

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Nova Pathfinder LTD
Petitioner,
vs.
State of Idaho Department of
Insurance
Respondent.

Case No. CV01-21-13633
MEMORANDUM DECISION AND
ORDER ON JUDICIAL REVIEW

Before the Court is Nova Pathfinder Ltd.'s ("Nova") Petition for Judicial Review from the State of Idaho Department of Insurance's ("Department") Order of Default Revoking Idaho Nonresident Producer Entity License ("Order"), filed August 2, 2021. The District Court affirms the decision of the Idaho Department of Insurance and dismisses the Petition, finding 1) that the Petitioner has not shown that a substantial right of the Petitioner has been prejudiced and 2) Petitioner has not shown the Department acted in an arbitrary and/or capricious matter or otherwise abused its discretion in revoking Petitioner's Idaho Nonresident Producer Entity License.

BACKGROUND

On July 7, 2021, the State of Idaho Department of Insurance, through its attorney, John C. Keenan, Deputy Attorney General, filed a Verified Complaint for Revocation of Nonresident Producer License and Notice of Right to Hearing against Nova Pathfinder Ltd. In the Complaint, the Department alleged that Nova failed to respond to the Department's inquiries regarding Nova marketing health plans in Idaho without a proper license. An Order of Default Revoking Idaho Nonresident Producer Entity License ("Order") was subsequently filed by the Department on August 2, 2021. The Agency Order was mailed to Nova on the same date (August 2, 2021).

Nova filed a Petition for Review ("Petition")¹ with the District Court on September 1, 2021, requesting this Court address:

¹ Petition for Review ("Petition"), filed Sep. 1, 2021.



1. Whether the Petitioner was afforded due process in addressing the allegations set forth in the Complaint based on the fact they did not receive the Complaint;
2. Whether the allegations contained in the Complaint are supported by the Department's record; and
3. Whether the Department acted in an arbitrary and/or capricious matter or otherwise abused its discretion in revoking Petitioner's Idaho Nonresident Producer Entity License based on Petitioner's alleged failure to provide allegedly requested information and records.

The Agency Record was filed on September 29, 2021 ("Record"),² and includes three documents: (1) Verified Complaint for Revocation of Nonresident Producer License and Notice of Right to Hearing, filed July 7, 2021³ ("Complaint"); (2) Statement of Counsel Re: Default, filed August 2, 2021;⁴ and (3) Order of Default Revoking Idaho Nonresident Producer Entity License, filed August 2, 2021 ("Order").⁵ The parties agree there is no transcript of any proceedings before the Department or any oral presentation of evidence.

Petitioner Nova Pathfinder Ltd. ("Nova") filed an opening brief⁶ requesting that the District Court set aside the Order of Default Revoking Idaho Nonresident Producer Entity Status (the "Order") entered by the Respondent so that Petitioner would then be allowed to answer the Complaint. Nova also filed an unsigned Motion to Consider Evidence Outside Agency Record⁷ that requests the Court consider declarations of

² Agency Record on Petition for Judicial Review ("Record"), filed Sep. 29, 2021.

³ Record, pp. 1–7.

⁴ Record, pp. 8–9.

⁵ Record, pp. 10–20 (the Order contains an Exhibit A, which is a copy of the Complaint, on pages 14–20). The Agency Order (1) revoked Nova's Nonresident Producer Entity License; (2) fined Nova \$2,000 dollars; and (3) ordered that Nova shall not be issued a new license for a period of three years from date of revocation and could only receive a license after showing good cause why prior revocation should not bar the issuance of a new license. Record, p. 11.

⁶ Petitioner's Brief, filed Nov. 2, 2021.

⁷ Motion to Consider Evidence Outside Agency Record ("Nova's Motion"), filed Nov. 2, 2021.

Note Attorney Michelle Points did not sign or date her filed motion as is required by Idaho Rule of Civil Procedure 11(a) ("Every pleading, written motion, and other paper must be signed by at least one attorney of record licensed in the State of Idaho, in the individual attorney's name, or by a party personally if the party is unrepresented.").



Phonetip Wilson,⁸ Clyde D. Meade,⁹ LJ Fay,¹⁰ and Matthew P. Scott,¹¹ that were filed concurrently with the unsigned motion. Respondent filed a brief in opposition to the Petition;¹² an objection to the request to consider evidence outside the record with a request to strike these declarations;¹³ and an application for leave to present additional evidence¹⁴ that requests the Court consider the affidavits of Mandy M. Ary,¹⁵ Eric Fletcher,¹⁶ Pamela A. Murray,¹⁷ and October Nickel.¹⁸ Petitioner filed a reply addressing issues raised in the Petition that discussed evidentiary issues,¹⁹ but did not file any separate briefing on the evidentiary requests.

Neither party requested a hearing, and the Court finds the Petition fully submitted for consideration.

The parties agree this Petition for Judicial Review is governed by the Idaho Administrative Procedures Act (“IDAPA”), Idaho Code §§ 67-5201 *et seq.*

EVIDENTIARY REQUESTS

1. Petitioner’s Request

Petitioner requests the Court consider evidence from the Declarations of Phonetip Wilson, Executive Assistant to the CEO of Nova Pathfinder Limited; Clyde D. Meade, Chief Operations Officer of Nova Pathfinder Limited, located in the State of

⁸ Declaration of Phonetip Wilson (“Wilson Dec”), filed Nov. 2, 2021.

⁹ Declaration of Clyde D. Meade (“Meade Dec”), filed Nov. 2, 2021.

¹⁰ Declaration of LJ Faye (“Faye Dec”), filed Nov. 2, 2021.

¹¹ Declaration of Matthew P. Scott (“Scott Dec”), filed Nov. 2, 2021.

¹² Respondent’s Brief, filed Nov. 29, 2021.

¹³ Objection to Petitioner’s Motion to Consider Evidence Outside Agency Record, Motion to Strike and Memorandum in Support, I.R.C.P. 12(f), Idaho Code §§ 67-5276 and 9-1406 (“Dep’t Objection”), filed Nov. 29, 2021.

¹⁴ Department’s Application for Leave to Present Additional Evidence and Memorandum in Support, Idaho Code § 67-5276; I.R.C.P. 84(e)(1)(B) (“Dep’t Motion”), filed Nov. 29, 2021.

¹⁵ Affidavit of Mandy M. Ary (“Ary Aff”), filed Nov. 29, 2021.

¹⁶ Affidavit of Eric Fletcher (“Fletcher Aff”), filed Nov. 29, 2021.

¹⁷ Affidavit of Pamela A. Murray (“Murray Aff”), filed Nov. 29, 2021.

¹⁸ Affidavit of October Nickel (“Nickel Aff”), filed Nov. 29, 2021.

¹⁹ Petitioner’s Reply Brief (“Reply”), filed Dec. 14, 2021.



Utah; LJ Fay, Chief Executive Officer of Nova Pathfinder Limited, located in Southern California; and Matthew P. Scott, Office Manager for the corporate office of Nova Pathfinder Limited, located in Las Vegas, Nevada. These declarations allege that Nova Pathfinder Limited, through its agents, received copies and notice of the Complaint on August 25, 2021, which was after the Order was entered;²⁰ and that the fourteen-day deadline for reconsideration of the Order expired before Nova’s receipt of the Order.²¹

Petitioner argues the Court should consider the declarations because the agency record is incomplete since it does not contain any proof of service of the Complaint or Order, and the record does not confirm the Petitioner received the Complaint.²² The Department opposes the Court considering the Petitioner’s declarations because the “Declarations do not follow the substance or form required by law” and therefore do not include evidence that the Court can consider.²³ The Department also requests the Court strike the declarations from the record. The Court finds it unnecessary to strike the declarations from the record. To the extent the declarations are impermissible evidence on review or are procedurally inadmissible, the Court explain why and then will not consider them further when reaching a decision on the merits of the Petition.

Idaho Rule of Civil Procedure 84(e)(1)(B)1 provides that, “[w]hen the authorizing statute provides that the district court make take additional evidence on judicial review,

²⁰ Mead Dec, ¶ 5, 7; Fay Dec, ¶¶ 5, 6–7; Scott Dec, ¶¶ 5, 6–7; Wilson Dec, ¶¶ 5, 6–7.

²¹ All of the paragraphs referenced in support of this allegation are hearsay under the Idaho Rules of Evidence. See Mead Dec, ¶ 8; Fay Dec, ¶ 8; Scott Dec, ¶, 8; Mead Dec, ¶ 8. Each paragraph contains identical language stating:

I am informed by Lawrence J. Semenza, Esq., and upon that basis believe, that on August 26, 2021, that Mr. Semenza engaged in a telephone conference with John C. Keenan, Esq., Deputy Attorney General regarding the Default and Revocation of NOVA’s Idaho Nonresident Producer License, and that the fourteen-day period within which NOVA could file a motion for reconsideration had expired before receipt of the Order of Revocation.

The Court finds the alleged conversation, and facts as communicated by Semenza, are hearsay. However, the Court finds the August 2, 2021 Order clearly states there is a fourteen-day deadline to file for reconsideration, (Record, p. 12). The court also finds that the testimony that notice was not received until August 25, 2021 makes this a factual allegation that is properly deduced from the declaration testimony.

²² Petitioner’s Brief, p. 3.

²³ Dep’t Motion, p. 2.



the district court may order the taking of additional evidence on its own motion or motion of any party to the judicial review.” Idaho Code § 67-5249 provides the agency record constitutes the exclusive basis for action in contested cases under this chapter or for judicial review thereof except “to the extent that this chapter or another statute provides otherwise.” IDAPA addresses additional evidence, stating:

If [an] application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

(a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.

(b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter.

IDAHO CODE § 67-5276(1)(a)-(b). Idaho Code Title 41, Chapter 2, does not contain language that permits consideration of evidence outside of the agency record. Therefore, the Court finds that the agency record is the exclusive basis for this Court’s review in this case under the statute, but the IDAPA rule allows the Court to permit the presentation of evidence of alleged procedural irregularities before the agency that caused a lack of notice and/or inability to timely respond. Since the Petitioner’s declarations were submitted to demonstrate that NOVA lacked notice or a chance to respond prior to the entry of the Order, the Court finds these declarations fall within the exception in IDAPA and the Court may consider the declarations during its review.

Still, the Department argues the Petitioner’s Affidavits are improper evidence because Idaho Rule of Civil Procedure 2.7 states, “Whenever these rules require or permit a written statement to be made under oath or affirmation, the statement may be made as provided in Idaho Code Section 9-1406.” Section 9-1406 provides:

Whenever...any matter is required or permitted to be supported, evidenced, established or proved by the sworn statement... in writing, of the person making the same, ...such matter may with like force and effect be supported, evidenced, established or proven by the unsworn certification or declaration, in writing, which is subscribed by such person and is in substantially the following form:

“I certify (or declare) under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.”



Each declaration contains the following language:

I, [Declarant], hereby states the following

1. I have personal knowledge of the facts stated herein, unless stated upon information and belief, and to those facts I believe them to be true and correct...

The Petitioner argues the declarations substantially comply with I.C. § 9-1406.²⁴

First, the Court finds that in order to be considered as part of this proceeding the affidavits must comply with the rules outlined above. The declarations are sworn. The declarations assert that their facts are “true and correct,” although they do not specifically state that any false statement(s) carry the penalty of perjury. Still, the Court finds that the declarations are sufficient—if barely so—to substantially comply with the requirements for affidavit evidence. So, the Court finds the Petitioner’s declarations are properly before this Court and can be considered as evidence on judicial review.²⁵ So, the Court GRANTS Petitioner’s Motion to Consider Evidence Outside Agency Record and will consider the Declarations of Phonetip Wilson, Clyde D. Meade, LJ Fay, and Matthew P. Scott.

²⁴ Reply, p. 2.

²⁵ The Court reached this decision in part based on the affidavits submitted in support of the Department’s response. The affidavits were all sworn before a notary affirming each was “SUBSCRIBED AND SWORN TO before me, the undersigned Notary Public of the State of Idaho[,]” but this has no bearing on their reliability in Court as sworn statements. See IDAHO CODE § 9-1406. The affidavits state:

[Affiant], being first duly sworn upon her oath, deposes and says:

1. I am over the age of 18 years and, if called to testify, could competently testify to the facts and statements made herein, which are based on my personal knowledge and belief.

The Court finds the Department’s affidavits also lack any acknowledgement that the statements are subject to the laws of the State of Idaho and false statements may carry the penalty of perjury. The Court finds that the Department’s arguments why Petitioner lacked compliance with § 9-1406 also apply when evaluating the Department’s supporting affidavits. Again, although the Department’s affidavit barely comply, they do substantially comply with the statutory requirements to the same degree as Petitioner complied.



2. Department's Request

The Department requests the Court consider the affidavits of Mandy M. Ary, Eric Fletcher, Pamela A. Murray, and October Nickel. Petitioner argued each affidavit was relevant separately²⁶ so the Court address the admissibility of each affidavit separately.

a. Mandy Ary

Mandy Ary is a paralegal employed by the State of Idaho, Office of the Attorney General, and assigned to the Idaho Department of Insurance. She performs duties to support John C. Kennan, counsel of record for the Department in this case.²⁷ Ary testifies that she prepared the certificate of service for the Complaint and identified the relevant addresses for Nova.²⁸ Ary indicated she filed and served the Complaint on the afternoon of July 7, 2021. She “presented the Verified Complaint to the Department Director’s assistant, Pamela A. Murray, for filing[,] signed the certificate of service, made copies of the Verified Complaint, and prepared envelopes for first class mailing in accordance with the certificate of service.”²⁹ Ary then “personally carried the sealed envelopes to the State mailroom and handed them to mailroom staff.”³⁰ Ary indicated that the copy of the Complaint mailed to the Las Vegas address was returned about July 19, 2021, indicating that it was undeliverable and was not served.³¹ Ary submitted a copy of the returned envelope, showing it was originally mailed on July 7, 2021.³² Petitioner acknowledges Ary’s affidavit “is relevant to the service of the Complaint” but argues “what the Respondent did or did not do in terms of completing a Certificate of Service and/or on their belief that envelopes were placed in the outgoing mailbox” is immaterial because Petitioner argues the Complaint was not received by Petitioner until August 25, 2021, after the Order was mailed. The Court finds that Ary’s actions taken in service of the Complaint are relevant to this Court’s determination of whether service

²⁶ Reply, p. 3.

²⁷ Ary Aff, ¶ 2.

²⁸ Ary Aff, ¶ 3.

²⁹ Ary Aff, ¶ 6.

³⁰ Ary Aff, ¶ 7.

³¹ Ary Aff, ¶ 9.

³² Ary Aff, Exhibit C.



was proper under Idaho Code § 41-212. So, the Court considers Ary's Affidavit when reaching its decision on the Petition.

b. Eric Fletcher

Eric Fletcher is the Department's Company Activities Bureau Chief and his responsibilities include ensuring "insurers and related licensed entities operating in Idaho are solvent and that the business practices of each entity are in compliance with the appropriate laws and rules...".³³ Fletcher's Affidavit sets forth the following facts about the Department's inquiry into Nova's nonresident license and the communications between the Department and Nova representatives.

On April 1, 2021, Fletcher sent an email to Nova's general email address that requested information.³⁴ Fletcher spoke by telephone with Laura Fay on April 5, 2021 about the request and understood that Nova would provide responses.³⁵ Fletcher set an e-mail to follow up on that conversation.³⁶ On April 14, 2021, the Department received an application for an Idaho nonresident producer license from Clyde Mead so the Department issued Nonresident Producer License No. 842608 to Mead on April 15, 2021.³⁷ The Department also received an application from Nova on April 21, 2021 and also issued Idaho Nonresident Producer Entity License No. 844241 to Nova on April 22, 2021. The Department records identify Mead as the individual responsible for Nova's compliance with Idaho rules and laws.³⁸ On April 27, 2021, Fletcher followed up with an email to Fay after the Department still had not received any response to its inquiry, giving Nova until May 7, 2021 to respond.³⁹ On May 6, 2021, Fletcher called Nova's

³³ Fletcher Aff, ¶¶ 2–3.

³⁴ Fletcher Aff, ¶ 5, Exhibit A. The email states in part:

This is an initial inquiry to obtain information and confirm compliance with Idaho law. Failure to respond could result in a formal investigation process being initiated by this Department with the intent to fully explore and enforce Idaho Insurance law, pursuant to Idaho Code, Title 41.

³⁵ Fletcher Aff, ¶ 6, Exhibit C.

³⁶ Fletcher Aff, ¶ 6, Exhibit C.

³⁷ Fletcher Aff, ¶ 7.

³⁸ Fletcher Aff, ¶ 8.

³⁹ Fletcher Aff, ¶ 9, Exhibit C. The email states in part:



general number and also sent an email reminder about the deadline for the responses.⁴⁰ During a telephone discussion between Fletcher and Fay that occurred on May 7, 2021, Fletcher granted Nova an extension until May 11, 2021 to respond, and Fletcher also sent an email confirming this extended deadline.⁴¹ The extended deadline passed without any response. The Department, through October Nickel, emailed a formal letter of inquiry to Mead and Fay on May 24, 2021, requesting a response no later than June 7, 2021.⁴² On June 16, 2021, Nickel then sent an email indicating a response had not been received and that the Department would be pursuing action.⁴³ On July 6, 2021, the day before filing the Complaint, Fletcher called Nova and attempted to contact Mead, who “did not answer and his voicemail was full,”⁴⁴ but Fletcher spoke with Fay, who offered to provide the requested information that same day.⁴⁵ Fletcher confirmed their discussion in an email that requested she respond by end of day (July 6, 2021).⁴⁶

On the morning of July 7, 2021, after not having received a response, Fletcher called Mead but was again unable to reach him. Later that day, Mead returned Fletcher’s call. Fletcher informed Mead that the responses were late and the Department would file its action against Nova later that day.⁴⁷ Fletcher then approved the filing of the Complaint.

I haven’t heard back from you in about 3 weeks. Can you please 1. acknowledge receipt and 2. provide answers to the below questions no later than May 7, 2021. Failure to respond will result in a formal investigation process being initiated by this Department with the intent to fully explore and enforce Idaho Insurance law, pursuant to Idaho Code, Title 41.

40 Fletcher Aff, ¶¶ 10, Exhibit E and F.

41 Fletcher Aff, ¶¶ 11, Exhibit G.

42 Fletcher Dec, ¶¶ 11–12, Exhibit H.

43 Fletcher Dec, ¶ 14, Exhibit I.

44 Fletcher Dec, ¶ 15.

45 Fletcher Dec, ¶¶ 15–16,

46 Fletcher Dec, Exhibit J.

47 Fletcher Dec, ¶ 17.



Petitioner argues the Fletcher Affidavit is irrelevant to the issue of service of the Complaint and argues it was only submitted to paint Petitioner in a bad light.⁴⁸ The Court finds the Department's communications requesting information and Petitioner's failure to respond that forms the basis of the Complaint are relevant. Fletcher's numerous notifications to Nova of the Department's intent to take action is also relevant to Nova's knowledge of the basis of the Complaint before it was filed and served. Finally, Fletcher informing Mead that an action would be filed on July 7, 2021 is relevant to Petitioner's due process claim and any allegation that the Department failed to notify Petitioner of the Complaint before the Order of Default was entered. In short, the Court finds the Fletcher Affidavit detailing discussions between the parties before the Complaint was filed is relevant.

c. Pamela Murray

Pamela Murray is the Assistant to the Director of the Department and her affidavit addresses the filing and service of the Order of Default by the Department.⁴⁹ Murray testified that she signed the certificate of service, prepared the envelopes and copies for mailing in accordance with the certificate of service, and delivered the envelopes to the Department's outgoing mail receptacle at the front desk.⁵⁰ She testifies that none of the envelopes were returned to the Department.⁵¹ Petitioner acknowledges it received the Order of Default so argues that Murray's Affidavit is irrelevant.⁵² The Court finds Murray's testimony is relevant to the weight to be given when comparing the parties' testimony about service of the Complaint (which Petitioner alleges was not timely received) and the testimony about the service of the Order of Default (which there is no dispute was received). So, the Court finds the Murray Affidavit is relevant and will be considered.

⁴⁸ Reply, p. 3.

⁴⁹ Murray Aff, ¶ 2.

⁵⁰ Murray Aff, ¶¶ 3, 5.

⁵¹ Murray Aff, ¶¶ 4, 7.

⁵² Reply, p. 3.



d. October Nickel

October Nickel is the Department's Senior Market Conduct Analyst, and his responsibilities include performing analysis and examining "all insurance carriers and the market of insurance products for the Idaho Department of Insurance."⁵³ Nickel states that, "On May 24, 2021, [he] sent a formal inquiry letter, under Idaho Code section 41-247, by email to Ms. Fay and Mr. Mead, both NOVA officers, requesting that NOVA respond to the inquiry by no later than June 7, 2021" and his Affidavit includes a copy of that email and receipt.⁵⁴ Nickel testifies that he sent a second email on June 16, 2021, informing them he had not received a response and that the Department would take action against NOVA, with a copy of that email, receipt, and a "read" receipt included with the Affidavit.⁵⁵ Nickel then sent the NOVA matter to the Department's counsel with his request for administrative action.⁵⁶

Petitioner argues that Nickel's affidavit is irrelevant on appeal because it only addresses his actions before the Complaint was filed or is an improper attempt to "paint Petitioner in a bad light."⁵⁷ Since the basis for the Petition is lack of notice of a Complaint being filed, the Court finds that Nickel's communications with Nova addressing the Department's requests for information and his statements to Nova that

⁵³ Nickel Aff, ¶¶ 2–3.

⁵⁴ Nickel Aff, ¶ 4, Exhibit A and B. Exhibit A is the letter and states, in part:

This letter is to indicate that a formal investigation of NOVA Pathfinder LC has been initiated by the Idaho Department of Insurance. Please review the following and respond in writing.

...

The Department requests that the Company immediately provide a response to these questions in writing. This request is made pursuant to the authority and powers granted the Director by Idaho Code § 41-247. Further, the Department has requested similar information as stated above from the Company which the Company failed to provide. For that reason, we ask the Company to provide the above information no later than June 7, 2021. Failure to provide such information in the time allotted could lead to further legal action against the company.

Exhibit A, pp. 2, 4.

⁵⁵ Nickel Aff, ¶ 5, Exhibit C, D, and E.

⁵⁶ Nickel Aff, ¶ 6.

⁵⁷ Reply, p. 3.



failure to respond would form the basis of a Complaint are relevant. Further, Nickel's notification to Nova of the Department's intent to take action is relevant to Nova's knowledge during the relevant period.

LEGAL STANDARD

Judicial review of an agency action is governed by the Idaho Administrative Procedures Act ("IDAPA"), (IDAHO CODE § 67-5270), and the district court acts as an appellate court. *Wheeler v. Idaho Dep't of Health & Welfare*, 147 Idaho 257, 260, 207 P.3d 988, 991 (2009). Idaho Code § 67-5279(3) governs the scope of judicial review, stating:

[T]he court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (d) arbitrary, capricious, or an abuse of discretion.

The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67–5279(3), and that a substantial right of the petitioner has been prejudiced. IDAHO CODE § 67–5279(4). See *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 205, 220 P.3d 318, 323 (2009).

"A strong presumption of validity favors an agency's actions," (*Chisholm v. Idaho Dep't of Water Res.*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005) (citing *Young Elec. Sign Co. v. State ex rel. Winder*, 135 Idaho 804, 807, 25 P.3d 117, 120 (2001))), and the burden of proof is on the party challenging the agency decision. *Druffel v. State, Dept. of Transp.*, 136 Idaho 853, 855, 41 P.3d 739, 741 (2002).

ANALYSIS

Petitioner argues Nova did not receive a copy of the Complaint until it was sent as an attachment to the Order of Default on August 2, 2021, so Nova was denied any



opportunity to submit a response or otherwise defendant in the Department's Agency Action.⁵⁸

1. Claim for relief under Idaho Rules of Civil Procedure

Petitioner argues the Court should set aside the Department's Order because "Good cause exists to set aside the Order" under Idaho Rule of Civil Procedure 55(c).⁵⁹ Alternatively, "Petitioner seeks relief under IRCP 60(b)... on the basis of mistake, inadvertence, surprise or excusable neglect" because the Petitioner was not afforded the opportunity to respond to the Complaint.⁶⁰ The State argues the Petitioner cannot assert a claim for relief under the Idaho Rules of Civil Procedure for relief from an Order of Default or general order of the Department when alleged in Petition for Judicial Review. The Court agrees.

Petitioner argues that the Administrative Procedures Act's incorporation of the Idaho Rules of Civil Procedure permits this Court to apply Rule 55 or 60 on appeal since there is no direct conflict with the statute. However, Petitioner provides no argument as to how there is no direct conflict between the Civil Rules and the statute. Idaho Code § 67-5279 clearly provides that on judicial review a petitioner must show that the agency erred in a manner specified in Idaho Code § 67-5279(3). So, the Petitioner is incorrect in its assertion that Idaho Rules of Civil Procedure 55 or 60 also provide a basis for relief from an administrative order under the statute that provides for judicial review.

All of Petitioner basis for judicial review center around Petitioner's arguments that Nova did not receive the Complaint and requests this Court evaluate: (1) Whether the Petitioner was afforded due process based on the fact they did not receive the Complaint; (2) Whether the allegations contained in the Complaint are supported by the Department's record; and (3) Whether the Department acted in an arbitrary and/or capricious matter or otherwise abused its discretion when it revoked Petitioner's Idaho Nonresident Producer Entity License because Petitioner failed to provide the requested information and records.

⁵⁸ Petitioner's Brief, pp. 1-2.

⁵⁹ Petitioner's Brief, p. 2.

⁶⁰ Petitioner's Brief, p. 2.



2. Due Process

Nova argues “there is no evidence within the agency record that establishes proof of service of any document or pleading contained within that record, other than a certificate of service which contains a number of Petitioner’s addresses.”⁶¹ Although the Court has considered Nova’s representatives’ declaration that indicate Nova did not receive copies of the Complaint that were mailed, the Court finds there is evidence in the agency record that shows copies of the Complaint were properly mailed to Nova on July 7, 2021 and that Nova was served with the Complaint on July 7, 2021. The declarations of the Department are also more credible that there was proper service of the Complaint by mail than the declarations submitted by the Petitioner for the District Court’s consideration on Petitioner’s alleged irregularities in procedure before the agency.

Idaho Code Title 41, Chapter 2 addresses the Department of Insurance. Idaho Code § 41-212 allows service of an order by mail and provides that “[s]ervice of orders and notices is complete ... when a copy properly addressed and postage prepaid is deposited in the United States mail or the statehouse mail....” Under that statute, the date of mailing is the date of service for an order issued by the Department of Insurance. Idaho Rule of Civil Procedure 5(e) addresses proof of service and states:

(1) Proof of service must:

- (A) be made by a certificate of the attorney or the party making service;
- (B) be attached to the copy of the document filed with the court, or if the document is not filed with the court, be filed within a reasonable time after service of the document; and
- (C) state the date and manner of service and the name and address of the person served.

(2) Failure to make proof of service does not affect the validity of the service.

The Complaint contains a Certificate of Service, signed by Mandy Ary, that certifies that she sent a copy of the Complaint through first class mail on July 7, 2021, to the following:

⁶¹ Petitioner’s Brief, p. 2.



1. NOVA Pathfinder Limited; 5739 Kanan Road, Ste. 336; Agoura, CA 91301-1601;
2. NOVA Pathfinder Limited; 1710 E. Pebble Road, Bldg. A; Las Vegas, NV 89123-3260;
3. NOVA Pathfinder Limited; 9120 Double Diamond Pkwy; Reno, NV 89521; and
4. Clyde Daniel Mead;⁶² 10436 Kestrel Rise Road; South Jordan, UT 84009.⁶³

Ary testified about the procedure for serving the Complaint and testified that she sent the Complaint as certified in the certificate of service. She testified that only one copy of the Complaint mailed to Las Vegas was returned to her officer as undeliverable.⁶⁴ More importantly, the postmark on the returned envelope of the Las Vegas copy of the Complaint proves it was mailed on July 7, 2021. There were three other copies of the Complaint mailed to Nova at other addresses (which including one mailed to Clyde Mead who was listed by Nova on Nova's application and license with the Department as the individual responsible for Nova's compliance with Idaho law). None of the three other copies of the Complaint were returned by the postal service. Further, Pamela Murray certified that she sent the Order by first class mail on August 2, 2021 to the same addresses for Nova and Clyde Meade identified in the Complaint and sent a copy to the Department. There is no dispute that Nova received all copies of the Order sent on August 2, 2021. Therefore, this Court finds that Petitioner has failed to prove its alleged irregularities in the agency's procedure for service of the Complaint. The Court finds these facts are sufficient to establish that copies of the Complaint were mailed by the Department to Nova on July 7, 2021 and that mailing complied with the statutory requirement that Petitioner Nova was served with the Complaint on July 7, 2021.

The Complaint includes a "Notice of Right to Hearing" informing Nova that "a written request for a hearing must be filed and served upon the Department within twenty-one (21) days after service of this Complaint" and that failure to file within the twenty-one days "shall be deemed a waiver of the opportunity for a hearing and to contest the allegations in the Complaint."⁶⁵ There is no dispute that Nova did not

⁶² Clyde Mead is listed as the individual responsible for Nova's compliance with Idaho law in the Department paperwork on Nova's application and license.

⁶³ Record, p. 7.

⁶⁴ Ary Dec, ¶¶6–10, Exhibit D.

⁶⁵ Record, p. 6.



respond within twenty-one days. Therefore, the agency's action is supported by the agency record before this Court. Nova was afforded all process due in service of the Complaint by mail and twenty one days to respond or request a hearing. Therefore, this Court would affirm the Agency's action on this basis alone.

However, the Court also notes that the Department's Affidavits contain ample evidence that Nova was aware of the Department's inquiry and request for information for several months before the Complaint was filed and served. The Department informed Nova on multiple occasions that failure to respond would result in legal action, Nova was aware of the deadlines for responding, and Nova was informed by the Department that it would file the Complaint on July 7, 2021. This additional evidence presented to the District Court is clear that Nova was aware that legal action being taken against it when the Complaint was filed.

The Court finds Nova was not denied due process—Nova had notice of the basis of the Department's claim, Petitioner was properly served according to statute, and there is evidence in the agency record of that proper service.

3. Petitioner's Remaining Bases for Review

Petitioner included the following bases for review in the Petition: (2) Whether the allegations contained in the Complaint are supported by the Department's record; and (3) Whether the Department acted in an arbitrary and/or capricious matter or otherwise abused its discretion in revoking Petitioner's Idaho Nonresident Producer Entity License based on Petitioner's alleged failure to provide allegedly requested information and records. However, Petitioner did not address either of these arguments in its briefing. In the briefing, Petitioner claims the only basis for review was that Nova did not actually receive a copy of the Complaint prior to the Order. Petitioner argued that the discussions between the parties before service of the Complaint was irrelevant to the claims before the Court. Therefore, the Court finds the Petitioner abandoned these two claims based on the briefing. The Court finds Petitioner has failed to meet its burden on these claims.

In the Court's review, the Complaint clearly outlined the basis for the Department's claim that Nova failed to respond to the Department's inquiries related to



their business practices and actions within Idaho.⁶⁶ The court finds there is adequate evidence in the record before the Court that the Department provided Nova with multiple requests and opportunities to answer the Department's inquiries before the Complaint was filed, within the twenty-one days after the Complaint was filed, and before the Order of Default was entered. The Petitioner has failed to point to any evidence in the record to support its claim that the agency's action was arbitrary and/or capricious, or an abuse of the agency's discretion. Further, the evidence submitted before the District Court does not support Petitioner's claim that there were irregularities in the procedure before the agency that would have lended support to any claim that the Department acted in any arbitrary and/or capricious matter or otherwise abused its discretion in revoking Petitioner's Idaho Nonresident Producer Entity License. Therefore, the Court finds the agency's actions are supported by the record before this Court and Petitioner has failed to show that the Department erred in a manner specified in Idaho Code § 67-5279(3) or that a substantial right of the Petitioner has been prejudiced. Therefore, this Court affirms the Order of Default entered by the Idaho Department of Insurance.

CONCLUSION

Based on the foregoing, the District Court **AFFIRMS** the Idaho Department of Insurance Order of Default Revoking Idaho Nonresident Producer Entity License, filed August 2, 2021, and the Petition for Judicial Review filed September 1, 2021, is **DENIED**.

IT IS ORDERED. 2/6/2022 9:14:03 PM



Lynn Norton
District Judge

⁶⁶ Record, pp. 2-4 (Complaint, ¶¶ 7-17).



