did not comply with Idaho Code § 55-1906 (which incorporates by reference Idaho Code § 55-1604).

At the end of the hearing, no evidence was presented to rebut Elle's testimony concerning these violations. Erickson made various arguments at the district court level that the statute allows incorporation by reference. At the time the hearing ended, Erickson had not made these

arguments, preventing Complainant to examine Erickson on his claims or offer rebuttal to his statements. The relevant agency record is devoid of these defenses. The Court is required to look at the agency record as it existed on June 22, 2016.

Substantial evidence existed to support the Board's determination.

3. Evidence supports the presiding Board's determination that Erickson violated Idaho Code § 54-1220 through IDAPA 10.01.02.004 and 005.

Idaho Code § 54-1220(1) allows "[a]ny affected party may prefer charges of fraud, deceit, gross negligence, incompetence, misconduct or violation of any provision of this chapter, or violation of any of the rules promulgated by the board against any individual licensee." The administrative rules governing the Board are set out in Chapter 10 of the Administrative Code. After March 29, 2010, "incompetence" was defined as "[f]ailure to meet the standard of care." IDAPA 10.01.02.004.04. IDAPA 10.01.02.005.01 (which has not been altered since 1993) requires that "[a]ll Licensees and Certificate Holders shall at all times recognize their primary obligation is to protect the safety, health and welfare of the public in the performance of their professional duties." IDAPA 10.01.02.005.02 required after March 29, 2010, that "[e]ach Licensee and Certificate Holder shall exercise such care, skill and diligence as others in that profession ordinarily exercise under like circumstances."

Laurino v. Bd. of Prof'l Discipline of Idaho State Bd. of Med., 137 Idaho 596, 602, 51 P.3d 410, 416 (2002) requires "a determination of a violation of the standard of care must be supported by expert testimony establishing the community's generally accepted standard of care." Complainant presented John Elle, PE, PLS, as its expert. Elle graduated from the University of Idaho in civil engineering in 1977, became licensed as a professional land surveyor in Idaho in

1983, and has personally performed over a hundred surveys similar to the subject of the hearing. Elle has also attended continuing education in professional land surveying, and is currently licensed as a professional land surveyor in the state of Idaho. His work is approximately divided equally between civil engineering and professional land surveying. Elle set forth how he is personally familiar with the standard of care for professional land surveyors licensed in Idaho. (Tr.35 through Tr.37). Erickson did not object to Elle's qualifications or his ability to provide an expert opinion as to the standard of care for a professional land surveyor licensed in the State of Idaho.

In addition to the statutory provisions Erickson violated earlier discussed, Elle identified several actions or failure to act by Erickson which he believed fell below the standard of care required of a licensed professional surveyor in Idaho: (1) failure to adequately research to re-trace a corner monument, (2) failure to delineate ownership of third party property, and (3) failure to correct an error without compensation. The presiding Board was also able to view Hearing Exhibit 17c.1 which was recorded in Idaho County as Instrument #498773 which provided additional justification for Erickson's Section 24 placement which would have been available in 2010 but not noted in his Record of Survey. Hearing Exhibit 17c.1 also contains unnecessary, uncomplimentary descriptions of his named former client and her new surveyors.

a. Failure to adequately research and re-trace an established corner monument.

Elle's testimony can be found in the Hearing Transcript, beginning at Tr.35 through Tr.321. One focus of Elle's testimony concerned the survey work done by Erickson for the Walkers in 2010. Hearing Exhibit 1.2 is the Record of Survey filed by Erickson for the Walkers on July 27,

2010. Regarding Hearing Exhibit 1.2, Complaint's expert testified that Erickson's placement of the SW ¼ corner of Section 24 violated the standard of care for a professional surveyor licensed in the State of Idaho.

Elle's testimony includes direct examination, cross-examination by Erickson, questions directed to him by Board members, re-direct, and a re-cross from Erickson.

Early in Elle's testimony, he was asked the following question:

> Now, based upon your experience and expertise, and your opinion as you've stated it, can you describe to the Board how Mr. Erickson's [R]ecord of [S]urvey, and survey of report violate the standard of care for a land surveyor in the state of Idaho, as it relates to this southwest corner of Section 24, and the information upon which you rely?

(Tr.69). Elle responded by stating:

> Mr. Erickson rejected the Edwards' stone as monumenting the southwest corner of Section 24, and had various arguments in his survey report of why he made that rejection, many of which were based on supposition without foundation.

(Tr.69).

The balance of Elle's testimony fleshes out his answer.

Elle testified about the standard practice a professional surveyor undertakes when he is re-tracing an established monument. He seeks information from the Bureau of Land Management which has the Government Land Office ("GLO") archives concerning the original survey and any subsequent surveys authorized by the federal government. He reviews any manual of surveying instructions relevant to the survey period. A professional surveyor then reviews earlier local surveys in the area. He searches old deeds, looks at aerial photographs and he talks to neighbors concerning historical knowledge. As Elle testified regarding his preparation:

> Government Land Office, GLO, notes are referenced. I've read through all of the GLO notes and the plats. I also requested the special instructions for this survey. And read through the 1894 manual of surveying instructions, which was referenced in the special instructions to Surveyor Shannon. I conducted an on-site review of corners on the west line, and the south line of Section 24, and on the west line of Section 25, and on the south line of Section 23. And I interviewed one of the landowners in Section 25, whose property abuts the south line of Section 24, to understand whether she had any knowledge of the original survey corners in that area.

(Tr.38, through Tr.39).

Erickson's Survey Report brushes off the 1897 GLO surveyor who completed the survey of Section 24 as inexperienced and inaccurate. As a result of disregarding the 1897 survey, Erickson also determined that the survey work of Carl Edwards in the area in the 1970s was also inaccurate, even though Edwards claimed that he had found the original stone marking the southwest corner of Section 24 that was set by David P. Thompson in 1873. Edwards had re-monumented the Thompson corner in 1977. Tr. 64-74. The expert discussed why he believed that Edwards' stone was the 1873 Thompson monument. Tr. 81, 82. Erickson rejected the monument.

Instead, Erickson determined that the SW corner for Section 24 was 272 feet from the SW corner which Edwards had re-monumented. As a result of Erickson's new survey results and recording of his survey, not only was the Walker property affected, but the properties in Sections 23, 24, 25 and 26 were affected. Tr. 62-63.

Elle testified that he was able to review the GLO survey notes and plat generated by the 1897 surveyor and the special instructions given to the surveyor, as well as the random audit done by the government to ensure that the 1897 surveyor was actually performing the work. The random audit included Section 24. Elle testified there was no evidence that Erickson had reviewed

the auditors' notes, which were available by request from the Idaho BLM office. (Tr. 73, 74). Elle further testified that these notes would have been beneficial for Erickson to review when researching for his Section 24 survey. *Ibid.* Elle is also uncertain whether Erickson reviewed the special instructions to the 1897 surveyor. (Tr.76). These instructions were also available from the Idaho BLM office. *Ibid.*

Elle testified that it was acceptable and common practice for a professional land surveyor to interview local neighbors regarding their knowledge of property lines when hired to perform a survey of land. When Elle spoke to an older property landowner whose property abutted Section 24, she was able to point out an area where she stated her father told her years ago a cornerstone monument had been. The neighbor pointed to a location near an area where a former schoolhouse stood. This information correlated with a U.S. Forest Service, Bureau of Public Roads, map from 1920, which showed the section corner in question being a few feet from the schoolhouse. Elle testified this evidence tended to support the Carl Edward's location as being the correct location for the stone. (Tr.74, 75).

While Elle continued to point out in direct testimony what he believed were errors contained in the Erickson Survey Report, a major issue which concerned him was Erickson's rejection of the stone which Carl Edwards found that Edwards believed was the original monument placed by Thompson based upon markings described by Thompson. Erickson dismissed the markings as being nothing more than an encounter with a field plow. (Tr.82 through Tr.83).

According to Elle, Erickson's rejection of the 1897 surveyor results based upon Thompson earlier survey and Carl Edwards re-establishment violated a fundamental provision for land

surveyors set forth in the BLM 2009 Manual of Surveying Instructions and the 1974 BLM circular entitled "*Restoration of Lost or Obliterated Corners and Subdivision of Sections*" which states that:

> The law provides that the corners marked during the process of an original survey shall forever remain fixed in position, even disregarding technical errors that may have passed undetected before the acceptance of the survey.

Section 4.2 of relevant BLM manual. (Tr.148).

Reducing several pages of transcript to their essence, the original GLO surveyors set an original monument. Even if the monument was poorly placed, it still controls the boundaries. Erickson who was a professional land surveyor retracing and searching for the original monument, was required to retrace back to the original surveys and the monuments described in them. Failure to do so violated the standard imposed upon a professional land surveyor. (Tr.149 through Tr.153).

By failing to honor the original monument, Erickson impacted the welfare in the community by leaving neighboring land owners uncertain as to their actual property boundaries. (Tr.147).

During Erickson's cross-examination of Elle, information was forthcoming and heard by the presiding Board members. The following information came from the cross-examination:

The neighbor who pointed out to Elle what she believed was where the S ¼ corner and the SW section corner of Section 24 monumented were located was the grandchild of the original patentee of the area. (Tr.175). Elle estimated the neighbor to be in her 50s. (Tr.179). Elle stated that he used the evidence by the neighbor with other evidence developed in this case rather than just relying upon her testimony. (Tr.179).

Of the eight original GLO stones/monuments of the exterior boundary, there are four (4) undisputed stones/monuments remaining in Section 24. (Tr.177).

There appears to be a difference of opinion among the surveyors where the south ¼ corner of Section 24 is located. (Tr.178).

It is possible that the (1897 surveyor) field notes could have been altered by other individuals, usually in the GLO office. (Tr.247).

Elle agreed that a surveyor who claims to have found an original corner stone is not necessarily correct. (Tr.268).

In Section 24, several of Carl Edwards' corners are in the wrong position. (Tr.273 through Tr.274). Although the expert did not think this corner was one of them. (Tr. 117).

Regarding the standard of care of a professional land surveyor, it is possible for surveyors to have different opinions and not violate the standard. (Tr. 278 through Tr.279).

The Board had an opportunity to question Elle, which begins at Tr.293.

Under Board questioning, Elle testified that some GLO surveyors would not accurately estimate dimensions of their original stone, while others were quite accurate. (Tr.296).

Respondents do not claim that there was not a scintilla of evidence which could support Erickson's placement of the SW ¼ corner of Section 24. Indeed, in 2015 Erickson wrote an article justifying his placement, relying upon wet drum scanning and old school house photographs. Why this information was not contained in his 2010 survey work has not been answered. When the hearing ended on June 22, 2016, Erickson had not presented his defense or justification. The district court has sent this matter back to the board for resentencing. When this appeal is

concluded, Erickson will be given an opportunity to present evidence in mitigation, but will also be subject to examination by Complainant and the presiding Board.

When the hearing was concluded, there was substantial evidence for the presiding Board to determine that in 2010 Erickson had failed to meet the standard of care required of professional surveyors licensed in Idaho in establishing the SW ¼ corner of Section 24.

b. Failure to delineate property owned by a third party.

Erickson's 2010 Survey of Record (Hearing Exhibit 1.2) does not denote the presence of the Grangeville Highway District property.

When comparing Hearing Exhibits 5.1 (later survey) and 5.3 (Tax Parcel identifying Grangeville Highway District land adjacent to Walker property) with Hearing Exhibit 1.2, it is clear that the "Walker" property shown on this exhibit appears to include the Grangeville Highway District property. This is further suggested by the notation "Walker" and written underneath, "605.740 acres." Calculating the acreage, Elle offered his belief that the 605.740 acres included the Grangeville Highway District property. (Tr. 46, "I concluded that it -- that 605.740 acres does include the twelve-and-a-half acres on the Grangeville a**5** Highway District property.")

Elle explained the relevancy of not clearly delineating a second property owner in Exhibit 1.2, explaining:

> It's also pertinent in this case, because Mr. Erickson's survey doesn't indicate the Grangeville Highway District property on his record of survey map. And it leads other people investigating the record to be unsure of whether the Walkers own all the property in the southwest 1/4 of Section 24 or not.

Tr. 46.

In Erickson's cross examination of Elle regarding the failure to denote the Grangeville Highway district property, he asked Elle the purpose of his 2010 survey and whether delineating a third party property was required. Beginning at Tr. 197. Elle stated that the title block indicated that it was a "Record of Survey, A dependent re-survey of the exterior and subdivision of Section 24, Township 30 North, Range 3 East, Boise, Meridian, Performed for Sydney and Dorothy Walker." (Tr. 198). Their exchange follows:

> (Erickson) If Mr. Erickson's purpose is to show the resurvey of the exterior in the subdivision, is it logical, fair, natural, just, to claim these -- determining ownership?
> (Elle) There are many things on this drawing that would lead a surveyor to come to conclusions, or the average person reading the map to come to conclusions. One of the things on the drawing is, in bold letters, in the middle of the section, it says, "Walker 605.740 Acres." My calculations of this drawing indicate that that is the entire section less the -- Lot 1, Lot 4, that says, "Zumwalt" on it. And that also indicates ownership to me, that you show Lot 4. You show Zumwalt. You show the bold line around Lot 4, and around the entire section, except for the east and south boundaries of Lot 4.
> (Erickson) Is Mr. Walker -- or Mr. Erickson, specifically, say, that the Walkers own 605.74 acres?
> (Elle). It says to me, when I read it, it infers that Walkers own 605.74 acres …

Tr. 199, 200.

Regarding failing to delineate the Grangeville Highway District property, Elle testified that the survey which was recorded denotes that it is a dependent re-survey of the exterior and subdivision of Section 24, Township 30, North Range East for the Walkers. As such, the standard of care would require that at least the outline of the Grangeville Highway District property should be shown. (Tr.310 through Tr.312).

When the presiding board members had an opportunity to examine Elle on his testimony, the following exchange occurred:

(Board member) (regarding Grangeville Highway District property) … Do you know why that wasn't shown?
(Elle) I don't know why that wasn't shown.
(Board member) Would you expect that for this type of survey, and the title block says, that it's a dependent resurvey of exterior and subdivision of Section 24, Township 30 North Range East, performed for Sydney and Dorothy Walker. A survey with that in a title block, would you expect that a parcel like the Highway District parcel would be shown? Is that --
(Elle) I would expect based on the entirety of that drawing, that it would be shown. Because you see the -- in the government Lot 4, it says, "Government Lot 4 Zumwalt."
(Board member) Yes.
(Elle) That's someone else. That's not Walker. And in the middle of the drawing, near the Section 24, it says, "Walker," and it says, "605.74 Acres." Taking all that together, I would expect to see at least the outline of the Grangeville Highway District property noted on there.
(Board member) Okay. Is that the standard of care?
(Elle) I believe it is.

Tr. 311, 312.

When Erickson left the hearing, the board had no explanation why his document clearly delineated a third party property owner (Zumwalt), but failed to delineate Grangeville Highway District property. A second question which was not answered is why the document appeared to indicate Walker owned 605.74 acreages which would include the Grangeville Highway District property.

The presiding Board determined that failure to delineate the Grangeville Highway District property was a violation of the standard of care of a professional surveyor licensed in Idaho. The presiding Board also found that this omission violated an Idaho licensed professional surveyor's obligation is to protect the safety, health and welfare of the public in the performance of their professional duties.

There is substantial evidence to support the presiding Board's findings and conclusions on this issue.

c. Failure to correct an error without additional compensation

In Erickson's Answer (A.R. 36-58), he admits that he performed a survey for Dorothy Walker ("Walker") for Section 24, that in 2011 he came to question his 2010 results, that he requested additional funding to resolve the matter, but was denied, and that he took no corrective action to resolve concerns. *See*, A.R. 37.

Erickson further admitted in his Answer that in 2011 Walker gave her consent for him to draft an article which was published in 2015. (Cite A.R. 37**)** Shortly after the article was published, Erickson rewrote the article, including names of his client and her subsequent surveyors and caused it to be recorded in Idaho County on March 20, 2015 as a Survey Report. *Ibid*. The document which was recorded in Idaho County is Hearing Exhibit 17 c.1.

Elle testified as to the standard required of a professional licensed surveyor in Idaho who comes to question his earlier survey work.

Erickson voluntarily prepared Hearing Exhibit 3.2, the December 29,2011 Survey Report, a document in which Erickson impeached his own 2010 recorded Survey and its accompanying Survey Report, calling his monuments "bogus." (page 4 of document). As explained by Elle, it is the duty of a professional land surveyor to correct the record when he believes that his earlier recorded survey and survey report were incorrect. Elle found no evidence that Erickson corrected what he identified as being incorrect work on his part. (Tr.138 through Tr.140).

Relating to the question whether a land surveyor is obligated to correct a mistake which he discovered he made, Elle explained in his experience with other surveyors:

> [I]t's the standard of care in the surveying profession, that if you've discovered you've made a mistake, you have to correct it. It doesn't matter when you discovered you made the mistake, or whether you are getting paid to fix the mistake[.]

(Tr.309 through Tr.310).

Elle did note that he understood that Erickson had reversed his position later. Hearing Exhibit 17e.1 is a communication by Erickson sent to staff counsel in July of 2015, which addresses Erickson's vacillation concerning Section 24 southwest corner location. Elle testified that based upon Hearing Exhibit 17e.1, under the established standard of care, it was incumbent on Erickson to correct the record. (Tr.141).

When Erickson left the hearing, there was no explanation why he failed to notify his clients that he believed in hindsight his 2010 work for them was in error and that it was incumbent on him to correct his error without further compensation. Instead of allowing other surveyors to perform additional surveys to either justify his 2010 position or correct discovered errors, Erickson chose to write an article lashing out at both his former client and the successor surveyors and then took the additional effort to include the names of his client and the surveyors and record it in the county of her residence.

The Board's findings that Erickson violated the standard of care of a licensed professional land surveyor to correct his earlier discovered errors is based upon substantial evidence.

Erickson did attempt to present evidence he had met the applicable standard of care by referencing a Montana state case in his examination of Elle. On re-direct, the following exchange

took place between Complainant counsel and expert Elle regarding Hearing Exhibit R which was a Montana court decision offered by Erickson which discussed the standard of care:

> Q. … "In surveying a tract of land according to a former plat or survey, the surveyor's only duty is to relocate, upon the best evidence obtainable, the courses and lines at the same where originally located by the first surveyor on the ground." Would you agree with that statement?
>
> A. I would.
>
> Q. And based upon that standard of care, do you have an opinion whether Mr. Erickson violated that standard of care, regards the [1897 surveyor][/] Edwards' stone?
>
> A. I believe that Mr. Erickson did not obtain -- did not use the best evidence obtainable in his evaluation of the Edwards, [1897 surveyor] stone.
>
> Q. And is that based upon anything, other than what you've testified throughout the day, yesterday and today?
>
> A. That's based on my testimony, yesterday and today.

(Tr.313 through Tr.314).

During Erickson's re-cross-examination of Elle, Elle did agree that while he testified that Erickson did not use the best evidence in evaluating the southwest corner of Section 24, which violated the standard of care; it may also be a sign of incompetence, but not necessarily. (Tr.320).

Erickson left the hearing prior to presenting a defense. He was not prevented or barred from explaining his actions or his rationale. After his wholly voluntary absence on the third scheduled day of the hearing, the presiding Board members had to rely upon the record presented to reach a decision.

There was substantial and competent evidence to support the administrative agency's determination.

C. Erickson waived additional claims by failing to present them to the District Court.

Erickson raises additional issues before this appellate body: constitutionality of the administrative agency process and procedure, the prohibition from creating a political body from an administrative agency are readily noted. As clearly stated in *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 220 P.3d 318 (2009):

> Under [Idaho Administrative Procedures Act], the Court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67–5277; *Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). As to the weight of the evidence on questions of fact, this Court does not substitute its judgment for that of the agency. [*Spencer v. Kootenai County,* 145 Idaho 448, 452, 180 P.3d 487, 491 (2008)]. The Court shall affirm an agency decision unless the Court finds the agency's findings, inferences, conclusions, or decisions were: "(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." I.C. § 67–5279(3); *see Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in I.C. § 67–5279(3), and that a substantial right of the petitioner has been prejudiced. I.C. § 67–5279(4); *Barron,* 135 Idaho at 417, 18 P.3d at 222.

In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170, 148 Idaho at 205, 220 P.3d at 323.

Respondents request that all issues that were not raised before be dismissed.

D. The failure of the Board to appeal the district court's determination to require reconsideration of the imposed disciplinary measure should not be considered an admission that abuse of discretion occurred.

A final brief mention concerning the district court's remand to the Board to reconsider the discipline imposed.

This Court has held that:

> "[T]he selection of administrative sanctions is vested in the agency's discretion." *Knight v. Idaho Dep't of Ins.*, 124 Idaho 645, 650, 862 P.2d 337, 342 (Ct.App.1993). "The purpose behind [professional] discipline is to protect the public from those unfit to practice ... and to deter future misconduct; the purpose is not punitive." *Idaho State Bar v. Souza,* 142 Idaho 502, 505, 129 P.3d 1251, 1254 (2006).

Williams v. Idaho State Bd. of Real Estate Appraisers, 157 Idaho at 509, 337 P.3d at 668.

The lower court has remanded this matter back for the Board to reconsider its discipline. One basis for the remand is an offer of settlement made by Complainant. However, as clearly set forth in the office of Attorney General, Rules of Administrative Procedure,

> Settlement negotiations in a contested case are confidential, unless all participants to the negotiation agree to the contrary in writing. Facts disclosed, ***offers made and all other aspects of negotiation (except agreements reached) in settlement negotiations in a contested case are not part of the record***.

IDAPA 04.11.01.610.

The Board was unaware of the settlement negotiations and made its decision based upon the record before it. The Board believes there is a clear basis to impose the discipline it entered; however, the Board did not appeal this issue.

Assuming this Court upholds the Board Decision finding that Erickson violated Idaho law and rules governing professional land surveyors in Idaho, the Board fully intends to give both staff and Erickson an opportunity to offer evidence as to an appropriate disciplinary sanction. However, the Board must still fashion some outcome wherein the need to protect the public is balanced with the right to practice a licensed profession competently.

IV. CONCLUSION

Based upon the foregoing, Respondents request this Court determine that the lower court did not err when it determined that within the scope of review set out in Idaho Code § 67-5279(3), the agency findings and conclusions were affirmed. Respondents ask that this Court independently determine there was sufficient competent evidence to support the agency findings and conclusions.

DATED this 19th day of April, 2018.

MICHAEL KANE & ASSOCIATES, PLLC

BY: Michael Kane
MICHAEL J. KANE
Attorneys For Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of April, 2018, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Chad Erickson
2165 Woodland Road
Kamiah, ID 83536
[Email: ericksonlandsurveys@gmail.com]

__XX__ U.S. Mail

__XX__ Email

Michael Kane
MICHAEL J. KANE