10-1-2010

Bell v. Idaho Transp. Dept. Clerk's Record Dckt. 37865

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

IN THE MATTER OF THE DRIVING PRIVILEGES OF: HAMISH ALLAN BELL.

HAMISH ALLEN BELL,

PETITIONER-APPELLANT,

vs.

IDAHO DEPARTMENT OF TRANSPORTATION,

RESPONDENT-RESPONDENT ON APPEAL.

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for ADA County

Hon KATHRYN A. STICKLEN, *District Judge*

DEAN B. ARNOLD

Attorney for Appellant

MICHAEL J. KANE

Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE DRIVING PRIVILEGES OF: HAMISH ALLAN BELL. --- HAMISH ALLEN BELL, Petitioner-Appellant, vs. IDAHO DEPARTMENT OF TRANSPORTATION, Respondent-Respondent on Appeal.	Supreme Court Case No. 37865

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE KATHRYN A. STICKLEN

DEAN B. ARNOLD	MICHAEL J. KANE
ATTORNEY FOR APPELLANT	ATTORNEY FOR RESPONDENT
BOISE, IDAHO	BOISE, IDAHO

TABLE OF CONTENTS.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

rth Judicial District Court - Ada Coun

ROA Report

Case: CV-OT-2009-18414 Current Judge: Kathryn A. Sticklen

In The Matter Of Hamish Allan Bell

In The Matter Of Hamish Allan Bell

Date	Code	User		Judge
9/24/2009	NCOT	CCDWONCP	New Case Filed - All Other	Kathryn A. Sticklen
	PETN	CCDWONCP	Petition for Judicial Review	Kathryn A. Sticklen
9/29/2009	OGAP	DCTYLENI	Order Governing Judicial Review	Kathryn A. Sticklen
10/7/2009	NOTC	CCRANDJD	Notice of Lodging of Agency Record	Kathryn A. Sticklen
10/9/2009	NOAP	CCTOWNRD	Notice Of Appearance (Kane for State)	Kathryn A. Sticklen
	NOTC	CCTOWNRD	Notice of Court Reporter's Estimate	Kathryn A. Sticklen
10/13/2009	STIP	CCNELSRF	Stipulation to Stay Enforcement of Order Suspending Driving Privileges of Hamish Allan Bell	Kathryn A. Sticklen
10/20/2009	ORDR	DCTYLENI	Order (Staying Enforcement of Order Suspending Driving Privileges)	Kathryn A. Sticklen
10/23/2009	NOTC	CCRANDJD	Notice of FIling of Agency Record	Kathryn A. Sticklen
11/5/2009	NOTC	CCSIMMSM	Notice of Lodging Transcript	Kathryn A. Sticklen
12/1/2009	NOTC	MCBIEHKJ	Notice of Filing Transcript	Kathryn A. Sticklen
12/22/2009	BREF	CCHOLMEE	Petitions Brief	Kathryn A. Sticklen
1/19/2010	BREF	CCLATICJ	Respondent's Brief	Kathryn A. Sticklen
1/28/2010	MOTN	CCLATICJ	Motion to Augment	Kathryn A. Sticklen
2/9/2010	BREF	CCDWONCP	Petitioner's Reply Brief	Kathryn A. Sticklen
2/10/2010	ORDR	DCTYLENI	Order (to Augment Record)	Kathryn A. Sticklen
2/16/2010	NOHG	CCMASTLW	Notice Of Hearing	Kathryn A. Sticklen
	HRSC	CCMASTLW	Hearing Scheduled (Petition 04/19/2010 02:00 PM) Petn/Judicial Review	Kathryn A. Sticklen
4/19/2010	DPHR	DCOATMAD	Hearing result for Petition held on 04/19/2010 02:00 PM: Disposition With Hearing Petn/Judicial Review Nicole Omsberg less than 50	Kathryn A. Sticklen
6/15/2010	DEOP	DCTYLENI	Memorandum Decision and Order	Kathryn A. Sticklen
	CDIS	DCTYLENI	Civil Disposition entered for: Bell, Hamish Allan, Subject. Filing date: 6/15/2010	Kathryn A. Sticklen
	STAT	DCTYLENI	STATUS CHANGED: Closed	Kathryn A. Sticklen
7/14/2010	APSC	CCTHIEBJ	Appealed To The Supreme Court	Kathryn A. Sticklen

Dean B. Arnold, ISB #6814
Law Offices of Dean B. Arnold
300 W. Main St., Suite 250, Office 202
Boise, Idaho 83702
Telephone: (208) 342-1575
Facsimile: (208) 342-3777

Attorneys for Defendant Hamish Bell

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

IN THE MATTER OF THE DRIVING PRIVILEGES OF: HAMISH ALLAN BELL	Case No. CV OT 09 18414 **PETITION FOR JUDICIAL REVIEW** Fee Category: L.3 Fee: $88.00

COMES NOW, the above-named Petitioner, Hamish Allan Bell, by and through his attorneys of record, Law Offices of Dean B. Arnold, and for judicial review of an agency action of the Respondent, Idaho Transportation Department, complains and alleges as follows:

1. This Petition is filed pursuant to and in accordance with Idaho Code Sections 18-8002A(8) and 67-5270, *et seq.*, and Idaho Rule of Civil Procedure 84.

2. Per Idaho Rule of Civil Procedure 84(d), Petitioner provides the following information and statements:

   a. Idaho Transportation Department (hereinafter "ITD") is the name of the agency for which judicial review is sought.

b. The District Court of the Fourth Judicial District, In and For the County of Ada, is the title of the district court to which the petition is taken.

c. *Findings of Fact and Conclusions of Law and Order*, entered on or about September 14, 2009, *In the Matter of the Driving Privileges of Hamish Allan Bell,* ITD File No. 807001277034 (hereinafter "Order), is the action for which judicial review is sought. A true and correct copy of the Order is attached and incorporated hereto as Exhibit A.

d. Hearings via teleconference were held on July 9, 2009 and July 23, 2009. Oral argument and objections were recorded by the ITD on both occasions. The Hearing Officer in possession of the recordings is David J. Baumann, Idaho Transportation Department, Drivers Services Section, P.O. Box 7129, 3311 W. State St., Boise, Idaho 83707.

e. The Petitioner intends to raise and assert on review the following issues, without limitation:

   i. Whether the hearing procedures afforded the Petitioner by ITD amounted to a denial of procedural due process under the Constitutions of the United States and the State of Idaho;

   ii. Whether the hearing procedures afforded the Petitioner by ITD were in violation of constitutional or statutory

provisions, and/or made upon unlawful procedure;

iii. Whether the findings of fact made by the Hearing Officer are not supported by substantial evidence on the record as a whole;

iv. Whether the Hearing Officer exceeded statutory authority and erroneously found that the evidentiary test administered on Petitioner was conducted in compliance with Idaho Code, IDAPA Rules, and the Idaho State Police Standard Operating Procedures;

v. Whether the Hearing Officer exceeded statutory authority and erroneously found that the evidentiary testing instrument was properly calibrated and approved for use on the date Petitioner submitted to evidentiary testing;

vi. Whether the Hearing Officer exceeded statutory authority and erroneously found that the evidentiary testing instrument functioned properly when the test was administered to the Petitioner;

vii. Whether the Hearing Officer exceeded statutory authority and erroneously found that the Petitioner was properly advised of the consequences of submitting to evidentiary testing as required by Idaho Code § 18-8002A(2);

viii. Whether the Hearing Officer exceeded statutory authority and erroneously found that the Petitioner was not denied

his due process rights;

ix. Whether the Hearing Officer exceeded statutory authority and erroneously found that Officer White followed all procedures and requirements set forth pursuant to Idaho law and the Idaho State Police Standard Operating Procedures;

x. Whether the Hearing Officer's Order is arbitrary, capricious, or an abuse of discretion;

xi. Whether the Hearing Officer exceeded statutory authority and erroneously relied upon the affidavit of Officer White, when ITD had actual or constructive knowledge of credibility issues of Officer White;

xii. Whether ITD's failure to disclose the information regarding Officer White's credibility to the Petitioner resulted in a denial of due process; and

xiii. Pursuant to Idaho Rule of Civil Procedure 84(d)(5), other issues later discovered.

f. Petitioner requests that ITD prepare the record and transcripts in accordance with Idaho Code § 67-5275.

DATED this 24th day of September, 2009.

Law Offices of Dean B. Arnold

By: Dean B. Arnold
Dean B. Arnold

IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

IN THE MATTER OF THE
DRIVING PRIVILEGES OF

IDAHO D.L. NO. ZE321585H
FILE NO. 807001277034

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

HAMISH ALLAN BELL

This matter came initially set for hearing June 30, 2009, by telephone conference, in reference to Hamish Bell being served with an Administrative License Suspension (ALS). At the request of Bell and at the direction of the Hearing Officer, the matter was continued on several occasions, with the hearing ultimately commencing July 23, 2009. Dean B. Arnold, Attorney at Law, represented Bell. Hamish Bell waived his right to appear.

The suspension set out in the Notice of Suspension for Failure of Evidentiary Testing served upon Hamish Bell pursuant to I.C. §18-8002A is **SUSTAINED**.

DOCUMENTATION/INFORMATION

The Hearing Examiner received the following exhibits into evidence as part of the hearing record:

1. Notice of Suspension Advisory Form
2. Evidentiary test results — EXHIBIT A
3. Sworn Statement
4. Idaho Uniform Citation #1277034

5. Idaho Driver's License
6. Envelope
7. Certification of Receipt of Law Enforcement Documents
8. Request for Administrative Hearing
9. Driver License Record
10. State of Idaho Response to Discovery Request
11. Certificate of Calibration
12. Subpoena Duces Tecum
13. Subpoena Duces Tecum
14. Order
15. Order

Hamish Bell supplemented the record with the following evidence/exhibits:

A. Proof of Service
B. Proof of Service
C. DUI General Report
D. Evidentiary Test Results
E. Notice of Suspension Advisory
F. Vehicle Disposition Report
G. Narrative Report
H. CD Rom

At the request of Hamish Bell and with the approval of the Hearing Officer, the record remained open to provide Bell the opportunity to supplement the record with additional evidence.

Hamish Bell supplemented the record with the following evidence/exhibits:

I. Dean Arnold Correspondence
J. Facsimile Coversheet
K. Boise Police Department Correspondence
L. Intoxilyzer 5000ENOperations Log
M. State's Supplemental Response to Request for Discovery
N. Idaho State Police Correspondence
O. Certificate of Analysis
P. Certificate of Analysis
Q. Subpoena Duces Tecum
R. Intoxilyzer 5000EN Operations Log
S. Intoxilyzer 5000 Calibration Checklist
T. State of Idaho v. Jake L. Jaborra Report Court Decision
U. George C. Schroeder v. State of Idaho Reported Court Decision
V. State of Idaho v. Shawn Patrick DeWitt Reported Court Decision
W. State of Idaho v. John W. Harmon Reported Court Decision
X. State of Idaho v. Marvin Gibbar Reported Court Decision
Y. Michael S. Virgil v. State of Idaho Reported Court Decision
Z. State of Idaho v. Monty W. Griffiths Reported Court Decision
AA. Delbert Beem v. State of Idaho Reported Court Decision
BB. State of Idaho v. Benito A. Diaz Reported Court Decision
CC. Armano Schmerber v. State of California Reported Court Decision
DD. State of Idaho V. James Ralph Woolery Reported Court Decision
EE. Florida v. Thomas Bostick Reported Court Decision
FF. State of Idaho v. Francisco Garcia Reported Court Decision
GG. Merle R. Schneckloth v. Robert Clyde Bustamonte Reported Court Decision
HH. Memorandum in Support of Defendant's Motion to Suppress
II. Supplemental Documentation in Support of Request to Vacate License Suspension
JJ. Motion to Dismiss

KK. Notice of Defendant's Non-Opposition to State's Motion to Dismiss

The Hearing Examiner took Judicial Notice of the following items:

1. Records regularly maintained by the Idaho Department of Transportation (Department)
2. Idaho Administrative Procedure Act Rules
3. All manuals adopted under IDAPA Rule 11.03.01 and 39.02.72
4. Idaho State Police Standards and Procedures for Breath-Testing Instruments
5. All City and County Ordinances and Procedures
6. Idaho Statutes
7. Reported Court Decisions

ADMINISTRATIVE HEARING PROCEEDINGS

Argument summarized from audiotape record of hearing

Attorney Dean Arnold raised and/or argued the following points:

1. The driver requested a Subpoena Duces Tecum for the Instrument Operations Log for 30 days prior to the test.
2. The Subpoena Duces Tecum was issued for June 3, 2009, through June 6, 2009.
3. The subpoena had a compliance date of June 29, 2009, and the hearing was set for June 30, 2009.
4. The hearing was continued and a subpoena requested for the log of the entire month prior to the arrest to determine whether the Standard Operating Procedures were met with respect to breath-testing.
5. The revised subpoena was not issued.
6. The subpoena's (Exhibits J & K) were served.
7. The Boise Police Department did not respond to the subpoena and they did not produce the logs.
8. On July 19, 2009, the driver's attorney received 14 pages of the log.
9. One doesn't know when the logs were produced and where they came from.

10. The Instrument Operations Log goes back from the first of May to the first of June.
11. The Boise Police Department didn't comply with the subpoena.
12. The objection was over-ruled on the record.
13. The driver proffers what would have been disclosed if the subpoenas were granted.
14. The subpoena for Callie Downum would have resulted in her testimony asserting that she had no idea when the logs were received.
15. There is nothing in the Idaho Transportation Department's file showing when the logs were received and by whom.
16. The calibration checks would show a violation of the IDAPA Rule and the Standard Operating Procedure.
17. Administrative License Suspension decisions would show the license should have been vacated for subpoena non-compliance.
18. The request for source simulators would have revealed that Repco who provides the simulator solutions for the calibration checks is not an approved provider per IDAPA and the Standard Operating Procedure.
19. Repco provides solutions directly to law enforcement agencies rather than the Idaho State Police
20. A violation of due process is grounds to vacate an Administrative License Suspension.
21. The Hearing Officer is requested to take notice of State v. Gibbar.
22. Both IDAPA Rule 11.03.01.013.05 and the Standard Operating Procedure at 2.2.1 require that the provider of simulator solutions be an approved provider.
23. Repco is not an approved provider in support of that.
24. Exhibit M, pages 3 & 4, response to 20 & 25, shows that Repco is the provider of the simulator solution and there is no document indicating they are an approved provider, and Exhibit M shows the contract was terminated on February 19, 2008.
25. The manufacturer and provider of the simulator solution is not an approved provider.

26. The driver was not properly informed of the consequences of submitting to evidentiary testing.
27. The advisory must be strictly complied with.
28. The Hearing Officer is requested to take notice of State v. Griffiths, State v. Virgil and State v. Beem.
29. The failure to comply with the statutorily mandated information requires reinstatement of driving privileges.
30. The Hearing Officer is requested to take notice of Exhibit H, track 2, at1:29:15 through 1:35:40.
31. It consists of a conversation between Officer White and the driver.
32. It occurs right after the advisement of rights.
33. The driver tells the officer he is not going to provide a breath sample.
34. Officer White tells the driver we either take the breath test or I am going to have someone take your blood because the State of Idaho says I can.
35. We don't take refusals.
36. The officer forces him to submit to a blood draw at 1:32:18.
37. Nothing that Officer White told the driver was correct
38. The State of Idaho has not said any peace officer can obtain a forced blood draw.
39. The Hearing Officer is requested to take notice of I. C. §18-8002(6) and case law.
40. The officer cannot direct a medical professional or paramedic to draw blood.
41. He may only request, but they can refuse.
42. The Hearing Officer is requested to take notice of State v. Diaz, page 303.
43. The officer cannot force the driver to provide a blood sample.
44. The officer cannot use whatever force needed to obtain a blood sample.
45. It must be done with reasonable force.
46. The officer cannot force the arrestee to give breath or blood evidence.
47. The officer negated the advisory given.
48. The officer misrepresented to the driver what would happen if the driver refused to provide a breath sample.

49. The officer forced the driver to provide a breath sample through coercion, duress and harassment and/or trickery or deceit.
50. An individual's consent is involuntary as what happened here.
51. Officer White negated the advisory by mis-representing what the law of refusal was.
52. The breath sample was obtained in violation of the driver's constitutional due process.
53. The Intoxilyzer did not have a proper calibration check as adopted by IDAPA and the Standard Operating Procedure.
54. Failure to properly calibrate the machine is a basis to vacate the suspension.
55. The Intoxilyzer 5000EN was not checked for calibration as required.
56. The Hearing Officer is requested to take notice of IDAPA 11.03.01.013.05.
57. The Hearing Officer is requested to take notice of the Standard Operating Procedure at 2.2.03.
58. The Hearing Officer is requested to take notice of the case law.
59. Exhibit R shows halfway down on June 5, 2009, Officer White's entry for the driver's test.
60. Three days prior, June 3, 2009, there were calibration checks for the .20 and .08 solutions.
61. The calibration checks are only good if there are subsequent checks.
62. A single calibration check is meaningless.
63. Exhibit S shows the next calibration check on June 25, 2009 by Sergeant (Sgt.) Sperry on the .20 solution, but she did not do a .08 calibration check.
64. This is not proper for the state to rely on June 3, 2009's check because there was no subsequent check.

ISSUES RAISED BY HAMISH BELL

1. Whether the driver was denied his due process rights because the subpoena requests were not complied with?
2. Whether the subpoenas were timely complied with?

3. Whether the simulator solutions utilized in his evidentiary testing procedure are valid and approved?
4. Whether he was properly informed of the consequences of submitting to evidentiary testing?
5. Whether the evidentiary testing instrument was properly calibrated and approved for use on the date he submitted to evidentiary testing?

IDAHO CODE §18-8002A(7) ISSUES

1. Did the peace officer possess legal cause for the stop of the driver's vehicle?
2. Did the peace officer possess legal cause to believe the driver was driving or in actual physical control of a motor vehicle while under the influence of alcohol, drugs, or other intoxicating substances in violation of the provisions of Idaho Code (I. C.) §§18-8004, 18-8004C, or 18-8006?
3. Did the test results show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of I. C. §§18-8004, 18-8004C, 18-8006?
4. Was the evidentiary test performed in compliance with Idaho Code, IDAPA Rule, and ISP Standard Operating Procedure?
5. Did the evidentiary testing instrument function properly when the test was administered?
6. Was the driver advised of the consequences of submitting to evidentiary testing as required by I. C. §18-8002A(2)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I having heard the issues raised by Hamish Bell; having considered the exhibits admitted as evidence; having considered the matter herein; and being advised in the premises and the law, make the following Findings of Fact and Conclusions of Law:

PURSUANT TO IDAHO CODE §18-8002A(7) THE PETITIONER CARRIES THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE REGARDING ALL IDAHO CODE §18-8002A STANDARDS AND ISSUES.

1.

DID OFFICER TUCKER POSSESS LEGAL CAUSE FOR THE STOP OF HAMISH BELL'S VEHICLE?

1. On June 5, 2009, Officer Tucker observed Bell's vehicle driving south on Capitol Boulevard, at Front Street, in Boise, Idaho.
2. This street is a one way street for northbound traffic only.
3. I. C. §49-636 provides that upon a highway designated for one-way traffic, a vehicle shall be driven only in the direction designated at all or such times as shall be indicated by traffic-control devices.
4. Bell violated I. C. §49-636.
5. Officer Tucker possessed legal cause for the stop of Bell's vehicle.

2.

DID OFFICER WHITE POSSESS LEGAL CAUSE FOR HAMISH BELL'S ARREST, LEGAL CAUSE TO BELIEVE BELL WAS DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL IN VIOLATION OF IDAHO CODE §18-8004, AND LEGAL CAUSE TO REQUEST BELL SUBMIT TO EVIDENTIARY TESTING?

1. Bell's driving and actual physical control of the motor vehicle was established by the observation of Officer Tucker.
2. Bell exhibited the following behaviors:
   a. Smelled of an alcoholic beverage
   b. Admitted to consuming alcoholic beverages-two beers
   c. Bloodshot eyes

d. Impaired memory
e. Glassy eyes

3. Bell met or exceeded the minimum decision points on the following standardized field sobriety tests:
   a. Horizontal Gaze Nystagmus (HGN)
   b. Walk & Turn
   c. One Leg Stand
4. Officer White possessed legal cause for Bell's arrest, legal cause to believe Bell was driving while under the influence of alcohol in violation of I. C. §18-8004, and legal cause to request Bell submit to evidentiary testing.

3.

DID HAMISH BELL'S EVIDENTIARY TEST RESULTS INDICATE A VIOLATION OF IDAHO CODE §18-8004?

1. Bell submitted to breath-testing June 5, 2009.
2. Bell provided breath samples of .154/.157.
3. Idaho's legal limit for breath alcohol concentration (BRAC) is .08.
4. Bell's BRAC results were in violation of I. C. §18-8004.

4.

WAS THE EVIDENTIARY TEST CONDUCTED IN ACCORDANCE WITH I.C. §18-8004(4), IDAPA RULES, AND THE IDAHO STATE POLICE (ISP) STANDARD OPERATING PROCEDURE?

1. Hamish Bell submitted to evidential breath-testing June 5, 2009, at 0033 hours.
2. At the jail and prior to breath-testing, Officer White checked Bell's mouth finding it clear and he first observed Bell for plus 15 minutes prior to the

collection of the first breath sample, thus satisfying the requisite15-minute monitoring period.

3. Prior to the observation period, Officer White advised Bell not to burp, belch or vomit for the next fifteen minutes.
4. Officer White was duly qualified to administer evidentiary testing, and he was properly certified to operate the evidentiary breath-testing instrument as evidenced by his operator certification expiration date of December 2010.
5. Officer White's sworn statement sets forth that the breath test was performed in compliance with statute and the standards and methods adopted by the Department of Law Enforcement (DLE)/ISP.
6. Bell's evidentiary test was conducted in accordance with the requirements of I. C. §18-8004, the IDAPA Rules, and ISP's Standard Operating Procedure.

5.

WAS THE EVIDENTIARY TESTING INSTRUMENT PROPERLY CALIBRATED AND APPROVED FOR USE PURSUANT TO ISP STANDARD OPERATING PROCEDURE, AND WAS THE INSTRUMENT FUNCTIONING ACCURATELY AT THE TIME OF BREATH-TESTING?

1. Hamish Bell submitted to an evidential breath test June 5, 2009, at 0033 hours, utilizing the breath-testing instrument.
2. The acceptable simulator solution check #0006, conducted June 5, 2008, at 0033 hours, immediately prior to the breath test, with calibration results of .083, approved the evidentiary testing instrument for evidentiary use in accordance with the ISP Standard Operating Procedure.
3. The Idaho State Police Standard Operating Procedure at section 2.2.3 sets forth that a two sample calibration check using a 0.08 reference solution should be ran and the results logged each time a solution is replaced with fresh solution. A 0.08 reference solution should be replaced with fresh

solution approximately every 100 samples or every month, whichever comes first.

4. Section 2.2.4 sets forth that a two sample calibration check using a 0.20 reference solution should be run and results logged once per calendar month and replaced with fresh solution approximately every 20-25 samples.
5. In this case, both the 0.08 and 0.20 solution changes were performed two days prior to Bell's evidentiary test, thus the solutions were fresh, current and valid, and the evidentiary testing instrument was properly calibrated and approved for use on the date Bell submitted to evidentiary testing.
6. Contrary to argument, the Standard Operating Procedure is absent of any language that sets forth that calibration checks are only good if there are subsequent checks.
7. Section 2.2.1 of the Standard Operating Procedure sets forth that Intoxilyzer 5000/EN calibration check is run using 0.08 and/or 0.20 reference solutions provided by the Idaho State Police Forensic Services or approved vendor and following the procedure outlined in the Intoxilyzer 5000/EN manual.
8. Exhibit O, the Idaho State Police Forensic Services Certificate of Analysis for simulator solution lot #8804, has approved the 0.08 solution for calibration checks to be run with an expiration date of August 11, 2010, with that Certificate of Analysis issued September 24, 2008.
9. Exhibit P, the Idaho State Police Forensic Services Certificate of Analysis for simulator solution lot #8101, has approved the 0.20 solution for calibration checks to be run with an expiration date of October 7, 2009, with that Certificate of Analysis issued August 12, 2008.
10. Thus, both the 0.08 and 0.20 simulator solutions used to conduct calibration checks are current and valid for evidentiary testing in the State of Idaho.
11. A reasonable inference can be drawn that if the Idaho State Police has certified simulator solution lot #'s 8804 and 8101 to be used to conduct calibration checks with respect to breath alcohol examination that it came from an approved provider.
12. Conversely, if the simulator solutions were not certified by the Idaho State Police Forensic Services for purposes of evidentiary testing, they would not

be in the possession of the various law enforcement agencies throughout the State of Idaho.

13. Petitioner's Exhibit N, the contract between Repco and the Idaho State Police Forensic Services, is an outdated contract with an expiration date of February 19, 2008, 16 months prior to Bell's evidentiary test, thus that exhibit is insufficient evidence to show that the solutions were not certified by an approved provider nor the Idaho State Police.
14. This record is absent of any factual evidence to show that the simulator solutions were not properly certified nor approved for evidentiary use.
15. Bell's argument fails.
16. The testing instrument was properly calibrated and approved for evidentiary testing of alcohol concentration, and the testing instrument was functioning accurately at the time of evidentiary breath-testing.

6.

WAS HAMISH BELL ADVISED OF THE CONSEQUENCES OF SUBMITTING TO EVIDENTIARY TESTING AND THE POSSIBLE SUSPENSION OF HIS IDAHO DRIVING PRIVILEGE?

1. Officer White played Bell the audiotape recording of the Notice of Suspension advisory.
2. I. C. §18-8002(1) provides that any person who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol, provided that such testing is administered at the request of a peace officer having reasonable grounds to believe that person has been driving or is in actual physical control of a motor vehicle in violation of the provisions of I. C. §18-8004.
3. Upon review of this record, Officer White properly and substantially advised Bell of the true consequences of submitting to evidentiary testing or of refusing to submit to evidentiary testing.

4. Officer White asserts to Bell that he needs to submit to the breath test, and if not, blood will be drawn.
5. Based on Idaho's Implied Consent law, Officer White's assertion is accurate.
6. Because Bell had already given his implied consent to evidentiary testing by driving on a public highway, he also gave his consent to a blood draw if necessary.
7. In State v. Diaz, 2007 Opinion No. 53, the court held that nothing in Idaho Code §18-8002 limits the officer's authority to require a defendant to submit to a blood draw.
8. Pursuant to Diaz, implied consent to evidentiary testing is not limited to the breathalyzer test, but may also include testing the suspect's blood or urine.
9. The evidentiary test to be employed is of the officer's choosing.
10. Finally, no evidential blood testing was performed, and secondly, Officer White did not order anyone to draw blood from Bell.
11. Based on the implied consent language set forth in I. C. §18-8002(1), State v. Diaz, and based on Officer White having reasonable grounds to believe Bell was driving while under the influence of alcohol in violation of the provisions of I. C. §18-8004, Officer White possessed legal cause to request Bell submit to evidentiary testing either by means of breath or blood testing.
12. Prior to being offered the breath test, Bell was substantially informed of the consequences of refusal and failure of the test as required by I. C. §§18-8002 and 18-8002A.
13. Bell was properly advised of the consequences of submitting to evidentiary testing, and the possible suspension of his Idaho driving privileges.

7.

WAS HAMISH BELL IMPROPERLY DENIED HIS DUE PROCESS RIGHTS?

1. I. C. §18-8002A(7) provides that 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; or
(b) the peace 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, 18-8006, Idaho Code; or
(c) the test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C, 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.

2. None of those grounds have any correlation with discovery issues or the production of the Instrument Operations Log.
3. The State's Response to a Discovery request is separate and apart from any relevant basis for dismissing the suspension in this proceeding, thus it shall not affect the validity of Bell's suspension outcome.
4. In the case of the Court of Appeals of the State of Idaho, 2003 Opinion No. 79, in the matter of Michael Peter Kane v. State of Idaho, Department of Transportation, the court held that the Hearing Officer is not authorized to vacate a suspension unless one of the five enumerated grounds have been satisfied.
5. The argument disregards the plain language of the statute, which enumerates five grounds upon which a hearing officer may vacate a license suspension, none of which concerns questions of discovery response and production of supplemental evidence.
6. It is Bell's burden to present evidence affirmatively showing one or more of the grounds for relief enumerated in I. C. §18-8002A(7).

7. In this case, Bell was provided with the subpoenaed Instrument Operations Log albeit untimely (just prior to the scheduled hearing time), but a continuance was granted to allow Bell's legal counsel the opportunity to timely and properly prepare for the rescheduled hearing date.
8. Additionally, the Boise Police Department timely complied with the Subpoena Duces Tecum although the subpoenaed material got misplaced at the Idaho Transportation Department.
9. The purpose of the Subpoena Duces Tecum is to obtain the requested documents/information and to make that information a part of the record which was the case in Bell's Administrative License Suspension hearing, thus any argument regarding timeliness of receipt of the requested information is irrelevant and not grounds for dismissal of the suspension.
10. The Hearing Officer has the sole authority for the conduct of the hearing and will determine if documents being offered are relevant.
11. Bell submitted to evidentiary testing June 5, 2009, with the .08 and .20 solutions changes and calibration checks performed June 3, 2009, two days prior to Bell's evidentiary test, thus the Subpoena Duces Tecum issued by the Hearing Officer for the period of June 3, 2009, through June 6, 2009, provided all the relevant information Bell needed.
12. Bell was not denied the opportunity to present evidence affirmatively showing one or more of the grounds for relief enumerated in I. C. §18-8002A.
13. Bell presented no factual evidence to vacate the suspension based on any of the grounds mandated by I. C. §18-8002A.
14. Bell's suspension will not be vacated solely on claims of a discovery argument and the production of supplemented evidence beyond the requisite documents that need submitted to the Department pursuant to I. C. §18-8002A.
15. Bell's arguments fail.
11. Bell was not denied his due process rights.

8.

DID OFFICER WHITE FOLLOW ALL PROCEDURES AND REQUIREMENTS SET FORTH PURSUANT TO IDAHO LAW AND THE ISP STANDARD OPERATING PROCEDURE?

1. Officer White followed all procedures and satisfied all requirements pursuant to I. C. §§18-8002A and 18-8004, and the ISP's Standard Operating Procedure was properly adhered with.

CONFLICTING FACTS, IF ANY, WERE CONSIDERED AND REJECTED IN FAVOR OF THE FOREGOING CITED FACTS. BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, I CONCLUDE THAT ALL OF THE STATUTORY REQUIREMENTS FOR SUSPENSION OF HAMISH BELL'S DRIVING PRIVILEGES WERE COMPLIED WITH IN THIS CASE.

THE FOLLOWING ORDER IS RENDERED:

ORDER

The suspension set out in the Notice of Suspension, served pursuant to I.C. §18-8002A, is **SUSTAINED and shall run for a period of one year commencing July 5, 2009, and shall remain in effect through July 5, 2010.**

EXHIBIT 9, HAMISH BELL'S DRIVER'S LICENSE RECORD, SETS FORTH THAT THIS IS BELL'S SECOND FAILURE OF EVIDENTIARY TESTING WITHIN THE IMMEDIATELY PRECEEDING FIVE YEARS.

DATED this 14th day of September, 2009

David J. Baumann

DAVID J. BAUMANN
CERTIFIED HEARING OFFICIAL

FINAL ORDER

(Hearings pursuant to Idaho Code § 18-802A)

This is a final order of the Department.

A motion for reconsideration may be filed with the Idaho Transportation Department's Administrative License Suspension Hearing Unit, PO Box 7129, Boise, ID 83707-1129 within fourteen (14) days of the issue date of this order. If the hearing officer fails to act upon this motion within twenty-one days of its receipt, the motion will be deemed denied.

Or pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which:

1. A hearing was held;
2. The final agency actions were taken; or
3. The party seeking review of the order resides.

An appeal must be filed within twenty-eight (28) days of the issue date of this final order. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Idaho Transportation Department
Driver Services Section
P.O. Box 7129
Boise, Idaho 83707-1129
Facsimile: (208) 332-2002

- [x] U.S. Mail
- [ ] Hand Delivered
- [ ] Overnight Mail
- [ ] Telecopy (Fax)

Dean B. Arnold

for Law Offices of Dean B. Arnold

NO. _____
A.M. _____ FILED P.M. 3:00

SEP 2 9 2009
J. DAVID NAVARRO, Clerk
By _____ DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IN THE MATTER OF THE DRIVIGN PRIVILEGES OF: HAMISH ALLAN BELL	Case No. CVOT0918414 ORDER GOVERNING JUDICIAL REVIEW

Petition for Judicial Review having been filed herein, and it appearing that the issues presented on appeal are questions of law and fact; and it further appearing that a record/transcript is necessary to process this appeal:

It is ORDERED:

1) That upon completion of the record the agency shall mail or deliver a notice of lodging of transcript and record to all attorneys of record or parties appearing in person and to the district court.

2) That the notice shall inform the parties before the agency that they pick up a copy of the transcript and record at the agency and that the parties have fourteen (14) days from the date of the mailing of the notice in which to file with the agency any objections, and the notice will further advise the petitioner to pay the balance of the fees for preparation before the transcript and record will be delivered to the petitioner.

3) That the Agency shall transmit the settled transcript and record to the district court within forty-two (42) days of the service of the petition for judicial review.

4) That the Agency, upon filing with the Court the record, shall send notice of such filing to all parties;

5) That the Petitioner's brief shall be filed and served within thirty-five (35) days of the date the transcript and record are filed with the Court.

6) That the Respondent's brief shall be filed and served within twenty-eight (28) days after service of Petitioner's brief.

7) That Petitioner's reply brief, if any, shall be filed and served within twenty-one (21) days after service of Respondent's brief.

8) That either party may notice the matter for oral argument after all briefs are filed, and that if within fourteen (14) days after the final brief is filed, neither party does so notice for oral argument, the Court will deem oral argument waived and decide the case on the briefs and the record.

Dated this 29th day of September, 2009.

Kathryn O Sticklen

KATHRYN STICKLEN
Senior District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of September, 2009, I mailed (served) a true and correct copy of the within instrument to:

DEAN B. ARNOLD
ATTORNEY AT LAW
300 W MAIN ST, STE 250, OFFICE 202
BOISE, ID 83702

IDAHO DEPARTMENT OF TRANSPORTATION
LEGAL DEPARTMENT
POST OFFICE BOX 7129
BOISE IDAHO 83707-1129

J. DAVID NAVARRO
Clerk of the District Court

By: _____
Deputy Court Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IN THE MATTER OF THE DRIVING PRIVILEGES OF:	)	
HAMISH ALLAN BELL	)	Case No. CV-OT-2009-0018414

PETITIONER'S BRIEF

JUDICIAL REVIEW FROM THE STATE OF IDAHO,
DEPARTMENT OF TRANSPORTATION

HONORABLE KATHRYN A. STICKLEN
Senior District Judge

Dean B. Arnold, ISB #6814
Law Offices of Dean B. Arnold
300 W. Main St., Suite 250, Office 202
Boise, Idaho 83702
Telephone: (208) 342-1575
Facsimile: (208) 342-3777

Attorney for Petitioner

Michael J. Kane, ISB #2652
Michael Kane & Associates, PLLC
P.O. Box 2865
Boise, Idaho 83701-2865
Telephone: (208) 342-4545
Fax: (208) 342-2323

Attorney for Respondent

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATE STATUTES

II. STATEMENT OF THE CASE

A. Nature of the Case.

This is a petition for judicial review of the Idaho Transportation Department's ("ITD") decision to uphold the administrative suspension of Hamish Bell's driving privileges for failure of evidentiary testing following his arrest for driving under the influence. Mr. Bell asks this Court to vacate the suspension based upon numerous grounds, including but not limited to:

- the Hearing Officer failed to provide Mr. Bell due process throughout the hearing process;
- the Hearing Officer refused to issue necessary subpoenas and produce relevant discovery;
- the Hearing Officer erroneously concluded that the Boise Police Department complied with ITD's subpoenas;
- the Hearing Officer erroneously concluded that the breath testing equipment was properly maintained, accurate, and functioning properly;
- the Hearing Officer erroneously concluded that Mr. Bell was properly informed of the consequences of submitting to evidentiary testing; and
- the Hearing Officer erroneously relied upon the police officer's affidavit after the officer had been deemed unreliable by the Boise Police Department.

B. Statement of the Facts and Course of Proceedings.

i. Mr. Bell's Arrest.

On or about June 4, 2009, Mr. Bell was stopped by police for a driving infraction and subsequently arrested by Boise Police Officer Tony White for misdemeanor driving

under the influence. (R p. 6.) Mr. Bell was transported to the Ada County Sheriff's Department for processing. At the jail, Officer White played an audio recording of the administrative license suspension (ALS) advisory. (R. p. 62A.) Thereafter, Mr. Bell informed Officer White that he would not submit to a breath-alcohol test. (R pp. 264-267.) Officer White then made numerous incorrect statements of Idaho law governing the officer's ability to forcibly obtain a blood draw from Mr. Bell, eventually coercing Mr. Bell into submitting two breath samples. *(Id.)*

Most notably, Officer White informed Mr. Bell that if he refused to provide a breath sample Officer White and other officers would use any amount of force necessary to strap Mr. Bell into a chair and obtain a forced blood draw from Mr. Bell's body. *(Id.)* During this time period, Officer White stated he was "forcing" Mr. Bell to submit to evidentiary testing, and that he would use as much force as was necessary in order to accomplish the requested testing, including getting into a "fight fight." (R pp. 265-266.)

The machine recorded test results of .154/.157. (R p. 3.) Officer White served Mr. Bell a notice of driver's license suspension. (R pp. 1-2.)

ii. State's Motion to Dismiss the Criminal Action.

Based upon Officer White's actions, Mr. Bell filed a Motion to Suppress in the criminal case, seeking the exclusion of the breath testing results. (R pp. 263-271.) The basis of the motion was that Officer White's conduct constituted an unreasonable search and seizure because the test results were obtained through coercion and duress

amounting to police misconduct. *(Id.)* The State then filed a Motion to Dismiss the case with prejudice (R pp. 277-278) which was granted by the magistrate judge. At the time, defense counsel believed the State's motion was filed solely in response to the Motion to Suppress.

However, it was subsequently discovered that Officer White had been terminated from the Boise Police Department for "conduct unbecoming an officer" after an internal investigation in which Officer White made "inconsistent statements"—police jargon for an officer who is no longer deemed credible by his department. (A true and correct copy of a formal disclosure by the Ada County Prosecuting Attorney's Office is attached hereto as Attachment A.) Accordingly, Mr. Bell is currently without knowledge whether the criminal case was dismissed upon the strength of his motion, Officer White's credibility issues, or both.

iii. Subpoenas Requested By Mr. Bell In Support of ALS Hearing.

Mr. Bell requested a hearing pursuant to Idaho Code § 18-8002A regarding the administrative suspension of his driving privileges. (R pp. 10-11.) ITD relied upon Officer White's affidavit in support of Mr. Bell's suspension. (R pp. 4-5; *see also* R p. 292, ¶ 6.) Mr. Bell's counsel requested ITD issue various subpoenas for information needed at the ALS Hearing (R pp. 10-11) some of which were denied or reduced in scope (R pp. 17-19).

For example, the Hearing Officer refused to issue a subpoena for a copy of Officer White's certification for the breath testing device used in this case (the "Intox

5000"). (R p. 19.) The Hearing Officer also refused to issue a subpoena for records relating to the Intox 5000 beyond the time period June 3-6, 2009. (R p. 18.) Counsel for Mr. Bell submitted a letter to the Hearing Officer requesting reconsideration of this issue and specifically explained why the additional information was relevant to the hearing. (R pp. 27-28.) No response was ever received from the Hearing Officer.

Mr. Bell's counsel served the original subpoenas as issued by the Hearing Officer, all of which had a compliance date of June 29, 2009 for a 10:00 a.m. hearing on June 30, 2009. (R pp. 21, 30-33, 52-53.) Due to the anticipated limited timeframe to review the subpoenaed information, Mr. Bell's counsel requested a continuance. (R pp. 27-28.) The hearing was rescheduled for July 9, 2009. (R p. 34.) On June 25, 2009, the Boise Police Department acknowledged receipt of the subpoenas for the various documents and audio recordings, but specifically stated it did "not have the Intoxilyzer logsheets yet for the period of June 3 thru June 6." (R p. 54.)

iv. July 9, 2009 ALS Hearing.

As of July 9, 2009, Mr. Bell had still received no information from the Boise Police Department in response to the subpoena for information concerning the Intox 5000. (Tr Vol. I, p. 6, ls. 10-17.) Less than two hours before the scheduled hearing Mr. Bell's counsel submitted additional exhibits clearly indicating he intended to raise the Boise Police Department's failure to comply with the subpoena as a basis to vacate Mr. Bell's suspension. (Tr Vol. I, pp. 3-4, ls. 22-5; R p. 70.) Approximately 1 hour before the hearing, ITD faxed Mr. Bell's counsel 14 partially redacted pages of Intoxilyzer log

sheets. (Tr Vol. I, pp. 6-7, ls. 24-19; R pp. 71-83.) Mr. Bell's counsel then spoke with Callie Downum of ITD, who was unable to state when, where, or from whom the logs sheets had been produced. (Tr Vol. II, p. 3, ls. 14-24.) When questioned why the documents far exceeded the scope of the subpoena, and appeared inconsistent with the subpoena itself, Ms. Downum had no answer. *(Id.)*

Mr. Bell's counsel appeared at the hearing and requested the suspension be vacated due to Boise Police Department's non-compliance with the subpoena. (Tr Vol. I, pp. 5-6, ls. 10-1.) The Hearing Officer denied that request stating, "I'm not going to dismiss the suspension just based on a Subpoena issue." (Tr Vol. I, p. 8, ls. 3-4.) The Hearing Officer acknowledged Mr. Bell's counsel had been given insufficient time to review the belatedly produced documents, but only offered to continue the hearing—an offer which Mr. Bell's counsel conceded he was "forced" to accept under the circumstances. (Tr Vol. I, p. 8, ls. 2-24.)

Mr. Bell's counsel then requested subpoenas for and production of the following documents: 1) Ms. Downum's testimony concerning the source of the Intoxilyzer logsheets; 2) copies of all calibration checks for the Intox 5000 (requested for the third time); 3) documents showing the source of the simulator solutions used on the Intox 5000; 4) documents showing the source of the simulator solutions was an "approved" provider as required by IDAPA; 5) documents showing the Intoxilyzer logsheets were actually produced by the Boise Police Department in response to Mr. Bell's subpoena; and 6) copies of ITD decisions in which other licensed drivers had their privileges

reinstated when police agencies had failed to comply with a subpoena issued by ITD. (R pp. 39-40.) The Hearing Officer produced copies of two certificates of analysis for simulator solutions #8804 and #8101 (R pp. 99-100) but denied all requests for the subpoenas and refused to produce the information in the possession of ITD (R p. 20). A new hearing date was set for July 23, 2009. (R p. 37.)

v. July 23, 2009 ALS Hearing.

At the subsequent hearing, Mr. Bell raised numerous due process arguments concerning the Hearing Officer's refusal to issue subpoenas for relevant and material information. (Tr Vol. II, pp. 3-5, ls. 3-18.) Mr. Bell's counsel submitted oral proffers to what that evidence would have shown had the subpoenas been issued. *(Id.)* For example, Mr. Bell's counsel proffered that had the Hearing Officer produced the requested ALS decisions, they would show that other individuals had their driving privileges reinstated based solely upon an agency's non-compliance to an ITD subpoena. (Tr Vol. II, p. 4, ls. 12-16.) Similarly, Mr. Bell's counsel proffered that had Ms. Downun been required to testify, her testimony would show the Intoxilyzer logsheets produced by ITD had not been produced by the Boise Police Department in response to Mr. Bell's subpoena. (Tr Vol. II, p. 3, ls. 14-24.) Mr. Bell's counsel also proffered that had the information concerning the simulator solutions and calibration checks been provided, those documents would show the Intox 5000 was not maintained in compliance with the Idaho Administrative Procedures Act (IDAPA) and the Idaho State Police Standard Operating Procedures (the "SOP's"). (Tr Vol. II, pp. 4-5, ls. 7-2.)

However, because Mr. Bell had been denied access to the requested information, he was forced to submit documents from other cases which supported these same arguments. For example, Mr. Bell submitted documentation produced by the State of Idaho and the Boise Police Department in a separate proceeding proving affirmatively that the Boise Police Department failed to conduct the required 0.08 calibration check on the Intox 5000. (R pp. 101-104.) Thus, the Intox 5000 was not properly maintained as required by IDAPA and the SOP's. (Tr Vol. II, pp. 16-19, ls. 1-10.) Moreover, Mr. Bell submitted documents authenticated by the State of Idaho in discovery in a separate case that the provider of the simulator lot solutions was no longer under contract with the State of Idaho. (R pp. 84-94.) Thus, the source of the simulator solutions was not an "approved" provider as required by IDAPA and the SOP's. (Tr Vol. II, pp. 4-5, ls. 17-2; Tr Vol. II, pp. 5-6, ls. 19-20.)

Mr. Bell also submitted the audio recording of Officer White's interaction with Mr. Bell documenting the fact Officer White admitted to "forcing" Mr. Bell to submit to evidentiary testing, and had threatened to use any amount of force to obtain a blood draw from Mr. Bell if he would not submit to a breath test. (Tr Vol. II, pp. 7-10, ls. 11-15, *citing* Exhibit H (R p. 62A).) Mr. Bell's counsel argued that Officer White's incorrect statements concerning Officer White's ability to obtain a forced blood draw violated Idaho law that required Mr. Bell be properly informed of the consequences of submitting to evidentiary testing. (Tr Vol. II, pp. 6-12, ls. 21-23.) Mr. Bell's counsel also argued that Officer White's coercive tactics nullified the audio advisory because

instead of relying upon the plain language of the statutory advisory Officer White chose to obtain a breath sample from Mr. Bell through coercion and duress amounting to police misconduct. (Tr Vol. II, pp. 12-25, ls. 24-25.)

vi. Hearing Officer's Decision.

On September 14, 2009—*53 days after the hearing and 102 days after Mr. Bell's arrest*—the Hearing Officer issued a written decision finding against Mr. Bell on every issue raised by him and sustaining Mr. Bell's one-year driver's license suspension beginning on July 5, 2009. (R pp. 282-299.) On September 24, 2009, Mr. Bell filed a timely Petition for Judicial Review. (R pp. 300-323.) On October 20, 2009, the Court issued an Order staying Mr. Bell's suspension beginning on October 23, 2009. On December 1, 2009, ITD filed its Notice of Filing of Transcript, thereby initiating the briefing schedule pursuant to the Court's Order Governing Judicial Review.

III. ISSUES PRESENTED ON APPEAL

1. Did the subpoenas issued by the Hearing Officer violate Mr. Bell's due process rights?
2. Did the Hearing Officer violate Mr. Bell's due process rights by impermissibly extending the administrative hearing process?
3. Did the Hearing Officer violate Mr. Bell's due process rights by refusing to issue subpoenas regarding Officer White's Intox 5000 certification?
4. Did the Hearing Officer violate Mr. Bell's due process rights by refusing to issue subpoenas regarding calibration checks?
5. Did the Hearing Officer err by finding the Boise Police Department complied with ITD's subpoena?

6. Did the Hearing Officer err in concluding that Mr. Bell's driver's license suspension could not be vacated based upon the Boise Police Department's failure to comply with ITD's subpoenas?

7. Did the Hearing Officer violate Mr. Bell's due process rights by refusing to issue subpoenas and produce documents regarding Boise Police Department's compliance with ITD's subpoena?

8. Did the Hearing Officer err by sustaining Mr. Bell's driver's license suspension when the evidence affirmatively showed the State failed to comply with IDAPA and the Standard Operating Procedures?

9. Did the Hearing Officer err in sustaining Mr. Bell's driver's license suspension when the evidence affirmatively showed the State's adopted procedures do not ensure accuracy and proper functioning of the breath testing device.

10. Did the Hearing Officer err by sustaining Mr. Bell's driver's license suspension when the evidence affirmatively showed the provider of the simulator solutions was not an "approved" provider as required by IDAPA and the Standard Operating Procedures?

11. Did the Hearing Officer err by sustaining Mr. Bell's driver's license suspension when the evidence affirmatively showed Officer White failed to properly inform Mr. Bell of the consequences of submitting to evidentiary testing?

12. Did the Hearing Officer err by relying on Officer White's affidavit when the State was in actual or constructive knowledge that Officer White had been deemed unreliable by the Boise Police Department?

IV. ARGUMENT

A. Standard of Review

The Idaho Administrative Procedures Act (IDAPA) governs the review of ITD decisions to deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. *In re Gibbar,* 143 Idaho 937, 941, 155 P.3d 1176, 1180 (Ct. App. 2006), *citing* I.C. § 67-5270. "When a district court entertains a petition for judicial review, it does

so in an appellate capacity." *Burns Holdings, LLC v. Madison County Bd. of County Comm'rs,* 147 Idaho 660, 214 P.3d 646, 648 (2009). The Court does not substitute its judgment for that of the ITD as to the weight of the evidence presented. *In re Gibbar,* 143 Idaho at 941, 155 P.3d at 1180. Instead, the Court defers to the ITD on findings of fact unless they are clearly erroneous. *Id.*

"A 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." *Id.* at 941-42, 155 P.3d at 1180-81, *citing* I.C. § 67-5279(3).

B. The Hearing Provided by ITD Violated Procedural Due Process.

Mr. Bell has a right to procedural due process[1] throughout the administrative hearing proceedings. *Id.* at 945, 155 P.3d at 1184. The private interest in Mr. Bell's driver's license is substantial. *Id.* at 947, 155 P.3d at 1186, *citing Matter of McNeely,* 119 Idaho 182, 191, 804 P.2d 911, 920 (Ct. App. 1990).

i. The Hearing Officer's Subpoenas Denied Mr. Bell Due Process.

In ALS proceedings, the petitioner can request the Hearing Officer issue subpoenas requiring the attendance of witnesses and the production of documentary or tangible evidence. IDAPA § 39.02.72.300.01. The petitioner is required to serve the

[1] Unless otherwise noted, all references to due process include all protections afforded by both the United States Constitution as well as the Idaho Constitution.

subpoenas. IDAPA § 39.02.72.300.02. However, the ITD has taken it upon itself to issue subpoenas that order the respondents to produce the documents and tangible items *directly to ITD.* (R pp. 17-18.) Then, ITD provides the documents, etc., to the petitioner. Documents can be forwarded by ITD to the petitioner via facsimile. But tangible objects such as compact discs of video and audio recordings must be sent by mail. Thus, under no set of circumstances do the subpoenas ensure that the subpoenaed information will be received by the petitioner until *the day after the compliance date* set by ITD on the subpoena.

Here, the subpoenas were issued by the Hearing Officer with a compliance date of June 29, 2009. The Hearing Officer set the Hearing for 10:00 a.m. on June 30, 2009. This case, like just about all DUI cases, included a request for all audio and video recordings. (R pp. 17, 62A.) Accordingly, under no set of circumstances would the subpoenas issued by the Hearing Officer ensure that all the information would be received by Mr. Bell before the Hearing—let alone with sufficient time for Mr. Bell and his counsel to review that information in preparation for the Hearing.

These subpoenas—on their face—are constitutionally unsound because they are designed to prevent the petitioner from receiving relevant information with sufficient time prior to the ALS Hearing to prepare to carry the petitioner's statutory burden. *See* I.C. § 18-8002A(7). There can be no better proof of a system that denies due process than the very subpoenas issued by ITD in this ALS proceeding.

ii. The Hearing Officer Impermissibly Extended the Hearing Process.

An administrative license suspension goes into effect 30 days after service of the notice of suspension. I.C. § 18-8002A(4)(b). The hearing process is set up to have a hearing and ruling prior to the driver's license suspension going into effect. IDAPA § 39.02.72.600.01. This is accomplished by requiring the driver to request a hearing within seven days, and then requiring a hearing before a Hearing Officer within 20 days from the driver's request, thus allowing at least three days for the Hearing Officer to render a decision before the suspension begins. I.C. § 18-8002A(7). The Hearing Officer may extend this time period for *one* ten-day period "for good cause shown." *Id.*

Here, the Hearing Officer had already extended Mr. Bell's hearing ten days until July 9, 2009. At that point, the Boise Police Department had failed to produce the subpoenaed documents. Mr. Bell's counsel appeared at the July 9, 2009 hearing and requested Mr. Bell's driving privileges be reinstated based upon the failure of the Boise Police Department to respond to the subpoena. The Hearing Officer acknowledged that Mr. Bell and his counsel had been denied a reasonable opportunity to review the documents that had been sent over by ITD just minutes before the Hearing, but the Hearing Officer refused to vacate the suspension for that reason, and merely offered Mr. Bell a continuance. However, the Hearing Officer was without authority to extend the Hearing any further because the statutory maximum ten days had already been used. (R pp. 21, 34.) Thus, the Hearing Officer, having acknowledged Mr. Bell was denied a reasonable opportunity to review the documents subpoenaed by ITD prior to the

Hearing, was required to vacate the suspension.

In addition, the Hearing Officer's failure to issue a prompt decision also violated due process. IDAPA requires the Hearing Officer issue a written decision prior to the expiration of the 30 day permit. IDAPA § 39.02.72.600.01. Here, after the July 23, 2009 hearing had occurred, the Hearing Officer took another 53 days to issue a decision. Thus, by the time the decision was issued, Mr. Bell's driving privileges had already been *administratively suspended for 72 days*—well beyond that permitted by statute or the constitutional protections of due process—without a ruling.

Accordingly, Mr. Bell's driving privileges were suspended in violation of Idaho Code § 18-8002A(7) and his constitutional rights to due process.

iii. The Hearing Officer Wrongfully Refused Mr. Bell's Request for Subpoenas Regarding Officer White's Certification.

The officer conducting a breath alcohol test must be certified on the machine. IDAPA § 11.03.01.013.04. Mr. Bell has a right to confirm whether the officer conducting the test is currently certified to use the machine in question. Mr. Bell requested a subpoena for this information (R p. 11), which the Hearing Officer denied (R p. 19). The Hearing Officer, by denying this request, denied Mr. Bell due process.[2]

[2] As explained later in this brief, Officer White's affidavit should not be considered sufficient evidence of his breath testing certification because he has been deemed unreliable and terminated by the Boise Police Department because of his credibility issues.

iv. The Hearing Officer Wrongfully Refused Mr. Bell's Requests for Subpoenas Regarding Calibration Checks.

Mr. Bell was entitled to challenge the breath testing results from the Intox 5000 by showing the machine was inaccurate or not functioning properly. *In re Gibbar,* 143 Idaho at 947, 155 P.3d at 1186. IDAPA and the SOP's require the State to conduct a 0.08 calibration check approximately every 100 samples or every month, whichever comes first. SOP § 2.2.3. The required calibration checks are recorded on the corresponding logsheets and, in certain circumstances, calibration checklists. (R pp. 73, 78, 83, 104.) "Failure to abide by the regulations set forth in the standard operating procedures and training manuals renders the test inadmissible as evidence absent expert testimony that the improperly administered test nevertheless produced reliable results." *In re Schroeder,* 147 Idaho 476, 210 P.3d 584, 586 (Ct. App. 2009); *cf. Wheeler v. Idaho Transp. Dept.,* No. 35839, 2009 WL 3299003, at *6 (Ct. App. Oct. 15, 2009), *petition for rev. filed* (Ct. App. Nov. 2, 2009) (violation of calibration check allows driver to attack test result with evidence that violation rendered result unreliable).

Mr. Bell first requested the Hearing Officer issue a subpoena for the logsheets to the Intox 5000 for the 30 days before and after Mr. Bell's arrest (approximately from May 4 thru July 4, 2009). The Hearing Officer denied that request, and only issued a subpoena for June 3-6, 2009. Mr. Bell immediately requested the Hearing Officer reconsider this subpoena as the "information was specifically requested in order to determine whether the calibration of the Intoxilyzer machine at issue had been properly

checked as required by Idaho law and standard operating procedures." (R p. 28, ¶ 6.) No response was received from the Hearing Officer. After the initial hearing on July 9, 2009, Mr. Bell sent another request specifically requesting a subpoena for "[a] copy of all documents reflecting any and all calibration checks performed from May 1, 2009 to July 13, 2009 on the breath-alcohol testing device used in this case." (R p. 39, ¶ 2.) That request was denied as well. (R p. 20.)

Accordingly, Mr. Bell was denied due process because the Hearing Officer refused to issue a subpoena for the only records that would allow Mr. Bell to determine whether the Intox 5000 was accurate, operating properly, and had been maintained as required by Idaho law. The subpoena issued by the Hearing Officer was insufficient on its face because under no possible set of circumstances would it produce the information to which Mr. Bell was entitled.

v. The Hearing Officer Erred in Finding the Boise Police Department Complied With the ITD Subpoena.

The Hearing Officer has discretion to admit or exclude evidence. I.C. § 67-5251. However, the Hearing Officer cannot *offer* exhibits on behalf of Mr. Bell, regardless of whether that information was obtained pursuant to a subpoena or not.

Here, the Hearing Officer offered and admitted the belatedly produced Intox Logs into evidence over Mr. Bell's objection. Specifically, Mr. Bell's counsel objected to the documents, *inter alia,* that Mr. Bell had not offered them as an exhibit, but more importantly, that they had not been produced in response to ITD's subpoena, but

instead, ITD had merely supplied numerous pages of intoxilyzer logsheets once it became apparent Mr. Bell was going to raise the Boise Police Department's failure to respond to the subpoena as a basis to vacate his suspension. The Hearing Officer overruled the objection and admitted the documents as Exhibit L. (R pp. 71-83.)

Under the circumstances, Mr. Bell was clearly entitled to discovery on the source of those documents (now admitted as an exhibit), especially in light of Ms. Downum's previous inability to explain either how these documents mysteriously appeared just minutes before the hearing or why they far exceeded the scope of the subpoena served on the Boise Police Department. However, when Mr. Bell requested subpoenas to determine whether Exhibit L had in fact been produced in response to the ITD subpoena, the Hearing Officer denied those requests. Then, without taking any testimony from Ms. Downum as requested by Mr. Bell, and without subpoenaing any documents that could answer these questions as requested by Mr. Bell, the Hearing Officer made the following findings of fact:

1. The Boise Police Department *timely complied* with the Subpoena Duces Tecum; and
2. The subpoenaed material *got misplaced* at the Idaho Transportation Department.

(R p. 297 ¶ 8) (emphasis added.)

The problem is *there is absolutely no evidence in the record supporting either of these two findings of fact.* In fact, the Hearing Officer precluded himself from making any such findings when he denied Mr. Bell's requests for subpoenas on these precise

issues. Moreover, both findings of fact directly contradict Mr. Bell's counsel's proffers (based upon his conversation with Ms. Downum) as to what the evidence would have shown had Mr. Bell been provided this information. Furthermore, no logical inference can be made that these documents were provided in response to the ITD subpoena because Exhibit L (covering April 28-June 6) is entirely inconsistent with the scope of the subpoena that was served on the Boise Police Department (covering June 3-6). The only logical inference is that the documents were not produced by the Boise Police Department in response to that subpoena.

These "findings of fact" are clearly erroneous and cannot stand. Also, the Hearing Officer's decision to admit Exhibit L violated due process, was made on unlawful procedure, exceeded statutory authority, was not supported by substantial evidence in the record, and was arbitrary, capricious, and an abuse of discretion.

vi. The Hearing Officer Wrongfully Refused Mr. Bell's Requests for Subpoenas and Discovery Regarding Boise Police Department's Compliance With ITD's Subpoena.

The Hearing Officer refused to vacate Mr. Bell's suspension based upon the Boise Police Department's failure to comply with the subpoena. (R p. 297, ¶ 14.) This alone violated due process.

Mr. Bell is permitted to request a document directly from ITD which "is a public record, relates to the petitioner hearing, and is in the possession of the Department." IDAPA § 39.02.72.400.01. At the July 9, 2009 Hearing, the Hearing Officer stated that subpoena non-compliance was not a basis to vacate Mr. Bell's suspension. In response

to this legal conclusion, Mr. Bell's counsel requested that ITD produce "[a] copy of all ALS Hearing decisions issued in the last twelve (12) months vacating an administrative driver's license suspension based upon a failure to comply with a subpoena issued by the ITD." (R p. 40.) That request was denied by the Hearing Officer. (R p. 43.)

The Hearing Officer's refusal to disclose this information violates due process because it precluded Mr. Bell from obtaining the very information necessary to establish the Hearing Officer's legal conclusion was incorrect. Mr. Bell's counsel had a good faith basis to request these documents because he had personally viewed at least one ITD decision vacating a driver's license suspension solely for subpoena non-compliance. Notably, the Hearing Officer did not respond by stating no such decisions exist. Instead, the Hearing Officer claimed the requested documents were "not clearly relevant." (R p. 43.) ITD, by refusing to disclose this information, precluded Mr. Bell from information within ITD's possession, custody, and control that would have refuted the Hearing Officer's legal conclusion that treated Mr. Bell differently than other ALS petitioners.

Not only did ITD's conduct violate due process, it shows the Hearing Officer's decision was made upon unlawful procedure and exceeded statutory authority. Moreover, had this information been disclosed, it would have shown the Hearing Officer's decision upholding Mr. Bell's driver's license suspension was not supported by substantial evidence in the record, and was arbitrary, capricious, and an abuse of discretion.

C. Mr. Bell Affirmatively Proved He Is Entitled to Have His Driver's License Suspension Vacated.

In order to prevail at the Hearing, Mr. Bell was required to show by a preponderance of the evidence that:

1. The tests results did not show an alcohol concentration in violation of Idaho Code Section 18-8004; or
2. The tests for alcohol concentration were not conducted in accordance with Idaho Code Section 18-8004(4); or
3. The testing equipment was not functioning properly when the test was administered; or
4. Mr. Bell was not informed of the consequences of submitting to evidentiary testing as required by Idaho Code Section 18-8002A(2).

I.C. § 18-8002A(7)(c), (d) & (e). The first three issues allow the driver to challenge the results of the Intox 5000 by showing the testing equipment was inaccurate or was not functioning properly, or that the State's adopted procedures do not ensure accuracy and proper functioning of the equipment. *In re Gibbar,* 143 Idaho at 947, 155 P.3d at 1186. The last isssue allows the driver to challenge whether the State *completely* advised him of his rights and duties under the statute. *In re Virgil,* 126 Idaho 946, 947, 895 P.2d 182, 183 (Ct. App. 1995) (emphasis in original). Because Mr. Bell established each of these requirements at the Hearing, the Hearing Officer's decision must be set aside.

i. The Hearing Officer Incorrectly Concluded the Breath Testing Instrument Had Been Maintained In Accordance With IDAPA and the Standard Operating Procedures.

IDAPA sets forth exacting standards the State must comply with in order for the results from the Intox 5000 to be valid:

> Each breath testing instrument *shall be checked on a schedule* established by the Department for accuracy with a simulator solution provided by the department or by a source approved by the department. These checks *shall be performed according to a procedure* established by the department.

IDAPA § 11.03.01.013.05 (emphasis added). The SOP's require:

> A two sample calibration check using a 0.08 reference solution should be ran and results logged each time a solution is replaced with fresh solution. A 0.08 reference solution should be replaced with fresh solution approximately *every 100 samples or every month, whichever comes first.*

SOP § 2.2.3 (emphasis added). Failure to meet any of these conditions is grounds to have the breath testing device disapproved for use until the deficiency is corrected. IDAPA § 11.03.01.013.07. Here, Mr. Bell affirmatively showed the State failed to comply with both IDAPA and the SOP's.

First, the Hearing Officer denied Mr. Bell's request for a subpoena for this very information. (*See, e.g.*, R p. 297, ¶ 11) (stating the subpoena issued for records from June 3-6, 2009 "provided all the relevant information Bell needed.") That alone is sufficient cause for this Court to set aside Mr. Bell's suspension because the denial of the subpoena denied Mr. Bell his right to procedural due process.

Second, despite the Hearing Officer's refusal to allow Mr. Bell access to the very information he needed to meet his burden, Mr. Bell affirmatively proved the State failed to comply with IDAPA and the SOP's through the use of documents obtained by Mr. Bell's counsel in a separate case. Exhibit S, a Calibration Checklist, affirmatively

proves that on June 25, 2009, Officer Sperry of the Boise Police Department conducted the 0.20 calibration check, but *did not complete the 0.08 calibration check.* (R p. 104.)

Third, the Calibration Checklist proves that the reason for the calibration check was "100 tests." *(Id.)* This is significant for at least three reasons: 1) the purpose of the calibration checks on June 25, 2009 was to perform a 0.08 calibration check; 2) 0.08 calibration checks are required every 100 *samples*—not tests; and 3) by waiting 100 tests, the State had waited *twice as long* to conduct the statutorily required calibration checks because there are two samples in every test.[3]

Fourth, the Hearing Officer's legal conclusion that "the Standard Operating Procedure is absent of any language that sets forth that calibration checks are only good if there are subsequent checks" completely ignores the express language of both the SOP's and IDAPA. (R p. 293, ¶ 6.) As set forth previously, the SOP's are required by IDAPA, and both the SOP's and IDAPA require both prior and subsequent calibration checks. In fact, IDAPA § 11.03.01.013.07 expressly states that failure to perform these required checks is grounds to remove the machine from use. The Hearing Officer's decision completely ignores these statutory requirements—as well as the affirmative evidence showing the State failed to comply with them.

---

[3] A valid breath alcohol test includes two separate breath samples. SOP § 3.2. Therefore, each time a subject successfully blows into the Intoxilyzer 5000 it constitutes one sample. *See State v. Mills,* 128 Idaho 426, 428-29, 913 P.2d 1196, 1198-99 (Ct. App. 1996) (discussing breath test with Intoxilyzer 5000 requires two separate breath "samples" per subject). Accordingly, "100 tests" equals 200 samples. *Id.*

Fifth, the Hearing Officer improperly relied upon Officer White's boilerplate affidavit as evidence that Mr. "Bell's evidentiary test was conducted in accordance with the requirements of I.C. § 18-8004, the IDAPA Rules, and ISP's Standard Operating Procedure." (R p. 292, ¶ 6.) It is established Idaho law that such generalized statements in an officer's sworn affidavit are not sufficient when confronted by credible evidence that demonstrates a violation of proper procedures. *Bennett v. State, Dept. of Transp.*, 147 Idaho 141, 206 P.3d 505, 508-09 (Ct. App. 2009). The Intox Logsheets (Exhibit L) and Officer Sperry's Calibration Checklist (Exhibit S) are credible evidence the Intox 5000 was not maintained in accordance with IDAPA and the SOP's. (R pp. 71-83, 104.)

Sixth, even using the documents offered and admitted into evidence by the Hearing Officer, the evidence proves the State failed to comply with IDAPA and the SOP's. Exhibit L shows that there were 164 samples tested between the 0.08 calibration checks on May 15, 2009 and June 3, 2009. (R pp. 78-83.) Accordingly, Exhibit L—which was relied upon by the Hearing Officer—proves the State failed to comply with IDAPA and the SOP's.

Seventh, the Hearing Officer failed to acknowledge Officer Sperry's Calibration Checklist (Exhibit S; R p. 104) in his findings of fact, or to justify why it should not be considered.

Therefore, the evidence admitted by the Hearing Officer affirmatively proves the State checked the 0.08 calibration on May 15, 2009, then again on June 3, 2009 after

164 samples, and then again at some time unknown, but not before 100 tests, and not before June 25, 2009. Thus, no matter which documents are analyzed, they all establish the State failed to comply with IDAPA and the SOP's. The Hearing Officer's decision to the contrary violated due process, exceeded statutory authority, was made upon unlawful procedure, was not supported by substantial evidence in the record, and was arbitrary, capricious, and an abuse of discretion.

ii. The State's Adopted Procedures for the Intox 5000 Do Not Ensure Accuracy and Proper Functioning.

Of course, if the Hearing Officer was correct, and there is no requirement to perform prior and subsequent calibration checks, the "standards" themselves are therefore illusory, and do not ensure accuracy and proper functioning. If so, the Hearing Officer erred by not vacating Mr. Bell's driver's license suspension for this reason. *See In re Gibbar,* 143 Idaho at 947, 155 P.3d at 1186.

In other words, the State cannot have it both ways. It either violated its own standards associated with maintaining the Intox 5000, or its standards are too vague and unenforceable to ensure the functioning and accuracy of the machine. IDAPA requires the Idaho State Police to establish standards that must be complied with. *See, e.g.,* IDAPA § 11.03.01.013.03. The Idaho State Police has attempted to do so in the SOP's. If the SOP's do not require an exacting standard by which the Hearing Officer or this Court can determine as a matter of fact whether the State has complied with or violated those standards, there are essentially no standards at all.

Here, the State performed the required 0.08 calibration check on May 15, 2009. Then, 164 samples later, it performed another 0.08 calibration check. Two days later, Mr. Bell submitted to evidentiary testing. Then, "100 tests" later, the State prepared to conduct the required 0.08 calibration check, but failed to do so. If such actions by the State do not rise to the level of violations of IDAPA and the SOP's that would vacate a driver's license suspension, there are essentially no enforceable standards to ensure these machines are operating as they are supposed to. If there are no enforceable standards to ensure accuracy and proper functioning of the breath-testing devices, Mr. Bell's driver's license suspension must be vacated because "the state has adopted procedures that do not ensure accuracy and proper functioning." *In re Gibbar,* 143 Idaho at 947, 155 P.3d at 1186.

Under either scenario, the Hearing Officer's decision violated due process, exceeded statutory authority, was made upon unlawful procedure, was not supported by substantial evidence in the record, and was arbitrary, capricious, and an abuse of discretion.

iii. The Hearing Officer Incorrectly Concluded the Simulator Solutions Came From An "Approved" Provider In Accordance With IDAPA and the Standard Operating Procedures.

IDAPA requires that the simulator solutions used in the calibration checks be "provided by the department or by a source approved by the department." IDAPA § 11.03.01.013.05. The SOP's also contain this requirement. SOP § 2.2.1. Mr. Bell requested subpoenas for "[a] copy of all documents identifying the source of the

simulator solution(s) used from May 1, 2009 to July 13, 2009 to check the calibration of the breath-alcohol testing device used in this case." (R p. 39.) This subpoena was refused by the Hearing Officer. (R p. 20.) Nonetheless, Mr. Bell affirmatively showed the source of the simulator solutions was no longer an approved provider.

First, the Hearing Officer denied Mr. Bell's request for a subpoena for this very information. That alone is sufficient for this Court to set aside Mr. Bell's suspension because the denial of the subpoena denied Mr. Bell his right to procedural due process.

Second, despite the Hearing Officer's refusal to allow Mr. Bell access to the very information he needed to meet his burden, Mr. Bell affirmatively proved the State failed to comply with IDAPA through the use of documents obtained by Mr. Bell's counsel in a separate case. As proffered by Mr. Bell's counsel at the Hearing, the provider of the simulator solutions used by Idaho law enforcement agencies is Repco Marketing, Inc. ("Repco"), and Repco provides the simulator solutions directly to the law enforcement agencies. (Tr Vol. II, pp. 4-5.) Exhibit N, an addendum to Idaho State Police Contract Number ISP-06-48, affirmatively proves the contract between ISP and Repco expired on February 19, 2008—*approximately 16 months prior to Mr. Bell's arrest.* (R p. 94.) This contract was authenticated by the State of Idaho on May 1, 2009, when it produced the same in criminal discovery in a separate case. (R pp. 84-92.) Specifically, in Exhibit M, the State of Idaho stated in Response 20: "the city responds by disclosing a copy of a contract between Idaho State Police and RepCo Marketing, Inc. It is the City's understanding that there is *not a current contract* and was not a current contract

at the time of the testing of this Defendant." (R p. 86) (emphasis added.)

Third, the Hearing Officer ignored the expired contract because it was "an outdated contract with an expiration date of February 19, 2008." (R p. 294, ¶ 13.) Yet, that is exactly the point. The contract had expired, and Repco was no longer an "approved" provider as required by IDAPA and the SOP's. The State even admitted no such contract was in effect as of May 1, 2009. It is implausible to infer that such a contract had been renewed sometime between May 1 and Mr. Bell's arrest on June 4, when no such contract had been entered for 16 months.[4] Similarly, it was an abuse of discretion for the Hearing Officer to determine the contract was "insufficient evidence" simply because it was expired, when in fact, it had been offered to affirmatively prove Repco's "approval" status had expired with the contract.

Fourth, the Hearing Officer found there was no "factual evidence to show that the simulator solutions were not properly certified nor approved for evidentiary use." (R p. 294, ¶ 14.) This finding is clearly erroneous as it directly conflicts with Exhibits M and N which established no current contract existed. Especially in light of the Hearing Officer's denial of any subpoenas for this information, Mr. Bell went far above and beyond that which could have been expected of him under the circumstances. To then reject this information produced by and confirmed by the State exceeded the Hearing Officer's statutory authority, was made upon unlawful procedure, was not

[4] Of course, had such a contract been entered, the requested subpoena would have produced this document. Here, the Hearing Officer denied the subpoena and then infers one must exist. Such procedure is entirely unlawful.

supported by substantial evidence in the record, and was arbitrary, capricious, and an abuse of discretion.

Fifth, the Hearing Officer relied solely on Exhibits O and P as a "reasonable inference" that the simulator solutions came from an approved provider. (R pp. 293-94, ¶¶ 7-12.) However, these certificates of analysis are merely a boilerplate document signed by a forensic scientist for the Idaho State Police containing a legal conclusion beyond his legal capacity to assert. The expired contract with Repco proves it was no longer an "approved" provider. Such credible evidence overcomes the purported legal conclusions to the contrary by a forensic scientist. *See Bennett,* 147 Idaho 141, 206 P.3d at 508-09 (holding officer's generalized affidavit concerning employment of proper procedures with alcohol breath-testing device is insufficient when contradicted by credible evidence demonstrating violation of proper procedures). "Thus, the hearing officer's finding that the breath test was conducted in compliance with procedural standards is not supported by substantial evidence in the record as a whole." *Id.* at 509.

And in any event, the simulator solutions relied upon by the Hearing Officer were purportedly "certified" on August 12, 2008 (R p. 100) and September 24, 2008 (R p. 99)—*dates when the State has admitted there was no contract in effect.*

iv. The Hearing Officer Incorrectly Concluded Mr. Bell Was Completely and Properly Informed of the Consequences of Submitting to Evidentiary Testing.

Idaho Code Section 18-8002A(2) requires that certain information be provided prior to evidentiary testing. Idaho law requires strict adherence to the statutory

language of the advisory. *In re Virgil,* 126 Idaho 946, 947, 895 P.2d 182, 183 (Ct. App. 1995) ("Idaho law requires strict adherence to the statutory language"); *accord In re Beem,* 119 Idaho 289, 292, 805 P.2d 495, 498 (Ct. App. 1991) ("Our Supreme Court has emphatically discountenanced interjection of judicial gloss upon the legislature's license suspension scheme"). This requirement must be met "in no uncertain terms." *Id.* When the State fails to properly advise the individual of the information regarding refusal the license suspension will not be upheld. I.C. § 18-8002A(7)(e); *In re Griffiths,* 113 Idaho 364, 368, 744 P.2d 92, 96 (1987).

Here, Officer White played the audio advisory for Mr. Bell. However, when Officer White asked Mr. Bell if he had any questions about the advisory, Officer White completely misrepresented the law of refusal and the State's ability to have a forced blood draw taken from Mr. Bell.

The following consists of relevant portions of the audio recordings made at the Ada County Sheriff's Jail, beginning immediately after the conclusion of the audio advisory:[5]

Officer: [29:17]	Mr. Bell, do you have any questions about that, sir?
Hamish Bell:	Umm...I'm not going to give evidence.
Officer:	OK. Well if you don't take this then I am going to have to call someone to come take your blood. We're going to

[5] A true and correct copy of the audio recording is Exhibit H to the Agency Record. (R p. 62A.) The relevant portions recited herein appear on Track 2 of the compact disc, at approximately 29:17-35:35.

take your blood.

Hamish Bell: You can force that?

Officer: Uh-uh.

Hamish Bell: Why's that?

Officer: Because the State of Idaho says I can.

Hamish Bell: I am not a resident of America – I'm not a citizen of America.

Officer: Doesn't matter. You're in Idaho. If you don't take this breath test I am going to call a paramedic down and take your blood. Which way—which one are you going to do?

Hamish Bell: How do you get to take my blood?

Officer: Because you are driving on the roads of Idaho.

Hamish Bell: So I can't talk to anyone?

Officer: Not until we're done.

Hamish Bell: Would you normally get to take someone's blood?

Officer: Yep.

Hamish Bell: No matter who it is?

Officer: No matter who it is.

Hamish Bell: As evidence [recording unintelligible.]

Officer: Yep. So, Mr. Bell, are you going to take the breath test or are we going to take your blood?

Hamish Bell: So why do you get the right to draw blood from me?

Officer: Because the State of Idaho says I can. You were driving on the roads in Idaho. We don't take refusals. We'll take your blood. We'll put you in that chair if we have to and

take your blood. That's why it's here.

Hamish Bell: I guess so...

Officer: OK.

Hamish Bell: ...because you—because you are forcing me.

Officer: [31:31] Yeah. And it's being recorded. And I am forcing you to take this. Yes.

***

Officer: [31:48] So no matter what, you'll take some evidence from me?

Officer: Yep.

Hamish Bell: Really?

Officer: Yep.

Hamish Bell: Does everyone get treated like that?

Officer: Yep.

Hamish Bell: [Recording unintelligible] ...didn't have to give evidence.

Officer: [Recording unintelligible] ...do you know what case law is, Mr. Bell?

Hamish Bell: No...no...no...

Officer: OK.

Hamish Bell: ...I'm just saying. I'm just.... So that's what that's for?

Officer: What?

Hamish Bell: That chair?

Officer:	That's what it's for. That's why it's sitting here.
Hamish Bell:	So, if I fought as hard as I could, you'd lock me up—lock me into it and take blood?
Officer:	You got it.
Hamish Bell:	[Recording unintelligible] ... I'm not into a fist fight tonight.
Officer: [33:08]	Good. Either am I. Can't burp. No more burping, OK? Or else I have to take your blood, OK?
	***
Hamish Bell: [35:06]	So you can force every single person to give evidence?
Officer:	Yep.
Hamish Bell:	[Recording unintelligible.]
Officer: [35:35]	We strap you in the chair. We call a paramedic over here and they take your blood and we send it off.

Exhibit H (emphasis added) (R p. 62A.) The problem is that practically none of the information provided by Officer White is consistent with Idaho law, and therefore, nullified the information given as part of the statutorily-required audio advisory.

First, the State cannot obtain a forced blood draw in every DUI case. For starters, Idaho Code Section 18-8002(6)(b) expressly limits the police officer's authority to order a forced blood draw, and misdemeanor DUI is not one of those enumerated situations. *State v. Diaz,* 144 Idaho 300, 303-04, 160 P.3d 739, 742-43 (2007). Moreover, a forced blood draw cannot be obtained in all situations—*e.g.,* where the subject has a legitimate fear of needles. *See, e.g., In re Griffiths,* 113 Idaho

at 372, 744 P.2d at 100. Therefore, Officer White's representations that no limitations existed were false.

Second, the State cannot *order* a paramedic or any other medical professional to conduct a forced blood draw in a misdemeanor DUI investigation. *Diaz,* 144 Idaho at 303-04, 160 P.3d at 742-43. In fact, Idaho case law clearly states that in such situations the officer may only *request* that a medical professional draw someone's blood. *Id.* Accordingly, such a request can be refused. In other words, Officer White, as a matter of law, could not order a paramedic to draw Mr. Bell's blood, and even if Officer White only requested the paramedic to do so, the paramedic could have lawfully refused. Officer White's representations to the contrary were false.

Third, the State cannot use whatever force it wants in order to obtain a blood sample. *Schmerber v. California,* 384 U.S. 757, 768 (1966); *Diaz,* 144 Idaho at 303, 160 P.3d at 742. Instead, the State's forced blood draws must be accomplished without unreasonable force. *Id.; State v. DeWitt,* 145 Idaho 709, 714, 184 P.3d 215, 220 (Ct. App. 2008) (holding blood draws must be done in a medically accepted manner and without unreasonable force). Therefore, Officer White's representations that he and his fellow officers could use whatever force they wanted, up to and including a "fist fight," is clearly contrary to the law. Accordingly, these statements by Officer White were also false.

Fourth, the State cannot force every single person arrested for misdemeanor DUI to submit to breath or blood testing. The Hearing Officer apparently believes that *Diaz*

authorizes an officer to "require" a driver to provide a blood sample without any limitations. (R p. 295, ¶ 7.) However, this legal conclusion is clearly incorrect. In addition to the case law set forth above, Idaho's appellate courts have clearly established there is a difference between implied consent and forcing someone to physically consent to evidentiary testing. *State v. Woolery,* 116 Idaho 368, 372, 775 P.2d 1210, 1214 (1989) ("By implying consent, the statute removes the *right* of a licensed driver to lawfully refuse, but it cannot remove his or her *physical power* to refuse") (emphasis in original); *see also DeWitt,* 145 Idaho at 713, 184 P.3d at 219 (stating advisory is intended to enforce the driver's previously implied consent without the use of force; the legislature provided administrative revocation "rather than condone a physical fight"). Here, Officer White admits he told Mr. Bell the "blood draw would be taken from him without his consent if need be." (R p. 61.) Both the Hearing Officer and Officer White misconstrue the scope of *Diaz* and what is and is not permitted in obtaining a blood sample. Quite simply, Officer White's statement that he could lawfully "force" Mr. Bell to provide a breath or blood sample was false.

Fifth, as set forth above, there is no Idaho case law supporting the legal assertions made by Officer White. Thus, when Mr. Bell rightfully questioned Officer White's misrepresentations of the law, and Officer White claimed his statements were supported by "case law," this assertion was also false. Officer White either doesn't understand the limitations on forced blood draws or purposely misrepresented them. Either way, Mr. Bell's suspension must be vacated.

Sixth, Officer White's coercive tactics nullified the audio advisory because no matter what Mr. Bell was initially told, Officer White succeeded in convincing Mr. Bell that he did not have a right to physically refuse to submit to evidentiary testing. As set forth above, Officer White *misstated the law,* told Mr. Bell he *had to take the test,* and indicated his *refusal would be meet with force* up to and including a "fist fight" if Officer White were to order a forced blood draw. Accordingly, the evidentiary testing was accomplished through "trickery or deceit amounting to police misconduct," and therefore, renders the request unreasonable and in violation of law. *See State v. Harmon,* 131 Idaho 80, 85-86, 952 P.2d 402, 407-08 (Ct. App. 1998) (stating that officer's conduct in misstating the law, telling driver he "had to" submit to evidentiary testing, or threatening physical harm would render request unreasonable and in violation of law).

Seventh, the Hearing Officer's conclusion that Officer White properly advised Mr. Bell of the consequences of submitting to evidentiary testing is simply wrong and the reasoning clearly flawed. Mr. Bell's counsel identified numerous statements by Officer White and cited to the binding Idaho case decisions and statutes which contradict Officer White's statements. The Hearing Officer did not make any findings of fact as to what was said. Instead, the Hearing Officer merely summarized the lengthy conversation into a single sentence that completely omits the actual conversation and its context; and then, based upon that one sentence summary, the Hearing Officer concluded all of Officer White's statements complied with Idaho law.

For example, the Hearing Officer found that Officer White merely told Mr. "Bell that he needs to submit to the breath test, and if not, blood will be drawn." (R p. 295, ¶ 4.) To the extent this is considered a finding of fact, it is clearly erroneous. Then the Hearing Officer concluded that this paraphrased summary is an accurate statement of law. (R p. 295, ¶ 5.) Of course, applying this "straw man" technique, no one could ever prevail on this issue.

Similarly, the Hearing Officer erroneously stated the Idaho Supreme Court held in *Diaz* that "nothing in Idaho Code § 18-8002 limits the officer's authority to require a defendant to submit to a blood draw." (R p. 295, ¶ 7.) That legal conclusion is certainly wrong. *Diaz,* as well as other Idaho case law (including that set forth above), provides very specific limits on forced blood draws and proves the Hearing Officer's statement is nothing more than an incorrect overgeneralization of very detailed and complex case law. However, the Hearing Officer's incorrect interpretation of *Diaz* further explains why his decision upholding Mr. Bell's suspension is flawed and cannot be upheld.

For all these reasons, Officer White's statements contradict Idaho law generally as well as the information mandated to be provided Mr. Bell by Idaho Code Section 18-8002A(2). Therefore, Mr. Bell was not properly advised of the consequences of submitting to evidentiary testing. Accordingly, his license suspension must be vacated.

D. The Hearing Officer Erred In Relying On Officer White's Affidavit Because the State Had Constructive Knowledge Officer White Had Been Deemed Not Credible and Terminated By the Boise Police Department.

The arresting officer is not required to provide live testimony at the Hearing. I.C. § 18-8002A(7). Instead, the State can rely upon the sworn statement of the arresting officer. *Id.* Here, Officer White did not testify. Rather, the Hearing Officer accepted the State's version of events based solely upon Officer White's affidavit. (R pp. 4-5.) The Hearing Officer relied upon Officer White's sworn affidavit in upholding Mr. Bell's suspension. (*See, e.g.,* R pp. 292, ¶ 5.)

The problem is Officer White—prior to the Hearing Officer issuing his decision—was found to have made false statements during an internal investigation and was terminated from the Boise Police Department. (Attachment A.) This information was known to prosecutors representing the State of Idaho. *Id.* Therefore, ITD, a political subdivision of the State of Idaho, had actual or constructive knowledge of these facts. Thus, not only should the Hearing Officer have taken this into account, ITD should have informed Mr. Bell that Officer White had been found to have made false statements in the past.

Because neither the criminal prosecutor's nor ITD ever disclosed this information to Mr. Bell, he was prevented from raising this issue before the Hearing Officer. However, the Court should consider this information in light of the fact all evidence submitted against Mr. Bell was established through Officer White's affidavit. At the very least, this omission requires the Hearing Officer's decision be remanded so

that this issue may be developed.

Officer White—*now Mr. White*—is simply not credible. The Hearing Officer, by relying upon Mr. White's affidavit when the State was in constructive knowledge of his veracity issues, violated Mr. Bell's right to due process and rendered a decision which exceeded statutory authority, was made upon unlawful procedure, was not supported by substantial evidence in the record, and was arbitrary, capricious, and an abuse of discretion.

V. CONCLUSION

Based upon the foregoing, the Court should set aside the Hearing Officer's decision and order that Mr. Bell's driving privileges be reinstated. Because there is sufficient evidence that Mr. Bell established his right to prevail at the administrative hearing, there is no need to remand this matter.

DATED this 21st day of December, 2009.

Law Offices of Dean B. Arnold

By: Dean B. Arnold
Dean B. Arnold

(3) Defendant's Prior Record: N/A

(4) Documents and Tangible Objects: N/A

(5) Reports of Examinations and/or Tests: N/A

(6) Witnesses:

It has come to our attention that Officer Tony White has separated from employment with the Boise Police Department. The Boise Police Department has issued sustained departmental policy violations against Officer Tony White for non-conformance to laws and conduct unbecoming an officer. The sustained violations are based upon an internal investigation, which disclosed sufficient evidence to conclude that Officer White failed to register his vehicle in Idaho as required by law, failed to timely pay sales tax on the vehicle, and attempted to protect the asset from seizure during an IRS audit process.

During proceedings regarding the internal investigation, Officer White gave inconsistent statements.

Pursuant to our obligations under *Brady v. Maryland* and *Giglio v. U.S.* and their progeny, as well as our obligation pursuant to Idaho Professional Rule of Conduct 3.8, the State makes this disclosure to you as it may be relevant to the officer's credibility.

Because this involves a confidential personnel matter, to the extent you wish to explore this issue further, we can seek an *en camera* review before the handling Judge. Should you seek this *en camera* review, please contact the handling attorney.

DATED This 17 day of August 2009.

GREG H. BOWER
Ada County Prosecuting Attorney

Tessie Buttram

By: Tessie Buttram
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael Kane & Associates, PLLC
1087 W. River St., Ste. 100
P.O. Box 2865
Boise, ID 83701-2865
Fax: (208) 342-2323

- ☐ U.S. Mail
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (Fax)

Dean B. Arnold

for Law Offices of Dean B. Arnold

MICHAEL J. KANE
MICHAEL KANE & ASSOCIATES, PLLC
1087 West River Street, Suite 100
Post Office Box 2865
Boise, Idaho 83701-2865
Telephone: (208) 342-4545
Facsimile: (208) 342-2323
Idaho State Bar No. 2652

ATTORNEYS FOR RESPONDENT

IN THIS DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

In The Matter Of: HAMISH ALLAN BELL, Petitioner, STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent.	Case No. CV OT 0918414 RESPONDENT'S BRIEF

COMES NOW the Respondent, IDAHO TRANSPORTATION DEPARTMENT, by and through its counsel of record, Michael J. Kane of the firm Michael Kane & Associates, PLLC, and hereby submits the Respondent's Brief on review to the above-entitled Court.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

On June 4, 2009, Officer Tucker observed a vehicle driving south on Capitol Blvd., which is a one-way street designated for northbound traffic only. (R. 4-5). Officer Tucker made contact with the driver who identified himself as Petitioner. (R. 5, 61). Petitioner admitted consuming alcohol so

Officer Tucker called Officer White for assistance. (R. 5, 61). Officer White made contact with Petitioner and had him exit the vehicle. (R. 61). Petitioner told Officer White that he had consumed two (2) beers and had stopped drinking about twenty (20) minutes ago. (R. 61). Officer White noticed that Petitioner's eyes were glassy and bloodshot. (R. 61). Officer White then administered the horizontal gaze nystagmus test which Petitioner failed. (R. 5, 61). Petitioner then performed the walk and turn and the one leg stand and failed both tests. (R. 5, 61). Officer White placed Petitioner under arrest for driving under the influence of alcohol and transported him to the Ada County Jail. (R. 5, 61). At the jail, Officer White confirmed that nothing was in Petitioner's mouth and asked Petitioner not to burp, belch or vomit for the next fifteen (15) minutes. (R. 61). Officer White then played the administrative license suspension tape for Petitioner, complied with the fifteen (15) minute observation period and offered Petitioner the Intoxilyzer 5000 (Intox 5000) instrument. (R. 61). Petitioner initially told Officer White that he would not submit to the breath test, but Officer White advised Petitioner that if he refused to take the breath test, a blood sample would be taken from him without his consent if necessary. (R. 61). Petitioner decided to submit to the breath test and provided two breath samples of .154 and .157 (R. 3, 5, 61).

Petitioner requested a hearing as to the administrative license suspension on June 10, 2009. (R. 10). The telephonic hearing was scheduled for June 30, 2009 at 10:00 a.m. (R. 21). In his request for hearing, Petitioner requested subpoenas for audio/video tapes, police reports, logsheets for the Intox 5000 for thirty (30) days prior to the time Petitioner was tested and thirty (30) days after Petitioner was tested, evidentiary test results, the calibration certificate and the "testing officer's certification for the [Intox 5000] used to administer a breath alcohol test to the [Petitioner]." (R. 11). On June 16, 2009, the hearing officer issued subpoenas to the Boise Police Department for the audio/video tapes, police reports, and "instrument operations logsheets for [Intox 5000] for the period of June 3, 2009 through June 6, 2009." (R. 18). These subpoenas had compliance dates of

June 29, 2009. (R. 17, 18). The hearing officer denied Petitioner's "request for the issuance of a subpoena duces tecum for the officer's certification card" because "[t]he probable cause affidavit states that Officer T. White's operator certification is valid until December 2010" and therefore he deemed the certification card "not clearly relevant." (R. 19).

On June 16, 2009, Petitioner requested a continuance of the hearing and reconsideration of the hearing officer's decision regarding the subpoena for the Intox 5000 logsheets. (R. 27). Petitioner claimed that the compliance date on the subpoenas was June 29, 2009 with a hearing date of June 30, 2009, so he needed additional time to review the documents received pursuant to the subpoenas. (R. 27). Regarding the subpoena for the Intox 5000 logsheeets, Petitioner stated that he "specifically requested" the logsheets for thirty (30) days prior to and after his breath test to determine whether the Intox 5000 was properly calibrated. (R. 28). As a result, Petitioner claimed that he "is unable to determine whether the Intoxilyzer machine's calibration was checked in compliance with Idaho law." (R. 28). Thus, Petitioner requested a subpoena for the Intox 5000 logsheets "from May 1, 2009 to the present (with a response date of June 29, 2009, to correspond with the other subpoenas previously issued in this matter)." (R. 28). On June 16, 2009, Respondent issued a Notice of 10 Day Extension of Hearing, rescheduling the hearing for July 9, 2009 at 10:00 a.m. (R. 34).

On July 9, 2009 at approximately 8:57 a.m., Respondent faxed Intox 5000 logsheets to Petitioner for April 28, 2009 through June 6, 2009. At the hearing, Petitioner summarized the procedural matters that had previously occurred. He noted that he first requested a subpoena for the Intox 5000 logs for thirty (30) days prior to his arrest, but that the subpoena actually issued by the hearing officer was for June 3, 2009 through June 6, 2009. *Administrative License Suspension Hearing, July 9, 2009*, p. 5. He further noted that he revised his request, asking for the Intox 5000 logs for the entire month prior to Petitioner's arrest. *Id.* at 6. Petitioner made such a request "so that

we could determine whether standard operating procedures were met with regard to the breath-testing machine this [sic] case." *Id.* Petitioner then stated that the Boise Police Department failed to comply with the subpoena requiring them to produce the Intox 5000 logsheets for June 3, 2009 through June 6, 2000 since he did not receive the logsheets until one (1) hour prior to the hearing. *Id.* at 6-7. Petitioner also noted that the logsheets had no cover letter with them, did not appear to be in response to the subpoena since they went back to April 28, 2009, they failed to provide information regarding when they were received by Respondent, and there was no information as to who produced the logsheets. *Id.* at 7. As a result, Petitioner claimed that since the Boise Police Department failed to comply with the subpoena, his license suspension should be vacated. *Id.* at 7.

The hearing officer declined to vacate the suspension "just based on a Subpoena issued [sic]. That's not one of the exclusive grounds pursuant to Statute that is the basis for vacating of the suspension." *Id.* at p. 8. The hearing officer then offered Petitioner a continuance "due to the delay in providing the logs to you." *Id.* Petitioner claimed to feel "forced" into asking for the continuance so he could "properly review those documents." *Id.* On July 10, 2009, Respondent issued a Notice of Rescheduled Telephone Hearing, rescheduling the hearing for July 23, 2009 at 12:00 p.m. (R. 37).

On July 13, 2009, Petitioner requested additional subpoenas "based on the disputed instrument operation logsheets that were disclosed immediately prior to [Petitioner's] previously scheduled hearing on July 9, 2009." (R. 39). Specifically, Petitioner requested the following subpoenas: (1) Callie Downum, Idaho Transportation Department, requiring her to testify at the hearing as to the source of the Intox 5000 logsheets produced on July 9, 2009; (2) Boise Police Department, for copies of documents "reflecting any and all calibration checks performed from May 1, 2009 to July 13, 2009" on the Intox 5000; (3) Idaho State Police, for copies of "all documents identifying the source of the simulator solution(s) used from May 1, 2009 to July 13, 2009 to check

the calibration of the [Intox 5000] used in this case;" (4) Idaho State Police, for copies of "all documents identifying the source(s) that provided the simulator solution(s) used from May 1, 2009 to July 13, 2009 on the [Intox 5000] in this case is/was an 'approved' provider as required by IDAPA and ISP-SOP." (R. 39, 40). Petitioner requested that Respondent produce copies "of all documents, correspondence, and other information showing when, where and how the instrument operation logsheets disclosed in this matter were received from the Boise Police Department in response to the subpoena served on it...." (R. 40). Petitioner also requested that Respondent produce copies of "all ALS Hearing decisions issued in the last twelve (12) months vacating an administrative driver's license suspension based upon a failure to comply with a subpoena issued by the ITD." (R. 40).

On July 14, 2009, the hearing officer denied Petitioner's request for subpoenas for "Callie Downum-I.T.D., all documents regarding calibration checks, the source of the simulator solutions, I.T.D. correspondence/documents regarding the receipt of the instrument operation logsheets, and twelve (12) months of ALS Hearing decisions" because he deemed them "not clearly relevant in this matter." (R. 43). The hearing officer did provide the Certificate of Analysis for Simulator Solution Lot #8804 and #8101. (R. 42, 43, 100).

On July 23, 2009, the administrative hearing was held. Petitioner reincorporated his argument regarding the subpoena from the July 9th hearing, citing to *In re Gibbar*, 143 Idaho 937, 155 P.3d 1176 (Ct. App. 2007), stating that had he received the information he requested, it "would confirm that noncompliance of the Subpoena is a basis to vacate a suspension." *Administrative License Suspension Hearing, July 23, 2009*, p. 5. Next, he argued that the provider for the simulator solutions for the Intox 5000 was not an approved provider as required by IDAPA 11.03.01.013.05 and Idaho State Police Standard Operating Procedures ("SOP"). *Id.* In support of this argument, Petitioner cited to Exhibit M which demonstrated that RepCo Marketing, Inc. was the provider of

the simulator solutions. *Id.* at 6. He also cited to Exhibit N which was an expired contract between RepCo Marketing, Inc. and Idaho State Police. *Id.* Petitioner further argued that he was not properly informed of the consequences of submitting to evidentiary testing as is required by Idaho Code § 18-8002A(2) because he was incorrectly advised by Officer White as to the law regarding forced blood draws. *Id.* Specifically, Petitioner stated that Idaho law limits forced blood draws to the certain circumstances set forth in Idaho Code § 18-8002(6). *Id.* Since Officer White implied that blood could be drawn from every suspect, Petitioner argued that Idaho Code was violated. *Id.* He also argued that Officer White stated that he would force a paramedic to draw Petitioner's blood which is untrue. *Id.* In addition, Petitioner claimed that Officer White could not use "whatever force he wants to obtain a blood sample" and that "[i]t must be done without unreasonable force." *Id.* at 11. Petitioner also claimed to have submitted to evidentiary testing "through coercion, duress, and harassment, and/or by trickery and deceit, all of which are in violation of the due process clause, which would also invalidate the advisory." *Id.* at 12-13.

Finally, Petitioner argued that the Intox 5000 was not properly calibrated "as required by IDAPA and the standard operating procedures." *Id.* at 16. He cited the following language from IDAPA 11.03.01.013.05: "Each breath-testing instrument shall be checked on a schedule established by the Department for accuracy with the simulator solution provided by the Department or by a source approved by the Department. These checks shall be performed according to a procedure established by the Department." He further stated that the SOPs, section 2.2.3 state that a "two-sample calibration check using a .08 reference solution should be ran and results logged each time the solution is replaced with fresh solution. It also says the .08 reference solution should be replaced with a fresh solution approximately every 100 samples or every month, whichever comes first." *Id.* at 17.

Petitioner pointed out that pursuant to Exhibit R, the Intox 5000 logsheets, the .20 and the .08 solution were calibrated on June 3, 2009. *Id.* Petitioner submitted to the breath test on June 5, 2009. However, Petitioner claimed that "the calibration checks are only significant at all and in compliance if there are subsequent checks." *Id.* He then pointed out that Exhibit F shows that the next calibration check was done on June 25, 2009 by Officer Sperry, but that only the .20 calibration check was completed and not the .08 calibration check. *Id.* at 18. He also said that on Exhibit F is a handwritten note saying "100 tests." Petitioner argued that this is "significant because the only basis to do a calibration check after 100 tests is for the .08 solution, so that's what needed to be done on this date" but Officer Sperry only performed the .20 calibration check. *Id.* He claimed that it is not

> proper for the State to rely upon the June 3rd calibration check, because that's meaningless without a subsequent one that shows that things were presumably operating properly in the meantime. So for whatever reason, the officer did the wrong check. She did the .20 instead of the .08, and based upon that, we would – it's our argument that...the State's records show that it failed to check the calibration of the Intoxilyzer machine as required by IDAPA and the standard operating procedures.

Id. at 19.

On July 23, 2009, a Request for Additional Time for Evidence was issued at the request of Petitioner to permit him to obtain and present additional evidence (the case law in support of his claims). (R. 47). The hearing officer granted Petitioner's request and left the record open for fifteen (15) days, stating that Petitioner's license suspension would not be stayed nor would his temporary permit be extended. (R. 47).

On August 7, 2009, Petitioner supplemented the record and provided case decisions to the hearing officer in support of the arguments made at the administrative hearing. (R. 105-262, 275). On August 18, 2009, Petitioner provided additional supplements to the record. (R. 275-281). Specifically, he provided the State's Motion to Dismiss and Notice of Defendant's Non-Opposition to State's Motion to Dismiss, both documents prepared during Petitioner's criminal prosecution. (R.

275-281). Petitioner argued that these documents contained information "which closely mirrored one of the arguments made before the Hearing Officer" at the administrative hearing. (R. 275).

The hearing officer issued Findings of Fact and Conclusions of Law and Order on September 14, 2009. (R. 232-299). He found that Petitioner's evidentiary test was conducted in accordance with Idaho Code, IDAPA and the SOPs because Officer White properly performed the observation period, he was properly certified to operate the Intox 5000 "as evidenced by his operator certification expiration date of December 2010, and his "sworn statement sets forth that the breath test was performed in compliance with statute and the standards and methods adopted by the Department of Law Enforcement." (R. 292). With respect to whether the Intox 5000 was properly calibrated, the hearing officer found that the acceptable simulator solution check #0006 which was conducted on June 5, 2009 immediately before Petitioner's breath samples, had calibration results of .083 and "approved the evidentiary testing instrument for evidentiary use in accordance with the ISP Standard Operating Procedure." (R. 292). He further found that "both the .08 and .20 solution changes were performed two days prior to [Petitioner's] evidentiary test, thus the solutions were fresh, current and valid." (R. 293). The hearing officer also noted that the SOPs contain no language stating that calibration checks are invalid if there are no subsequent checks. (R. 293).

Regarding whether the simulator solutions were from an approved provider, the hearing officer stated that "[s]ection 2.2.1 of the Standard Operating Procedure sets forth that Intoxilyzer 5000/EN calibration check is run using a 0.08 and/or 0.20 reference solutions provided by the Idaho State Police Forensic Services or approved vendor and following the procedure outlined in the Intoxilyzer 5000/EN manual." (R. 293). He noted that "Exhibit O, the Idaho State Police Forensic Services Certificate of Analysis for simulator solution lot #8804, has approved the 0.08 solution for calibration checks to be run with an expiration date of August 11, 2010, with that Certificate of Analysis issued September 24, 2008." In addition, Exhibit P, the Idaho State Police Forensic

Services Certificate of Analysis for simulator solution lot #8101, "has approved the 0.20 solution for calibration checks to be run with an expiration date of October 7, 2009, with that Certificate of Analysis issued August 12, 2008." (R. 293). As a result, the 0.08 and 0.20 simulator solutions that are used to perform calibration checks "are current and valid for evidentiary testing in the State of Idaho." (R. 293). The hearing officer further stated that "[a] reasonable inference can be drawn that if the Idaho State Police has certified simulator solution lot #'s 8804 and 8101 to be used to conduct calibration checks with respect to breath alcohol examination that it came from an approved provider." (R. 293). Finally, the hearing officer found that Exhibit N, the expired contract between RepCo Marketing, Inc. and the Idaho State Police is insufficient to demonstrate that the solutions "were not certified by an approved provider nor the Idaho State Police." (R. 294).

The hearing officer also found that Petitioner was properly advised of the consequences of submitting to evidentiary testing. In so finding, the hearing officer noted that Officer White's statement that Petitioner had to submit to a breath test or his blood would be drawn was correct based on Idaho's implied consent law. (R. 295). The hearing officer also noted that no blood was drawn, and Officer White did not order anyone to take Petitioner's blood. (R. 295).

With respect to whether Petitioner's due process rights were violated because the hearing officer refused to issue certain subpoenas and other discovery, the hearing officer noted that he is not authorized to vacate a suspension unless one of the reasons listed in Idaho Code § 18-8002A(7) is satisfied. Further, none of the reasons listed in Idaho Code § 18-8002A(7) "have any correlation with discovery issues or the production of the Instrument Operations Log." (R. 296). He also noted that "[t]he State's Response to a Discovery request is separate and apart from any relevant basis for dismissing the suspension in this proceeding, thus it shall not affect the validity of [Petitioner's] suspension outcome." (R. 295). The hearing officer specifically addressed the subpoena regarding the Intox 5000 logs and stated that Petitioner was provided with such logs and even though they

were untimely, Petitioner was granted a continuance to have time to review the documents. (R. 297). Also, since Petitioner's breath test was performed on June 5, 2009, the subpoena for the Intox 5000 logs for June 3, 2009 through June 6, 2009 was sufficient to provide the information Petitioner needed. (R. 297). In addition, the hearing officer stated that the Boise Police Department did timely comply with the subpoena but the documents were misplaced at the Idaho Transportation Department. (R. 297). Further, the hearing officer noted that "[t]he purpose of the Subpoena Duces Tecum is to obtain the requested documents/information and to make that information as a part of the record which was the case in [Petitioner's] Administrative License Suspension hearing, thus any argument regarding timeliness of receipt of the requested information is irrelevant and not grounds for dismissal of the suspension." (R. 297). Consequently, the hearing officer found that Petitioner's due process rights were not violated.

Petitioner filed a Petition for Judicial Review. (R. 300-323).

STANDARD OF REVIEW

"The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." IDAHO CODE § 67-5279(1). The 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

(e) arbitrary, capricious, or an abuse of discretion."

IDAHO CODE § 67-5279(3).

ARGUMENT

Before beginning an analysis of Petitioner's claim, it is important to identify those issues that are properly before a hearing officer in a given case. Idaho Code § 18-8002A(7) lists the five areas to be dealt with by the hearing officer in a hearing on a suspension. These are:

1. Whether the peace officer had legal cause to stop the person;

2. Whether the officer had legal cause to believe the person had been driving under the influence;

3. Whether the test results showed an alcohol concentration in violation of Idaho Code §§ 18-8004, 18-8004C or 18-8006;

4. Whether the test results for alcohol concentration were conducted in accordance with the requirements of Idaho Code § 18-8004(4) or whether the testing equipment was functioning properly when the test was administered; or

5. Whether the person was informed of the consequences of submitting to an evidentiary test.

In all cases, the burden of proof is on the person requesting the hearing to a preponderance of the evidence standard. Indeed, the statute directs the hearing officer not to vacate the suspension unless one of the five aforementioned findings occurs.

Because Petitioner's Brief addresses numerous issues, for ease of review, this Respondent's Brief will address each of the issues as they are set forth in the "Issues Presented on Appeal," pages 8 and 9 of Petitioner's Brief.

1. Did the subpoenas issued by the Hearing Officer violate Mr. Bell's due process rights?

Petitioner claims that the system set up by Respondent is flawed because Respondent issues subpoenas and then orders the recipient to produce documents directly to Respondent.

Then, Respondent provides the documents to Petitioner. Petitioner argues that "under no set of circumstances do the subpoenas ensure that the subpoenaed information will be received by the petitioner until *the day after the compliance date* set by ITD on the subpoena." *Petitioner's Brief*, p. 11. Because the compliance date on the subpoenas issued in this case was June 29, 2009 with a hearing date of 10:00 a.m. on June 30, 2009, Petitioner argues that he had insufficient time to review the information prior to the hearing. As a result, he claims that the subpoenas are unconstitutional and denied him due process.

Petitioner has cited no authority supporting his claim that the subpoenas, or the process regarding subpoenas in administrative license suspension hearings, are unconstitutional. Neither the rules governing administrative license suspensions ("IDAPA") nor Idaho Code provide any time frame to which the subpoenas must adhere, other than the rule stating that witnesses are not required to appear and testify at a hearing unless they are served with a subpoena at least seventy-two (72) hours prior to the hearing. IDAPA 39.02.72.300.02. Other than this specific time frame, there is no other language in the applicable statute or rules requiring subpoenas to comply with time schedules. Regardless, this issue is moot because the hearing officer accepted the claim that Petitioner did not have enough time to review the Intox 5000 logsheets produced in response to the subpoena, so he granted a continuance to permit Petitioner additional time to review the documents. As a result, Petitioner had adequate time to prepare for the hearing regardless of the compliance date set forth in the subpoena.

2. Did the Hearing Officer violate Mr. Bell's due process rights by impermissibly extending the administrative hearing process?

The hearing was first set in this matter for June 30, 2009. It was then rescheduled for July 9, 2009 and then rescheduled again for July 23, 2009 so that Petitioner would have adequate opportunity to review the documents produced by the subpoena. Petitioner points out that Idaho

Code § 18-8002A(7) states that a "hearing shall be held within twenty (20) days of the date the hearing request was received by the department unless this period is, for good cause shown, extended by the hearing officer for one ten (10) day period." Petitioner relies on this language, arguing that the hearing officer impermissibly extended the hearing process beyond the one ten (10) day period set forth in the statute. As a result, Petitioner claims that the hearing officer "was required to vacate the suspension." *Petitioner's Brief*, p. 12-13.

Petitioner can point to no authority providing that vacating a suspension is required if the administrative license suspension hearing is extended for more than ten (10) days. In fact, the hearing officer:

> *shall not* vacate the suspension unless he finds, by preponderance of the evidence, that:
> 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...while under the influence of alcohol...; or
> c. The test results did not show an alcohol concentration... in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
> d. The tests for alcohol concentration...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.

Idaho Code § 18-8002A(7) (emphasis added). Nowhere in this list is there any mention of vacating a license suspension because a hearing is extended beyond ten (10) days. The hearing officer's decision not to vacate the suspension was mandated by Idaho Code because according to the statute, he is not permitted to vacate the suspension for reasons other than those listed above.

As stated above, the hearing officer permitted an additional extension of the hearing so that Petitioner would have time to review the subpoenaed documents. Petitioner complained that he did not have enough time to review the documents for the June 30th hearing and is now complaining that the hearing officer permitted an extension to give Petitioner the time he needed to review the documents. Simply put, Petitioner cannot have it both ways. The hearing officer acted in accordance with Idaho Code in deciding to reschedule the hearing.

Petitioner also argues that pursuant to IDAPA, the hearing officer must issue a written decision "prior to the expiration of the temporary thirty day permit" but did not issue his findings for fifty-three (53) days. As a result, Petitioner argues that his license was suspended for seventy-two (72) days, "well beyond that permitted by statute or the constitutional protections of due process...." *Petitioner's Brief*, p. 13.

IDAPA specifically states that failure to issue a written decision prior to the thirty (30) days "shall not be grounds for staying or vacating the suspension." IDAPA 39.02.72.600.01. In addition, Petitioner fails to mention that the hearing officer agreed to keep the record open for fifteen (15) days after the July 23rd hearing so that Petitioner could submit additional evidence. In fact, Petitioner submitted evidence as late as August 18, 2009. Consequently, the hearing officer could not have even begun to prepare his written findings until August 18, 2009, when he had received all of Petitioner's evidence. The hearing officer's Findings of Fact and Conclusions of Law and Order were issued on September 14, 2009. Taking into account the fact that Petitioner submitted evidence as late as August 18, 2009, Petitioner's claim that the hearing officer took fifty-three (53) days to issue his written findings is misleading. Regardless, as stated in IDAPA, the hearing officer's failure to issue his written decision prior to the thirty (30) days is not grounds for vacating the suspension.

Petitioner further claims that his due process rights were violated since his license was suspended for seventy-two (72) days due to the extension of the hearing and due to the delay of the hearing officer's written findings. An individual's driver's license "may not be taken away without procedural due process." *In re Gibbar*, 143 Idaho 937, 945, 155 P.3d 1176, 1184 (Ct. App. 1991). To determine whether a due process violation exists, three factors must be considered:

> '[F]irst, 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 requirement would entail.'

Id. at 946, 1185 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976)).

With respect to the first factor, Respondent admits that Petitioner's interest in his driver's license is substantial. This is presumably why the hearing officer rescheduled the hearing to permit Petitioner adequate time to review the subpoenaed documents.

However, with respect to the second factor, the risk of erroneous deprivation of his driver's license would not have been decreased if the hearing would have been held sooner or had the hearing officer issued his written findings sooner. As stated by the Ohio Court of Appeals when discussing this factor:

> For a police officer to suspend an individual's driver's license, certain basic steps must be followed. First, the officer must have reasonable and articulable suspicion that a motorist is operating a vehicle in violation of the law to make an initial traffic stop. *Hamilton v. Lawson* (1994), 94 Ohio App.3d 462. If, during that brief detention, the officer develops probable cause to believe the suspect is driving under the influence of alcohol, the officer may place the individual under arrest. *State v. Antill* (1993), 91 Ohio App.3d 589. Next, if the officer requests the individual to submit to a chemical test and the individual either refuses or has an

> alcohol level over the legal limit, R.C. 4511.191 requires the officer to immediately seize and suspend the individual's driver's license. Before the officer requests a chemical test, however, the officer is required to advise the individual of the consequences for refusing to submit to a chemical test or for being found over the legal alcohol level by the test.

State v. Powell, 2006 WL 1851710, (Ct. App. Ohio 2006).

Therefore, "[t]he risk of erroneous observation or deliberate misrepresentation by the reporting police officer of the facts forming the basis for the suspension is insubstantial." *Mackey v. Montrym*, 443 U.S. 1, 2, 99 S.Ct. 2612, 2613, 61 L.Ed.2d 321 (1979). Here, there was reasonable, articulable suspicion that Petitioner was violating traffic laws since he was going the wrong way down a one-way street. Once he made contact with Petitioner, Officer White possessed probable cause to believe that Petitioner was driving under the influence of alcohol. Officer White advised Petitioner of the consequences of submitting to evidentiary testing. Petitioner submitted to a breath test and his results showed that his alcohol concentration was above the legal limit. In light of the statutory safeguards in place and the fact that Officer White complied with these safeguards, the risk that Petitioner's license suspension was erroneous is very small. In addition, the timing of the hearing and the timing of the written findings has no bearing on the actual evidence in the case. The evidence would have been the same regardless.

Finally, there is obviously a compelling interest in keeping Idaho roads safe and free of drunk drivers. "This Court held that the state's strong interest in preventing intoxicated persons from driving and in avoiding overly burdensome procedures outweighed the driver's interest in maintaining his driver's license, even though the driver's interest was substantial." *In re Gibbar*, 143 Idaho at 946, 1185 (discussing *Matter of McNeely*, 119 Idaho 182, 191, 804 P.2d 911, 920 (Ct.App.1990)). This compelling interest, combined with the fact that the risk of erroneous deprivation is very low, justifies Petitioner's license suspension in this case.

3. Did the Hearing Officer violate Mr. Bell's due process rights by refusing to issue subpoenas regarding Officer White's Intox 5000 certification?

Petitioner argues that the hearing officer wrongfully refused to issue subpoenas regarding Officer White's Intox 5000 certification. According to IDAPA, "the hearing officer assigned to the matter *may*, upon written request, issue subpoenas requiring the attendance of witnesses or the production of documentary or tangible evidence at a hearing." *In re Gibbar*, 143 Idaho at 945, 1184 (citing IDAPA 39.02.72.300.01) (emphasis added). Also, a hearing officer "may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds...." Idaho Code § 67-5251(1). The hearing officer has "broad discretion in the extent of discovery that he or she orders." *Id.* Obviously if a hearing officer must comply with every single request for documents, at some point it becomes over burdensome and akin to a "fishing expedition." Here, the hearing officer determined that a subpoena demonstrating that Officer's White was certified to operate the Intox 5000 was irrelevant and unduly repetitious because Officer White's sworn affidavit states that his operator certification expiration date was December 2010. The hearing officer found that this was enough evidence to determine that Officer White was properly certified to operate the Intox 5000. His decision was well within his rights as a hearing officer as set forth in IDAPA and Idaho Code § 67-5251(1).

With respect to Petitioner's claim that the hearing officer's decision violated his due process rights, the same argument discussing the *Mathews v. Eldridge* factors presented above in Issue 2 applies. Petitioner's interest in his driver's license is substantial. However, in light of the statutory safeguards in place and the fact that Officer White complied with these safeguards, the risk that Petitioner's license suspension was erroneous is very small. In addition, the exclusion of documents demonstrating that Officer White was certified on the Intox 5000, especially given that Officer White's sworn statement demonstrated that he was certified at the

time of Petitioner's breath test, has no bearing on the actual evidence in the case. The evidence would have been the same regardless.

Finally, the state has a strong interest in keeping drunk drivers off the roads. The state also has a strong interest "in avoiding overly burdensome procedures." *In re Gibbar*, 143 Idaho at 946, 1185. These strong state interests outweigh "the driver's interest in maintaining his driver's license, even though the driver's interest [is] substantial." *Id.* As a result, the hearing officer's decision did not violate Petitioner's due process rights.

4. Did the Hearing Officer violate Mr. Bell's due process rights by refusing to issue subpoenas regarding calibration checks?

Petitioner argues that he "was entitled to challenge the breath testing results from the Intox 5000 by showing the machine was inaccurate or not functioning properly." *Petitioner's Brief*, p. 14. He then notes that he first requested a subpoena be issued for the Intox 5000 logsheets for thirty (30) days prior to and after Petitioner's arrest (from May 4, 2009 through July 4, 2009). The hearing officer denied Petitioner's request and issued a subpoena for Intox 5000 logsheets for June 3, 2009 through June 6, 2009. After the July 9th hearing, Petitioner requested a subpoena for the Intox 5000 logsheets for May 1, 2009 through July 13, 2009. The hearing officer denied this request. Petitioner claims that "the subpoena issued by the Hearing Officer was insufficient on its face because under no possible set of circumstances would it produce the information to which Mr. Bell was entitled." *Petitioner's Brief*, p. 15.

It is true that Petitioner was entitled to challenge the breath test results by showing the Intox 5000 was inaccurate or not functioning properly. He claims that the subpoena for the logsheets for June 3, 2009 through June 6, 2009 did not provide him adequate information to make such a determination. However, the Intox 5000 logsheets from June 3, 2009 demonstrate that a both a .08 and .20 calibration check were performed on that date. In addition, on July 9, 2009, prior to the

hearing, Respondent faxed Petitioner the Intox 5000 logsheets from April 28, 2009 through June 6, 2009. So, Petitioner's argument that he was entitled to the logsheets for thirty (30) days prior to his breath test is moot because he did receive those documents. Petitioner, in a different issue in his brief, claims that he was also entitled to the logsheets through July 13, 2009 because one (1) calibration check is not enough to demonstrate the Intox 5000 was functioning properly. *Petitioner's Brief*, p. 21. He argues that a subsequent calibration check is necessary to make such a determination. This argument will be discussed in more detail below, but as the hearing officer found, the SOPs contain no language stating that calibration checks are invalid if there are no subsequent checks. In light of the above, it is clear that Petitioner received all the documents necessary to determine whether the Intox 5000 was functioning properly. As a result, his argument that the subpoena issued by the hearing officer was improper is moot.

Furthermore, Petitioner's claim that his due process rights were violated fails, and the same *Mathews v. Eldridge* factors presented above apply. Petitioner's interest in his driver's license is substantial. However, in light of the statutory safeguards in place and the fact that Officer White complied with these safeguards, the risk that Petitioner's license suspension was erroneous is very small. In addition, the exclusion of the Intox 5000 logsheets from June 7, 2009 through July 13, 2009 has absolutely no bearing on the case since the logsheets from that time frame are irrelevant. Finally, the state has a strong interest in keeping drunk drivers off the roads. The state also has a strong interest "in avoiding overly burdensome procedures." *In re Gibbar*, 143 Idaho at 946, 1185. These strong state interests outweigh "the driver's interest in maintaining his driver's license, even though the driver's interest [is] substantial." *Id.* As a result, the hearing officer's decision did not violate Petitioner's due process rights.

5. Did the Hearing Officer err by finding the Boise Police Department complied with ITD's subpoena?

Petitioner admits that the hearing officer has discretion when deciding to admit or exclude evidence. *Petitioner's Brief*, p. 15. But, he claims that "the Hearing Officer cannot *offer* exhibits on behalf of Mr. Bell, regardless of whether that information was obtained pursuant to a subpoena or not." Petitioner takes issue with the hearing officer's decision to admit the "belatedly produced" Intox 5000 loghseets from April 28, 2009 through June 6, 2009 (Exhibit L), claiming that the logsheets "had not been produced in response to ITD's subpoena, but instead, ITD had merely supplied numerous pages of Intoxilyzer logsheets once it became apparent Mr. Bell was going to raise the Boise Police Department's failure to respond to the subpoena as a basis to vacate his suspension." Petitioner further argues that he was entitled to discovery as to the source of those Intox 5000 logsheets since Ms. Downum could not give him that information. Petitioner requested a subpoena for Ms. Downum's testimony as well as any other documents as to the source of the "belatedly produced" Intox 5000 logsheets. The hearing officer denied the subpoena, and in his written findings stated that the Boise Police Department timely complied with the subpoena but that the documents were misplaced by Respondent. Petitioner claims there is no evidence in the record supporting the hearing officer's statements.

First, Petitioner points to no authority stating that the hearing officer was not permitted to admit the Intox 5000 logsheets into evidence. Interestingly, Petitioner has previously argued that the hearing officer violated his due process rights by not issuing a subpoena for Intox 5000 logsheets beyond the June 3rd through June 6th timeframe. Now he argues that his due process rights were violated because the hearing officer admitted logsheets from April 28, 2009 through June 6, 2009, claiming that they are beyond the scope of the subpoena and must not have been produced *in response to* the subpoena. Petitioner argues that "ITD had merely supplied

numerous pages of intoxilyzer logsheets once it became apparent Mr. Bell was going to raise the Boise Police Department's failure to respond to the subpoena as a basis to vacate his suspension." *Petitioner's Brief*, p. 16. This is pure speculation, and the hearing officer specifically stated in his written findings that the Boise Police Department did comply with the subpoena but that the documents were misplaced at the Idaho Transportation Department. Petitioner obviously believes that the hearing officer is not being truthful. There is no reason to believe, and no evidence proving, that the hearing officer is lying.

Regarding Petitioner's argument that he was entitled to discovery as to the source of the Intox 5000 loghseets, as stated above, according to IDAPA, "the hearing officer assigned to the matter *may*, upon written request, issue subpoenas requiring the attendance of witnesses or the production of documentary or tangible evidence at a hearing." *In re Gibbar*, 143 Idaho at 945, 1184 (citing IDAPA 39.02.72.300.01) (emphasis added). Also, a hearing officer "may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds...." Idaho Code § 67-5251(1). The hearing officer has "broad discretion in the extent of discovery that he or she orders." *Id.* Again, if a hearing officer must comply with every single request for documents, at some point it becomes over burdensome and akin to a "fishing expedition."

With respect to Petitioner's claim that the hearing officer's decision violated his due process rights, the same argument discussing the *Mathews v. Eldridge* factors presented above applies. Petitioner's interest in his driver's license is substantial. However, in light of the statutory safeguards in place and the fact that Officer White complied with these safeguards, the risk that Petitioner's license suspension was erroneous is very small. In addition, the exclusion of documents demonstrating the source of the Intox 5000 logsheets has no bearing in this case, especially since the hearing officer stated that the Boise Police Department did comply with the

subpoena. The state has a strong interest "in avoiding overly burdensome procedures" and requiring the hearing officer to permit discovery as to the source of the Intox 5000 logsheets is certainly overly burdensome under these circumstances. *In re Gibbar*, 143 Idaho at 946, 1185. The state also has a strong interest in keeping drunk drivers off the roads. *Id.* These strong state interests outweigh "the driver's interest in maintaining his driver's license, even though the driver's interest [is] substantial." *Id.* As a result, the hearing officer's decision did not violate Petitioner's due process rights.

6. Did the Hearing Officer err in concluding that Mr. Bell's driver's license suspension could not be vacated based upon the Boise Police Department's failure to comply with ITD's subpoenas?

Petitioner argues that the hearing officer's decision to vacate Petitioner's license suspension based on the Boise Police Department's failure to comply with the subpoena violated his due process rights. He also argues that the hearing officer was incorrect in refusing to produce a copy of ALS hearing decisions over the last twelve (12) months that vacated license suspensions based on subpoena noncompliance. In support of this argument, he cites to IDAPA 39.02.72.400.01, stating that he is permitted to request documents from ITD that are public records, which relate to the petitioner hearing, and are in possession of Respondent.

Regarding the hearing officer's refusal to produce twelve (12) months of ALS hearing decisions, IDAPA 39.02.72.400.01 states that "[t]o obtain a photocopy of a document which is public record, *relates to the petitioner hearing*, and is in the possession of the Department, petitioners shall make a written request to the Department." (emphasis added). Clearly other ALS cases do not relate to Petitioner's hearing, so the hearing officer's decision not to produce the documents was proper and well within his authority.

With respect to Petitioner's claim that the hearing officer's decision not to vacate Petitioner's driver's license and not to produce prior ALS decisions violated his due process

rights, the same argument discussing the *Mathews v. Eldridge* factors presented above applies. Petitioner's interest in his driver's license is substantial. However, in light of the statutory safeguards in place and the fact that Officer White complied with these safeguards, the risk that Petitioner's license suspension was erroneous is very small. Finally, the state has a strong interest in keeping drunk drivers off the roads. *In re Gibbar*, 143 Idaho at 946, 1185. This strong state interest outweighs "the driver's interest in maintaining his driver's license, even though the driver's interest [is] substantial." *Id.* As a result, the hearing officer's decision did not violate Petitioner's due process rights.

In addition, as stated above, the hearing officer

> *shall not* vacate the suspension unless he finds, by preponderance of the evidence, that:
> 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...while under the influence of alcohol...; or
> c. The test results did not show an alcohol concentration... in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
> d. The tests for alcohol concentration...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.

Idaho Code § 18-8002A(7) (emphasis added). Nowhere in this list is there any mention of vacating a license suspension due to subpoena noncompliance. As a result, the hearing officer's decision was appropriate.

7. **Did the Hearing Officer err by sustaining Mr. Bell's driver's license suspension when the evidence affirmatively showed the State failed to comply with IDAPA and the Standard Operating Procedures?**

Petitioner claims that "the State failed to comply with both IDAPA and SOP's" with respect to the Intox 5000. *Petitioner's Brief*, p. 20. Specifically, he argues that "Exhibit S, a Calibration Checklist, affirmatively proves that on June 25, 2009, Officer Sperry of the Boise Police Department conducted the 0.20 calibration check, but *did not complete the 0.08 calibration check*." *Petitioner's Brief*, p. 20-21. He also argues that the Calibration Checklist demonstrates that reason the calibration check was done was "'100 tests."' Petitioner states that:

> This is significant for at least three reasons: 1) the purpose of the calibration checks on June 25, 2009 was to perform a 0.08 calibration check; 2) 0.08 calibration checks are required every 100 *samples* – not tests; and 3) by waiting 100 tests, the State had waited *twice as long* to conduct the statutorily required calibration checks because there are two samples in every test.

Petitioner's Brief, p. 21. (footnote omitted).

Petitioner also argues that "the SOPs and IDAPA require both prior and subsequent calibration checks. In fact, IDAPA 11.03.01.013.07 expressly states that failure to perform these required checks is grounds to remove the machine from use." *Id.*

Next, Petitioner argues that the hearing officer erred in relying on Officer White's "boilerplate affidavit" to demonstrate that Petitioner's breath test complied with Idaho law. He claims that "generalized statements in an officer's sworn affidavit are not sufficient when confronted by credible evidence that demonstrates a violation of proper procedures." *Petitioner's Brief*, p. 22. He then claims that the Intox 5000 logsheets and the Calibration Checklist "are credible evidence the Intox 5000 was not maintained in accordance with IDAPA and the SOP's." *Id.*

Petitioner argues that the Intox 5000 logs prove that the State did not comply with IDAPA and the SOPs. In support of his argument, Petitioner points out that "there were 164 samples tested between the 0.08 calibration checks on May 15, 2009 and June 3, 2009. Accordingly, Exhibit L – which was relied upon by the hearing officer – proves the State failed to comply with IDAPA and the SOP's." *Petitioner's Brief*, p. 22.

With respect to Petitioner's argument regarding Exhibit S, the Calibration Checklist, Respondent submits that it is irrelevant. All this document shows is that on June 25, 2009, Officer Sperry conducted a calibration check and that a handwritten note on the document says "100 tests." Petitioner argues that this document with the note is important because "1) the purpose of the calibration checks on June 25, 2009 was to perform a 0.08 calibration check." Respondent fails to see how Petitioner knows for certain that the purpose of the calibration check on June 25, 2009 was to perform a 0.08 calibration check. In fact, it would seem that because the Calibration Checklist consists of information relating to only a 0.20 calibration check, its purpose may not have been to perform a 0.08 calibration check. Petitioner then argues that the Calibration Checklist is important because "2) 0.08 calibration checks are required every 100 *samples*-not tests." Respondent agrees that pursuant to the language of the SOP's, 0.08 calibration checks are required every 100 samples. However, a handwritten note on the Calibration Checklist that says "100 tests" is not conclusive evidence that the State waited twice as long to conduct the required calibration checks. It is unknown why Officer Sperry wrote "100 tests" or why she failed to fill calibration check results for the 0.08 solution. Frankly, it does not matter. The Intox 5000 logs demonstrate that a calibration check was performed on June 3, 2009 – two (2) days prior to Petitioner's breath test. Contrary to Petitioner's claim, there is nothing in either the SOPS or IDAPA that requires a subsequent calibration check. Consequently, arguing over the Calibration Checklist from June 25, 2009 is ridiculous because it has no bearing on this

case. Petitioner notes that the hearing officer did not acknowledge the Calibration Checklist in his written findings. Perhaps the hearing officer did not acknowledge the Calibration Checklist because he found it irrelevant. In light of the above, it is easy to see why the hearing officer did not acknowledge it or address it in his written findings – because it does provide any useful information to this case.

With respect to Petitioner's argument that the hearing officer improperly relied on Officer White's boilerplate affidavit to demonstrate that his breath test complied with Idaho law, this is simply not the case. The hearing officer did rely on Officer White's affidavit, but also relied on the Intox 5000 logs which demonstrated that a calibration check was performed just two (2) days before Petitioner submitted to a breath test.

Petitioner also claims that the Intox 5000 logs prove that the State did not comply with IDAPA and the SOPs because there were 164 samples tested between 0.08 calibration checks on May 15, 2009 and June 3, 2009. The SOPs state that:

> A two sample calibration check using a **0.08 reference solution** should be ran and results logged each time a solution is replaced with fresh solution. A 0.08 reference solution should be replaced with fresh solution approximately every 100 samples or every month, whichever comes first.

SOPs, 2.2.3. What happened between May 15, 2009 and June 3, 2009 does not matter for purposes of this case. Again, a calibration check was performed on June 3, 2009 and Petitioner submitted to a breath test on June 5, 2009. The fact that 164 samples were tested at one point with no calibration check is irrelevant to Petitioner. If he is arguing that a breath testing machine should never be used again because a calibration check was not done in accordance with the SOPs at some point in the past, that argument is absurd. In this case, the calibration check was performed two (2) days prior to Petitioner's breath test which demonstrates the State's compliance with IDAPA and the SOPs.

8. **Did the Hearing Officer err in sustaining Mr. Bell's driver's license suspension when the evidence affirmatively showed the State's adopted procedures do not ensure accuracy and proper functioning of the breath testing device?**

Petitioner claims that "if the Hearing Officer was correct, and there is no requirement to perform prior and subsequent calibration checks, the 'standards' themselves are therefore illusory, and do not ensure accuracy and proper functioning." *Petitioner's Brief*, p. 23. As stated above, the SOPs do contain a requirement to perform calibration checks to ensure accuracy and proper functioning of breath testing equipment. Simply because no *subsequent* calibration check is mandated by the SOPs does not mean that the SOPS are illusory. Petitioner fails to provide any authority whatsoever supporting this argument.

9. **Did the Hearing Officer err by sustaining Mr. Bell's driver's license suspension when the evidence affirmatively showed the provider of the simulator solutions was not an "approved" provider as required by IDAPA and the Standard Operating Procedures?**

Petitioner claims that both IDAPA and the SOPs require "that the simulator solutions used in the calibration checks be 'provided by the department or by a source approved by the department.'" *Petitioner's Brief*, p. 24 (quoting IDAPA 11.03.01.013.05). Petitioner requested the hearing officer issue a subpoena for documents that would identify "the source of the simulator solution(s) used from May 1, 2009 to July 13, 2009 to check the calibration of the breath-alcohol testing device used in this case." *Petitioner's Brief*, p. 25. He claims that the hearing officer's denial of this subpoena violated his due process rights.

Petitioner also argues at length that because there is no current contract between the Idaho State Police and RepCo Marketing, Inc., the purported provider of the simulator solutions, that RepCo Marketing, Inc. is not an "approved" provider pursuant to IDAPA and the SOPs.

As stated above, the hearing officer found that "[s]ection 2.2.1 of the Standard Operating Procedure sets forth that Intoxilyzer 5000/EN calibration check is run using a 0.08 and/or 0.20

reference solutions provided by the Idaho State Police Forensic Services or approved vendor and following the procedure outlined in the Intoxilyzer 5000/EN manual." (R. 293). He notes that "Exhibit O, the Idaho State Police Forensic Services Certificate of Analysis for simulator solution lot #8804, has approved the 0.08 solution for calibration checks to be run with an expiration date of August 11, 2010, with that Certificate of Analysis issued September 24, 2008." In addition, Exhibit P, the Idaho State Police Forensic Services Certificate of Analysis for simulator solution lot #8101, has approved the 0.20 solution for calibration checks to be run with an expiration date of October 7, 2009, with that Certificate of Analysis issued August 12, 2008." (R. 293). As a result, the 0.08 and 0.20 simulator solutions that are used to perform calibration checks "are current and valid for evidentiary testing in the State of Idaho." (R. 293). The hearing officer further stated that "[a] reasonable inference can be drawn that if the Idaho State Police has certified simulator solution lot #'s 8804 and 8101 to be used to conduct calibration checks with respect to breath alcohol examination that it came from an approved provider." (R. 293). Finally, the hearing officer found that Exhibit N, the expired contract between RepCo Marketing, Inc. and the Idaho State Police is insufficient to demonstrate that the solutions "were not certified by an approved provider nor the Idaho State Police." (R. 294). The hearing officer adequately refuted Petitioner's argument. His decision thoroughly demonstrates that the simulator solutions used in this case were from an approved provider. Petitioner's argument fails because his entire argument hinges on the fact that no current contract exists between RepCo Marketing, Inc. and the Idaho State Police. There is no requirement in IDAPA or the SOPs that a contract must exist in order for the source of the simulator solution to be an approved provider. Thus, the hearing officer correctly concluded that the source of the simulator solutions was an approved provider.

As has already been stated many times, with respect to Petitioner's claim that the hearing officer's decision not to issue a subpoena for documents identifying the source of the simulator

solutions was in violation of his due process rights, the same argument discussing the *Mathews v. Eldridge* factors presented above applies. Petitioner's interest in his driver's license is substantial. However, in light of the statutory safeguards in place and the fact that Officer White complied with these safeguards, the risk that Petitioner's license suspension was erroneous is very small. Finally, the state has a strong interest in keeping drunk drivers off the roads. *In re Gibbar*, 143 Idaho at 946, 1185. This strong state interest outweighs "the driver's interest in maintaining his driver's license, even though the driver's interest [is] substantial." *Id.* As a result, the hearing officer's decision did not violate Petitioner's due process rights.

10. Did the Hearing Officer err by sustaining Mr. Bell's driver's license suspension when the evidence affirmatively showed Officer White failed to properly inform Mr. Bell of the consequences of submitting to evidentiary testing?

Petitioner argues that he was not properly advised of the consequences of submitting to evidentiary testing pursuant to Idaho Code § 18-8002A(2). In support of his argument, he cites to the audio recording of his conversation with Officer White regarding whether he could be forced to have his blood drawn if he did not provide a breath sample.

In essence, Petitioner argues that the information provided by Officer White regarding forced blood draws was untrue and inconsistent with Idaho law. He claims that a forced blood draw cannot be obtained in every DUI case, including misdemeanor DUI cases. He also claims that, contrary to Officer White's representations, blood draws cannot be obtained in every situation, such as where the suspect is afraid of needles. As a result, he claims that "Officer White's representations that no limitations existed were false." *Petitioner's Brief*, p. 31.

Petitioner then argues that "the State cannot *order* a paramedic or any other medical professional to conduct a forced blood draw in a misdemeanor DUI investigation." *Petitioner's*

Brief, p. 32 (citing *State v. Diaz*, 144 Idaho 300, 303-04 160 P.3d 739, 742-43 (2007)). He claims this is contrary to what Officer White represented.

Petitioner also argues that "the State cannot use whatever force it wants in order to obtain a blood sample" because reasonable force is required. *Petitioner's Brief*, p. 32 (citing *Schmerber v. California*, 384 U.S. 757, 768 (1966); *Diaz*, 144 Idaho at 303, 160 P.3d at 742)). Consequently, Petitioner claims that "Officer White's representations that he and his fellow officers could use whatever force they wanted, up to and including a 'fist fight,' is clearly contrary to the law." *Id.*

Petitioner argues that "the State cannot force every single person arrested for misdemeanor DUI to submit to breath or blood testing." He claims that Officer White's statement that "the 'blood draw would be taken from him without his consent if need be"' is untrue and outside the scope of *Diaz*.

Finally, Petitioner argues that because Officer White misstated the law, told him that he must take the test, that his refusal would be met with force including a fist fight if necessary, Officer White used "coercive tactics," trickery and deceit, which "nullified the audio advisory." *Petitioner's Brief*, p. 34.

In Idaho, any person who operates a motor vehicle within the State is "deemed to have given his consent to evidentiary testing for concentration of alcohol" in instances where "a peace officer [has] reasonable grounds to believe that person has been driving or in actual physical control of a motor vehicle in violation of the provision of section 18-8004." IDAHO CODE § 18-8002(1). A person who is required to submit to chemical testing under § 18-8002(1) "shall be informed that if he refuses to submit to or if he fails to complete, evidentiary testing" he is subject to a civil penalty and his driver's license will be seized. IDAHO CODE § 18-8002(3)(a), (5). The Idaho Supreme Court has expressly held that there is no statutory right of refusal. *State*

v. Woolery, 116 Idaho 368, 775 P.2d 1210 (1989). It has further reiterated that the implied consent statute includes consent to blood draws. *State v. Diaz*, 144 Idaho 300 (2007).

In *Woolery*, the court began its analysis by reviewing *Schmerber v. California*, 384 U.S. 757 (1966). The Court in *Schmerber* held that a warrantless procedure was reasonable and permissible under the Fourth Amendment, since a delay to obtain a warrant would threaten the destruction of the evidence. 384 U.S. at 1834-1836. The *Woolery* court, following *Schmerber*, held that "the destruction of the evidence by metabolism of alcohol in the blood provides an inherent exigency which justifies the warrantless search." 116 Idaho at 370. The court went on to note that, prior to the enactment of Idaho Code § 18-8002, courts held that there was no constitutional right to refuse to take a blood alcohol test. In enacting the implied consent law, the legislature "has acknowledged a driver's *physical ability to refuse* to submit to an evidentiary test, but it did not create a *statutory right* for a driver to withdraw his previously given consent to an evidentiary test for concentration of alcohol, drugs or other intoxicating substances." *Id.* at 372 (emphasis in original). The statute itself was part of a legislative "get tough" policy in DUI cases. In enacting the statute, the legislature had left out a provision of the prior law, which stated that when a person refused to take the test, no test would be given. *Id.* at 372. The court went on to hold that the results of the blood test were not subject to suppression, even though the officer had not followed the procedures set forth in Idaho Code § 18-8002:

> The Idaho Legislature has not created a statutory right to refuse to submit to an evidentiary test to determine a driver's blood alcohol level. It is difficult to believe that the Idaho Legislature would provide an individual with the statutory right to prevent the state from obtaining highly relevant evidence when a law enforcement officer has reasonable cause to believe that individual has committed a crime - whether it would be driving under the influence, vehicular manslaughter, sale of controlled substances, or murder. If the driver's constitutional right to be free from unreasonable searches and seizures is complied with, the state should not be prevented from obtaining such relevant evidence as the alcohol content of the driver's blood.

Id. at 373; *see State v. McCormack*, 117 Idaho 1009, 1014, 793 P.2d 682, 687 (1990) ("Although under I.C. § 18-8002(3) a driver has the physical ability to refuse to submit to an evidentiary test, that section did not create a statutory right in a driver to withdraw his implied consent or to refuse to submit to an evidentiary test to determine his blood alcohol level.").

In this case, Officer White had probable cause to arrest Petitioner for suspicion of driving under the influence. By choosing to operate a motor vehicle in Idaho, Petitioner impliedly consented to submit to chemical testing to determine whether he was operating his vehicle while under the influence of alcohol. Officer White informed Petitioner of the penalties for refusing to submit to evidentiary testing, and after Petitioner refused, he informed Petitioner that if he didn't provide a breath sample he would have someone take his blood. Petitioner asked Officer White if he could force him to provide a blood sample, and Officer White told him that he could pursuant to Idaho law. Officer White informed Petitioner that he had no right to refuse the blood draw, and that he'd put him in a chair if necessary to obtain his blood. Based on the law set forth above, Officer White's representations were correct. Contrary to Petitioner's assertions, he had no right to refuse to submit to evidentiary testing. Further, Petitioner's argument that a forced blood draw cannot be obtained in misdemeanor DUI cases is false, as has been demonstrated by numerous case law. *See, e.g., State v. Turner*, 94 Idaho 548, 494 P.2d 146 (1972); *State v. Cooper,* 136 Idaho 697, 701, 39 P.3d 637, 641 (Ct. App. 2001); *State v. Curtis*, 106 Idaho 483, 489, 680 P.2d 1383, 1389 (Ct. App. 1984) (citing *Turner* and *Schmerber*); *see also Halen v. State*, 136 Idaho 829, 834, 41 P.3d 257, 262 (2002) (in deciding whether Halen had sufficient cause for refusal to submit to a BAC test, the Court noted "an officer's authority to require a defendant to submit to a blood withdrawal, under I.C. § 18-8002, does not turn on whether

aggravating factors are present" and thereby implicitly rejected the notion that a forced blood draw in "routine" DUI cases is inappropriate).

Petitioner seems to think that Officer White was required to inform Petitioner of every single aspect related to the law of forced blood draws. For example, he states that Officer White did not inform Petitioner that forced blood draws cannot be obtained in situations where a suspect has a fear of needles. Officer White adequately and correctly advised Petitioner that he was required to submit to evidentiary testing and that his blood would be taken if he refused to provide a breath sample. He did not have to provide Petitioner with a lesson in all relevant case law with respect to forced blood draws.

Petitioner also argues that "the State cannot *order* a paramedic or any other medical professional to conduct a forced blood draw in a misdemeanor DUI investigation." As stated in Petitioner's Brief, Officer White said, "Well if you don't take this then I am going to have to call someone to come take your blood...If you don't take this breath test I am going to call a paramedic down and take your blood." *Petitioner's Brief*, p. 28-29. Respondent fails to see how this argument is even relevant since Officer White did not tell Petitioner that he would order a paramedic to draw his blood. And obviously since there was never a blood draw in this case, Officer White did not order a paramedic to take his blood.

Next, Petitioner argues that the State must use reasonable force to obtain a blood sample. The portion of the conversation between Officer White and Petitioner that is the subject of this argument began with Petitioner stating, "So, if I fought as hard as I could, you'd lock me up - lock me into it and take blood?" Officer White stated, "you got it." *Petitioner's Brief*, p. 31. Petitioner then stated, "I'm not into a fist fight tonight" and Officer White said, "Good. Either am I." *Id.*

Idaho courts have clearly read the implied consent statute to include consent to forced blood draws and to mean that there is no right to refuse a blood test, even though it is possible to *physically* refuse. If an individual can physically refuse, but pursuant to Idaho law they have no right to withdraw their previously given consent to submit to evidentiary testing, how else is a suspect's blood alcohol content to be determined? An individual can physically refuse to blow into a breath testing machine and an officer cannot force that person to do so. However, a person can be forced to submit to a blood draw to determine his blood alcohol content. In circumstances like Petitioner's, a forced blood draw is the only way to make such a determination and it is clearly permitted under Idaho's implied consent statute.

Petitioner is correct that a blood draw must be reasonable. To be reasonable under the Fourth Amendment, "the procedure must be done in a medically acceptable manner and without unreasonable force." *Diaz*, at 301. The United States Supreme Court has held that whether a particular use of force in the course of a seizure is appropriate under the Fourth Amendment depends on "whether the officers' actions [were] 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). The reasonableness inquiry involves attention to the circumstances of the police action, which are often uncertain, rapidly evolving, and possibly posing an immediate threat to the safety of the officers or others. *Id.* at 396. Further, the reasonableness of the force used by the police is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

In this case, Officer White's response to Petitioner's question about whether he would be locked up and his blood drawn even if he fought as hard as he could did not indicate that unnecessary force would be used or that unnecessary force is acceptable during forced blood

draws. In fact, Officer White's statement that Petitioner would be locked up if he fought the blood draw is consistent with Idaho law. In *State v. Worthington*, court of appeals stated that:

> Worthington refused to perform any field sobriety tests and informed the arresting officer that he would not submit to any procedures to determine the alcohol content of his blood or breath. Instead, he told the arresting officer "that if [the officer] was going to get blood out of him, that [the officer] was going to have to fight him." Two other officers thereafter transported Worthington to the Gooding Hospital to have his blood drawn for testing. No warrant had been issued authorizing the procedure.
>
> At the hospital, Worthington became very combative. Three police officers and two nurses held him onto a table so that a laboratory technician could draw his blood. During this process, Worthington was handcuffed with a belly restraint. The blood was taken from Worthington's ankle because the technician could not find a usable vein in either of his arms.

State v. Worthington, 138 Idaho 470, 471-472, 65 P.3d 211, 212-213 (Ct.App. 2002). Despite the fact that it took three police officers, two nurses, and a belly restraint to draw blood from Worthington, the Idaho Court of Appeals concluded that the forced blood draw (and test results) were reasonably obtained under the Fourth Amendment. Based on *Worthington*, clearly Officer White's statement to Petitioner regarding the force that could be used to obtain his blood is supported by Idaho law.

Finally, Petitioner's argument that the audio advisory was nullified because Officer White used "coercive tactics, trickery and deceit" when he said that Petitioner's refusal "would be met with force including a fist fight if necessary" is incorrect. The Idaho Supreme Court has held that police officer's use of subterfuge and trickery to gain a suspect's compliance is a reasonable and acceptable tool that does not violate a suspect's rights. *State v. Bentley,* 132 Idaho 497, 975 P.2d 785 (1999). The United States Supreme Court stated that "[c]riminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer." *Sherman v. United States,* 356 U.S. 369, 372, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). It is

also noteworthy that the use of trickery and subterfuge by police has been approved in a number of circumstances. *See Frazier v. Cupp,* 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) (holding that an officer's lie to the defendant that his co-conspirator had confessed was insufficient to make an otherwise voluntary confession inadmissible); *Lewis v. United States,* 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966) (finding no violation of defendant's privacy when a policeman lied about his identity in order to gain admittance to defendant's home and purchase illegal drugs); *United States v. Contreras-Ceballos,* 999 F.2d 432 (9th Cir.1993) (holding that where police used deception to induce an occupant to open the door, the knock and announce statute was not implicated); *Leahy v. United States,* 272 F.2d 487 (9th Cir.1960) (upholding the validity of an arrest made after an agent gained admittance to the appellant's premises by stating that he was an agent from the County Assessor's Office); *United States v. Salter,* 815 F.2d 1150 (7th Cir.1987) (holding police action in inducing defendant to open door by means of a ruse did not constitute intrusion within meaning of knock and announce statute).

Officer White did not use coercive tactics, trickery or deceit because his statements to Petitioner were true and in accordance with Idaho law. However, even assuming Officer White did engage in such conduct, as stated above, trickery and subterfuge are reasonable and lawful actions.

11. Did the Hearing Officer err by relying on Officer White's affidavit when the State was in actual or constructive knowledge that Officer White had been deemed unreliable by the Boise Police Department?

Petitioner argues that prior to the hearing, Officer White "was found to have made false statements during an internal investigation and was terminated from the Boise Police Department." *Petitioner's Brief*, p. 36. Petitioner also notes that prosecutors "representing the State of Idaho" knew of this information. Consequently, Petitioner claims that "ITD, a political subdivision of the State of Idaho, had actual or constructive knowledge of these facts." *Id.* He

claims that the hearing officer should have considered this information and should have informed Petitioner "that Officer White had been found to have made false statements in the past." *Id.* As a result, Petitioner argues that "he was prevented from raising this issue before the Hearing Officer." *Id.* Therefore, Petitioner claims that:

> The Hearing Officer, by relying upon Mr. White's affidavit when the State was in constructive knowledge of his veracity issues, violated Mr. Bell's right to due process and rendered a decision which exceeded statutory authority, was made upon unlawful procedure, was not supported by substantial evidence in the record, and was arbitrary, capricious, and an abuse of discretion.

Petitioner's Brief, p. 37.

First, Petitioner's argument that Respondent had constructive notice of the information regarding Officer White is a stretch. The Idaho Transportation Department is not a criminal division of the State of Idaho. It is not even located in the same building as the prosecutor's office. To impute prosecutors' knowledge to Respondent is outrageous and there is absolutely no reason to conclude that Respondent should know the facts of all cases being handled at the prosecutor's office.

Because Respondent did not have constructive knowledge, it cannot be argued that the hearing officer wrongfully withheld the information from Petitioner and that his decision was otherwise improper. In addition, Petitioner's due process rights were not violated. As repeatedly stated above, Petitioner's interest in his driver's license is substantial, but the risk that Officer White lied about the facts of Petitioner's arrest is very small. Also, the state has a strong interest in keeping drunk drivers off the roads, which outweigh "the driver's interest in maintaining his driver's license, even though the driver's interest [is] substantial." *In re Gibbar*, 143 Idaho at 946, 1185.

CONCLUSION

For these reasons, it is respectfully submitted that this Court should affirm the findings of the hearing officer and leave the suspension of Petitioner undisturbed.

DATED this 15 day of January, 2010.

MICHAEL KANE & ASSOCIATES, PLLC

BY: _____
MICHAEL J. KANE
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of January, 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Mr. Dean B. Arnold
Law Offices of Dean B. Arnold
300 W. Main Street, Suite 250, Office 202
Boise, ID 83702
[Facsimile: #342-3777]

✓ U.S. Mail
_____ Hand Delivery
_____ Overnight Mail
_____ Facsimile

_____
MICHAEL J. KANE

Dean B. Arnold, ISB #6814
Law Offices of Dean B. Arnold
300 W. Main St., Suite 250, Office 202
Boise, Idaho 83702
Telephone: (208) 342-1575
Facsimile: (208) 342-3777

Attorneys for Defendant Hamish Bell

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

IN THE MATTER OF THE DRIVING PRIVILEGES OF:	)	Case No. CV-OT-2009-0018414
HAMISH ALLAN BELL	)	**MOTION TO AUGMENT**

COMES NOW, the above-named Petitioner, Hamish Allan Bell, by and through his attorneys of record, Law Offices of Dean B. Arnold, and moves this Court pursuant to Idaho Appellate Rule 30, for an order augmenting the record in the above-entitled appeal with:

A copy of the following documents submitted by Mr. Bell's counsel to Respondent, State of Idaho Department of Transportation, during the administrative hearing process:

1. E-mail dated July 23, 2009, from attorney Dean B. Arnold to ITD Hearing Officer Dave Baumann.
2. E-mail dated August 7, 2009, from attorney Dean B. Arnold to ITD Hearing Officer Dave Baumann.

The specific grounds for the request are as follows:

Respondent, in Respondent's Brief, seeks to attribute certain delays to Mr. Bell. The above e-mails are evidence that Respondent's contentions are incorrect. Although most of the documents attached to the above e-mails were made part of the Agency Record, Respondent failed to include the corresponding e-mails as part of the record.

Undersigned counsel apologizes to the Court for failing to recognize their absence previously, but given the rather disorganized Agency Record that was submitted by Respondent, hopes the Court understands this oversight. Moreover, Mr. Bell did not anticipate an argument by Respondent that is contrary to the facts as known by Respondent.

In any event, the Agency Record should be augmented with the above-listed documents so that Mr. Bell can refute a factual allegation asserted by Respondent which is demonstrably false.

True and correct copies of the above e-mails are attached hereto.

DATED this 28th day of January, 2010.

Law Offices of Dean B. Arnold

By: _____
Dean B. Arnold

Dean B. Arnold

From: Dean B. Arnold [dean@deanarnoldlaw.com]
Sent: Thursday, July 23, 2009 2:32 PM
To: 'dave.baumann@itd.idaho.gov'
Subject: Hamish Bell
Attachments: In re Schroeder; State v. Jaborra; State v. Garcia; Florida v. Bostick; State v. Woolery; Schnekloth v. Bustamonte; Schmerber v. California; State v. Diaz; In re Beem; In re Virgil; In re Griffiths; In re Gibbar

Mr. Baumann,

Attached are the case decisions cited to today in my argument on behalf of Hamish Bell, File No. 807001277034. If you need anything else, please let me know.

Regards,

Dean

Dean B. Arnold | Law Offices of Dean B. Arnold
300 W. Main St., Suite 250, Office 202
Boise, Idaho 83702
Tel: 208.342.1575 | Fax: 208.342.3777
Email: dean@deanarnoldlaw.com

Dean B. Arnold

From: Dean B. Arnold [dean@deanarnoldlaw.com]
Sent: Friday, August 07, 2009 2:25 PM
To: 'dave.baumann@itd.idaho.gov'
Subject: In re Hamish Bell
Attachments: Bell - Memo in Supp Mot to Suppress.pdf; Jaborra.doc; Schroeder.doc; DeWitt.doc; Harmon.doc; Gibbar.doc; Virgil.doc; Griffiths.doc; Beem.doc; Diaz.doc; Schmerber.doc; Schneckloth.doc; Woolery.doc; Bostick.doc; Garcia.doc

Mr. Baumann,

In response to the request I received from your office this week, I have attached the case decisions cited to during the ALS Hearing of Hamish Bell on July 23, 2009, with pertinent sections highlighted. I have included two case decisions (DeWitt and Harmon) that were not attached to my previous email, dated July 23, 2009. With the exception of the highlighting, the remaining twelve decisions are the same as the previous email.

I have also attached a copy of a similar brief filed in the corresponding criminal case. Although the arguments are slightly different, I hope the underlying facts and relevant case law will be of assistance.

If there is anything further we can do to help, please let me know.

Regards,

Dean

Dean B. Arnold | Law Offices of Dean B. Arnold 300 W. Main St., Suite 250, Office 202 Boise, Idaho 83702
Tel: 208.342.1575 | Fax: 208.342.3777
Email: dean@deanarnoldlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael Kane & Associates, PLLC
P.O. Box 2865
Boise, ID 83701-2865

- [x] U.S. Mail
- [ ] Hand Delivered
- [ ] Overnight Mail
- [ ] Telecopy (Fax)

Dean B. Arnold

for Law Offices of Dean B. Arnold

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IN THE MATTER OF THE DRIVING PRIVILEGES OF:	)	
HAMISH ALLAN BELL	)	Case No. CV-OT-2009-0018414

PETITIONER'S REPLY BRIEF

JUDICIAL REVIEW FROM THE STATE OF IDAHO,
DEPARTMENT OF TRANSPORTATION

HONORABLE KATHRYN A. STICKLEN
Senior District Judge

Dean B. Arnold, ISB #6814
Law Offices of Dean B. Arnold
300 W. Main St., Suite 250, Office 202
Boise, Idaho 83702
Telephone: (208) 342-1575
Facsimile: (208) 342-3777

Attorney for Petitioner

Michael J. Kane, ISB #2652
Michael Kane & Associates, PLLC
P.O. Box 2865
Boise, Idaho 83701-2865
Telephone: (208) 342-4545
Fax: (208) 342-2323

Attorney for Respondent

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATE STATUTES

Mr. Bell, through his counsel of record, replies to the Respondent's Brief as follows:

II. ARGUMENT

A. The Hearing Officer Is Required to Ensure Driver's Are Afforded Due Process.

Respondent contends that because Idaho Code § 18-8002A(7) does not specifically list due process violations as a basis to vacate a suspension, the Hearing Officer is precluded from doing so. (Respondent's Brief at 11 & 13.) This is not the law. No state is permitted to statutorily circumvent the constitutional guarantees of due process, and there is nothing in the Idaho Code that says the legislature even attempted to remove these protections when it enacted the administrative license suspension statutes.

In fact, the Idaho Court of Appeals has stated, in no uncertain terms, "the hearing officer's discretionary decision must comply with the procedural due process guarantees of the United States and Idaho Constitutions." *In re Gibbar,* 143 Idaho 937, 945, 155 P.3d 1176, 1184 (Ct. App. 2006). Similarly, "driver's licenses may not be taken away without procedural due process." *Id., citing Dixon v. Love,* 431 U.S. 105, 112 (1971). Respondent's argument is nothing more than a regurgitation of the Hearing Officer's supposed justification not to address any of the procedural errors raised by Mr. Hull—*that due process is not expressly listed in I.C. 18-802A(7).*

However, Respondent's argument is interesting because it is an apparent

admission by the State that no due process protections exist at the administrative level, as such can only apparently be addressed on judicial review months after the suspension has gone into effect. If the State's argument was true, there would be no doubt such a system is unconstitutional as it would limit due process only to those financially capable of filing a petition for judicial review, and in the end, render the due process protections essentially meaningless as the suspension for most driver's would nearly be complete by the time they could even seek a stay of their driver's license suspension.

For example, Mr. Bell's suspension was in effect for 72 days before even receiving the Hearing Officer's decision. (Petitioner's Brief at 8 & 13.) For those facing the standard 90-day suspension, *see* I.C. § 18-8002A(2)(d), Respondent's position facially denies those driver's any due process rights because, as stated by the United States Supreme Court, the state "will not be able to make a driver whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through post-suspension review procedures." *Mackey v. Montrym,* 443 U.S. 1, 11 (1979).

Regardless, it is indisputable that this Court is empowered to address due process violations. *See, e.g., In re Gibbar,* 143 Idaho at 945-950, 155 P.3d at 1184-1189. And Mr. Bell is asking the Court to review the entirety of the process afforded him to determine whether it complied with due process.

B. The Subpoenas Issued By the Hearing Officer Facially Denied Due Process.

Respondent does not dispute the Hearing Officer issued subpoenas that allowed

the law enforcement agencies to respond to them in a manner that would deny Mr. Bell sufficient time to review and analyze the information. Nor does Respondent deny that pursuant to the subpoenas the physical items—such as compact discs of the audio recordings—would not be provided to Mr. Bell until after the hearing. Instead, Respondent claims nothing in Idaho Code or IDAPA requires Respondent to provide this information to Mr. Bell in advance of the hearing. (Respondent's Brief at 12.)

Once again, the mere absence of a statutory requirement does not exempt Respondent from the due process requirements of the United States and Idaho constitutions. Regardless, the Court of Appeals provided us some insight on this issue in *In re Gibbar* when it found the discovery process constitutionally sufficient because it had "enabled Gibbar to receive, *a few days in advance of the hearing,* the log for the breath testing instrument used in this case as well as all materials forwarded to the ITD by the Clearwater County Sheriff's Office...." 143 Idaho at 948, 155 P.3d at 1187 (emphasis added).

Unlike Mr. Gibbar, the timeframe for discovery in Mr. Bell's case was *not* "long enough to provide him with discovery responses in sufficient time that he could utilize them for the hearing." *Id.* Accordingly, subpoenas which permit disclosure of documentary evidence only hours before the hearing, and actually permit disclosure of audio recordings after the hearing has occurred, are the definition of unconstitutional.

C. The Hearing Officer Had No Authority to Extend the Hearing Process.

Respondent—apparently realizing the above problems with the subpoenas are

significant—next contends the Hearing Officer corrected the above situation by forcing Mr. Bell to choose between proceeding without an opportunity to review the documents or continuing the hearing until another date. (Respondent's Brief at 13.) However, Respondent also recognizes the Hearing Officer is statutorily limited to only one 10-day extension, which had been previously used by the Hearing Officer on July 9, 2009. *Id.* Seemingly cornered on this issue, Respondent seeks to circumvent the statute by arguing there is no legal authority that a license suspension must be vacated if the Hearing Officer extends the hearing for more than 10 days. Respondent either misses the point or is attempting to divert the Court from the real issue.

The Hearing Officer did not have authority to extend the hearing past July 9, 2009, because he had previously used the one 10-day extension permitted by I.C. § 18-8002A(7). However, on that same date, the Hearing Officer acknowledged Mr. Bell had insufficient time to review the belatedly produced documents. Accordingly, the Hearing Officer had two options: 1) proceed with the hearing; or 2) vacate Mr. Bell's suspension. However, the Hearing Officer could not proceed with the hearing because he had acknowledged Mr. Bell was not given any time to review the intoxilyer log sheets and calibration checks. Thus, the only option was to vacate the suspension.

Respondent's argument that the "hearing officer acted in accordance with Idaho Code in deciding to reschedule the hearing" is expressly refuted by the time limitations set forth by Idaho Code § 18-8002A(7). The statute permits the Hearing Officer *one* 10-day extension. *Id.* Nothing more. Respondent's assertion to the contrary is false.

D. The Hearing Officer's Delay Violated Due Process.

Respondent argues that the Hearing Officer's delay in issuing a written decision which resulted in Mr. Bell's driving privileges being suspended for 72 days without a ruling did not violate due process. In support of its position, Respondent relies upon IDAPA 39.02.72.600.01, which states:

> The Hearing Officer shall issue the Findings of Fact, Conclusions of Law and Order prior to the expiration of the thirty (30) day temporary permit, but failure to do so shall not be grounds for staying or vacating the suspension.

Granted, the failure to issue a written decision before the suspension goes into effect is not a statutorily-based right to have the suspension vacated. But, once again, neither IDAPA nor the Idaho Code can circumvent the protections of due process. And in any event, Mr. Bell is not asking the Hearing Officer to vacate the suspension for missing the deadline by a day or two. He is asking the Court to vacate the suspension because after the 30 days had run, the Hearing Officer did not issue a written decision for another 72 days. It is that delay which Mr. Bell contends violates due process. Nothing submitted by Respondent even addresses this issue.

Respondent's apparent reliance upon an Ohio court's decision does not help its cause. (Respondent's Brief at 15-16, *citing State v. Powell,* 2006 WL 1851710 (Ohio Ct. App. June 26, 2006).) If anything, that decision supports Mr. Bell's position. First, there is no indication the Ohio ALS statute is anything like Idaho's, and what little description there is, clearly indicates it is a substantially different statute. Second, in *Powell,* the driver was not complaining about the length of time it took a hearing officer

to render a decision; he was apparently attacking the entire ALS process generally. Third, the quotation providing by Respondent strategically *omits* the portion of the Ohio court's reasoning which is contrary to Respondent's argument.

The paragraph quoted by Respondent actually concludes with this missing sentence: "The suspension will last until the initial appearance on the charge, *which must be held within five days after the arrest,* at which time the suspension may be appealed." *Id.* at *5 (emphasis added). The Ohio court went on to discuss the importance of this short time duration.

> In addition, a suspension may be appealed at the initial appearance on the charge, which must be held within five days. *This safeguard limits the duration of any potentially wrongful deprivation of the driver's property interest, the duration being an important factor in evaluating the impact of the state action on the private interest involved.*

Id. (emphasis added), *citing Fusari v. Steinberg,* 419 U.S. 379, 389 (1975). Mr. Bell's situation—which took 102 days from the date of his arrest—is more than 20 times longer than the five days discussed in *Powell.*

Respondent's reliance upon *Mackey v. Montrym,* 443 U.S. 1 (1979), fairs no better. First, Respondent quotes from the case syllabus (Respondent's Brief at 16, *citing Mackey,* 443 U.S. at 2), which expressly states it "constitutes no part of the opinion of the Court." Second, *Mackey* has nothing at all to do with delay in rendering a decision after the administrative hearing. The issue in *Mackey* was whether due process required a pre-suspension hearing when the Massachusetts statute in question

granted a post-suspension hearing immediately upon the driver's suspension. *Id.* at 11-12. Third, *Mackey,* citing the same Supreme Court decision relied upon in *Powell,* also acknowledged the importance of any potential delay in the procedural outcome:

> The *duration of any potentially wrongful deprivation* of a property interest is *an important factor* in assessing the impact of official action on the private interest involved.

Id. at 12 (emphasis added), *citing Fusari,* 419 U.S. at 389.

Accordingly, Respondent's argument that an officer is likely to accurately convey the facts of the case to the Hearing Officer has nothing at all to do with the *duration* in which the Hearing Officer must render his decision. If Respondent's position were correct, the entire hearing and review process is unnecessary because the police officer will never make a mistake. But we know that is incorrect, because numerous administrative suspensions have never gone into effect or have been vacated because the police officer did make a mistake. In any event, Respondent's argument does not even respond to the actual issue—whether Mr. Bell was denied due process when his driving privileges were suspended for 72 days without a decision.

If the statute relied upon by Respondent—IDAPA 39.02.72.600.01—stated the Hearing Officer could wait 72 days before rendering a decision, there is no doubt the statute would be struck as unconstitutional. That is essentially all Mr. Bell is arguing here.

E. Mr. Bell Did Not Delay the Hearing Officer's Decision.

Recognizing the extensive delay in this case, Respondent seeks to blame the

delay on Mr. Bell. (Respondent's Brief at 14.) These allegations are not only untrue, they are refuted by documents in Respondent's possession.

The basis of this argument is Respondent's contention that after the July 23, 2009 hearing, "a Request for Additional Time for Evidence was issued *at the request of Petitioner* to permit him to obtain and present additional evidence (the case law in support of his claims)." *Id.* at 7 (emphasis added). This assertion is false. Mr. Bell never requested additional time. This continuance was initiated *sua sponte* by the Hearing Officer, and when Mr. Bell immediately submitted the requested information on that same date, the Hearing Officer waited approximately 10 days before requesting Mr. Bell resubmit this same information with pertinent sections "highlighted." This delay can only be attributed to the Hearing Officer. It is certainly not attributable to Mr. Bell.

Specifically, during the July 23, 2009 hearing, Mr. Bell's counsel repeatedly cited to case decisions with specific page citations in support of his argument. (Tr Vol. II, pp. 7, 11-14.) Towards the end of the hearing, the Hearing Officer interrupted Mr. Bell's counsel and asked that he submit copies of the case decisions he was relying upon. *Id.* at 14. At the conclusion of the hearing, the Hearing Officer voluntarily stated the record would be kept open so that Mr. Bell could submit the case decisions, to which Mr. Bell's counsel indicated he would submit them within the next 24 hours. *Id.* at 19-20. No request was ever made by Mr. Bell or his counsel for an extension of time.

On that same date, at approximately 2:32 p.m., Mr. Bell's counsel e-mailed each of the case decision to the Hearing Officer. Approximately 10 days later, ITD staff contacted Mr. Bell's counsel and requested that he resubmit the case decisions with the pertinent sections highlighted. On August 7, 2009, Mr. Bell's counsel resubmitted the case decisions as requested, and also included a brief filed in the corresponding criminal case to further assist the Hearing Officer in summarizing the arguments and reliance upon the cases provided. (R pp. 263-274.) Accordingly, nothing by Mr. Bell delayed the Hearing Officer in rendering his decision.

On August 18, 2009, having still not received a decision from the Hearing Officer, Mr. Bell's counsel submitted a copy of the State's newly filed Motion to Dismiss the criminal charge in the "interest of justice" believing it had been filed in response to the very same issue raised before the Hearing Officer. (R pp. 275-281.) Although heavily relied upon by Respondent as causing further delay, there is absolutely no factual basis to contend this one-page document impacted the Hearing Officer's ability to render a timely decision.

Respondent also fails to inform the Court the "Request for Additional Time for Evidence" states:

> If the additional evidence is received prior to the expiration of the 15 day time frame, *the record will be closed at the time the evidence is received* and a finding of fact will be issued.

(R p. 47) (emphasis added.) Therefore, Mr. Bell had every right to believe the record

was closed on July 23, 2009 when his counsel submitted all the information requested by the Hearing Officer. It wasn't until the Hearing Officer requested the same information be submitted in a different format that Mr. Bell could have even known the decision would not be issued in the near future.

Accordingly, Respondent's attempt to blame Mr. Bell for delaying the Hearing Officer in issuing his decision is directly contradicted by the facts. Interestingly, ITD failed to make the e-mails documenting these facts as part of the record. These documents are part of Mr. Bell's Motion to Augment, filed on January 28, 2010 (requesting the Court augment the record with two e-mails and number them 333 and 334, respectively).

F. The Police Officer's Affidavit Does Not Preclude Mr. Bell's Right to Due Process.

In response to the various issues raised by Mr. Bell concerning the Hearing Officer's denial of the requested subpoenas, Respondent, citing to the second factor listed in *Mathews v. Eldridge,* seeks protection by merely claiming "in light of the statutory safeguards in place and the fact that Officer White complied with these safeguards, the risk that Petitioner's license suspension was erroneous is very small." (Respondent's Brief at 16, 17, 19, 21, 23, 29, & 37.) This repeated argument is inherently flawed.

First, Respondent fails to address the entirety of the second *Mathews* factor—the risk of erroneous deprivation of such interest through the procedures used, *and the*

probable value, if any, of additional or substitute procedural safeguards.

(Respondent's Brief at 15.) Nowhere in Respondent's brief is the later portion even discussed, let alone analyzed.

Second, Respondent's argument that the State has a strong interest in avoiding overly burdensome procedures (Respondent's Brief at 19) has no place here. All the Hearing Officer needed to do was issue the requested subpoenas. There is nothing "overly burdensome" about that practice which is utilized in nearly every administrative license suspension hearing, and in any event, expressly authorized by IDAPA § 39.02.72.300.01.

Third, the subpoenas denied by the Hearing Officer merely requested copies of documents which are mandated by IDAPA and/or the SOP's to be kept by the officer and/or the agency maintaining the breath testing device. For example, the Hearing Officer denied subpoenas for Officer White's Intoxilyzer 5000 certification, intoxilyzer logs, and calibration checks.[1] *See* IDAPA § 11.03.01.013.04 (requiring operator certification); SOP § 1.6 ("It is the responsibility of each individual agency to store calibration records, subject records, maintenance records, instrument logs, or any other records as pertaining to the evidentiary use of breath testing instruments and to maintain a current record of operator certification."). Similarly, the Hearing Officer

[1] Respondent's argument that the subpoena issued for intoxilyzer log sheets and calibration checks between June 3-6, 2009 was sufficient (Respondent's Brief at 19) is curious, in that it implies the Hearing Officer somehow knew *prior to issuing the subpoena* that a calibration check would be included in this brief time period.

also denied subpoenas establishing the simulator solutions were produced by an "approved" provider as required by IDAPA § 11.03.01.013.05 and SOP § 2.2.1.

Accordingly, there can be no comparison of Mr. Bell's requested subpoenas to the subpoena requested in *In re Gibbar* which the Court of Appeals held was "not necessary to support Gibbar's stated challenge to the basis of the BAC test and would impose an unreasonable burden on the state when alternative methods of presenting such a challenge were available." 143 Idaho at 948, 155 P.3d at 1187. The basis for that decision was Mr. Gibbar's requested subpoena sought the testimony of the director of the state's breath testing program who was unlikely to testify the State had acted unlawfully as argued by Mr. Gibbar. *Id.* at 947, 155 P.3d at 1186. Here, Mr. Bell merely sought the basic documents which State law required the law enforcement agencies to maintain. Respondent, by merely quoting selected and irrelevant text from *In re Gibbar*, does nothing to help its case.

Fourth, the "probable value" of the requested information has been established by numerous court opinions setting forth the manner in which to attack an administrative license suspension. *See, e.g., In re Schroeder,* 147 Idaho 476, 210 P.3d 584, 586 (Ct. App. 2009) (failure to comply with rules and regulations sufficient basis to attack suspension); *Bennett v. State, Dept. of Transp.,* 147 Idaho 141, 206 P.3d 505, 508-09 (Ct. App. 2009) (specific evidence contradicting officer's sworn affidavit sufficient basis to attack suspension). By refusing to provide the requested information, the State can effectively remove all due process protections at the administrative level.

Fifth, Respondent's argument is based entirely on Mr. White's affidavit asserting all proper procedures were followed. However, because Mr. White has been deemed unreliable by his former employer—the Boise Police Department—there is ample basis to suspect the veracity of any sworn statement made by Mr. White. This only further erodes Respondent's argument under the second *Mathews* factor.

G. The Hearing Officer's Factual Findings That the Boise Police Department Complied With the Subpoenas Are Clearly Erroneous; Respondent Cannot Circumvent Mr. Bell's Specific Proffers By Misbranding Them As Speculation.

Respondent contends Mr. Bell's position regarding the Hearing Officer's findings of fact as to whether the Boise Police Department complied with the Hearing Officer's subpoena is based upon "pure speculation." (Respondent's Brief at 21.) Respondent is wrong. Mr. Bell's counsel made specific proffers during the administrative hearing that an ITD employee, Ms. Downum, informed him that ITD had no information in its possession regarding the receipt, source, or corresponding subpoena related to the intoxilyzer log sheets (Exhibits L) sent to Mr. Bell's counsel immediately before the hearing. (Petitioner's Brief at 6, *citing* Tr Vol. II, p. 4, ls. 12-16.) When the Hearing Officer subsequently denied any discovery on this issue—either through Ms. Downum's testimony or simply by producing the documents in ITD's possession establishing the production of these documents (R p. 20)—he precluded himself from making any findings of facts contrary to the proffers submitted by Mr. Bell's counsel.

More importantly, Respondent does not refute the facts—it merely seeks to avoid the issue by claiming it is based upon "speculation." Nothing could be further from the truth. The Hearing Officer's findings on this issue are clearly erroneous, and to let them stand, would violate due process because Mr. Bell was specifically refused any information on this issue after ITD staff provided his counsel information that directly contradicts the Hearing Officer's factual findings.

H. The Hearing Officer Should Not Be Allowed to Deny Petitioner Access to Relevant ITD Hearing Decisions, Especially Where Petitioner Has No Other Means to Access This Information.

Mr. Bell merely sought copies of ITD decision which contradicted the Hearing Officer's legal conclusion that subpoena non-compliance is not a basis to vacate a driver's license suspension. (R pp. 39-40; Petitioner's Brief at 17-18.) Respondent contends Mr. Bell is not entitled to this information because these decision "do not relate to Petitioner's hearing." (Respondent's Brief at 22.) Respondent is wrong.

Once the Hearing Officer refused to vacate the suspension based upon subpoena non-compliance, Mr. Bell had a lawful right to copies of any ITD decision in which other driver's had their suspensions vacated for this reason. In fact, Mr. Bell could have requested *all* such decisions in ITD's possession. Instead, he merely asked for those issued within the past 12 months.

This is especially true here because these decisions are not accessible through any published media or electronic database known to Mr. Bell or his counsel. A fair analogy to Respondent's argument would be if the Idaho courts kept all of its written

decisions locked in its file cabinets and refused the various legal reporters and electronic legal research providers access to those decisions; and when an Idaho judge claimed there was no legal justification for a certain request, refused to give the requesting party access to the other, previous decisions which established that judge's statement of the law was incorrect. No court would uphold such action. But that is exactly what Respondent is arguing here.

The information requested by Mr. Bell does "relate" to his hearing because it is the only means by which he could challenge the Hearing Officer's legal conclusion. By hiding this information from drivers who are facing license suspensions, the administrative process loses its ability to provide any meaningful review.

I. Respondent Does Not Refute That the State Failed to Perform the Required Calibration Checks, But Merely Contends the State's Failure to Comply With IDAPA And the SOP's Is Irrelevant.

Respondent spends three pages of its Response confirming the facts and rules governing breath testing devices as set forth by Mr. Bell, all merely to then contend the intoxilyzer log sheets and calibration checks are "irrelevant." (Respondent's Brief at 24-26.) Respondent even goes so far to argue any discussion of subsequent calibration checks is "ridiculous" and "absurd." *Id.* at 25 & 26. No matter what Respondent argues, it cannot refute the facts.

The State performed calibration checks 164 samples prior to June 3, 2009 (R pp. 71-83), and then when it should have conducted a subsequent calibration check on June 25, 2009, it failed to do so (R p. 104). Granted, we don't know exactly how many

samples were tested prior to June 25, 2009, but that is only because the Hearing Officer refused to issue a subpoena for those records and Mr. Bell's counsel could only obtain records through June 13, 2009 from another source. However, applying one of the Hearing Officer's "reasonable inferences," the intoxilyzer log sheets establish the breath testing device was on pace for a 0.08 calibration check on or about June 25, 2009. That, combined with the aborted 0.08 calibration check on June 25, 2009, is sufficient evidence a 0.08 calibration check was required on that date. (Exhibit S; R p. 104.)

"Respondent agrees that pursuant to the language of the SOP's, 0.08 calibration checks are required every 100 samples." (Respondent's Brief at 25.) There is no doubt the State failed to comply on both ends of the spectrum surrounding Mr. Bell's evidentiary testing. Respondent's attempt to rely on a single calibration check is refuted by IDAPA, the SOP's, and Respondent's admission that 0.08 calibration checks are required "every 100 samples." That, by definition, makes subsequent calibration checks *relevant.*

J. If Prior and Subsequent Calibration Checks As Required by IDAPA and the SOP's Are Irrelevant, the State's Adopted Procedures Do Not Ensure Accuracy and Proper Functioning As Required By Law.

Respondent contends "the SOP's do contain a requirement to perform calibration checks to ensure accuracy and proper functioning of breath testing equipment." (Respondent's Brief at 27.) This position is expressly contradictory to Respondent's previous arguments 1) that the State's failure to perform a subsequent calibration check

is "irrelevant" and 2) that any argument based upon the State's failure to properly perform a previous calibration check is "absurd." *Id.* at 25 & 26.

As stated in Mr. Bell's brief, Respondent cannot have it both ways. (Petitioner's Brief at 23.) IDAPA § 11.03.01.013.03 requires the State to establish standards. If the Hearing Officer's decision is correct, the State has essentially whittled the SOP's down to the point they are meaningless, and therefore, cannot be based upon any scientific principles that ensure accuracy and precision.

K. Respondent Fails to Refute That Repco Marketing, Inc. Was Not An "Approved" Provider; Nor Does Respondent Establish That the Hearing Officer's Conclusions Are Supported By Substantial Evidence In the Record.

Respondent merely regurgitates the Hearing Officer's decision regarding whether the simulator lot solutions were from an "approved" provider, and fails to address the specific points raised by Mr. Bell in his brief. The Hearing Officer refused to issue subpoenas that would disclose whether the State was in compliance with IDAPA and the SOP's concerning the mandatory use of an "approved" provider. Despite the Hearing Officer's reluctance, Mr. Bell affirmatively established the State's contract with Repco Marketing, Inc. ("Repco") had long since expired.

Respondent's sole argument is there is no requirement that a valid contract exist for Repco to be an "approved" provider. That may or may not be the case, but IDAPA § 11.03.01.013.05 and SOP § 2.2.1 requires some sort of approval process. It was those documents which Mr. Bell sought. But Mr. Bell was precluded from even looking into the issue because the Hearing Officer denied his subpoenas for documents showing the

simulator lot solutions used in this case were from an approved provider. (R p. 20 & 40.)

The issues before the Court are whether the Hearing Officer's finding that the simulator lot solutions used in this case were submitted by an approved provider was clearly erroneous, and whether the Hearing Officer's decision exceeded his authority, was made upon unlawful procedure, was not supported by substantial evidence in the record, and was arbitrary, capricious, and an abuse of discretion. Exhibits M and N clearly establish the Hearing Officer erred in his findings on this issue. (R pp. 84-94.) The fact the Hearing Officer denied Mr. Bell access to the approval documents is evidence of another due process violation.

L. Respondent Mischaracterizes Mr. Bell's Position on Forced Blood Draws.

Respondent mischaracterizes Mr. Bell's position on forced blood draws. Respondent states Mr. Bell contends he had a statutory right to refuse to submit to evidentiary testing. (Respondent's Brief at 32.) Mr. Bell does not so argue. Instead, Mr. Bell established that Idaho courts have recognized the State cannot force someone to physically consent to evidentiary testing, and cited to the case law that establishes that premise.[2] (Petitioner's Brief at 32-33.) Nor does Mr. Bell contend a forced blood draw can never be obtained in a misdemeanor DUI case. (Respondent's Brief at 32.) Instead, Mr. Bell established that Idaho law does not allow the State to obtain a forced

[2] Respondent agrees. *See* Respondent's Brief at 34 ("An individual can physically refuse to blow into a breath testing machine and an officer cannot force that person to do so").

blood draw in every DUI case, and cited to the statutes and case law that establishes that premise. (Petitioner's Brief at 31-32.) Respondent either did not understand or purposely misstated Mr. Bell's position. Under either scenario, Mr. Bell stands by his briefing and arguments contained therein.

The core of Mr. Bell's position is that the State could not order a paramedic to draw Mr. Bell's blood, nor could it engage in a "fist fight" with Mr. Bell to forcibly obtain a blood draw. This is clearly established by Idaho Code § 18-8002(6)(b), *State v. Diaz,* 144 Idaho 300, 160 P.3d 739 (2007), and *Schmerber v. California,* 384 U.S. 757 (1966). When Mr. Bell indicated he would not physically consent to a breath-alcohol test, Mr. White successfully overcame that decision by convincing Mr. Bell that Idaho law allowed Mr. White to order a paramedic to draw his blood and to use any amount of force Mr. White wanted to obtain that sample, up to and including a "fist fight." It was that conduct that nullified the audio advisory played for Mr. Bell, because Mr. White's assertions were contrary to Idaho law.

Second, Respondent's own characterization of Mr. White's statements confirm he misstated the law to Mr. Bell. Respondent states, "Officer White informed Petitioner of the penalties for refusing to submit to evidentiary testing, and after Petitioner refused, he informed Petitioner that if he didn't provide a breath sample *he would have someone take his blood."* (Respondent's Brief at 32) (emphasis added.) Yet, no police officer in Idaho can direct a medical profession to conduct a blood draw in these circumstances; the police officer can merely ask, and the medical professional can

refuse. *Diaz,* 144 Idaho at 303-04, 160 P.3d at 742-43. Mr. White, in telling Mr. Bell he was lawfully "forcing" him to submit to evidentiary testing (Petitioner's Brief at 30), misstated the law which nullified the advisory.

Third, Respondent's reliance on *State v. Worthington,* 138 Idaho 470, 65 P.3d 211 (Ct. App. 2002), does nothing to help its case. (Respondent's Brief at 35.) In *Worthington,* the officers and medical staff held him on a table while he was handcuffed with a belly restraint. Although Worthington claimed the officer would have to "fight" him, no actual fight took place. To the extent Respondent is arguing *Worthington* condones "fist fights" to obtain a blood draw, such an argument is clearly refuted by *Schmerber, Diaz,* and *DeWitt,* all of which hold a blood draw must be done with *reasonable* force. (Petitioner's Brief at 32.) A "fist fight" can never be reasonable for purposes of obtaining a blood sample in a misdemeanor DUI case. *State v. DeWitt,* 145 Idaho 709, 713, 184 P.3d 215, 219 (Ct. App. 2008) (stating advisory is intended to enforce the driver's previously implied consent without the use of force; the legislature provided administrative revocation "rather than condone a physical fight").

M. Respondent Incorrectly Believes Consent Can Be Obtained Through Threats of Force and/or Police Trickery and Deceit.

Respondent also attempts to justify Mr. White's trickery and deceit based upon case law which has absolutely no application to obtaining one's consent. The cases relied upon by Respondent authorize certain, purposeful misstatements by police officers during police interrogation, *Frazier v. Cupp,* 394 U.S. 731 (1969), in order to

gain access to a person's home in an undercover capacity, *Lewis v. United States,* 385 U.S. 206 (1966), in order to safely have an occupant answer the door in executing a search warrant, *United States v. Contreras-Ceballos,* 999 F.2d 432 (9th Cir. 1993) and *United States v. Salter,* 815 F.2d 1150 (7th Cir. 1987), and in order to safely enter a residence to execute a valid arrest warrant, *Leahy v. United States,* 272 F.2d 487 (9th Cir. 1960). However, none of those cases authorize obtaining one's consent through the threat of force or through misstatements of the law.

Here, Respondent admits Mr. White was seeking Mr. Bell's physical consent to submit to evidentiary testing. (Respondent's Brief at 34.) Idaho is an implied-consent state, but the Idaho Supreme Court has clearly stated the implied-consent law does not permit the State to force an individual to submit to evidentiary testing:

> By implying consent, the statute removes the *right* of a licensed driver to lawfully refuse, but it cannot remove his or her *physical power* to refuse.

Woolery, 116 Idaho at 372, 775 P.2d at 1214 (emphasis in original) (quoting *State v. Newton,* 636 P.2d 393 (Or. 1981)).

However, such refusal does not permit the police to obtain an evidentiary sample through whatever means they deem necessary. *DeWitt,* 145 Idaho at 714, 184 P.3d at 220 (holding blood draws must be done in a medically accepted manner and without unreasonable force), *citing Schmerber,* 384 U.S. at 771-72. In fact, the Idaho Court of Appeals has clearly stated that force—or the threat of force—is not to be used to gather such evidence:

> The purpose of a warning of license suspension following a refusal ... is to overcome an unsanctioned refusal by threat instead of force. It is not to reinstate a right to choice, but rather to *nonforcibly* enforce the driver's previous implied consent. ... *Rather than condone a physical conflict,* the legislature provided for the administrative revocation of the license of an individual who refuses to comply with his previously given consent.

Id. at 713, 184 P.3d at 219 (emphasis added).

Of course, constitutional protections prohibit law enforcement officers from attempting to convince an individual to physically consent to evidentiary testing through coercion or duress. *See Scheckloth v. Bustamonte,* 412 U.S. 218, 228 (1973) ("the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force"); *see also Florida v. Bostick,* 501 U.S. 429, 438 (1991) ("'Consent' that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse."). Thus, an individual's "consent" is involuntary if his will has been overborne and his capacity for self-determination critically impaired. *State v. Garcia,* 143 Idaho 744, 778, 152 P.3d 645, 649 (Ct. App. 2006); *State v. Jaborra,* 143 Idaho 94, 97, 137 P.3d 481, 484 (Ct. App. 2006).

Here, there is no question Mr. Bell informed the officer of his decision not to physically consent to evidentiary testing, and that Mr. Bell's will was then overborne by the officer's conduct. The cases cited by Respondent do not authorize such

"consent." Accordingly, Respondent's argument that "trickery and subterfuge are reasonable and lawful actions" (Respondent's Brief at 36) do not apply here.

And in any event, the advisory information is *statutorily mandated* and cannot be circumvented. I.C. § 18-8002A(2); *In re Virgil,* 126 Idaho 946, 947, 895 P.2d 182, 183 (Ct. App. 1995) (stating the advisory language must be provided "in no uncertain terms"). Respondent's argument here is nothing more than an attempt to circumvent the advisory through Mr. White's trickery and deceit. So, even if consent could constitutionally be obtain through coercion or duress, it would not allow the state to circumvent the advisory in this same manner.

N. Respondent Confuses Actual Knowledge With Constructive Knowledge.

Regarding Mr. White's veracity issues and his apparent termination from the Boise Police Department for lying under oath, Respondent contends ITD was without actual knowledge of this information. Even assuming that is the case, Mr. Bell's argument is that ITD had either actual *or constructive* knowledge of these facts.

Here, the entire administrative process is based upon the officer's sworn affidavit which the Hearing Officer accepts as truthful. In this case, the Hearing Officer expressly relied upon Mr. White's affidavit in resolving factual and legal issues against Mr. Bell. (*See, e.g.,* R p. 292, ¶ 5.)

The State of Idaho had actual knowledge of Mr. White's veracity issues. Thus, ITD had constructive knowledge of this information. It should have been disclosed to Mr. Bell and the Hearing Officer should have taken this into account when resolving

factual and legal disputes at the administrative level. This issue alone requires remand.

III. CONCLUSION

Based upon the foregoing, the Court should set aside the Hearing Officer's decision and order that Mr. Bell's driving privileges be reinstated. Because there is sufficient evidence that Mr. Bell established his right to prevail at the administrative hearing, there is no need to remand this matter.

DATED this 9th day of February, 2010.

Law Offices of Dean B. Arnold

By: Dean B. Arnold
Dean B. Arnold

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael Kane & Associates, PLLC
1087 W. River St., Ste. 100
P.O. Box 2865
Boise, ID 83701-2865
Fax: (208) 342-2323

- ☐ U.S. Mail
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (Fax)

Dean S. Arnold

for Law Offices of Dean B. Arnold

Dean B. Arnold, ISB #6814
Law Offices of Dean B. Arnold
300 W. Main St., Suite 250, Office 202
Boise, Idaho 83702
Telephone: (208) 342-1575
Facsimile: (208) 342-3777

Attorneys for Defendant Hamish Bell

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

IN THE MATTER OF THE DRIVING PRIVILEGES OF:	)	Case No. CV-OT-2009-0018414
HAMISH ALLAN BELL	)	**ORDER**

The petitioner, Hamish Allan Bell, through his counsel of record, and pursuant to Idaho Appellate Rule 30, has filed a Motion to Augment ("Motion") in the above-entitled case. The Court has reviewed the Motion, and good cause having been found, grants the Motion as follows.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Agency Record is hereby augmented with the addition of the following documents:

1. E-mail dated July 23, 2009, from attorney Dean B. Arnold to ITD Hearing Officer Dave Baumann; and
2. E-mail dated August 7, 2009, from attorney Dean B. Arnold to ITD Hearing Officer Dave Baumann.

The additional documents will be numbered pages 333 and 334, respectively.

DATED this 10th day of February 2010.

Kathleen A. Stickler
Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael Kane Michael Kane & Associates, PLLC P.O. Box 2865 Boise, Idaho 83701-2865 Facsimile: (208) 342-2323	☑ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (Fax)
Dean B. Arnold Law Offices of Dean B. Arnold 300 W. Main St., Ste. 250, Office 202 Boise, Idaho 83702 Fax: (208) 342-3777	☑ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (Fax)

Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IN THE MATTER OF THE DRIVING PRIVILEGES OF: HAMISH ALLAN BELL,	Case No. CV-OT090018414 MEMORANDUM DECISION AND ORDER

This matter is before the Court on appeal from an administrative hearing officer's decision to sustain the suspension of Hamish Allan Bell's ("Bell's") driving privileges upon finding that the requirements of Idaho Code § 18-8002A were met. Bell asks this Court to vacate the suspension because the hearing officer failed to provide Bell with due process and because the decision is based on erroneous conclusions. For the reasons set forth below, the Court affirms the hearing officer's ruling.

FACTUAL & PROCEDURAL BACKGROUND

On June 4, 2009, Officer Tucker stopped a vehicle driven by Bell after observing Bell drive the vehicle the wrong way on a one-way street. During the stop, Bell admitted that he had been drinking, and Officer Tucker called Officer White for assistance. After Officer White arrived, Bell again admitted that he had been drinking. Officer White then administered field sobriety tests which Bell failed. Officer White placed Bell under arrest for driving under the influence of alcohol and transported Bell to the Ada County Jail. At the jail, Officer White played the administrative

license suspension tape for Bell and then asked him to submit to a breath test. When Bell first refused, Officer White informed him that a blood draw would be taken without consent. Officer White further informed Bell that he did not take refusals and that he could force Bell to have his blood drawn. Bell then submitted to the breath test and gave two (2) breath samples of .154 and .157. Officer White then seized Bell's driver's license, gave him a notice of license suspension, and issued him a temporary driving permit.

On June 10, 2009, Bell requested an administrative hearing on the license suspension. In the request for hearing, Bell asked for subpoenas for the following information: (1) any audio/video tapes in existence in the case; (2) any and all police reports in existence in the case; (3) a copy of the log sheet for the testing device used to test Bell's breath including the thirty (30) day periods prior to and after Bell's test; (4) a copy of evidentiary results; (5) a copy of the calibration certificate; and (6) the testing officer's certification.

On June 16, 2009, a telephonic hearing was scheduled for June 30, 2009 at 10:00 a.m., and subpoenas were issued with compliance dates of June 29, 2009. The subpoenas required the Boise Police Department to send the requested information to the Idaho Transportation Department ("ITD").

The hearing officer issued subpoenas for the following information: (1) audio and video of the stop/arrest/evidentiary testing of Bell; (2) any report regarding the stop/arrest/evidentiary testing of Bell; and (3) instrument log sheets for the period of June 3, 2009 thru June 6, 2009. However, the hearing officer issued an order denying Bell's request for the testing officer's certification card upon finding the evidence was not clearly relevant in light of the statement in the probable cause affidavit that the officer's certification is valid until December 2010.

Later that same day, Bell requested a continuance of the hearing because the compliance date on the subpoenas would not give him enough time to review the requested information before the hearing. Bell also asked for a new subpoena for a sixty (60) day period of log sheets because the existing subpoena for a four (4) day period of log sheets did not satisfy his earlier request and because the additional log sheets were necessary to determine whether the calibration had been checked in compliance with Idaho law.

The ITD responded by sending a notice that the telephonic hearing had been rescheduled for July 9, 2009 at 10:00 a.m. However, the hearing officer did not respond or otherwise issue the requested subpoena.

On June 25, 2009, the records custodian for the Boise Police Department sent the subpoenaed information to the ITD with the exception of the log sheets because custodian did not yet have the log sheets for June 3 through June 6, 2009. The ITD then presumably forwarded this information to Bell.

On July 9, 2009 at approximately 8:57 a.m., the ITD faxed log sheets, covering the period from April 28, 2009 to June 6, 2009, to Bell's counsel.

An hour later, the telephonic hearing began. Bell argued that the log sheets he just received should not be entered as exhibits because it was unclear "when those documents were received [by the ITD], where they came from, [and] whether the Boise Police Department produced those in response to our subpoena." He further argued that the evidence was strong that the Boise Police Department did not comply with the subpoena and that the suspension should therefore be vacated. However, the hearing officer admitted the log sheets as exhibits and denied the request to vacate the suspension for the reason that subpoena issues are not a statutory basis for vacating a suspension.

As a result of this ruling, Bell felt "forced" to request a continuance to review the log sheets. The hearing officer granted the continuance, and the hearing was rescheduled for July 23, 2009.

On July 13, 2009, before the rescheduled hearing, Bell requested additional subpoenas "based on the disputed instrument operation logsheets disclosed" on July 9, 2009. More specifically, Bell asked for the following: (1) the testimony of Callie Downum, ITD, as to the circumstances surrounding the log sheets; (2) all documents reflecting calibration checks from May 1, 2009 to July 13, 2009; (3) the source of the simulator solution used from May 1, 2009 to July 13, 2009; (4) identification of the provider(s) of the simulator solution used from May 1, 2009 to July 13, 2009; (5) documents and correspondence showing when, where, and how the log sheets were received; and (6) a copy of all administrative license suspension hearing decisions issued in the last twelve (12) months vacating a driver's license suspension for the ITD's failure to comply with a subpoena. The hearing officer denied the request for these subpoenas but did require production of the Certificate of Analysis for Simulator Solution Lot #8804 and #8101.

On July 23, 2009, the telephonic administrative hearing was held. Midway through the hearing, the hearing officer asked Bell to submit copies of the decisions that he was citing in his argument. At the end of the hearing, the hearing officer stated that he would keep the record open to allow Bell to submit the case law in support of his argument, and Bell informed the hearing officer that he would e-mail the decisions within twenty-four (24) hours.

Later that same day, Bell e-mailed the decisions to the hearing officer. Approximately ten (10) days later, Bell received a request to resubmit the decisions with the relevant portions highlighted. On August 7, 2009, Bell resubmitted the requested decisions

On August 18, 2009, Bell submitted a copy of the State's newly filed motion to dismiss the criminal charges against Bell in the interest of justice.

On September 14, 2009, the hearing officer issued Findings of Fact and Conclusions of Law and Order. The hearing officer found that the requirements were met for the suspension of Bell's driver's license privileges under Idaho Code § 18-8002A and therefore sustained the driver's license suspension.

ISSUES ON APPEAL

A. Whether the administrative proceeding, the hearing officer, or the subpoenas violated Bell's due process rights.

1. Whether the subpoenas issued by the hearing officer violated Bell's due process rights.
2. Whether the hearing officer violated Bell's due process rights by impermissibly extending the administrative hearing process.
3. Whether the hearing officer violated Bell's due process rights by refusing to issue subpoenas regarding Officer White's Intox 5000 certification.
4. Whether the hearing officer violated Bell's due process rights by refusing to issue subpoenas regarding calibration checks.
5. Whether the hearing officer erred by finding the Boise Police Department complied with the ITD's subpoena.
6. Whether the hearing officer erred in concluding that Bell's driver's license suspension could not be vacated based upon the Boise Police Department's failure to comply with the ITD's subpoenas.
7. Whether the hearing officer violated Bell's due process rights by refusing to issue subpoenas and require production of documents regarding Boise Police Department's compliance with the ITD's subpoena.

B. Whether the hearing officer was statutorily required to vacate the license suspension if subpoenaed information was not timely received.

C. Whether the evidence supported vacating Bell's license suspension.

8. Whether the hearing officer erred in sustaining Bell's driver's license suspension when the evidence affirmatively showed the State failed to comply with IDAPA and the Standard Operating Procedures.

9. Whether the hearing officer erred by sustaining Bell's driver's license suspension when the evidence affirmatively showed the State's adopted procedures do not ensure accuracy and proper functioning of the breath testing device.

10. Whether the hearing officer erred by sustaining Bell's driver's license suspension when the evidence affirmatively showed the provider of the simulator solutions was not an "approved" provider as required by IDAPA and the Standard Operating Procedures.

11. Whether the hearing officer erred by sustaining Bell's driver's license suspension when the evidence affirmatively showed Officer White failed to properly inform Bell of the consequences of submitting to evidentiary testing.

D. Whether the hearing officer properly relied on Officer White's affidavit.

12. Whether the hearing officer erred by relying on Officer White's affidavit when the State was in actual or constructive knowledge that Officer White had been deemed unreliable by the Boise Police Department.

STANDARD OF REVIEW

The Idaho Administrative Procedures Act (IDAPA) governs the review of an agency's decision to suspend a person's driver's license. *In re Gibbar*, 143 Idaho 937, 941, 155 P.3d 1176, 1180 (Ct. App. 2006); *see also* Idaho Code §§ 49-201, 49-330, 67-5201(2), 67-5270. When an appellate court reviews an agency's decision, the court may not "substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Idaho Code § 67-5279(1). Instead, the court must defer "to the agency's findings of fact unless they are clearly erroneous." *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998); *Bennett v. State*, 147 Idaho 141, 142, 206 P.3d 505, 506 (Ct. App. 2009).

Agency action must be affirmed on appeal unless the court determines that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an

abuse of discretion. Idaho Code § 67-5279(3); *Bennett*, 147 Idaho at 142, 206 P.3d at 506. The party attacking the agency's decision bears the burden of demonstrating that the agency erred in a manner specified in section 67-6279(3) and that a substantial right has been prejudiced. *Price*, 131 Idaho at 429, 958 P.2d at 586; *Bennett*, 147 Idaho at 142, 206 P.3d at 506.

Agencies are given the authority to make their own determinations of credibility and "to place greater or less weight on any particular piece of evidence according to its relative credibility." *Morgan v. Idaho Dep't of Health & Welfare*, 120 Idaho 6, 8, 813 P.2d 345, 347 (1991); *see also Cooper v. Bd. of Prof'l Discipline*, 134 Idaho 449, 457, 4 P.3d 561, 569 (2000).

ANALYSIS

A. The administrative proceeding, the hearing officer, and the subpoenas did not violate Bell's due process rights.

Bell claims he has a substantial interest in his driver's license that gives him the right to procedural due process. According to Bell, this right to due process was violated during the administrative proceeding because: the hearing officer issued subpoenas designed to prevent the petitioner from having adequate time to review the subpoenaed information before the hearing; the hearing officer delayed the hearing in violation of Idaho law when the Boise Police Department failed to produce subpoenaed information in a timely manner; the hearing officer failed to issue a decision within the time required and before the license suspension had already taken effect; the hearing officer did not issue all of the subpoenas requested for relevant information; and the hearing officer admitted documents into the record over the objection of Bell upon concluding that the documents were in response to the subpoena and timely complied with the subpoena. Bell contends that regardless of whether there is a statutory basis for vacating the license suspension, the

suspension may be vacated because the administrative proceedings and hearing officer's actions violated Bell's right to procedural due process.

In support of his position, Bell makes four general arguments. First, the compliance date on the subpoenas that were issued did not ensure that Bell would have enough time to review the information before the hearing and therefore forced him to delay the hearing. Second, the license suspension must be vacated if the hearing cannot be held and a decision issued within the mandated time frame and before the thirty (30) day temporary license permit expires. Third, the subpoenas not issued were necessary to obtain information to challenge Officer White's certification, to challenge the accuracy and proper functioning of the Intoxilyzer 5000, and to establish that the hearing officer can vacate a driver's license suspension solely for subpoena non-compliance. Finally, the log sheets admitted into the record over Bell's objection were not in response to and did not comply with the subpoena, and there was no evidence attached to the log sheets indicating that they were in fact produced by the Boise Police Department.

The ITD acknowledges that Bell has a substantial interest in his driver's license but claims that there is a low risk that Bell was erroneously deprived of that interest because Officer White complied with the procedural safeguards before suspending Bell's license. According to the ITD, the procedural delays in the administrative hearing and decision do not change the low risk of error, and the information not subpoenaed has no bearing on and is irrelevant to the outcome. Furthermore, the low risk of error is outweighed by the State's compelling interest in keeping Idaho's roads safe and free from drunk drivers.

The ITD further denies that Bell's arguments have any merit for four reasons. First, neither the Constitution nor IDAPA provide any timeframe in which subpoenaed information must be produced, and the issue became moot when the hearing was postponed so Bell could have more

time to review subpoenaed information. Second, a license suspension cannot be vacated just because a hearing is extended for more than ten (10) days or a judge does not issue a decision within the time required. Third, the information not subpoenaed was irrelevant, unduly repetitious, and unnecessary. Finally, the hearing officer did not abuse his discretion or act untruthfully in finding that the log sheets had been misplaced at the ITD, complied with the subpoena, and could be admitted into the record.

In this case, the parties do not dispute that Bell faced delays and denials of requested information throughout the administrative proceeding regarding his license suspension. Instead, they dispute whether any of these delays or denials, individually or collectively, constitutes a basis for vacating Bell's license suspension. Although the ITD argues that there is no statutory basis for vacating the license suspension based on administrative procedures and decisions, whether there is a statutory basis for vacating the license suspension is a separate issue that is not relevant in determining whether there is a constitutional basis to vacate the license suspension for a due process violation. Bell's first seven issues raise constitutional challenges to the license suspension.[1]

As recognized by federal and state courts, a driver has an important interest in his driver's license which cannot be taken away without procedural due process. *Dixon v. Love*, 431 U.S. 105, 112 (1977); *State v. Ankney*, 109 Idaho 1, 3-4, 704 P.2d 333, 335-36 (1985); *In re Gibbar*, 143 Idaho at 945, 155 P.3d at 1184. A driver also has a substantial interest in the continued possession and use of his license pending the outcome of a hearing relating to his license suspension because the driver cannot be made "whole for any personal inconvenience and economic hardship suffered

[1] The only statutory challenge raised in the first seven issues is addressed under section B.

by reason of any delay in redressing an erroneous suspension through postsuspension review procedures." *Mackey v. Montrym*, 443 U.S. 1, 11 (1979).

If a driver raises a due process challenge to his license suspension, the court must consider the following three factors in deciding whether due process was violated:

> 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 requirement would entail.

Ankney, 109 Idaho at 4, 704 P.2d at 336 (quoting *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976)). The court must determine not only what the private interest is but also what the impact of official action is on that private interest, such as the "duration of any potentially wrongful deprivation of a property interest." *Mackey*, 443 U.S. at 12.

Both of Idaho's appellate courts have considered the *Mathews* factors in relation to administrative license suspension hearings and have found that the driver's interest in maintaining his driver's license may be overcome by the State's strong interest in preventing intoxicated persons from driving and the State's interest in protecting the driver's rights with existing and not overly burdensome procedures. *Id.* at 4-5, 704 P.2d at 336-37; *Matter of McNeely*, 119 Idaho 182, 190-91, 804 P.2d 911, 919-20 (Ct. App. 1990).

1. The subpoenas issued by the hearing officer did not violate Bell's right to due process.

Where a subpoena is not issued or a hearing is unjustifiably delayed, there may be a violation of due process. *See Mallen*, 486 U.S. at 242; *In re Gibbar*, 143 Idaho at 947, 155 P.3d at

1186. Alternatively, where a subpoena is issued and the compliance date on a subpoena does not result in a hearing being unjustifiably delayed, there is no basis for finding a due process violation.

In *Gibbar*, a driver claimed that he was not given adequate time for discovery before the administrative hearing. 143 Idaho at 945, 155 P.3d at 1184. However, the court held that the thirty (30) day discovery process was not so short that it amounted to a due process violation because the driver received the discovery responses a few days before the license suspension hearing and therefore had sufficient time to be able to use them for the hearing. *Id.* at 948, 155 P.3d at 1187.

In this case, the compliance date on the subpoena may not have given Bell sufficient time to review all of the information by the original hearing date but any potential due process violation was remedied when the hearing was delayed by ten (10) days. This delay was permitted by Idaho Code § 18-8002A(7) and was not unreasonable because it gave Bell an opportunity to review the subpoenaed information and decide whether to use it in his defense. Because the statute permits a hearing date to be moved and because the hearing date in this case was moved to accommodate the discovery process, the compliance date on the subpoenas did not result in any due process violation.

2. The delayed hearing and delayed decision did not violate Bell's right to due process.

Where there is a procedural delay in holding a suspension hearing or issuing a decision, there may be a constitutional violation of due process. *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 242 (1988); *Jones v. City of Gary, Ind.*, 57 F.3d 1435, 1444 (7th Cir. 1995). To determine whether a delay is justified, the court must "examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Mallen*, 486 U.S. at 242.

With respect to license suspension proceedings, extending a hearing fourteen (14) days beyond the effective date of a license suspension does not violate due process because "the risk of error in the initial decision to suspend the license of a driver arrested for driving under the influence is insubstantial" and "the state has a compelling interest in highway safety." *Fisher*, 705 N.E.2d at 77 (Ill. 1998). With respect to other administrative proceedings, a nine (9) month delay in the proceedings does not violate due process if the delay stems in part from the thoroughness of the proceedings and there is no evidence that the proceedings are unreasonably prolonged. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985). Additionally, a hearing held sixth (6) months after suspension may be sufficiently prompt if the person requesting the administrative hearing contributes to the delay. *Jones*, 57 F.3d at 1444-45.

Here, the first delay in Bell's administrative hearing from June 30, 2009 to July 9, 2009 was permitted by statute, and it was granted to ensure that Bell would have ample opportunity to review the information subpoenaed. Although this first delay meant that Bell's thirty (30) day temporary permit expired and the license suspension took effect by the time the July 9, 2009 hearing began, there is no evidence that this delay was unreasonable or unjustified.

The second delay in Bell's administrative hearing from July 9, 2009 to July 23, 2009 was not specifically provided for by statute, but it was granted so that Bell could review the subpoenaed materials he received an hour before the prior hearing. Again, there is no evidence that this further delay was unreasonable or unjustified considering that the delay was requested by Bell to review subpoenaed information that was not timely provided.

Once the hearing was held, the hearing officer delayed issuing a decision until almost two (2) months after the hearing. However, there is no indication that this delay was unreasonable even though the administrative code generally requires a decision to be issued before the expiration of the

thirty (30) day temporary permit. IDAPA § 39.02.72.600.01.[2] Instead, the delay seems to have resulted from the need for additional time to thoroughly review the record and the cases relied upon by Bell. Because Bell raised numerous issues and presented a large amount of materials for review, the delayed decision was justified.

Furthermore, any harm resulting from the interim suspension of Bell's license during the delays was minimal considering the low risk of error that Officer White wrongfully suspended the license in the first place. Also, Bell's interim interest in his license is outweighed by the State's compelling interest in keeping Idaho's roads free from drunk drivers. The duration of the proceedings did not increase the risk of error in the outcome and did not last so long that it amounted to a due process violation for which Bell's license suspension must be vacated.

3. The hearing officer did not violate Bell's right to due process by denying some of Bell's requests for information.

Where a subpoena request is denied and the evidence requested is relevant, the exclusion of such evidence does not violate due process if the evidence would not decrease the risk of erroneous deprivation of a driver's license. *In re Gibbar*, 143 Idaho at 947, 155 P.3d at 1186. In that case, a driver sought to use a state employee's testimony to challenge the proper functioning of testing equipment, and the hearing officer erroneously concluded that the testimony was not relevant. *Id.* at 946-47, 155 P.3d at 1185-86. Nevertheless, the hearing officer did not violate the driver's due process rights because the driver had other options available for challenging the basis for the breath alcohol test, such as obtaining an independent expert. *Id.* at 947-48, 155 P.3d at 1186-87. The court

[2] Idaho's administrative code provides that a hearing officer "shall issue the Findings of Fact, Conclusions of Law and Order prior to the expiration of the thirty (30) day temporary permit." IDAPA § 39.02.72.600.01. However, this rule also states that the hearing officer's failure to issue the order within thirty (30) days "shall not be grounds for staying or vacating the suspension." *Id.*

of appeals found that the risk of erroneous deprivation of the driver's license would not have been decreased by the admission of the excluded testimony and further determined that permitting the particular testimony would have imposed an unjustifiably heavy burden on the State. *Id.* The driver in that case also claimed that he had been denied due process because he had been denied access to the log showing the use and maintenance for the breath testing instrument. *Id.* at 948, 155 P.3d at 1187. However, because the driver had been provided with a portion of the log and because the driver did not argue why the portion provided was insufficient or why other portions were relevant, the court declined to address how much of the log the driver was entitled to obtain. *Id.*

More recently, the Court of Appeals suggested that an arresting officer's testimony may be requested but that the officer's testimony is not required in an administrative hearing absent a request for the officer to be subpoenaed. *Wheeler v. Idaho Transp. Dep't*, 148 Idaho 378, __, 223 P.3d 761, 766 (Ct. App. 2009). If the officer is not subpoenaed, the officer's sworn statement is admissible as evidence without any foundation. *Id.*; Idaho Code § 67-5251(1).

Because a driver may challenge whether the probable cause affidavit provides a sufficient basis for license suspension under Idaho Code § 18-8002A(7), a driver may request relevant information to challenge that affidavit. *See* Idaho Code § 67-5251(1); *Wheeler*, 148 Idaho at __, 223 P.3d at 766; *In re Gibbar*, 143 Idaho at 947, 155 P.3d at 1186. Nevertheless, a hearing officer may exclude evidence that is unduly repetitious. Idaho Code § 67-5251(1).[3] The hearing officer generally "has broad discretion in the extent of discovery he or she orders," but the hearing officer's

[3] Idaho Code § 67-5251(1) provides in full:

> The presiding officer may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of this state. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.

decision "must comply with procedural due process guarantees." *In re Gibbar*, 143 Idaho at 945, 155 P.3d at 1184.

a. Officer White's Certification

In this case, the hearing officer denied Bell's request to subpoena Officer White's certification. The hearing officer concluded that the certification card was not relevant because "[t]he probable cause affidavit states that Officer White's operator certification is valid until December 2010." (R. 19.) Bell argues that the certification card was relevant to confirm whether the officer was certified to use the breath testing instrument.

A license suspension may be vacated if a breath alcohol test was not administered "by a laboratory operated by the Idaho state police . . . under the provisions of approval and certification standards to be set by that department." Idaho Code §§ 18-8002A(7)(d), 18-8004(4). Pursuant to the administrative rules governing alcohol testing, "[e]ach individual operator shall demonstrate that he has sufficient training to operate the instrument correctly. This shall be accomplished by successfully completing a training course approved by the department. Officers must retrain periodically as required by the department." IDAPA § 11.03.01.013.04.

Because a laboratory may only be operated by a person who can demonstrate sufficient training on the machine that person uses, whether a person is properly trained is relevant in determining whether a breath test was properly administered. Therefore, the hearing officer erred in concluding that Officer White's certification was irrelevant. However, his reliance on the officer's affidavit was appropriate; thus requiring production of the certification card was not necessary.

b. Log Sheets

The hearing officer also denied Bell's request for a sixty (60) day period of log sheets for the Intoxilyzer 5000 used to test Bell. Though the hearing officer did issue subpoenas for a four (4) day period of log sheets, he provided no explanation regarding his decision. Bell claims that the entire period of log sheets was necessary to determine whether the Intoxilyzer 5000 was accurate and properly functioning. According to Bell, the Boise Police Department's failure to routinely check the calibration of the instrument according to SOP requirements necessarily rendered test results inadmissible.

While the proper calibration of an Intoxilyzer 5000 instrument may be relevant in determining whether the instrument was accurate and properly functioning, the procedures set forth in SOP 2.2.3 and 2.2.4 for checking calibration are not mandatory, and the failure to follow those procedures does not alone indicate that the instrument was not accurate or properly functioning. *Wheeler*, 148 Idaho at __, 223 P.3d at 768-69. Instead, expert testimony or other evidence is necessary to prove that the failure to follow calibration procedures somehow renders test results unreliable. *Id.*

Because the Boise Police Department's failure to follow calibration check procedures cannot by itself indicate that the Intoxilyzer 5000 was not functioning properly and because Bell does not claim that he could or would have produced other evidence to establish the unreliability of the instrument based on irregular calibration checks, additional evidence regarding the timing of calibration checks would not have provided any basis for establishing that the instrument was not accurate or functioning properly. As a result, additional log sheets would have been irrelevant for Bell's stated purpose.

Additionally, the log sheets that were subpoenaed and produced show that the Intoxilyzer 5000 was calibrated approximately two (2) days prior to Bell's breath test.[4] The log sheets do not indicate that the instrument was not working, and Bell does not establish how additional log sheets could indicate that the instrument was nonetheless unreliable.

In sum, there is no indication that the production of additional log sheets could have decreased the risk that Bell was erroneously deprived of his driver's license. Therefore, the hearing officer did not violate Bell's right to due process by not issuing a subpoena for all of the requested log sheets.

c. Documents Related to Subpoena Compliance

The hearing officer also denied Bell's request for documents regarding the source of the log sheets that were admitted into the record and for documents showing that non-subpoena compliance is a basis to vacate a license suspension. Bell argues that he is entitled to challenge the source of the log sheets, which were admitted over his objection, and to establish that in administrative license suspension hearing decisions, the hearing officer can vacate a driver's license suspension solely for subpoena non-compliance.

None of these requested documents would have provided any basis for establishing that Bell's license suspension should have been vacated under Idaho Code § 18-8002A(7), and none of these requested documents would have reduced the risk that Bell was erroneously deprived of his driver's license. Consequently, the hearing officer did not abuse his discretion or otherwise violate any due process right by refusing to subpoena these documents.

---

[4] The subpoena required the Boise Police Department to provide log sheets for June 3 to June 6, 2009, and the log sheets indicate that calibration checks were run for .20 and .08 reference solutions on June 3, 2009. (R. 83.) Bell's breath test took place on June 5, 2009.

4. The hearing officer did not violate Bell's right to due process by admitting the log sheets into the record.

Where evidence "is of a type commonly relied upon by prudent persons in the conduct of their affairs," such evidence may be admitted into the record in an administrative proceeding. Idaho Code § 67-5251(1). "The Hearing Officer assigned to the matter may, upon written request, issue subpoenas requiring the attendance of witnesses or the production of documentary or tangible evidence at a hearing." IDAPA § 39.02.72.300.01.

In this case, the hearing officer issued a subpoena for log sheets upon the written request of Bell. The subpoena required the Boise Police Department to send log sheets to the ITD by June 29, 2009, and the ITD bore the responsibility of forwarding the information to Bell. Log sheets were sent to Bell on July 9, 2009, and the hearing officer found that these log sheets were in response to the subpoena. According to the hearing officer, these log sheets came from the Boise Police Department and had been misplaced by the ITD before they were sent to Bell.

There is no indication or reason to doubt that the log sheets were originally provided by the Boise Police Department to the ITD in response to the subpoena. To require city and state officials to testify as to the source of these documents would create an unreasonable and unnecessary burden on the State and it would not provide any basis for questioning the validity of Bell's license suspension. Furthermore, whether or not log sheets were timely sent to Bell is irrelevant in determining whether there is a basis for vacating Bell's license suspension.

Because Bell was given an opportunity to review the log sheets before the hearing, the hearing officer did not abuse his discretion or otherwise violate Bell's right to due process by admitting the log sheets into the record.

B. The hearing officer was not statutorily required to vacate the license suspension if subpoenaed information was not timely received.

Bell also argues that the hearing officer was required to vacate his license suspension because the subpoenaed information was not timely received and thereby prevented the hearing from being held within the time required by Idaho Code § 18-8002A(7).

The ITD argues that the hearing officer may only vacate the license suspension if he finds beyond a preponderance of the evidence that one of five statutory bases for the suspension was not met under Idaho Code § 18-8002A(7)(a)-(e).

Idaho Code § 18-8002A(7) sets forth procedures governing an administrative hearing and the basis for vacating a license suspension. "If a hearing is requested, the hearing shall be held within twenty (20) days of the date the hearing request was received by the department unless this period is, for good cause shown, extended by the hearing officer for one ten (10) day period." Idaho Code § 18-8002A(7). Although this statute does not allow for more than one extension, the statute does not give the hearing officer the option of vacating the suspension if the hearing cannot be held within this time frame. *See id.* Rather, the statute provides that the hearing officer may only vacate a suspension if one of the five (5) requirements for the suspension is not met under subsections (a)-(e). *Id.*; *Kane v. State*, 139 Idaho 586, 590, 83 P.3d 130, 134 (Ct. App. 2003). Consequently, the failure to timely hold a hearing does not constitute a basis for the hearing officer to vacate the suspension. *Cf. Kane*, 139 Idaho at 590, 83 P.3d at 134 ("[A] hearing officer is not authorized to vacate a suspension based upon technical flaws in documents delivered to the ITD.")

In this case, the hearing was delayed a second time because subpoenaed information was not provided in a timely manner. To have allowed the first extended hearing to proceed would have prevented Bell from fully presenting his case because Bell did not have adequate time before the

hearing to review the information and to determine whether to use the information in his case. Thus, delaying the proceeding protected Bell's due process rights and did not provide a statutory basis for vacating the license suspension.

C. The hearing officer did not err in his findings or in sustaining Bell's driver's license suspension.

Bell next claims that the hearing officer erred in not finding a statutory basis for vacating the suspension based on the evidence admitted, in relying on a boilerplate affidavit where there was contradictory evidence, and in not subpoenaing evidence necessary to further support vacating the license suspension. According to Bell, the license suspension should have been vacated under Idaho Code § 18-8002A(7)(d) and (e) because the breath testing instrument was not operated "under the provisions of approval and certification standards" set by the Idaho State Police as required by Idaho Code § 18-8004(4) and because Bell was not properly informed of the consequences of submitting to evidentiary testing.

More specifically, Bell argues that the Intoxilyzer 5000 was not accurate and properly functioning because the instrument was not checked and calibrated according to the established schedules and procedures and because the simulator solution used in the instrument was not supplied by an approved source. He also argues that Officer White misrepresented the law by claiming that he could forcefully require a blood test if Bell did not submit to a breath test.

Conversely, the ITD argues that the evidence admitted does not support Bell's claims and that the additional evidence Bell requested was irrelevant. According to the ITD, the calibration check performed two (2) days before Bell's breath test demonstrates compliance with the requirements; a calibration check was not necessary to ensure accurate and proper functioning; and the source of the simulator solutions was an approved provider. Additionally, the ITD contends that

Officer White's statements were consistent with Idaho law because drivers do not have a statutory right to refuse an evidentiary test and because blood draws can be forced.

A person whose driver's license is suspended may request an administrative hearing on the matter, but that person bears the burden of proving that there was no legal basis for the suspension. Idaho Code § 18-8002A(7). The hearing officer may only vacate the suspension if he finds, by a preponderance of the evidence, that one of the five (5) requirements for the suspension is not met:

> (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 . . . 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 . . . in violation of section 18-8004 . . . Idaho Code; or
>
> (d) The tests for alcohol concentration . . . 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.

Id. If the petitioner does not meet his burden of proving that one of these requirements was not met, then the hearing officer must sustain the suspension. *Id.*

1. The evidence supports a finding that Intoxilyzer 5000 was functioning properly and was administered properly.

There is no evidence that the Intoxilyzer 5000 was not functioning properly when the breath test was administered. First, the instrument was calibrated two (2) days before Bell's breath test, and there is no indication or evidence that the machine was not working when it was checked or

when it was used two (2) days later. Second, the alleged failure of the ITD to follow procedures before and after Bell's breath test does not provide evidence that the instrument was not working at the time of Bell's breath test. *See Wheeler v. Idaho Transp. Dep't*, 148 Idaho 378, __, 223 P.3d 761, 766. Finally, whether the solution came from an approved provider is irrelevant in determining whether the instrument was functioning properly.

Additionally, there is no evidence that Officer White did not administer the test in accordance with the requirements of 18-8004(4). Whether the Boise Police Department followed proper procedures for checking the instrument's calibration and whether they used solution from an approved provider is irrelevant in determining whether Officer White performed his job as required.

Therefore, there is no evidentiary basis for vacating the license suspension under Idaho Code § 18-8002A(7)(d).

2. The evidence supports a finding that Officer White properly informed Bell of the consequences of submitting to a breath test.

There is no evidence that Officer White did not properly inform Bell of the consequences set forth in Idaho Code § 18-8002A(2) for submitting to and failing a breath test or refusing to submit to a breath test. Rather, the undisputed evidence is that Officer White played an audio advisory informing Bell of the statutory consequences. Although Officer White subsequently stated that he could force Bell to submit to a blood draw, his various statements to that effect did not negate the advisory because they did not alter the statutory consequences. By informing Bell that he would not accept a refusal, Officer White essentially told Bell that he was not allowing the statutory consequences for refusal to take effect. Such statements successfully coerced Bell's peaceful compliance without creating grounds for vacating the license suspension.

An officer is required to inform a person of the consequences of submitting to and failing a breath test and of refusing to submit to an evidentiary test. Idaho Code § 18-8002A(2), (7)(e). An officer's failure to so inform a person is grounds for vacating a license suspension. Idaho Code § 18-8002A(7)(e). However, when an officer coerces peaceful compliance by stating that an evidentiary test may be forced and not refused, the officer's statements do not constitute grounds for vacating the suspension because they do not alter the consequences for failing a test or for successfully refusing a test. *See* Idaho Code § 18-8002A(7)(e).

Although Idaho statutes provide consequences in the event of refusal, these statutes are designed to discourage physical conflict in the event of a physical refusal rather than to give a right of refusal. *See* Idaho Code §§ 18-8002(2), 18-8002A(2); *Woolery*, 116 Idaho at 373, 775 P.2d at 1215; *DeWitt*, 145 Idaho at 713, 184 P.3d at 219. The purpose of these statutes is to obtain compliance by threat rather than force, not to "hamstring the ability of law enforcement to properly investigate and obtain evidence." *Woolery*, 116 Idaho at 373, 775 P.2d at 1215.

Any person driving a vehicle in Idaho gives his or her implied consent to a blood alcohol test where an officer has reasonable grounds to believe that the person was driving under the influence of alcohol. Idaho Code §§ 18-8002(1), -8004(1). Once a person chooses to drive a vehicle, that person gives up any right to withdraw the statutorily implied consent. *State v. Woolery*, 116 Idaho 368, 372, 775 P.2d 1210, 1214 (1989); *DeWitt*, 145 Idaho at 712-13, 184 P.3d at 218-19. A person has no statutory right to refuse an evidentiary test, and an officer may obtain an evidentiary test by coercion. *See Woolery*, 116 Idaho at 372, 775 P.2d at 1214; *State v. Nickerson*, 132 Idaho 406, 409-10, 973 P.2d 758, 761-62 (Ct. App. 1999).

Because Officer White informed Bell of the statutory consequences under Idaho Code § 18-8002A(2) and because Office White's comments about forcing an evidentiary test did not alter or

contradict the consequences, there is no evidentiary basis for vacating the license suspension under Idaho Code § 18-8002A(7)(e).

D. The hearing officer did not err in relying on Officer White's affidavit.

Finally, Bell claims that the hearing officer erred in relying on Officer White's affidavit because Officer White had been terminated from the Boise Police Department for not being credible. He argues that the ITD, as a political subdivision of the State, had actual or constructive knowledge that Officer White made false statements during an internal investigation and that the hearing officer should have therefore found Officer White not credible.

The ITD argues that it had no actual or constructive knowledge of Officer White's actions and that the risk that Officer White lied about the facts of Bell's arrest is very small.

Bell fails to cite any law in support of his position or otherwise explain how reliance on Officer White's affidavit constitutes error which should not be affirmed on appeal. He does not argue that the hearing officer's reliance on the affidavit violated a constitutional or statutory provision; was in excess of statutory authority; was made upon unlawful procedure; was not supported by substantial evidence on the record as a whole; or was arbitrary, capricious, or an abuse of discretion.

Furthermore, there is no evidence that the ITD had actual knowledge regarding false statements allegedly made by Officer White during an internal investigation that it should have passed on to Bell. Because the ITD did not have knowledge of these statements and because the hearing officer may properly rely upon a sworn affidavit, the hearing officer did not err in relying upon Officer White's affidavit.

CONCLUSION

For the reasons stated above, the Court affirms the hearing officer's decision.

IT IS SO ORDERED.

Dated this 15th day of June, 2010.

Kathryn A. Sticklen
District Judge

CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.R.C.P. to each of the attorneys of record in this cause in envelopes addressed as follows:

MICHAEL J. KANE
MICHAEL KANE AND ASSOCIATES, PLLC
PO BOX 2865
BOISE, ID 83701-2865

DEAN B. ARNOLD
ATTORNEY AT LAW
300 W MAIN ST, STE 250, OFFICE 202
BOISE, ID 83702

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

Date: 6/15/10

By _____
Deputy Clerk

Dean B. Arnold, ISB #6814
Law Offices of Dean B. Arnold
300 W. Main St., Suite 202
Boise, Idaho 83702
Telephone: (208) 342-1575
Facsimile: (208) 342-3777
E-mail: dean@deanarnoldlaw.com

Attorney for Appellant

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

IN THE MATTER OF THE DRIVING PRIVILEGES OF: HAMISH ALLEN BELL	Case No. CV-OT-2009-18414
	NOTICE OF APPEAL
HAMISH ALLEN BELL, Petitioner-Appellant,	Fee Category: L.4 ($101.00)
vs.	
STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent-Respondent on Appeal.	

TO: THE RESPONDENT, STATE OF IDAHO, DEPARTMENT OF TRANSPORATION, AND ITS ATTORNEYS, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named petitioner, Hamish Allen Bell, appeals against the above-named respondent to the Idaho Supreme Court from the Memorandum Decision and Order filed in the above-entitled matter on the 15th day of June, 2010, by the Honorable Kathryn A. Sticklen, Ada County District Judge.

2. The party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to I.A.R. 11(f).

3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal.

a. Did the subpoenas issued by the Hearing Officer violate Mr. Bell's due process rights?

b. Did the Hearing Officer violate Mr. Bell's due process rights by impermissibly extending the administrative hearing process?

c. Did the Hearing Officer violate Mr. Bell's due process rights by refusing to issue subpoenas regarding Officer White's Intox 5000 certification?

d. Did the Hearing Officer violate Mr. Bell's due process rights by refusing to issue subpoenas regarding calibration checks?

e. Did the Hearing Officer err by finding the Boise Police Department complied with ITD's subpoena?

f. Did the Hearing Officer err in concluding that Mr. Bell's driver's license suspension could not be vacated based upon the Boise Police Department's failure to comply with ITD's subpoenas?

g. Did the Hearing Officer violate Mr. Bell's due process rights by refusing to issue subpoenas and produce documents regarding Boise Police Department's compliance with ITD's subpoena?

h. Did the Hearing Officer err by sustaining Mr. Bell's driver's license suspension when the evidence affirmatively showed the State failed to comply with IDAPA and the Standard Operating Procedures?

i. Did the Hearing Officer err in sustaining Mr. Bell's driver's license suspension when the evidence affirmatively showed the State's adopted procedures do not ensure accuracy and proper functioning of the breath testing device?

j. Did the Hearing Officer err by sustaining Mr. Bell's driver's license suspension when the evidence affirmatively showed the provider of the simulator solutions was not an "approved" provider as required by IDAPA and the Standard Operating Procedures?

k. Did the Hearing Officer err by sustaining Mr. Bell's driver's license suspension when the evidence affirmatively showed Officer White failed to properly inform Mr. Bell of the consequences of submitting to evidentiary testing?

l. Did the Hearing Officer err by relying on Officer White's affidavit when

the State was in actual or constructive knowledge that Officer White had been deemed unreliable by the Boise Police Department?

4. Has an order been entered sealing all or any portion of the record? NO.

5. Is a reporter's transcript requested? NO.

(Two reporter's transcripts of the administrative hearing that occurred before the hearing officer are already part of the record, and should be lodged pursuant to I.A.R. 31(a)(2).)

6. The appellant requests the following documents be included in the clerk's record in addition to those automatically included under I.A.R. 28:

a. Order (augmenting the record), filed February 10, 2010.

b. Although the entire ITD Record should be included pursuant to I.A.R. 31(a)(2), the appellant specifically requests that Record pages 333-334 pursuant to Order be included as well. These pages are attached to the original Motion to Augment, filed January 28, 2010.

c. Audio Recording of Oral Argument, dated April 19, 2010, at 2:00 p.m., before Ada County District Judge Kathryn A. Sticklen.

7. I certify:

a. That all appellate filing fees and estimated fees for preparation of the clerk's record have been paid as required by the clerk accepting this document for filing.

b. That service has been made upon all parties required to be served pursuant to I.A.R. 20 (and the attorney general of Idaho pursuant to I.C. § 67-1401(1)), as reflected on the attached certificate of service.

DATED this 14th day of July, 2010.

Law Offices of Dean B. Arnold

By: Dean B. Arnold

Dean B. Arnold

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael J. Kane Special Deputy Attorney General Idaho Department of Transportation c/o Michael Kane & Associates, PLLC P.O. Box 2865 Boise, Idaho 83701-2865	☒ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (Fax)
State of Idaho Office of the Attorney General 700 W. Jefferson St. P.O. Box 83720 Boise, Idaho 83720-0010	☒ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (Fax)

Dean B. Arnold

for Law Offices of Dean B. Arnold

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

IN THE MATTER OF THE DRIVING PRIVILEGES OF: HAMISH ALLAN BELL. --- HAMISH ALLEN BELL, Petitioner-Appellant, vs. IDAHO DEPARTMENT OF TRANSPORTATION, Respondent-Respondent on Appeal.	Supreme Court Case No. 37865 CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Agency Record, received October 23, 2009.
2. Transcript of Hearing Held July 9, 2009, Boise, Idaho, received November 5, 2009.
3. Transcript of Hearing Held July 23, 2009, Boise, Idaho, received November 5, 2009.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 24th day of August, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

SEAL

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

IN THE MATTER OF THE DRIVING PRIVILEGES OF: HAMISH ALLAN BELL. --- HAMISH ALLEN BELL, Petitioner-Appellant, vs. IDAHO DEPARTMENT OF TRANSPORTATION, Respondent-Respondent on Appeal.	Supreme Court Case No. 37865 CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

DEAN B. ARNOLD

ATTORNEY FOR APPELLANT

BOISE, IDAHO

MICHAEL J. KANE

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

J. DAVID NAVARRO
Clerk of the District Court

Date of Service: SEP 0 1 2010

By BRADLEY J. THIES
Deputy Clerk

SEAL

CERTIFICATE OF SERVICE

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

IN THE MATTER OF THE DRIVING PRIVILEGES OF: HAMISH ALLAN BELL. --- HAMISH ALLEN BELL, Petitioner-Appellant, vs. IDAHO DEPARTMENT OF TRANSPORTATION, Respondent-Respondent on Appeal.	Supreme Court Case No. 37865 CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 14th day of July, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

SEAL

CERTIFICATE TO RECORD