



hearing be vacated as RFK would not attend. In light of RFK's request, the hearing was vacated.

## II. FINDINGS OF FACT

1. The Board issued a provisional license to RFK on June 18, 2010.
2. RFK appealed the Board's decision to issue that provisional license.
3. RFK declined to appear at the hearing and asked that the hearing be vacated.
4. By declining to appear at the hearing on its appeal, RFK failed to show any basis from which the hearing examiner could determine that the Board's decision to issue a provisional license was unwarranted.

## III. CONCLUSIONS OF LAW

1. A license applicant may request a hearing on the issuance of a provisional license but has the burden of proving that the agency's decision was improper. *See, e.g., Montana Environmental Information Center and Environmental Defense v. Montana Dept. Of Environmental Quality*, 2005 MT 96, ¶16, 326 Mont. 502, ¶16, 112 P.3d 964, ¶16 (holding that under the Montana Administrative Procedures Act, the party asserting that an agency determination is in error has the burden of going forward with evidence and the burden of persuading the fact finder that the agency's determination was in error). In this case, the applicant seeks review of the decision to grant a provisional license. As such, it bears the burden of proof to demonstrate that the Board's denial of its license was erroneous either in fact or law.

2. RFK, though provided an opportunity to do so, did not avail itself of the opportunity to appear and present evidence on the issues. By failing to do so, RFK failed to carry its burden of proof to show that issuance of the provisional license was in error either in fact or in law.

3. Because RFK has failed to carry its burden of proof, there is no basis for the hearing examiner to find that some other type of license should have been issued or that the granting of a provisional license was in error.

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**IV. RECOMMENDED ORDER**

For the foregoing reasons, the Board should affirm its June 18, 2010 action of granting RFK a provisional license under the terms set forth in that license.

DATED this 18th day of April, 2011.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT  
GREGORY L. HANCHETT  
Hearing Examiner

**NOTICE**

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.