



Therefore, Goehring seeks to have the Commission review whether she is entitled to attorney fees and costs under revised § 12-117.

I.

**PROCEDURAL BACKGROUND AND ISSUES**

**A. Background and Prior Proceedings**

At the Commission's request, the parties have provided briefing on the issues presented and we consider this Motion to Reopen pursuant to IDAPA 15.04.01.202.05.b. ("IPC Rule 202.05.b."). Respondent submitted a Brief in Support of Motion to Reopen on the Issue of Attorney Fees/Costs ("Goehring Opening Brief") on March 31, 2010 and DEQ submitted its Response to Motion to Reopen on the Issue of Attorney Fees/Costs ("DEQ Brief") on April 14, 2010. Donesely also provided a Reply Brief in Support of Motion to Reopen on Issue of Attorney's Fees/Costs ("Goehring Reply Brief") on April 21, 2010. We declined to have any oral argument on this motion because we deem it unnecessary given the nature of the issues presented. Further, and more importantly, the parties provided ample and adequate briefing on the issues. The Commission has reviewed all briefs filed on this Motion to Reopen.

**B. ISSUES**

1. Does the IPC have jurisdiction to reopen this case and consider whether attorney fees and costs are warranted in favor of Goehring?
2. Did DEQ act without a reasonable basis in fact or law, thus warranting attorney fees and costs pursuant to Idaho Code § 12-117?

## II.

### DISCUSSION

#### A. There is Basis for Commission to Grant Motion to Reopen

The Hearing Officer initially awarded attorney fees in the June 16, 2009 Preliminary Order on the merits. However, upon realizing there was no authority for such an award (*Rammell v. Idaho Dep't. of Agriculture*, 147 Idaho 415 (2009) and *Floyd-Miller v. Idaho Dep't. of Juvenile Corrections*, IPC Case No. 08-21 (Decision and Order on Petition for Review, July 17, 2009)), the Hearing Officer issued the Preliminary Order Denying Fees on July 28, 2009. DEQ timely filed Petition for Review with the IPC from the Hearing Officer's Preliminary Order on the merits. On August 17, 2009, Goehring also filed Petition for Review with the IPC from the Preliminary Order Denying Fees. However, on September 22, 2009, just prior to the brief filing deadline set by the IPC, Goehring filed a Notice of Withdrawal of Appellant Rebecca Goehring's Petition for Review Pertaining to Attorney Fees and Other Costs ("Notice of Withdrawal"). Therefore, the IPC took up DEQ's petition for review on the merits and ultimately issued its Decision and Order on February 22, 2010.

DEQ asserts that when Goehring withdrew her petition for review from the Hearing Officer's Preliminary Order Denying Fees, it rendered that Preliminary Order Denying Fees final since the time for appeal had passed, and therefore, the Commission has lost jurisdiction to consider whether attorney fees are warranted at the Hearing Officer level. In other words, DEQ argues that Goehring has not preserved this issue, and has effectively waived claims on this issue after filing the Notice of Withdrawal.

This position has merit. The IPC is a tribunal of limited jurisdiction, dependent entirely upon Idaho Code §§ 67-5316 and 67-5317. Decisions of the hearing officer “shall be final and conclusive between the parties, unless a petition for review is filed with the commission within thirty-five (35) days.” Idaho Code § 67-5316(8). While initially, Goehring timely filed petition for review from the Preliminary Order Denying Fees, she also withdrew the appeal on September 22, 2009. The deadline for filing petition for review had long passed when Goehring filed this Motion to Reopen on the Issue of Attorney Fees and Costs; the parties had already briefed the merits of the case and presented oral argument regarding the issues on appeal, and they did not include any claims regarding attorney fees and costs. DEQ argues that with the time for appeal of the Preliminary Order Denying Fees long past, that order has become final and not subject to the Commission’s review. I.C. § 67-5316(8).

As a general matter of law, we agree with DEQ and believe that when a party withdraws a petition for review from a Hearing Officer decision and the time for appeal has run under I.C. § 67-5316(8), it is a final decision and cannot be revived. The statutory timeline provides for IPC jurisdiction and is intended to provide finality to matters. An appeal is either timely filed and there is jurisdiction, or it is not timely filed and there is not. Further, if an order issued by a hearing officer is rendered final there is no ability to file petition for review with the District Court since there was no exhaustion of administrative remedies.

However, given the rather unique circumstances presented in this case, we believe there is basis to grant the Motion to Reopen and reach the issue of whether attorney fees are warranted in this matter. Further, and in any event, Goehring has not

waived the issue whether attorney fees and costs are warranted on petition for review to the Commission pursuant to IPC Rule 202.08.

During the pendency of this case (which began early in 2008), the Commission had its authority to award attorney fees and costs extinguished by the Supreme Court (June 1, 2009 issuance of *Rammell* decision, just prior to Hearing Officer's issuance of the Preliminary Order), only to see its authority revived and applied retroactively this past legislative session by enactment of H 421 on March 4, 2010. Between this loss of authority and revival, the Commission entertained and considered DEQ's Petition for Review from the Hearing Officer's Preliminary Order on the merits. In fact, we had only issued our Decision and Order on February 22, 2010, which 3-2 split decision was appealed by DEQ to District Court on March 3, 2010.

This case was clearly filed as of June 1, 2009 and is still pending by virtue of timely petition for review to the District Court. Goehring's counsel represents he withdrew the petition for review from the Hearing Officer's Preliminary Order Denying Fees because, at that time, he recognized the IPC's lack of authority based upon *Rammell* and realized there was no legal basis for the IPC to award attorney fees and costs. Goehring filed the Motion to Reopen based upon the pending enactment of H 421 and clear legislative intent applying it retroactively to cases filed and pending as of June 1, 2009.

Given the narrow facts and circumstances presented, we hereby grant the Motion to Reopen. Effectively, by virtue of legislative overruling of *Rammell* and retroactive application of H 421, this Commission has never lost the authority to award fees in those cases filed and pending as of the date of the *Rammell* decision, June 1,

2009, including this case. This case has not been finally litigated and the issue of attorney fees and costs would have been addressed had this Commission had authority at all times during the pendency of this case. We find that the passage of H 421 has revived any attorney fees issues presented in this pending case, even where such issues may have previously been withdrawn from consideration based on the law at the time.

**B. DEQ Did Not Act Without a Reasonable Basis in Fact or Law and Attorney Fees and Costs are Not Warranted under Idaho Code § 12-117**

Idaho Code § 12-117 does not provide for an automatic award of attorney fees and costs to the prevailing party. Instead, the IPC can award attorney fees and costs to a prevailing party, but only where the non-prevailing party has acted without a reasonable basis in fact or law in the matter. If the legislature had intended that attorney fees and costs be automatically awarded to prevailing parties, this standard wouldn't have been included. Just because DEQ did not persuade the majority (3) of the Commissioners that it had proven just cause for Goehring's termination by a preponderance of the evidence, does not mean it acted without a reasonable basis in fact or law.

What does "without a reasonable basis in fact or law" mean? There is little case law interpretation of this standard. However, it is dominantly thought of as equal to frivolousness; that it is a high, difficult standard to meet before justifying an award of attorney fees and costs. It appears to have been mostly applied against a governmental entity when that entity acted knowingly without authority to act; where there wasn't even a good faith, reasonable argument or interpretation upon which a governmental entity acted. Ralph Naylor Farms, LLC v. Latah County, 144 Idaho 806,

172 P.3d 1081, 1084 (2007). Essentially, Idaho Code § 12-117 requires a showing that a non-prevailing party's claims are frivolous, unreasonable, groundless or in bad faith. Boise Tower Associates, LLC v. Timothy J. Hogland, 147 Idaho 774, 784, 215 P.3d, 494, 504 (2009).

At this past Legislative Session, H 421 was before the Senate Judiciary and Rules Committee on February 15, 2010. Testimony from various individuals sheds light on how "without a reasonable basis in fact or law" is generally understood. There is a clear consensus that the standard is very high. A copy of the *Minutes of Senate Judiciary and Rules Committee* is attached as Exhibit 1 to the Goehring Opening Brief filed with the Commission on March 31, 2010.

Representative Grant Burgoyne, a Boise attorney and sponsor of H 421, stated that "the standard for attorney fee awards remains very high". He indicated that under § 12-117, attorney fee awards "are only made if the non-prevailing party has pursued or defended the case without a basis in fact or law." "There must be a finding that the [non-prevailing] party proceeded frivolously". . . . Senator Les Bock, a Boise attorney, said he "would equate 'no reasonable basis' to frivolous. Even Mr. Donesley, counsel for Goehring, testified that "[t]he standard is high. *Minutes of Senate Judiciary and Rules Committee, February 15, 2010, pp. 2-5.*

This Commission had the benefit of reviewing the pertinent parts of the evidentiary record, considering the briefs and hearing oral argument on this matter on petition for review. This was a complicated case involving complex evidence and explanation of the evidence. The result was a 3-2 decision in favor of Goehring.

Goehring's predominant argument for attorney fees and costs centers around

repeated assertions in briefing that there was no evidence that Goehring altered the data; therefore, DEQ acted without a reasonable basis in fact or law. Goehring Opening Brief, pp. 2, 9,10; Goehring Reply Brief, p. 2, 6, 7. He even asserts the IPC determined “there was no evidence that Ms. Goehring altered data”. Goehring Opening Brief, p. 9, 10.

This misrepresents the IPC majority opinion. The majority held that, while there was certainly evidence in the record showing the altered data, and evidence placing Goehring at her desk on the morning it was altered, it was, in essence circumstantial; that there wasn't direct evidence linking the importing/altering of data in question to Goehring. Therefore, from a level of proof perspective, the majority found DEQ's evidence didn't directly show Goehring altered the data. Decision and Order, p. 13.

The dissenting Commissioners felt otherwise and set forth their position in a 8 ½ page dissent finding, ultimately, that DEQ provided substantial and competent evidence in the record to prove by a preponderance of the evidence (more probable than not) that Goehring did alter the data. Reasonable and capable minds on this Commission differed on whether DEQ met its burden of proof that Goehring altered the data at issue in this case.

Idaho Code § 12-117 exists as a deterrence of groundless, unreasonable, bad faith, frivolous actions by parties to administrative proceedings, including both governmental action and, in the context of IPC proceedings, state employee actions in defense. On the same note, the 'reasonable basis in fact or law' standard exists in § 12-117 so that parties to administrative actions can take action and otherwise exercise duties and rights without the fear of suffering automatic awards of attorney fees and

costs, should they not prevail, as long as there is a reasonable basis in fact or law for such action. This is as important. Both reflect important public policy determinations.

Whether one agrees with the Majority Opinion or the dissent, there is no support for finding DEQ acted without a reasonable basis in fact or law. Even though differing in the ultimate decision on the merits, this Commission unanimously agrees that DEQ had a reasonable basis in fact or law for proceeding in this matter; that its actions were not frivolous or in bad faith. Therefore, there is no basis for awarding attorney fees and costs against DEQ in this case.

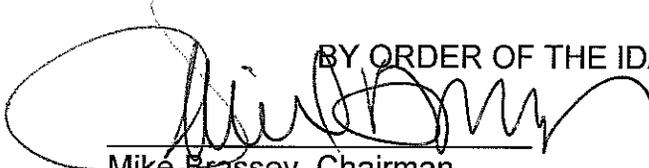
### III.

### CONCLUSION

Based upon the above, while granting the Motion to Reopen with narrow application of the unique circumstances and facts presented, we decline to award attorney fees and costs under I.C. § 12-117 because we do not find that DEQ acted without a reasonable basis in law or fact, which is required in order to justify such an award.

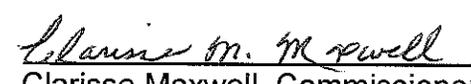
IT IS SO ORDERED.

BY ORDER OF THE IDAHO PERSONNEL COMMISSION

  
Mike Brassey, Chairman

  
Pete Black, Commissioner

  
John Cowden, Commissioner

  
Clarisse Maxwell, Commissioner

  
Evan Frasure, Commissioner

### STATEMENT OF APPEAL RIGHTS

Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

- (1) That the findings of fact are not based on any substantial, competent evidence;
- (2) That the commission has acted without jurisdiction or in excess of its powers;
- (3) That the findings of fact by the commission do not as a matter of law support the decision.

Idaho Code § 67-5318.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following parties by the method stated below on this 1<sup>st</sup> day of July, 2010.

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