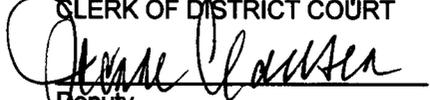


STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED 3/24/2020

AT 2:40 O'Clock P-M

CLERK OF DISTRICT COURT


Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**CHAN and TERESA KARUPIAH, and)
CHRIS GORMSEN, individually and dba)
BOILEAU'S BUTTONHOOK INN, aka THE)
BUTTONHOOK RESTURANT, aka [THE])
BUTTONHOOK, Premise Location: 34076)
N. Main, Bayview, ID)
Petitioner,)
vs.)
IDAHO STATE POLICE, ALCHOHOL)
BEVERAGE CONTROL)
Respondent.)**

Case No. **CV28-20-0583**

**MEMORANDUM DECISION AND
ORDER DENYING IDAHO STATE
POLICE, ALCHOHOL BEVERAGE
CONTROL BUREAU'S MOTION TO
DISMISS**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This matter is before the Court on a Motion to Dismiss filed on January 24, 2020 by Respondent Idaho State Police, Alcohol Beverage Control (ABC) against Petitioners Chan and Teresa Karupiah, Chris Gorrmsen, and Boileau's Buttonhook Inn.

The nature of the case is a Petition for Judicial Review of a final order issued by ABC pertaining to the denial of a waterfront resort liquor license. Pet. For Judicial Review 17 (citing) Ex. A. Tara Malek, the Hearing Officer, filed a Findings of Fact, Conclusions of Law and Preliminary Decision on December 16, 2019. Petitioners filed a Petition for Judicial Review on January 20, 2020. ABC filed an Agency's Motion and Memorandum in Support of Dismissal on January 24, 2020. That motion seeks dismissal of this case under I.R.C.P. 84(b)(1)(A) and 84(n). Petitioners filed a Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss on January

31, 2020. ABC filed an Agency's Reply to Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss on February 12, 2020. Oral argument on ABC's Motion to Dismiss was held on March 24, 2020. At the conclusion of that hearing, the Court denied that motion, and the Court indicated no written opinion would issue. The Court, upon further reflection, has chosen to articulate its reasons expressed on the record, to provide more detail to the parties on this motion to dismiss.

II. ANALYSIS.

ABC asks this Court "to dismiss Petitioner's Petition for Judicial Review as untimely, pursuant to I.R.C.P. 84(b)(1)(A) and 84(n)[,]" (Agency's Mot. and Mem. in Supp. of Dismissal 2) because "[t]he Court in this instance lacks subject matter jurisdiction as Petitioner's Petition for Judicial Review was filed 7 days outside the allowable 28-day time limit for said filing." *Id.*

Under I.R.C.P. 84(b)(1)(A), the petition for judicial review "must be filed within 28 days after the agency action is ripe for judicial review under the statute authorizing judicial review, unless a different time or procedure is prescribed by statute." Under I.R.C.P. 84(n), a "...failure to physically file a petition for judicial review. . .with the district court within the time limits prescribed by statute and these rules is jurisdictional and will cause automatic dismissal of the petition for judicial review on motion for any party. . ."

ABC argues that:

In this case, the hearing officer's preliminary order became a final order by operation of law on December 16, 2019, because the Petitioner's did not seek reconsideration of that order before the agency or said hearing officer. On January 13, 2019, thirty-five (35) days after the order became final, the Petitioner's filed the petition for judicial review.

Agency's Mot. and Mem. in Supp. of Dismissal 3. ABC goes on to argue that "[s]ince

the petitioner's missed the filing deadline of January 13, 2019, the court in this matter lacks the requisite subject matter jurisdiction to preside over the petition." *Id.*

Petitioners argue that:

ABC argues that I.C. § 67-5273(2) requires that a petition for judicial review be filed within twenty-eight (28) days of the final order's service date. ABC's position runs directly contrary to the clear language of the statute. The hearing Officer issued a Preliminary Decision. By its own definition, the Preliminary Decision was not final. The Preliminary Decision was subject to a petition for reconsideration or a request for review by the Agency head within the fourteen (14) days that followed. The Petitioners were statutorily precluded from filing a petition for review until the fourteen (14) days had passed. It was only after the fourteen (14) days passed that the Preliminary Order became a Final Order.

ABC also argues, with virtually no support, that the Preliminary Decision of December 16 became a retroactive final order on December 31, 2019, after no one filed a petition for reconsideration or request for Agency review. This too runs afoul of the language of the Idaho Administrative Procedure Act.

I.C. § 67-5243 provides that if the presiding officer is not the Agency head (as here), then the presiding officer may only issue a preliminary order. I.C. § 67-5245 provides that a preliminary order may be reviewed by the Agency head provided a request is made within fourteen (14) days. I.C. § 67-5273(2) provides that the twenty-eight (28) day period within which a petition for review can be filed runs from the date the preliminary order becomes final. Pursuant to Section 67-5243(b), a preliminary order which is not reviewed on a motion for reconsideration or by the Agency head will become final. Since a motion for reconsideration or a request for review by the Agency head had to be filed within fourteen (14) days of the date of the preliminary decision (or on December 31, 2019), and since neither party did so, the Preliminary Decision then became final.

ABC argues, with no authority, that once the parties failed to file a petition for review or reconsideration, that somehow the Agency Order became retroactively final fourteen (14) days earlier. This is nonsense. The Hearing Officer correctly noted "This Decision is a PRELIMINARY ORDER. It can and will become final without further action of the Agency unless either party petitions for reconsideration... or appeals to the Direction [sic] of the Idaho State Police." See Preliminary Decision at p. 25. Consistent with Idaho Code, the use of the terms "can" and "will" are references to future events, rather than retroactive events.

Pet'rs. Mem. in Opposition to Respondent's Mot. to Dismiss 5-6.

In response to Petitioner's argument made in Petitioners' Memorandum in

Opposition to Respondent's Motion to Dismiss, ABC argued that:

Plaintiffs' counsel has miscalculated the timely requirements from the issuance of the Preliminary Order by the Hearing Officer to the date of the Final Order...

The hearing officer, in her decision, stated that the appeal must be filed within 28 days of "this Preliminary Order becoming[s] final." The Preliminary Order became final by operation of law on December 16, 2019. "If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, IDAHO CODE." IDAHO CODE § 67-5246(3). *Laughy v. Idaho Dept. of Transp.*, 149 Idaho 867 (2010). In this case, the petitioners did not seek reconsideration of that Preliminary order before either the agency or said hearing officer.

Plaintiffs' are mistaken in their time calculations, another "Final Order" is not issued—it is the Preliminary Order that becomes Final. The timeframe does not toll 14 days from the date of Preliminary Order and then add that additional time for the order to become final nor does it extend the time within which to file for judicial review. IDAHO CODE § 67-5271(2).

Judicial review of an administrative decision is wholly statutory, there is no right of judicial review absent the statutory grant. Thus, a party's failure to file a petition for judicial review with the district court within the time limits prescribe [sic] by statute and the Rules of Civil Procedure is jurisdictional and results in a dismissal of the appeal. *Cobbley v. City of Challis*, 139 Idaho 732, 139 P.3d 732 (2006). Petitioners missed the filing deadline of January 13, 2019, and the court in this matter lacks the requisite subject matter jurisdiction to preside over the petition.

Agency's Reply to Pet'rs. Mem. in Opposition to Resp't. Mot. to Dismiss 2-3.

This Court denies the motion to dismiss because under Idaho Code § 67-5273(2), Petitioners' were required to file their petition for review, not within twenty-eight (28) days of "the service date of a preliminary, procedural or intermediate agency order[.]", but rather, "twenty eight days of the date when the preliminary order became final", and this Court finds that preliminary order became final when the agency head did not review the preliminary order as provided under Idaho Code § 67-5246(3), Idaho Code § 67-5245(2)-(7).

Starting with Idaho Code § 67-5273(2), which reads:

A petition for judicial review of a final order or a preliminary order that has become final when it was not reviewed by the agency head or preliminary, procedural or intermediate agency action under section 67-5271(2), Idaho Code, must be filed within twenty-eight (28) days of the service date of the final order, *the date when the preliminary order became final*, or **the service date of a preliminary, procedural or intermediate agency order**, or, if reconsideration is sought, within twenty-eight (28) days after the service date of the decision thereon.

(italics and bold added). ABC urges the Court to focus on the bold portion, petitioners ask the Court to focus on the italicized portion.

First, the Court finds the pertinent portion of Idaho Code § 67-5273(2), as it applies to the facts of this case, where a preliminary order was issued (as is Tara Malek's order, as it is not the order of the agency head), and where neither party appealed that order to the agency head nor did the agency head conduct a review sua sponte, is as follows: A petition for judicial review of a . . . preliminary order that has become final when it was not reviewed by the agency head . . . must be filed within twenty-eight (28) days of . . . date when the preliminary order became final . . ."

In the present case, the hearing officer was not the agency head. Idaho Code § 67-5243 states that, "[i]f the presiding officer is not the agency head, the presiding officer shall issue . . . [a] preliminary order, which becomes a final order unless reviewed in accordance with section 67-5245, Idaho Code." It is clear to this Court that this is the time in which Tara Malek's order in the present case became final...once the fourteen days allowed for agency review. Idaho Code § 67-5245(3) states:

A petition for review of a preliminary order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within fourteen (14) days after the service date of the preliminary order unless a different time is required by other provision of law....The fourteen (14) day period for filing of notice is tolled by the filing of a petition for reconsideration under section 67-5243(3), Idaho Code.

Idaho Code § 67-5243(3) states:

Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of a recommended order or a preliminary order within fourteen (14) days of the service date of that order. The presiding officer shall render a written order disposing of the petition. The petition is deemed denied if the presiding officer does not dispose of it within twenty-one (21) days after the filing of the petition.

Idaho Code § 67-5271 states:

- (1) A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.
- (2) A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy.

Thus, the agency head could review Tara Malek's order within the 14 days after that order was issued, or, the parties may ask the agency head to review Tara Malek's order within 14 days after that order was issued, but the parties may not appeal to the District Court until after the 14 days has passed from the issuance of Tara Malek's order.

Again, Idaho Code § 67-5273(2) reads:

A petition for judicial review of a final order or a preliminary order that has become final when it was not reviewed by the agency head or preliminary, procedural or intermediate agency action under section 67-5271(2), Idaho Code, must be filed within twenty-eight (28) days of the service date of the final order, *the date when the preliminary order became final*, or **the service date of a preliminary, procedural or intermediate agency order**, or, if reconsideration is sought, within twenty-eight (28) days after the service date of the decision thereon.

In the Case at hand, the actions taken by petitioners fall within the plain language of Idaho Code § 67-5273(2), prescribing that a petition for judicial review must be filed within twenty-eight (28) days after "the date when the preliminary order became final", not, "the service date of a preliminary, procedural or intermediate agency order[.]"

As shown above, the plain language of Idaho Code § 67-5273(2) delineates the four scenarios for when the twenty-eight (28) day timeframe for filing a petition for judicial review begins to run. (1) "the service date of the final order"; (2) "the date when

the preliminary order became final”; (3) “the service date of a preliminary, procedural or intermediate agency order”; (4) if reconsideration is sought, within twenty-eight (28) days after the service date of the decision thereon.” This Court finds the first scenario pertains to the situation where the agency head issues the order, and thus, does not pertain to the present case at hand, because in the present case, the agency head did not issue the order and the order was clearly described by the hearing officer as a preliminary order. The second scenario pertains to this situation where Tara Malek’s order became final after 14 days. The second scenario would also pertain to the situation under I.C. Code § 67-5243(3), where a petitioner has filed a motion for reconsideration with the agency and the preliminary order became final after the presiding officer either disposed of the motion for reconsideration or takes no action as to the motion twenty-one (21) days after it has been filed. In the Case at hand, no motion for reconsideration has been filed by the Petitioners so this scenario does not apply. The third situation does provide for the service date of a preliminary order. However, the service date does not make the preliminary order a final order, only the passage of fourteen days makes the preliminary order a final order. The fourth scenario clearly pertains to Idaho Code § 67-5245(3), where a petition for reconsideration has been filed and a final decision as to the petition for reconsideration has been rendered. Again, in the Case at hand, no petition for reconsideration has been filed, and therefore this scenario does not apply. Since these four alternatives are contained in Idaho Code § 67-5273(2), with the disjunctive “or”, even if scenario three applies, scenario two clearly applies, and thus, petitioners should be allowed the longer of the two time periods. Also, if scenario two and scenario three are in conflict, the scenario providing the longer period to appeal should be applied. As the Court of

Appeals of Idaho held in *Latham v. Haney Seed Co.*, 119 Idaho 427, 429, 807 P.2d 645, 647 (Ct. App. 1990).

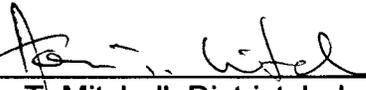
Statutes of limitation prescribing a relatively short period of time in which to commence an action are usually construed narrowly to give the party a fair opportunity to present the claim. *Safeco Ins. Co. of America v. Honeywell*, 639 P.2d 996 (Alaska 1981). See also *Thiel v. Taurus Drilling Ltd.*, 218 Mont. 201, 710 P.2d 33 (1985) (longest of two conflicting statutes of limitation shall apply). In Idaho our Supreme Court has held that "where two constructions of a statute of limitation or a rule which impacts directly upon such a statute are possible, courts generally prefer the construction which gives the longer period in which to prosecute the action." *James v. Buck*, 111 Idaho 708, 710, 727 P.2d 1136, 1138 (1986). See also 3A SUTHERLAND STAT. CONST. § 70.03, pp. 493-94 (4th ed. 1986).

While the Idaho Supreme Court subsequently reversed the Court of Appeals in *Latham v. Haney Seed Co.*, 119 Idaho 412, 429, 807 P.2d 630 (1991), finding that the shorter of the two statutes of limitations considered by the Court of appeals applied, however, the above passage from the Idaho Court of Appeals was not overruled or criticized by the Idaho Supreme Court.

For the reasons stated above, the Motion to Dismiss is denied.

III. ORDER.

IT IS HEREBY ORDERED that Idaho State Police, Idaho Beverage Control's Motion to Dismiss Petitioners' Petition for Judicial Review is **DENIED**.



John T. Mitchell, District Judge

Certificate of Service

I certify that on the 24th day of March, 2020, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

- John Magnuson,
fax 208-667-0500 ✓
johnemagnusononline.com
- Cheryl Rambo,
Cheryl.rambo@isp.idaho.gov ✓



Anne Clauson
Secretary