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In Re Trottier Respondent's Brief Dckt. 39949

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**IN THE SUPREME COURT OF THE
STATE OF IDAHO**

IN THE MATTER OF THE DRIVING)
LICENSE PRIVILEGES OF)
WILLIAM TROTTIER)

SUPREME COURT Nos. 39994-2012
&
39949-2012

WILLIAM TROTTIER,)

RESPONDENT'S BRIEF

Petitioner-Respondent,)

v.)

STATE OF IDAHO,)
TRANSPORTATION DEPARTMENT,)

Respondent-Appellant.)
_____)

APPEAL FROM SECOND JUDICIAL DISTRICT, LATAH COUNTY

THE HONORABLE JOHN R. STEGNER, PRESIDING

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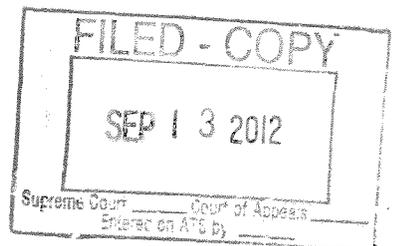


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I.

STATEMENT OF THE CASE

This case is an Appeal by the Idaho Transportation Department from two Orders issued by the Honorable John R. Stegner, District Judge. The two Orders arise from a consolidated hearing wherein Judge Stegner ruled upon two separate Petitions for Judicial Review filed by Mr. Trottier. Judge Stegner vacated the Idaho Transportation Department suspension of the regular driving privileges of William Trottier and the suspension of the commercial driving privileges of William Trottier. The Administrative License Suspension will hereinafter be referred to as the “ALS Hearing.” (ITD File Number 657000098436, Latah County Case No. CV-2011-1069, and Idaho Supreme Court Case No. 39994-2012). The Commercial Driver’s License Hearing will hereinafter be referred to as the “CDL Hearing.” (ITD File Number 657A05885297, Latah County Case No. CV-2011-1163, and Idaho Supreme Court case No. 39949-2012). The Idaho Transportation Department will be referred to herein as “ITD.” Mr. William Trottier will be referred to herein as “Mr. Trottier.”

A. Statement of the Case Regarding Mr. Trottier’s ALS Hearing.

On September 3, 2011 Mr. Trottier was arrested for DUI in Latah County Case Number CR-2011-3140. On September 20, 2011 the State of Idaho amended the charge to Inattentive Driving. Mr. Trottier plead guilty and paid a fine and costs of \$240.00.

On September 3, 2011 Idaho State Patrolman, Jacob Schwecke issued a Suspension Advisory to Mr. Trottier. Supreme Court Case Number 39994-2012. R. Vol. I, pp. 26-27.

On September 6, 2011 Mr. Trottier through his attorney filed a Request for an Administrative Hearing with the ITD. R. Vol. I, pp. 38-39. The ALS Hearing exhibits included the CD of the traffic

stop of Mr. Trottier containing the video and audio of the events leading up to the arrest, the arrest, and the post arrest.

A telephonic Administrative Hearing was held on September 26, 2011 before Administrative Hearing Examiner Skip Carter. On September 28, 2011 Findings of Fact and Conclusions of Law and Order were issued in ITD File Number 657000098436. R. Vol. I, pp. 59-68.

Mr. Trottier by and through his attorney filed a Petition for Judicial Review in Latah County Case Number CV-2011-1069 on October 6, 2011 setting forth the issues sought to be reviewed by the court. R. Vol. I, pp. 69-70.

On October 6, 2011 Judge Stegner entered an Order for Stay Pending Appeal. R. Vol. I, pp. 75-76. The Order for Stay Pending Appeal provided in part as follows:

“IT IS HEREBY ORDERED that the execution and/or enforcement of the Findings of Fact and Conclusions of Law and Order issued by the Idaho Transportation Department (“ITD”) on September 28, 2011, in ITD File No. 657000098436, suspending Petitioner’s driving privileges is hereby STAYED during the pendency of appeal of said order. Petitioner’s driving privileges are therefore ordered reinstated during the pendency of appeal.”

Mr. Trottier prepared and submitted his Brief and Reply Brief to the court by and through his attorney John W. Walker. The Idaho Transportation Department by and through attorney Ed Litteneker presented its Brief to the court. District Judge John R. Stegner consolidated the ALS Petition for Judicial Review hearing filed in Latah County Case Number CV-2011-1069 with the CDL Petition for Judicial Review hearing filed in Latah County Case Number CV-2011-1163 by way of an Order Vacating and Resetting Appellant Argument dated February 22, 2012. R. Vol. I, pp. 145-146.

B. Statement of the Case Regarding Mr. Trottier's CDL Hearing.

On September 13, 2011 the ITD submitted to Mr. Trottier a Notice of Lifetime Disqualification of his commercial driver's license. Supreme Court Case Number 39949-2012 R. Vol. I, pp. 22.

On September 22, 2011 Mr. Trottier's attorney submitted a written Request for Hearing to the ITD regarding its intention to permanently suspend his CDL. R. Vol. I, pp. 25-26.

A Notice of Telephonic Hearing was submitted scheduling the telephonic hearing for October 11, 2011 at 1:00 p.m.

On October 6, 2011 Mr. Trottier's attorney submitted a letter to the ITD requesting that the matter be vacated until the District Court had an opportunity to decide the Petition for Judicial Review regarding the ALS license suspension. In support of the request to vacate the CDL hearing, Mr. Trottier's attorney submitted with the October 6, 2011 letter a Petition for Judicial Review, the Exparte Motion for Stay Pending Appeal, and the Order for Stay Pending Appeal which had been signed by Judge Stegner. R. Vol. I, pp. 46 – 53.

After discussing the matter with the ITD by telephone, Mr. Trottier's attorney submitted an October 7, 2011 letter advising that Mr. Trottier did wish to have the hearing given the fact that the ITD refused to recognize the Stay Order issued by Judge Stegner in the ALS proceeding. Mr. Trottier requested that the hearing examiner in the CDL case consider the ten (10) exhibits that were submitted by the State of Idaho as well as the exhibits that were submitted by Mr. Trottier in the ALS case, which included the DVD containing the audio and video of the stop, the arrest, and the post arrest events. Mr. Trottier articulated the four (4) issues raised in the ALS hearing to be considered in the CDL hearing. R. Vol. I, pp. 54-55.

A hearing was held on October 11, 2011 telephonically by Hearing Examiner, Michael B. Howell. A copy of the official eleven (11) page transcript from the CDL hearing is made apart of the record on appeal. This transcript was reported by Hedrick Court Reporting under CDL Disqualification File Number 657A05885297.

In summary, the hearing officer refused to acknowledge the efficacy of Judge Stegner's Stay Order and furthermore refused to permit Mr. Trottier to present any evidence in the matter. It was the position of the hearing officer that all the State needed to consider was the mere existence of the two (2) ALS suspensions. The Hearing Officer refused to consider either the merits of the second ALS suspension or the fact the "execution and/or enforcement" of the ITD ALS Order was subject to Judge Stegner's Stay Order pending the Petition for Judicial Review. Findings of Fact and Conclusions of Law and Preliminary Order were entered by Michael B. Howell, Hearing Examiner, on October 13, 2011. R. Vol. I, pp. 56-59.

Mr. Trottier filed a Petition for Judicial Review in Latah County requesting that the District Court review the CDL suspension which was assigned case number CV-2011-1163. R. Vol. I, pp. 6-7.

An Order for Stay Pending Appeal was entered by Judge Stegner staying the ITD Order suspending the CDL of Mr. Trottier in Latah County Case Number CV-2011-1163 on October 28, 2011. R. Vol. I, pp. 15-16.

On January 11, 2012 Petitioner, William Trottier's Brief Regarding Commercial Driver's License was filed in Latah County Case Number CV-2011-1163. R. Vol. I, pp. 85-94.

The ITD filed its Brief on February 15, 2012. R. Vol. I, pp. 97-119.

On February 23, 2012 Mr. Trottier filed his Reply Brief and Motion for Leave to Present Additional Evidence of Petitioner William Trottier Regarding Commercial Driver's License. R. Vol. I, pp. 120-126.

C. *Statement of the Case Regarding the Consolidated Hearing on the Two Petitions for Judicial Review.*

The consolidated hearing of the two cases was heard by Judge Stegner on March 19, 2012. There is a full Reporter's Transcript filed in Supreme Court Case Number 39994-2012. The Court Reporter's Transcript reports the entire hearing in the ALS Petition for Judicial Review (Latah County Case Number CV-2011-1069) and the CDL Petition for Judicial Review (Latah County Case Number CV-2011-1163) held before Judge Stegner.

The court and respective attorneys for the parties stipulated and agreed to the consolidated hearing. As stated during the March 19, 2012 appellate hearing before Judge Stegner:

“(THE COURT) Mr. Walker, Mr. Litteneker and I have had discussions about this in the past that you haven't been privy to. I'm going to try to acquaint you with the discussion we've had.

My belief is that the driving privileges are analogous to the set and that the CDL privileges would be a subset of those driving privileges. And if the driving privileges are suspended, then the commercial driving privileges would be suspended. If the driver's license is not suspended, then the commercial driver's license should not have been suspended.

MR. WALKER: We're all on the same sheet of music, Your Honor.

THE COURT: All right. Then – then you may proceed.” Tr. Vol. I, P. 3 L 18-25 and P. 4, L 1-7.

Mr. Trottier raised several issues for Judge Stegner to consider. However, Judge Stegner did not reach all of the issues raised in the ALS Petition for Judicial Review. Instead, the District Court found that after reviewing the entire record, including the video and audio contained on the DVD, that the Trooper did not have a factual basis to conclude that there was a reasonable suspicion that

Mr. Trottier had driven in such a manner so as to provide the Trooper with a reason to stop Mr. Trottier's vehicle. Judge Stegner found "well, I've looked at the DVD and I can't find what the hearing officer concluded was there to be seen." Tr. Vol. I, P. 28 L. 25, P. 29 L. 1-2.

At pages 39, 40, 41, and 42 of the court reporter's transcript the court articulates its Findings of Fact and Conclusions and summarizes that: "the Hearing Officer's determination that Mr. Trottier's license should be suspended is not supported by a substantial and competent evidence." Tr. Vol. P. 39 L. 24 & 25, P. 40 L. 1.

The court further concluded that since the ALS suspension was improper that there were not two license suspensions to support the suspension of the commercial driver's license.

On March 29, 2012 in Latah County Case Number CV-2011-1069 Judge Stegner entered an "Order Vacating Driver's License Suspension and Remanding to Idaho Transportation Department with Instructions to Reinstate Driver's License." R. Vol. I, pp. 149-151.

District Judge Stegner during the hearing addressed only one of the issues raised by Mr. Trottier in his two (2) Petitions for Judicial Review. The court did not find it necessary in the ALS and CDL Petitions for Judicial Review to address the other issues that were raised by Mr. Trottier. These other issues are set forth specifically within Mr. Trottier's Brief, and are identified separately within Section II of this Brief as Additional Issues Raised on Appeal.

Therefore, those issues are now before the Idaho Supreme Court on this appeal pursuant to IAR 35(b)(4) in the event the Court rules that Trooper Schwecke had legal cause to stop Mr. Trottier.

The Idaho Transportation Department filed the Notice of Appeal in Latah County Case Number CV-2011-1069 on May 1, 2012.

The court found that because the ALS suspension was improper that the CDL suspension was improper. Judge Stegner entered the “Order Vacating Commercial Driver’s License Suspension and Remanding to Idaho Transportation Department with Instructions to Reinstate to Driver’s License” on March 29, 2012. R. Vol. I, pp. 129-131.

The ITD filed its Notice of Appeal in Latah County Case Number CV-2011-1163 on May 1, 2012.

D. Statement of the Case Regarding the DVD Video and Audio Evidence.

On September 3, 2011 at 2:10:30 Mr. Trottier legally drove his vehicle from a parking lot onto Main Street and proceeded in a north bound direction. Trooper Schwecke was north bound on Main Street and followed behind Mr. Trottier’s vehicle. Trooper Schwecke had activated the audio/video recorder in his vehicle which was recorded on a DVD. The DVD provides the real time record of what occurred on September 3, 2011. The DVD establishes by clear evidence that between 2:10:30 to 2:10:55 Mr. Trottier lawfully drove his vehicle northbound on Main Street. The video evidence is unvarnished and unembellished. The video clearly establishes that Mr. Trottier did not violate any rules of the road. The video clearly establishes that Mr. Trottier did not conduct an illegal right hand turn onto northbound U.S. 95 at approximately C Street or improperly straddle the passing hash marks at the approximate center of the vehicle for approximately 20 to 30 feet. The DVD clearly establishes that the allegations concerning Mr. Trottier’s driving behavior contained in Trooper Schwecke’s Affidavit are not supported by substantial evidence on the record as a whole. The DVD clearly establishes that Trooper Schwecke did not have legal cause to stop Mr. Trottier. The DVD supports the ruling by Judge Stegner that the Administrative License Suspension should be vacated and the driver’s license of Mr. Trottier should be reinstated. Furthermore, the DVD

supports Judge Stegner's ruling that since the ALS suspension cannot stand that there is not a valid second suspension of Mr. Trottier's license to support the lifetime suspension of his commercial driver's license.

In summary: "The truth is in the tale of the tape." Mr. Trottier requests that each of the Justices of the Idaho Supreme Court review the DVD, particularly the time period articulated herein. Said DVD is marked as Exhibit A to the 9-26-11 hearing. A copy of the DVD is included at the end of Respondent's Brief as Exhibit A.

II.

ADDITIONAL ISSUES PRESENTED ON APPEAL

In addition to Mr. Trottier's position that Judge Stegner was correct in ruling that Mr. Trottier had met his burden of showing that Trooper Schwecke lacked legal cause for the stop, he also raises issues on appeal pursuant to IAR 35(b)(4). Although Mr. Trottier raised these issues before the District Court, Judge Stegner limited his ruling to the lack of legal cause for the stop.

For purposes of this appeal, and pursuant to IAR 35(b)(4), Mr. Trottier raises the following additional issues for consideration by the Supreme Court as to the Administrative License Suspension and Commercial Driver's License appeals in the event the Supreme Court reverses Judge Stegner's two (2) Orders and rules that Trooper Schwecke had legal cause to stop Mr. Trottier. Those issues are identified in Respondent's Brief in the Argument section as:

III.B. Whether Trooper Schwecke conducted a valid monitoring period for fifteen (15) minutes prior to administering the breath test to Mr. Trottier, and thus whether the Idaho Transportation Department's findings were supported by substantial evidence. Further, if the blood alcohol concentration test and results as taken on September 3,

2011 are invalid, then the test results cannot be used in any proceedings involving Mr. Trottier's regular and commercial driver's licenses.

III.C. Whether Mr. Trottier should be permitted to present additional evidence in the CDL case that is material and relates to the validity of the agency action as there were good reasons for Mr. Trottier's failure to present the evidence in the proceedings before the agency. That is, the hearing officer refused the request of Mr. Trottier to consider said evidence and to present oral argument on the issues. Mr. Trottier seeks a court order remanding the matter to the agency with directions to receive the additional evidence, including the District Court's ruling on the appeal in Latah County Case No. CV-2011-1069. Further, whether the Court should take proof on the matter based upon the procedural irregularities conducted before the agency and thereafter remand the matter to the hearing officer with directions to reinstate the Commercial Driver's License of Mr. Trottier. Alternatively, the Court should take judicial notice of the evidence set forth by Mr. Trottier in his Brief Regarding CDL at pages 92 and 93 of the Transcript as well as the District Court's Final Opinion and Judgment entered in the appellate case in Latah County Case No. CV-2011-1069.

III.D. Whether, as to the Commercial Driver's License Suspension, the decision by the Idaho Department of Transportation to suspend Mr. Trottier's Commercial Driver's License for his lifetime was in violation of Mr. Trottier's procedural and substantive due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, and under Article I, Section Thirteen of the Idaho Constitution.

III.

ARGUMENTS

A. *The District Court was correct in ruling that Mr. Trottier had met his burden of showing that Trooper Schwecke lacked legal cause for his stop of Mr. Trottier.*

The following excerpts from the March 19, 2012 Hearing before Judge Stegner are set forth which summarize the Court's ruling on the lack of legal cause for the stop of Mr. Trottier's vehicle, and the stipulation and agreement between the attorneys representing the respective parties and District Judge Stegner consolidating the Administrative License and Commercial Driver's License suspension cases. Said excerpts are identified as follows:

A. At pages 3 and 4 of the Transcript:

“(THE COURT) Mr. Walker, Mr. Litteneker and I have had discussions about this in the past that you haven't been privy to. I'm going to try to acquaint you with the discussion that we've had.

My belief is that the driving privileges are analogous to the set and that the CDL privileges would be a subset of those driving privileges. And if the driving privileges are suspended, then the commercial driving privileges would be suspended. If the driver's license is not suspended, then the commercial driver's license should not have been suspended.

MR. WALKER: We're all on the same sheet of music, Your Honor.

THE COURT: All right. Then – then you may proceed.” Tr. Vol. I, P. 3 L 18-25 and P. 4, L 1-7.

B. At page 12 of the Transcript:

“THE COURT: So, we're back to where I started. I think what it means is that Mr. Trottier's CDL rises or falls on the success of his – success or failure of his license challenge.” Tr. Vol. I, P. 12 L 16-19.

C. At page 21 of the Transcript:

“THE COURT: Well, you don't win this case by persuading me that the

administrative hearing officer should not have gone to a hearing. You persuade me by showing me that the underlying case was decided incorrectly.

MR. WALKER: Okay. I understand that, Your Honor. But I wanted to get to the point of articulating all of the reasons why we're going to get to the point that you want me to finally get to...

THE COURT: All right.

MR. WALKER: So, now we'll go to the ALS case.

THE COURT: All right." Tr. Vol. I, P. 21 L 4-15.

D. At pages 26 and 27 of the Transcript:

"THE COURT: But it doesn't – it's immaterial whether it's the second strike or not. It's material whether the driver's license should have been suspended by the hearing officer in 1069.

MR. WALKER: Right. But if – if – if that falls, if – if the suspension in 1069 falls –

THE COURT: Right.

MR. WALKER: – ie., if this Court reverses that decision –

THE COURT: Right.

MR. WALKER: – then not only does he get his regular license back, but he gets his CDL back as well.

THE COURT: Correct.

MR. WALKER: That's my case.

THE COURT: That's what I've been trying to say, that the fact that it might be a second violation would only impact the penalty, not the fact that it was taken away from him.

MR. WALKER: Yes.

THE COURT: Mr. Littenecker.

MR. LITTENEKER: Thank you, Judge. There isn't any question that if the ALS fails, the CDL fails. And –

THE COURT: I'm with you.

MR. LITTENEKER: And I'm glad to hear that.” Tr. Vol. I, P. 26 L 4-25 and P. 27, L 1-2.

E. **At page 32 of the Transcript:**

“THE COURT: Right. I'm more troubled with his conclusion that there were violations of law when I look at the DVD. I don't see what he says he sees.” Tr. Vol. I, P. 32 L 12-14. (Emphasis added).

F. **At pages 33 and 34 of the Transcript:**

“THE COURT: Well, but there has to be substantial and competent evidence to support the finding. And if I conclude that the DVD does not corroborate the affidavit, I'm concluding that there isn't substantial and competent evidence to corroborate.” Tr. Vol. I, P. 33 L 25 and P. 34 L 1-4.

G. **At pages 39 through 42 of the Transcript:**

“THE COURT: Very well. Then I am of a mind that the hearing officer's determination that Mr. Trottier's license should be suspended is not supported by a substantial and competent evidence.

I – I do think that the DVD does not corroborate the affidavit, that it is in stark contrast to the affidavit, and therefore I find that the hearing officer's conclusion that Mr. Schwecke's stop of Mr. Trottier was not based on reasonable and articulable suspicion, and I'm therefore remanding this to the hearing officer for that basis.

I do also think that the hearing officer's conclusion that Mr. Trottier engaged in an illegal turn and failed to maintain his lane of travel, in violation of Idaho Code section 49-637, is not supported by substantial and competent evidence.

I think there's a – I don't know if it's a misunderstanding of 49-637, but the statute actually says, “Whenever any highway has been divided into two or more clearly marked lanes for traffic, the following, in addition to all else, shall apply: The vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from that lane until the driver has first ascertained that the movement can be made with safety.”

The DVD shows Mr. Trottier driving out of the parking lot around the pickup that is nearest to the curb in what looks to me to be as practicable as possible way. I don't see him driving over the centerline.

To the extent that the hearing officer and the administrative license suspension concludes that he did drive over the centerline, he says, "The painted – that the paint on dash line dividers is faded but still discernable."

The statute requires clearly marked lanes I don't think they're clearly marked to begin with. I don't think that Mr. Trottier drove across them, and to the extent that they're not clearly marked, there's not been a violation of the statute. And to the extent that they're not clearly marked, it suggests to me that others drove in the way that Schwecke thinks that Mr. Trottier drove and therefore if everybody is doing it, it's not a reasonable and articulable suspicious behavior that would justify being stopped.

So, would you submit an order to the effect that I have remanded this to the hearing officer?

MR. WALKER: Yes, Your Honor.

THE COURT: and in CR-11-1163, because I have remanded 1069 to the hearing officer, any disqualification is also remanded.

MR. LITTENEKER: And, Judge, consistent with the Court's analysis, I think that the ALS order should contain language that the suspension is vacated because otherwise my understanding would be the Department would still proceed with the CDL.

THE COURT: Thank you. Then, Mr. Walker, would you submit the order that you're about to present, to Mr. Litteneker for his approval, as to it's form before you submit it to me?

MR. WALKER: I will, Your Honor. And I'll have a place for him to sign off as approved as to form and content." Tr. Vol. I, P. 33 L 25 through P 42 L 4. (Emphasis added).

A party's attorney of record has implied authority to enter into stipulations and agreements respecting matters of procedure. *In Interest of Holt*, 102 Idaho 44, 47, 625 P.2d 398, 401 (1981). "Oral stipulations of the parties in the presence of the court are generally held to be binding, especially when acted upon or entered on the court records...." *Kohring v. Robertson*, 137 Idaho 94,

99, 44 P.3d 1149, 1154 (2002).

In this case, it is clear from the Court Reporter's transcript that the attorneys representing the ITD and Mr. Trottier agreed and stipulated on the record that the District Court's decision regarding the ALS hearing would determine the outcome of the CDL hearing. Thus, if the Court ruled that Mr. Trottier prevailed in the ALS case, then, Mr. Trottier would prevail in the CDL case because there would not be a valid, lawful, second suspension.

Inexplicably, Attorney Litteneker on behalf of the ITD appears to be arguing on appeal a position completely inconsistent with and contrary to the clear agreement and stipulation contained within the District Court record. *See Appellant's Brief at pages 15-21.*

The applicable standard of review herein was recently set forth by the Court of Appeals' decision in *Bell v. Idaho Transportation Department*, 151 Idaho 659, 663-664, 262 P.3d 1030, 1034-1035 (Ct.App.2011), wherein the Court stated:

The Idaho Administrative Procedures Act 2009 (IDAPA) governs the review of ITD decisions to deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. *See* I.C. §§49-201, 49-330, 67-5201(2), 67-5270. In an appeal from the decision of a district court acting in its appellate capacity under IDAPA, this Court reviews the agency record independently of the district court's decision. *Marshall v. Dep't of Transp.*, 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct.App.2002). This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. I.C. §67-5279(1); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. This Court instead defers to the agency's findings of fact unless they are clearly erroneous. *Castenada v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial and competent evidence in the record. *Urratia v. Blaine County, ex. rel. Bd of Comm'rs*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000); *Marshall*, 137 Idaho at 340, 48 P.3d at 669.

The Court may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed

the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. §67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. §67-5279(3) and that a substantial right of that party has been prejudiced. *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. If the agency's decision is not affirmed on appeal, "it shall be set aside ... and remanded for further proceedings as necessary." I.C. §67-5279(3).

The administrative license suspension statute, I.C. §18-8002A, requires that ITD suspend the driver's license of a driver who has failed a BAC test administered by a law enforcement officer. The period of suspension is ninety days for a driver's first failure of an evidentiary test, and one year for any subsequent test failure within five years. I.C. §18-8002A(4)(a). A person who has been notified of such an administrative license suspension may request a hearing before a hearing officer designated by ITD to contest the suspension. I.C. §18-8002A(7). At the administrative hearing, the burden of proof rests upon the driver to prove any of the grounds to vacate the suspension I.C. §18-8002A(7); *Kane v. State, Dep't of Transp.*, 139 Idaho 586, 590, 83 P.3d 130, 134 (Ct.App.2003). The hearing officer must uphold the suspension unless he or she finds, by a preponderance of the evidence, that the driver has shown one of several grounds enumerated in I.C. §18-8002A(7) for vacating the suspension. Those grounds include:

- (a) The peace officer did not have legal cause to stop the person; or
- (b) The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
- (c) The test results did not show an alcohol concentration or the presence or drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
- (d) The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered; or
- (e) The person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section. I.C. §18-8002A(7).

The hearing officer's decision is subject to challenge through a petition for judicial review. I.C. §18-8002A(8); *Kane*, 139 Idaho at 589, 83 P.3d at 133.

Idaho Code §18-8002A(7) provides: The hearing officer shall not vacate the suspension unless he finds by a preponderance of the evidence that:

- (a) The peace officer did not have legal cause to stop the person...

In the case of *State v. Emory*, 119 Idaho 661, 809 P.2d 522 (1991), the Idaho Court of Appeals held that the arresting officer did not have “a reasonable and articulable suspicion” justifying his stop of Emory’s vehicle. *Emory*, 119 Idaho at 664, 809 P.2d at 525. In said decision, the Court of Appeals distinguished the difference between “a reasonable and articulable suspicion” versus “probable cause.” *Id.* The Court held in *Emory* that “to have probable cause for a stop, an officer must possess facts that would lead a person of ordinary prudence to entertain an honest belief that the suspect has committed a crime.” *Emory*, 119 Idaho at 663, 809 P.2d at 524, *citing United States v. Cortez*, 449 US 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981). The Court contrasted that with reasonable and articulable suspicion, stating that “an investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. The reasonableness of the suspicion must be evaluated upon the totality of the circumstances at the time of the stop.” *Emory*, 119 Idaho at 664, 809 P.2d at 524, *citing Mason v. State Department of Law Enforcement*, 103 Idaho 748, 653 P.2d 803 (Ct.App.1982).

In the case of *In Re Suspension of Driver’s License of Gibbar*, 143 Idaho 937, 155 P.3d 1176 (2006), the Idaho Court of Appeals stated “[I]daho Appellate Courts have not yet decided whether the ‘legal cause’ to request evidentiary testing required in I.C. §18-8002(4)(b) is equated to probable cause for an arrest or reasonable suspicion. (Citation omitted). We also need not decide that question in this case because the officer had probable cause.” *In re Gibbar*, 143 Idaho at 943, 155 P.3d at 1182.

In *Deen v. State*, 131 Idaho 435, 958 P.2d 592 (1998), the Idaho Court of Appeals concluded that the officer had a reasonable and articulable suspicion that the Defendant was driving inattentively and therefore had legal cause to stop the vehicle. *Deen*, 131 Idaho at 436, 958 P.2d at 593. The Court of Appeals discussed the history and definitions of “legal cause”, “probable cause”, and “reasonable articulable suspicion” standards as applied to suspension of driver’s license cases. *Id.*

In the instant case, whether the standard as defined by the statute as legal cause is defined as “reasonable articulable suspicion” or “probable cause” makes no difference. Trooper Schwecke had neither probable cause nor reasonable suspicion to stop Mr. Trottier. Therefore, Mr. Trottier’s driver’s license and commercial driver’s license should be fully reinstated.

The two (2) suspensions of Mr. Trottier’s driver’s license and commercial driver’s license were clearly erroneous and not supported by substantial and competent evidence in the record as a whole. The video evidence contained on the DVD clearly establishes that Trooper Schwecke did not have legal cause to stop Mr. Trottier.

B. The Department Hearing Officer’s conclusion that Trooper Schwecke conducted a valid monitoring period for fifteen (15) minutes prior to administering the breath test to Mr. Trottier is not supported by substantial evidence. Thus, the test results cannot be used in any proceedings involving Mr. Trottier’s regular and commercial driver’s licenses.

As noted above, this issue was not ruled upon by the District Court upon the two (2) Petitions for Judicial Review of the two (2) decisions from the Department of Transportation. By way of an additional issue on appeal, Mr. Trottier contends that substantial and competent evidence does not exist in the agency records to support the Hearing Officer’s finding that Trooper Schwecke conducted a valid monitoring period for fifteen (15) minutes prior to administering the breath test

to Mr. Trottier.

Please refer to the DVD that is part of the enclosed record as Exhibit A. The DVD shows the following events occurred at the following times.

At 02:10:30 to 02:10:55, Mr. Trottier legally drove his vehicle northbound on Main Street (U.S. 95). Mr. Trottier was illegally stopped, detained, searched, and arrested by Trooper Schwecke.

A very important discrepancy exists with regard to the timing differential between the calibration of the Lifeloc FC20 timer and the DVD. That is, there is a two (2) minute differential between the time setting on the DVD and the Lifeloc FC20 timer. This is important when using the time calculation with respect to the DVD. The DVD is the timer that is relied upon for purposes of this record.

According to the printout of the Lifeloc FC 20 timer, the first air sample was given by Mr. Trottier at 02:44:00. However, the DVD clearly shows that the first air sample is given by Mr. Trottier at 02:42:00, as represented by the timer on the DVD. For purposes of arguing this record, Mr. Trottier is relying upon the time as reported on the DVD. The first breath test as reported on the timer of the DVD is actually administered starting at 02:42:00 and is concluded at 02:42:24.

Again, using the times contained on the DVD, the following events occurred:

- A. At 02:18:30, Trooper Schwecke commences the gaze nystagmus test.
- B. At 02:20:40, Trooper Schwecke starts the heel to toe test.
- C. At 02:26:00, Trooper Schwecke commences administration of the one legged stand test.
- D. At 02:27:00, the DVD reflects that Mr. Trottier is still performing the one legged stand and other field sobriety tests.

- E. At 02:28:38 and at 02:29:15, Trooper Schwecke states that he will not actually start the fifteen (15) minute observation period until after he has read the advisory form.
- F. At 02:30:11, Trooper Schwecke states: “Let me read this form to ya.”
- G. At 02:30:19, Trooper Schwecke states: “This is the suspension advisory”, and commences to read the advisory form.
- H. At 02:33:29, Trooper Schwecke finishes reading the advisory form and asks the Defendant: “Do you understand?”
- I. At 02:42:00, Trooper Schwecke administers the first breath test. Note this is not a full fifteen (15) minute period from the time that the officer concluded reading the advisory form. Instead, it is less than nine (9) minutes after he completes reading the advisory form.
- J. At 02:44:32, Trooper Schwecke administers the second breath test. Again, this does not allow for a full fifteen (15) minute observation prior to administering the breath test.

In summary, Trooper Schwecke failed to adequately monitor Mr. Trottier for the mandatory fifteen (15) minute observation period before administering the breath test to determine alcohol concentration. As such, the results of the breath tests are not reliable and should be excluded from the record.

At the administrative hearing, the driver must prove, by a preponderance of the evidence, one of the grounds listed in Idaho Code § 18-8002A(7). However, when there is a violation of a mandatory regulation, “such as the 15-minute waiting period,” the driver meets this burden by showing that the procedure was not followed, and the hearing officer is required to vacate the suspension. *Wheeler v. ITD*, 148 Idaho 378, 223 P.3d 761,768 (Ct. App. 2009) (citing *In re Suspension of Driver’s License of Gibbar*, 143 Idaho 937, 944, 155 P.3d 1176, 1182 (Ct. App. 2006); *Bennett v. State of Idaho, Department of Transportation*, 147 Idaho 141, 144, 206 P.3d 505, 508 (Ct. App. 2009).

Idaho Code § 18-8004(4) charges the Idaho State Police (“ISP”) with promulgating standards for the administration of tests for alcohol content. *State v. Stump*, 146 Idaho 857, 203 P.3d 1257, 1258 (Ct. App. 2009). Therefore, ISP has issued training manuals for the approved testing equipment, as well as Standard Operating Procedures (“SOPs”) for breath alcohol testing.

The introductory paragraph to SOP § 3 states, “Proper testing procedures by certified operators *is necessary* in order to provide accurate results that will be admissible in court.”

(Emphasis added.) SOP § 3 provides:

Prior to evidential breath alcohol testing, the subject must be **monitored for fifteen (15) minutes**. Any material which absorbs/adsorbs or traps alcohol should be removed from the mouth prior to the start of the 15 minute waiting period. During the monitoring period the subject should not be allowed to smoke, drink, eat, or belch/ burp. SOP 3.1 (emphasis in original).

During the monitoring period, the operator must be alert for any event that might influence the accuracy of the breath test. SOP 3.1.5

Therefore, the fifteen-minute monitoring period is “required in order to rule out the possibility that alcohol or other substances have been introduced into the subject’s mouth from the outside or by belching or regurgitation. *State v. Carson*, 133 Idaho 451, 453, 988 P.2d 225, 227 (Ct. App. 1999). Further, the monitoring period “is not an onerous burden and is a precaution that is necessary to insure the validity of the test results.” *State v. DeFranco*, 143 Idaho 335, 338, 144 P.3d 40, 43 (Ct. App. 2006) (internal quotations omitted).

Trooper Schwecke’s mode and level of surveillance were insufficient to accomplish the goal of the monitoring period because, under the circumstances of this case, Trooper Schwecke was not always in a physical position to use a combination of his senses of sight, smell, and hearing to ensure William Trottier did not belch or regurgitate. Trooper Schwecke was administering the field sobriety

tests and reading the advisory form fifteen (15) minutes prior to administering the test. Further, Trooper Schwecke stated he would read the advisory form before starting the fifteen (15) minute observation period. Instead, he administered the first test less than nine (9) minutes after reading the advisory form.

Although officers are not required to “stare fixedly” at a test subject for the full fifteen (15) minute period, “the level of surveillance must be such as could reasonably be expected to accomplish the purpose of the requirement.” *State v. Carson*, 133 Idaho at 453, 988 P.2d at 227. There, the court held that the officer’s mode of observation was insufficient to “likely detect belching, regurgitation into the mouth, or like.” *Id.* Part of the monitoring period included the time the officer spent transporting the driver to the sheriff’s office, during which he intermittently observed the driver through glances in the rearview mirror. *Carson*, 133 Idaho at 452-453, 988 P.2d at 226-227. The court pointed out that, during the trip, the officer’s “attention necessarily was devoted primarily to driving.” *Carson*, 133 Idaho at 453, 988 P.2d at 227. Further, the court explained that a combination of factors impeded the officer’s ability to hear whether the driver belched. *Id.* Those factors included noise from the automobile engine, tires on the road surface, rain, windshield wipers, and a hearing impairment. *Id.*

Sight, alone, is not enough to properly monitor a subject. *See Bennett v. State, Dep’t of Transp.*, 147 Idaho 141, 144, 206 P.3d 505, 508 (Ct. App. 2009). Further, when an officer is not in a position to use his sight to observe the defendant, he must be able to use his combined senses of hearing and smell. *See State v. DeFranco*, 144 Idaho 335, 449, 144 P.3d 40, 43 (stating that “as in *Carson*, the officer was not always in a physical position to use either his sight or, alternatively, his sense of smell or hearing, to accomplish the purpose of the monitoring period”). Therefore, an

officer must be in a position to use more than one sense at all times to properly monitor a subject.

In *DeFranco*, after completing the field sobriety test, the officer handcuffed the driver and placed him in the rear passenger-side of the patrol car. *DeFranco*, 144 Idaho at 336, 144 P.3d at 41. The officer left the rear car door ajar while he walked to the back of the vehicle to obtain an advisory form from his trunk. *Id.* The officer testified that, while at the trunk, he could see the driver through the rear window by looking through a gap between the trunk lid and vehicle body. *Id.* Further, the officer testified that, had the driver belched or coughed loudly, he would have heard it. *Id.*

However, the court held that the officer's "level of monitoring could not reasonably be expected to accomplish the purpose of the requirement." *DeFranco*, 144 Idaho at 337, 144 P.3d at 42. The court pointed out that, as in *Carson*, the officer "was not always in a physical position to use either his sight or, alternatively, his senses of smell and hearing, to accomplish the purpose of the monitoring period." *Id.*

The courts in both *Carson* and *DeFranco* distinguished their situations from that found in *State v. Remsburg*, 126 Idaho 338, 882 P.2d 993 (Ct.App.1994). *State v. Carson*, 133 Idaho 451, 453, 988 P.2d 225, 227 (Ct.App.1999); *State v. DeFranco*, 143 Idaho 335, 337, 144 P.3d 40, 42 (Ct.App.2006). In *Remsburg*, the driver argued that the monitoring period was insufficient because, during the seven (7) minutes immediately preceding the breath test, the officer was programming the breath testing machine and reading the statutory advisory. *Remsburg*, 126 Idaho at 339, 882 P.2d at 994.

The *Remsburg* court held that the monitoring period was sufficient because the officer was in the same room with the driver at all times. *Id.* However, the court made specific reference to the fact that the driver was seated next to the officer. *Id.* (n.1). In contrast, in *Bennett*, the court found

that surveillance was insufficient when the officer twice left the room during the observation period. *Bennett*, 147 Idaho 140, 144-145, 206 P.3d 505, 508-509 (Ct. App. 2009).

Therefore, in *Carson* and *DeFranco*, the court distinguished *Remsburg* by pointing out that, although the *Remsburg* officer “did not maintain constant visual contact, there was no evidence that the officer was unable to adequately monitor through use of his other senses.” *State v. Carson*, 133 Idaho 451, 453, 144 P.3d 40, 42 (Ct.App.1999); *State v. DeFranco*, 143 Idaho 335, 337, 144 P.3d 40, 42 (Ct.App.2006). Further, *Carson* demonstrates that an officer can still be in close proximity to the driver (even in the same vehicle) but that conditions can exist that render the observation insufficient. *State v. Carson*, 133 Idaho 451, 453, 144 P.3d 40, 42 (Ct.App.1999)

Here, the court must look at the record as a whole and not merely the Affidavit of Trooper Schwecke. In this case, Trooper Schwecke was focused on administering the field sobriety tests and on the reading the advisory form. To properly administer the fifteen (15) minute waiting period, Trooper Schwecke needed to be observing William Trottier for any burps and/or regurgitation, and thus the possibility of mouth alcohol presence. Trooper Schwecke’s ability to observe and employ his senses of hearing, sight, and smell were compromised when he attempted to do multiple tasks at the same time. Trooper Schwecke violated the standard operating procedures as set forth by the Idaho State Patrol with regard to the fifteen (15) monitoring period.

In summary, Trooper Schwecke failed to properly administer the breath test to determine alcohol concentration. Therefore, the test results are not reliable and should be excluded from the record. Without the test results there is no factual basis to support either the ALS suspension or the CDL suspension. Mr. Trottier’s regular driver’s license and commercial driver’s license should be reinstated.

- C. Mr. Trottier should be permitted to present additional evidence in the CDL case that is material and relates to the validity of the agency action as there were good reasons for Mr. Trottier's failure to present the evidence in the proceedings before the agency. That is, the hearing officer refused the request of Mr. Trottier to consider said evidence and to present oral argument on the issues. Mr. Trottier seeks a court order remanding the matter to the agency with directions to receive the additional evidence, including the District Court's ruling on the appeal in Latah County Case No. CV-2011-1069. Further, the Court should take proof on the matter based upon the procedural irregularities conducted before the agency and thereafter remand the matter to the hearing officer with directions to reinstate the Commercial Driver's License of Mr. Trottier. Alternatively, the Court should take judicial notice of the evidence set forth by Mr. Trottier in his Brief Regarding CDL at pages 92 and 93 of the Transcript, as well as the District Court's Final Opinion and Judgment entered in the appellate case in Latah County Case No. CV-2011-1069.

On February 23, 2012, Mr. Trottier filed a Reply Brief and Motion for Leave to Present Additional Evidence of Petitioner William Trottier Regarding Commercial Drive's License. R. Vol. I, pp. 120-126. Mr. Trottier asked the District Court to take Judicial Notice of documents, records, audio evidence, video evidence, judgments, and opinions, which were enumerated. *See* R. Vol. I p.121. Alternatively, Mr. Trottier sought pursuant to the Idaho Administrative Procedures Act leave to present additional evidence as enumerated in the Motion for the reasons stated therein.

During the consolidated hearing of the two (2) Petitions for Judicial Review held before Judge Stegner on March 19, 2012, Mr. Trottier's attorney requested that the Court either take judicial notice of the evidence, or permit the presentation of additional evidence. *See* Reporter's Transcript, page 5, ls. 2-25, pp. 6-12.

Judge Stegner, in view of the stipulation and agreement of the parties to consolidate the two (2) cases and hearings, responded at page 12, lines 16-19, as follows:

"THE COURT: So, we're back to where I started. I think what it means is that Mr. Trottier's CDL rises or falls on the success of his – success or failure of his license challenge."

Thus, the District Court deemed it unnecessary to rule on Mr. Trottier's Motion given the fact that the Court and the attorneys for the parties had agreed: If the driver's license is not suspended, then the commercial driver's license should not have been suspended.

If the Appellate Court takes a position contrary to the agreement and stipulation of the parties as contained in the Reporter's Transcript, then Mr. Trottier requests that the Appellate Court grant the Motion to Take Judicial Notice or to supplement the record in the CDL case as set forth in Mr. Trottier's Reply Brief and Motion for Leave to Present Additional Evidence.

D. As to the Commercial Driver's License Suspension, the decision by the Idaho Department of Transportation to suspend Mr. Trottier's Commercial Driver's License for his lifetime was in violation of Mr. Trottier's procedural and substantive due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, and under Article I, Section Thirteen of the Idaho Constitution.

Mr. Trottier has not had his commercial driver's license properly and legally suspended for the remainder of his lifetime by the Idaho Transportation Department.

The hearing officer based the lifetime suspension of William R. Trottier's commercial driver's license on Findings of Fact and Conclusions of Law that were filed in File Number 657A05885297. The hearing officer based the suspension of the driver's license on the administrative license suspension issued on September 28, 2011. See Findings of Fact and Conclusions of Law IV at pages 56 and 57 of Vol. I of the CDL Clerks's Record.

Furthermore, the hearing officer assumed and made findings that Mr. Trottier had committed two (2) or more offenses, which gave rise to the suspension of his commercial driver's license. See Findings of Fact and Conclusions of Law VIII, IX, and X at pages 57 and 58 of Vol. I of the CDL Clerk's Record.

The hearing officer entered Findings of Fact and Conclusions of Law finding that a second violation had occurred with respect to the September 3, 2011 blood alcohol concentration level, despite the fact that Mr. Trottier had filed a Petition for Judicial Review and obtained an Order for Stay Pending Appeal. The Petition for Judicial Review was filed in Latah County Case Number CV-2011-1069. Said Petition is included at pages 47 and 48 of Vol. I of the CDL Clerk's Record.

Furthermore, the Order for Stay Pending Appeal is also apart of the Agency Record and is included at pages 51 and 52 of Vol. I of the CDL Clerk's Record. Said Order provides as follows:

"IT IS HEREBY ORDERED that the execution and/or enforcement of the Findings of Fact and Conclusions of Law and Order issued by the Idaho Transportation Department ("ITD") on September 28, 2011, in ITD File No. 657000098436, suspending Petitioner's driving privileges is hereby STAYED during the pendency of appeal of said order. Petitioner's driving privileges are therefore ordered reinstated during the pendency of appeal." (*Emphasis added*)

Mr. Trottier argued that the hearing officer should not consider the suspension of his driving privileges for purposes of the commercial driver's license suspension since the District Court had issued a Stay Order that stayed "the execution and/or enforcement of the Findings of Fact and Conclusions of Law and Order issued by the Idaho Transportation Department." Further said Order provided that "[P]etitioner's driving privileges are therefore ordered reinstated during the pendency of appeal."

The hearing officer disregarded the Order of the District Court and considered the driving privileges of Mr. Trottier suspended. This conduct violated the Stay Order and denied Mr. Trottier procedural and substantive due process.

Mr. Trottier argued this position during the hearing as set forth at pages 1 through 11 of the transcript set forth in the Commercial Driver's License Disqualification Hearing held on October 11,

2011 before Hearing Officer Michael Howell in File No. 657 A05885297 as reported by Hedrick Court Reporting.

The hearing officer improperly refused to permit Mr. Trottier to raise and argue issues concerning the validity of the stop of Mr. Trottier's vehicle, and the improprieties in administering the blood alcohol test. The refusal of the hearing officer to permit Mr. Trottier to raise these issues during the hearing on the commercial driver's license denied Mr. Trottier procedural and substantive due process under the Fifth and Fourteenth Amendments to the United States Constitution, as well as the due process guaranties contained within Article I, Section Thirteen of the Idaho Constitution. See the original CDL Hearing Transcript, page 3, lines 16 through 25, and pages 4 through 10.

In *Bell v. Idaho Transp. Dep't.*, 151 Idaho 659, 664, 262 P.3d 1030, 1035 (Ct.App.2011), the Idaho Court of Appeals ruled:

Because the suspension of issued driver's license involves state action that adjudicates important interests of the licensees, drivers' licenses may not be taken away without procedural due process. *Dixon v. Love*, 431 U.S. 105, 112, 97 S.Ct. 1723, 1727, 52 L.Ed.2d 172, 179-80 (1977); *State v. Ankney*, 109 Idaho 1, 3-4, 704 P.2d 333, 335-36 (1985); *In re Gibbar*, 143 Idaho 937, 945, 155 P.3d 1176, 1184 (Ct.App.2006). Courts must consider three factors in procedural due process challenges:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976).

Idaho's appellate courts have considered the *Mathews* factors in the context of administrative license suspension hearings and have found that while an individual does have a substantial interest in his or her license, that interest may be subordinated by the State's interest in preventing intoxicated persons from driving, particularly where the individual is entitled to review procedures. See *Ankey*, 109 Idaho at 4-5, 704 P.2d at 336-37 (concluding that the then-applicable statute, I.C. §49-352, which enabled a police officer to seize a

person's driver's license prior to a hearing, did not violate procedural due process because there was not a high risk of erroneous deprivation where the statute provided for a prompt post-seizure review, coupled with the requirement that the police officer requesting the evidentiary test have reasonable grounds to believe the driver is intoxicated); *see also In re McNeely*, 119 Idaho 182, 190-91, 804 P.2d 911, 919-20 (Ct.App.1990) (concluding that the notice provided by the advisory form, as set forth in the applicable statute, did not violate the driver's procedural due process).

Bell does not argue the *Matthews* factors with respect to any of his claims. While he generally argues that he has a procedural due process right throughout the administrative hearing proceedings and that the private interest in his driver's license is substantial, he does not address any of the *Matthews* factors or attempt to apply its balancing test. The only argument he makes regarding the *Matthews* factors is set forth in his reply brief in response to the State's argument on one of the issues.

Here, Mr. Trottier did argue the *Matthews* factors before the District Court. Tr. Vol, I, p. 13, ls. 8-25 and pp. 14-21.

The District Court did not rule on the Constitutional issues raised by Mr. Trottier.

Mr. Trottier asserts his substantive and procedural due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, and under Article I, Section Thirteen of the Idaho Constitution, were violated by the failure of the Hearing Officer to obey the Stay Order, the failure to permit Mr. Trottier to produce and introduce evidence, and by executing and enforcing the ALS suspension while that decision was under review in the District Court pursuant to the Petition for Judicial Review filed in Latah County Case No. CV-2011-1069.

Mr. Trottier addresses the three (3) *Matthews* factors as follows.

The first factor is "the private interest that will be affected by the official action." *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976). Mr. Trottier's commercial driver's license is absolutely necessary for him to secure and maintain his employment with the City of Moscow. Without a commercial driver's license, Mr. Trottier is unemployable.

This is a lifetime suspension of his commercial driver's license. There is no "work permit" or "temporary suspension with a subsequent reinstatement." Without a job, Mr. Trottier cannot support, feed, and house himself and his family. That is, the lifetime suspension of Mr. Trottier's CDL takes away his ability to pursue "life, liberty, and happiness."

The second factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976). Mr. Trottier was not afforded the opportunity to challenge the suspension of his regular license through the Petition for Judicial Review filed in Latah County Case No. CV-2011-1069 before the ITD suspended his CDL. That is, the District Court was in the process of reviewing the ALS suspension. Pending that review, the Court issued an Order Staying the ALS decision. The Stay Order mandated that:

1. The execution and enforcement of the Findings of Fact and Conclusions of Law and Order issued on September 28, 2011 were stayed;
2. The suspension of Mr. Trottier's driving privileges during the pendency of the appeal were stayed; and
3. Mr. Trottier's driving privileges were ordered reinstated during the pendency of the appeal.

The Hearing Officer in the CDL case totally disregarded all three sub-parts of the Court-mandated Order. The Hearing Officer considered the ALS Findings and Order as final even though it was under judicial review and subject to the Stay Order. The CDL Hearing Officer intentionally disregarded and violated the Court Ordered additional or substitute safeguards provided by the Stay Order and Petition for Judicial Review by:

1. Executing and enforcing the September 28, 2011 ALS ITD Order as though it was final, not under judicial review, and not stayed;
2. Suspending Mr. Trottier's driving privileges during the pendency of the appeal contrary to the Stay Order;
3. Failing to following the Court's mandate that Mr. Trottier's driving privileges were specifically reinstated during the appeal; and
4. Failing to provide Mr. Trottier with fundamental due process and an opportunity to present evidence at a meaningful time and in a meaningful manner.

In summary, the Hearing Officer in the CDL case deprived Mr. Trottier of his property interest in his CDL, and thus his livelihood, without fundamental procedural and substantive due process.

The third *Matthews* factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional procedural requirement would entail." *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976). In the instant case, the governmental interest would have been better served had the Hearing Officer complied with Judge Stegner's Stay Order. The fiscal and administrative burdens would actually have been considerably lessened if the Hearing Officer had stayed the CDL proceedings until the Petition for Judicial Review in the ALS matter had been fully adjudicated. The following administrative and judicial proceedings and expenses would have been alleviated had the Hearing Officer awaited the District Court's final determination regarding the ALS suspension:

1. There would not have been an ITD CDL administrative hearing;
2. There would not have been a Petition for Judicial Review regarding the CDL administrative hearing decision; and
3. The appeal in Supreme Court Case No. 39949-2012 would not have been necessary.

Here, the Government interest is that the ITD must follow the judicial orders of this State. If not, then there is no separation of powers. Once a court issues an order, it must be followed until or unless it is overturned on appeal. There is no fiscal or administrative burden resulting from following court orders and procedural requirements. The heavy fiscal and societal cost comes when administrators, hearing officers, and bureaucrats arbitrarily decide for themselves when they will choose to comply with the rule of law.

Mr. Trottier requests an Order from this Court affirming Judge Stegner's two (2) Orders vacating the ALS and CDL suspensions and fully reinstating both his regular and commercial driver's licenses.

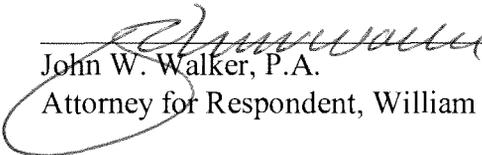
IV.

CONCLUSION

The Appellate Court should sustain the ruling of the District Court, which vacated Mr. Trottier's Administrative and Commercial Driver's License Suspensions on the basis that Trooper Schwecke lacked legal cause to stop Mr. Trottier's vehicle.

If the Appellate Court reverses the decision of the District Court, then in such case the Appellate Court should find in favor of Mr. Trottier on the additional issues raised by him in this appeal.

RESPECTFULLY SUBMITTED this 12th day of September, 2012.


John W. Walker, P.A.

Attorney for Respondent, William Trottier

TROTTIER EXHIBIT A

INSTRUCTIONS FOR DVD VIEWING:

1. Upon opening disc on computer, seven (7) files will appear on the disc;
2. Right click one on “AVViewer.exe” file;
3. Left click once on “Run as administrator” option;
4. In User Account Control window, left click “Yes” in response to question “[D]o you want to allow the following program from an unknown publisher to make changes to this computer?”; and
5. In Open window, double left click on “091043.AV” file to view video.

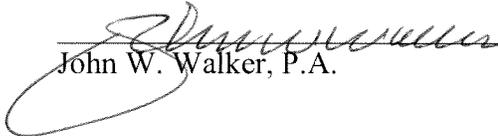
CERTIFICATE OF COMPLIANCE

I hereby certify that on the 12th day of September, 2012, I served a true and correct copy

of the foregoing document by the method indicated and addressed to the following:

Edwin L. Litteneker	<input type="checkbox"/>	U.S. Mail
Special Deputy Attorney General	<input type="checkbox"/>	Hand Delivered
P.O. Box 321	<input checked="" type="checkbox"/>	Overnight Mail
Lewiston, ID 83501	<input type="checkbox"/>	Facsimile

William Trottier	<input checked="" type="checkbox"/>	U.S. Mail
1753 E. F Street	<input type="checkbox"/>	Hand Delivered
Moscow, ID 83843	<input type="checkbox"/>	Overnight Mail
	<input type="checkbox"/>	Facsimile



John W. Walker, P.A.