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 COUNTY OF KOOTENAI
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 DEPUTY

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

)	CASE NO. CV-2012-1442
ROSALIE NADINE JOHNSTON,)	
)	MEMORANDUM DECISION AND
Petitioner,)	ORDER RE: JUDICIAL REVIEW
)	
v.)	
)	
IDAHO STATE POLICE BUREAU OF CRIMINAL IDENTIFICATION)	
)	
Respondent.)	

Michael G. Palmer, PALMER |GEORGE, PLLC, for Petitioner

Jenny C. Grunke, IDAHO STATE POLICE, for Respondent

FACTS AND PROCEDURE

The petitioner, Ms. Johnston, has requested a judicial review of an Idaho State Police Bureau of Criminal Investigation (BCI) decision. BCI's decision was a denial of Ms. Johnston's request to expunge criminal history information that was taken in connection with her 2010 arrest. On July 9, 2010, Ms. Johnston was arrested and charged with a misdemeanor DUI. She pled not guilty and moved to suppress evidence connected to her arrest. The presiding magistrate granted this motion and ordered the suppression of all evidence that resulted from her stop, seizure, and search. After the order to suppress, the prosecution moved to dismiss the case, and a judgment of dismissal was entered.

On January 11, 2012, Ms. Johnston requested BCI to expunge her criminal history. Idaho Code permits expungement by request in two circumstances:

Any person who was arrested or served a criminal summons and who subsequently was not charged by indictment or information within one (1) year of the arrest or summons and any person who was acquitted of all offenses arising from an arrest or criminal summons may have the fingerprint and criminal history record taken in connection with the incident expunged pursuant to the person's written request directed to the department. IDAHO CODE § 67-3004(10).

Ms. Johnston did not fall under the first circumstance because she was charged within one year of her arrest. BCI did deny Ms. Johnston's written request under the second circumstance, however, because it defined "acquitted" to mean a judgment entered after an accused is found "not guilty" by a jury. Because charges were dismissed by the State and not the result of a jury verdict, BCI held that a dismissal was not tantamount to an acquittal and denied Ms. Johnston's request.

Ms. Johnston then petitioned for judicial review of BCI's decision. This Court determined that a sole letter denying the petitioner's request was an insufficient procedural record upon which to review the agency's decision and remanded the case for BCI to augment the record with the agency's procedure for its action. Specifically, the record failed to contain such information as the process followed in denying the petitioner's request, and the legal basis upon which the petitioner's request was denied.

On remand, BCI has augmented the record with several additional items for the Court's consideration. First, BCI provided a memorandum that described the procedure for criminal-record expungement requests. When an individual petitions BCI for an expungement of his or her criminal history, the request is forwarded to the Criminal History Records Supervisor, who performs any necessary updates to the criminal record and the information related to the

expungement request. The supervisor then analyzes the request based upon the agency's criterion. The criterion that BCI uses in its determination includes interpreting the Idaho Code § 67-3004(10) term "acquitted" to mean "found 'not guilty.'" After making the determination, the supervisor and submits his or her analysis to the Bureau Manager for approval. The Bureau Manager reviews the request, and the request is returned to the supervisor and forwarded to legal counsel for review. Upon approval, legal counsel notifies the BCI administrative assistant to prepare a letter for the manager's signature, and the letter approving or denying the request is sent to the petitioner.

BCI has also provided the Court two other legal considerations for its judicial review. First, BCI has submitted additional statutes, Idaho Code §§ 19-2408 through 19-2411 and 19-2107 through 19-2109, which BCI argues operates as an acquittal, although not applicable to this case. Second, BCI submitted a memorandum opinion from First Judicial District Judge Michael J. Griffin that was published in October of 2012. In this opinion, Judge Griffin upheld BCI's interpretation of "acquitted." While the Court takes judicial notice of Judge Griffin's memorandum opinion, the Court also notes that Judge Griffin's opinion is not binding upon this Court. This Court now takes up its judicial review of BCI's denial of Ms. Johnston's request for the expungement of her criminal record.

DISCUSSION

The judiciary is restricted in its review BCI's denial of Ms. Johnston's request. BCI's grant or denial of the expungement request constitutes an agency action and a final order under the Idaho Administrative Procedure Act. *See* Idaho Code §§ 67-5201(3)(c), 67-5246 (2012). As a final order, the petitioner is entitled to a judicial review of the agency's action. Idaho Code §

67-5270(2) (2012). However, this Court's judicial review is limited; the Court must affirm the agency action unless the action violated constitutional or statutory provisions, exceeded the agency's statutory authority, was based upon unlawful procedure, or was arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(2) (2012). If the Court does not affirm the agency action, it must remand the action for further proceedings. *Id.*

When an agency action is based on an agency interpretation of a statute, however, the reviewing court has a slightly altered role. This altered role stems from the judiciary's traditional purpose: "It is fundamental that the judiciary has the ultimate responsibility to construe legislative language to determine the law." *J.R. Simplot Co., Inc. v. Idaho State Tax Commn.*, 120 Idaho 849, 853, 820 P.2d 1206, 1210 (1991). *See also Marbury v. Madison*, 5 U.S. 137 (1803). In this case, the Court agrees with BCI that the Court's role is not to grant or deny the petitioner's request for an expungement. However, this Court can review BCI's interpretation of "acquitted" in Idaho Code section 67-3004(10). First, a court reviews an agency's statutory interpretation for permissibility and deference. If BCI's interpretation is permissible, this Court's next step is to consider the weight this Court should afford BCI's interpretation. Based on Idaho case law, a court must balance the enumerated reasons that underlie agency deference and determine whether the agency's statutory interpretation should receive either great deference, or whether the court should accept the interpretation as persuasive. If an agency's statutory interpretation is held to be merely persuasive, justifiable reasons may exist for a court to depart from the agency's interpretation. In summary, the scope of this judicial review is to review BCI's denial of Ms. Johnston's request in terms of whether BCI's interpretation of "acquitted" in Idaho Code section 67-3004(10) is permissible and determine whether the interpretation should receive great deference or be considered as a persuasive interpretation. If

this Court holds that the agency interpretation should not receive great deference and is not persuasive, then this Court may interpret the statute for the agency to apply.

BCI's interpretation of "acquitted" is only a persuasive interpretation, and this Court is not persuaded that "acquitted" should narrowly mean "found not guilty after trial and when the court issues a judgment of acquittal." When an agency interprets a statute, Idaho courts apply a four-prong test to determine how much deference to give the agency interpretation. *See J.R. Simplot Co., Inc. v. Idaho State Tax Commission*, 120 Idaho 849, 820 P.2d 1206 (1991). The first three prongs must be met for an agency's interpretation to be permissible and afforded any deference. *See id.* The fourth prong balances factors that help courts to determine the weight of deference that should be given to an agency's statutory interpretation. *See id.*

Three prongs must be met for an agency's statutory interpretation to be permissible and afforded any deference. First, a court must determine if the agency has been authorized to administer the statute at issue. *J.R. Simplot Co., Inc.*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991). "Only if the agency has received this authority will it be impliedly clothed with power to construe the law." *Id.* (citations omitted). Second, the agency's statutory interpretation must be reasonable. *Id.* "[D]eference would not be appropriate when an agency interpretation is so obscure and doubtful that it is entitled to no weight or consideration." *Id.* (citations omitted). Third, the statutory language cannot directly address the issue before the court. *Id.* "An agency construction will not be followed if it contradicts the clear expressions of the legislature because 'the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Although federal agencies receive great deference, in Idaho, state

courts may determine what weight of deference it should afford a state agency's statutory interpretation.

The weight of deference that a court affords the agency's statutory interpretation comprises the fourth prong of the four-prong test. Under this prong, a court balances five factors to determine whether the agency's statutory interpretation should receive great deference or persuasive acceptance; these factors are based on the underlying reasons for giving agencies deference. *Canty v. Idaho State Tax Commn.*, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002). *See also J.R. Simplot*, 120 Idaho at 858-59, 820 P.2d at 1215-1216. First, the court must determine whether the agency's statutory interpretation is practical. *Canty*, 138 Idaho at 184, 59 P.3d at 989. A court may also consider any legislative acquiescence. *Id.* "By not altering the statutory text the legislature is presumed to have sanctioned the agency interpretation." *J.R. Simplot*, 120 Idaho at 859, 820 P.2d at 1216 (However, the Court noted in a footnote that this rationale was "a very weak reed on which to base a decision."). Thirdly, a court may consider whether the agency has expertise that relates to the statutory interpretation. *Canty*, 138 Idaho at 184, 59 P.3d at 989. The fourth balancing factor is repose, where a court considers interests that have come to rely on the agency interpretation. *J.R. Simplot*, 120 Idaho at 858, 820 P.2d at 1215. *See also Canty*, 138 Idaho at 184, 59 P.3d at 989 (Court held repose to be absent when the agency issued only two agency decisions, and only one district court decision had upheld the agency's statutory interpretation.) Finally, a court may consider whether the agency interpretation was contemporaneous with the passage of the legislation, as such interpretation might lend insight to the legislative intent. *J.R. Simplot*, 120 Idaho at 859, 820 P.2d at 1216; *Canty*, 138 Idaho at 184, 59 P.3d at 989.

Missing rationales, however, lessen the weight of deference given to an agency's statutory interpretation. "[T]he absence of one rationale in the presence of others could, in an appropriate case, still present a 'cogent reason' for departing from the agency's statutory construction." *J.R. Simplot*, 120 Idaho at 862, 820 P.2d at 1219. If no "cogent reason" exists for departing from the agency's statutory interpretation, it must be given considerable weight. *Id.* However, if some reasons underlying agency deference are missing, then the agency's statutory interpretation is only considered with its persuasive weight. *Id.* at 862-63, 820 P.2d at 1219-20. Additionally, whenever a court considers an agency's interpretation to be unpersuasive and ultimately departs from that statutory interpretation, the court must explain the cogent reasons for doing so. *Id.* at 862-63, 820 P.2d at 1219-20.

In this case, the first three prongs of the JR Simplot test are met, so BCI's statutory interpretation is permissible. Idaho Code § 67-3003 provided for the creation of the Bureau of Criminal Identification as a repository of criminal history records, thus BCI is authorized under that provision to administer the statute. Additionally, the agency's statutory interpretation of "acquitted" is reasonable because one viable definition certainly includes finding an accused person to be not guilty. Finally, "acquitted" is not defined in Chapter 30 of the Idaho Code, leaving this term open to interpretation by the agency or the judiciary. *See* Idaho Code § 67-3001 (2012). Although the first three prongs of the J.R. Simplot test are met and the BCI's statutory interpretation is permissible, this Court must balance the rationales under the fourth prong to determine whether the agency interpretation should receive great deference or carry merely a persuasive weight.

Missing rationales under the fourth prong provide cogent reasons for considering BCI's interpretation of "acquitted" with merely a persuasive weight. BCI's interpretation of

“acquitted” is not practical and is instead an inefficient use of court resources. In cases such as Ms. Johnston’s, the State dismissed because it did not have admissible evidence to prove the case. Under BCI’s interpretation of “acquitted,” an accused person planning to petition for expungement must insist that the State, who would otherwise dismiss, undergo voir dire and spend court and State resources so that the accused might acquire her “not guilty” verdict and the court could subsequently enter a judgment of acquittal. Repose is another missing rationale. BCI has asked for judicial notice of a decision by Judge Griffin that upheld BCI’s definition of “acquitted.” However, this decision was issued recently: October 2012. BCI’s record contains no additional indication that BCI’s interpretation of “acquitted” has existed for such a length of time that important interests have formed around it. It is also unlikely for BCI’s interpretation to be contemporaneous with the passage of the legislation, as the agency was created at the same time and with the same legislation that contained § 67-3004(10). 1999 Idaho Sess. Laws ch. 249, at 638-42. With the absence of these rationales, this Court holds BCI’s interpretation of “acquitted” only carries a persuasive weight for this Court in considering statutory interpretation of the § 67-3004(10) term “acquitted.”

This Court holds that BCI’s definition of “acquitted” is not persuasive. In its memorandum objecting to Ms. Johnston’s petition for judicial review, BCI offered its interpretation to the Court: “[A]cquitted in Idaho means not guilty after trial and when the court issues a judgment of acquittal.” BCI cited no authority for this definition. On remand, BCI augmented the record with a memorandum of its petition-review procedure and listed its expungement criterion, which included its statutory interpretation of “acquitted”: “found ‘not guilty.’” There was no legal authority or other resource cited for this interpretation, either. BCI also augmented the record with criminal statutes that BCI argues amount to an acquittal.

However, these statutes are in a different chapter in the Idaho Code and not relevant to Ms. Johnston's case; thus the Court cannot not discuss them; such discussion amounts to an advisory decision. Finally, BCI's definition of "acquit" is not practical or judicially economical, as described above. For these reasons, this Court departs from BCI's statutory interpretation of what it means to be "acquitted" of a charge.

This Court holds that the plain meaning of "acquitted" is the appropriate interpretation for Idaho Code § 67-3004(10). Statutory interpretation is a question of law, and "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." *McLean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 813, 135 P.3d 756, 759 (2006) (citations omitted). *See also State v. Steelsmith*, 288 P.3d 132, 136 (Id. Ct. App. 2012); *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001).

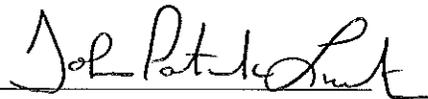
The plain meaning of the term "acquit" and its linguistic variants means to release a person from a criminal charge through a judicial process. To "acquit" means "to discharge completely (as from an obligation or accusation)." MERRIAM WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 52 (1983). Similarly, "acquittal" is "a setting free from the charge of an offense by verdict, sentence, or other legal process." *Id.* This definition fits into the context of the statute provision that applies to Ms. Johnston's case. "[A]ny person who was acquitted of all offenses arising from an arrest or criminal summons may have fingerprint and criminal history record taken in connection with the incident expunged pursuant to the person's written request directed to the department." Idaho Code § 67-3004(10). A person must be cleared of all the charges, regardless of by jury verdict or by prosecutorial discretion, resulting from one

specific arrest in order to be eligible for an expungement of the criminal record taken from that arrest.

CONCLUSION

In summary, this Court holds that “acquitted” means to be discharged from a criminal charge by verdict, sentence, or other legal process. Discharged by a legal process other than verdict includes dismissal of the charges by the State. Because BCI’s action is based on a definition of “acquitted” contrary to what this Court has decided, this Court hereby sets aside BCI’s denial as a decision in violation of the statute pursuant to Idaho Code section 67-5267(2) and now remands this case back to BCI for an order consistent with this opinion.

DATED this 11th day of December, 2012.

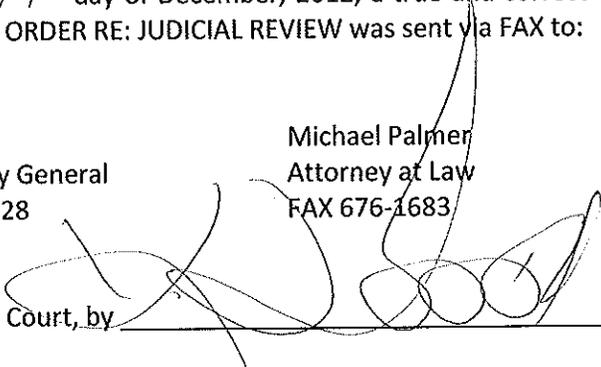


John Patrick Luster
District Judge

I hereby certify that on the 11 day of December, 2012, a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER RE: JUDICIAL REVIEW was sent via FAX to:

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