

7-16-2008

Bennett v. State, Dept. of Transp. Appellant's Brief Dckt. 35150

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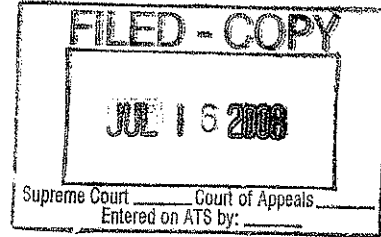
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IN THE SUPREME COURT OF THE
STATE OF IDAHO

IN THE MATTER OF THE DRIVING)
LICENSE PRIVILEGES OF STACIE)
DAWN BENNETT.)

Supreme Court No. 35150

STACIE DAWN BENNETT,)

Petitioner-Respondent,)

APPELLANT'S BRIEF

v.)

STATE OF IDAHO, DEPARTMENT OF)
TRANSPORTATION,)

Respondent-Appellant.)

APPEAL FROM SECOND JUDICIAL DISTRICT, NEZ PERCE COUNTY

THE HONORABLE JEFF M. BRUDIE, PRESIDING

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I. STATEMENT OF THE CASE

a. Nature of the Case.

This is the initial brief on appeal of The Idaho Department of Transportation. This is an appeal by the Idaho Department of Transportation of the District Court Judge Jeff M. Brudie's Decision of March 10, 2008 setting aside the driver's license suspension of Stacey Dawn Bennett which had been entered by the Department's Hearing Officer.

b. Party References.

The Idaho Transportation Department is referred to as the "Department" for purposes of this argument. Ms. Bennett is specifically referred to by name. Where "driver" is used, it is in reference to a hypothetical or to drivers generally.

c. Factual Statement and Procedural History.

At approximately 2:25 a.m., on October 14, 2007, Moscow Police Officer, W.L. Krasselt was stopped in the parking lot of Moscow Transmission and saw a black Honda Accord with Idaho license N118607 slowly back out of parking lot on the north side of CJ's at 112 N. Main. Officer Krasselt watched the driver of vehicle drive to the street and then stop and drive back into the lot and park in a different space. A white male who had been standing in the lot near the Honda, immediately walked over to the Officer Krasselt and notified him that the Honda hit another vehicle in the lot when the driver backed up. The male told Officer Krasselt that he told the female driver of the Honda to stop in the lot. (R. pp. 003-004)

Officer Krasselt drove to CJ's parking lot and identified the driver as Stacie Dawn Bennett. Ms. Bennett stated that she was trying to move the Honda to a better parking space to wait for a ride when she hit the other vehicle. Officer Krasselt saw a fresh white paint transfer on the left front fender of the Honda and the other vehicle, a white Ford

Explorer had been freshly scraped on the right rear fender. (R. p. 004)

Officer Krasselt smelled the odor of an alcoholic beverage on Ms. Bennett's breath and observed that her speech was slightly slurred. Officer Krasselt asked how much Ms. Bennett had to drink, Ms. Bennett stated that she had two mixed drinks at a bar in Uniontown when she was on her way to Moscow from Lewiston earlier in the evening. (R. 004)

Officer Krasselt performed the Horizontal Gaze Nystagmus test on Ms. Bennett and saw the onset of jerky pursuit onset prior to forty five degrees and distinct nystagmus at maximum deviation in both eyes. Officer Krasselt then asked Ms. Bennett if she knew the alphabet. Ms. Bennett stated that she could say the alphabet forwards and backwards and that she had been practicing it. Officer Krasselt asked Ms. Bennett to say the alphabet starting at the letter 'M'. Ms. Bennett said three letters then stopped and said it was hard, she then started over at the letter 'M' and missed or said several letters out of order starting with the letter 'S'. Ms. Bennett was able to count correctly from 65 to 75 and from 75 back to 65 when asked. (R. p. 004)

Officer Krasselt also performed the walk and turn evaluation and Ms. Bennett did not take the correct number of steps, did not turn as instructed and missed touching heel to toe on several steps. Officer Krasselt also asked Ms. Bennett to perform the one legged stand evaluation, Ms. Bennett held her arms straight out from her sides for balance during the entire test and put her foot down once. (R. p. 004)

Officer Krasselt then placed Ms. Bennett under arrest and transported her to the Latah County Jail. Ms. Bennett's breath alcohol test results were .090 and .095. (R. pp. 004-005)

Ms. Bennett timely requested an Administrative Hearing. (R. pp. 10-13) The hearing was held telephonically before Michael B. Howell, Hearing Officer for the Department of Transportation on November 2, 2007 at 10:00 M.T. (R. p. 019)

The Hearing Officer entered his Findings of Fact and Conclusions of Law and Decision on November 3, 2007, suspending Ms. Bennett's driving privileges for 90 days as set out in the Notice of Suspension served on Ms. Bennett. (R. pp. 028-032) Ms. Bennett timely filed a Petition for Judicial Review. (R. pp. 036-037) Ms. Bennett's Administrative Driver's License Suspension has been stayed pending this Petition for Judicial Review.

After briefing submitted by the parties, Judge Brudie heard oral argument from Ms. Bennett and the Department on February, 21, 2008. Judge Brudie entered a Memorandum Opinion and Order on Petition for Judicial Review on March 10, 2008 vacating the Hearing Officer's Decision and reinstating the driving privileges of Ms. Bennett.

The Department timely filed its Notice of Appeal.

II. ISSUES ON APPEAL

The Department identifies two issues on appeal:

The Department's Hearing Officer's Decision is supported by substantial competent evidence.

Ms. Bennett's driving privileges should be suspended pursuant to the decision of the Department's Hearing Officer.

III. STANDARD OF REVIEW

The Court is asked to review the Hearing Officer's Decision suspending Ms. Bennett's driving privileges for 90 days. This Court reviews the Department's Record independently of the District Court's Decision. *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 155 P.3d 1176 (2006).

This Court defers to the Department's Hearing Officer as to the weight of the evidence and does not substitute its judgment for the judgment of the Department's Hearing Officer. Only if the Hearing Officer's Findings are clearly erroneous should the Court not defer to the administrative findings. *Gibbar at 940*.

The Department's Hearing Officer's factual determinations are binding on the reviewing Court even where there is conflicting evidence before the Department so long as the Hearing Officer's determinations are supported by substantial competent evidence in the Record. *Archer v. State, Dept. of Transp.*, 145 Idaho 617, 181 P.3d 543, Idaho App. (2008).

The Idaho Administrative Procedure Act limits the Court's ability to overturn the Department's Hearing Officer's Decision.¹

¹ Idaho Code § 67-5279(3) provides:

When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, 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. If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

IV. ADMINISTRATIVE LICENSE SUSPENSION PROCESS

Idaho Code § 18-8002A requires the Department to suspend the driving privileges of a driver based upon the failure of an evidentiary test for the concentration of alcohol. The driver is entitled to an administrative hearing wherein the driver has the burden to prove any of the statutory grounds to vacate the suspension by a preponderance of the evidence.²

Here only Idaho Code § 18-8002A(7)(d) was implicated in Ms. Bennett's Petition for Judicial Review. There has been no challenge to the circumstances of the stop, of Ms. Bennett being in actual physical control of a motor vehicle, that she failed an evidentiary test for alcohol concentration or that she was informed of the consequence of submitting to evidentiary testing.

² Idaho Code § 18-8002A(7) sets out the burden of the driver to demonstrate to the Hearing Officer that driving privileges should be reinstated because:

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

ARGUMENT

ISSUE 1

The Department's Hearing Officer's Decision is supported by substantial competent evidence.

The question before the Hearing Officer and to be considered by the Court now is whether the test for alcohol concentration, drugs, or other intoxicating substances administered at the direction of the peace officer was not conducted in accordance with Idaho Code § 18-8004(4).³

There is no claim that the testing equipment was not functioning properly when the test was administered.

Idaho Code § 18-8004(4) contemplates that the results of alcohol testing which identifies the formula, the location, circumstances of testing and administered consistent with the policies of the Idaho State Police can be considered in the Administrative License Suspension context without the necessity of additional foundation.

³ Idaho Code § 18-8804(4) provides:

For purposes of this chapter, an evidentiary test for alcohol concentration shall be based upon a formula of grams of alcohol per one hundred (100) cubic centimeters of blood, per two hundred ten (210) liters of breath or sixty-seven (67) milliliters of urine. Analysis of blood, urine or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho state police. Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

Here the Hearing Officer found that the test results indicated a failed test.⁴

However, the District Court determined that the police officer's affidavit setting out the circumstances of breath alcohol testing was insufficient in light of the testimony of Ms. Bennett. Ms. Bennett testified that Officer Krasselt was in and out of the room prior to the administration of the breath alcohol test. (Tr. p. 14 LL. 1-25 to p. 15 LL 1-8).

The testimony of Ms. Bennett is ambiguous at best. Ms. Bennett does not testify about the amount of time she spent in the room awaiting testing, she does not testify as to the duration and circumstances of the police officer's absence from the room, she does not testify that the police officer's view or whether the use of any of the officer's other senses were affected in anyway. Additionally, Ms. Bennett does not testify that she smoked, ingested any substance, vomited, or belched at any time awaiting alcohol testing.

The only fact at issue here is whether there was a sufficient 15 minute waiting

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VII.

The officer certified that he administered the breath test in compliance with the standards and methods adopted by the Department of Law Enforcement for the administration of breath tests which standards include specific directions on a 15 minute observation period prior to the test administration. While the driver testified that the officer was in and out of the room during the waiting period, no specific testimony was produced to show that the 15 minute period was not present. The driver had the burden to do so if she were to successfully challenge the officer's statement that he had properly observed the waiting period.

VII.

The driver testified that she was coughing repeatedly prior to taking the breath test. However, she did not say that she has vomited or regurgitated any substance from her stomach that could have affected the test. According to the Standard Operating Procedures for Breath Alcohol Testing, if "... the subject vomits or is otherwise suspected of regurgitating material from the stomach, the 15 minute waiting period must begin again." The testimony of the driver that she "coughed" is insufficient to invalidate the test or to rebut the statement of the officer that the test was properly conducted.

VIII.

Proper procedures and standards were followed by the peace officer to insure the operation of the test machine to be reliable, with the results of .90 and .95.

See Hearing Officer's Findings of Fact and Conclusions of Law and Order, R. pp. 47-48, ¶ VII - VIII.

period prior to the administration of the breath alcohol test. The Court of Appeals sets out the significance of the 15 minute waiting period in requiring compliance with the Idaho State Police Standard Operating Procedures Manual to meet Idaho Code § 18-8004(4).⁵

The Hearing Officer considered Ms. Bennett's testimony and Officer Krasselt's Affidavit and considering the entirety of the Record before him, concluded that Ms. Bennett had not met her burden to demonstrate that the test was not properly administered.⁶

However, the District Court simply makes a factual determination different from the Hearing Officer and has substituted its judgment for that of the Hearing Officer. The Hearing Officer's Decision was based on the entirety of the Record not placing more significance on Ms. Bennett's ambiguous testimony.⁷

The purpose of the 15 minute waiting period is to eliminate the tainting of a

⁵ The manual requires that the breath test subject be monitored for a period of fifteen minutes immediately prior to administration of the breath test to assure that the subject did not smoke, ingest any substance, vomit, or belch, which actions could render the breath test inaccurate. In the absence of a validly conducted fifteen-minute wait required by the manual, the hearing officer should vacate the license suspension because the breath test was not conducted in accordance with the requirements of I.C. § 18-8004(4). *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 155 P.3d 1176 (2006) at p. 1183.

⁶ The officer certified that he administered the breath test in compliance with the standards and methods adopted by the Department of Law Enforcement for the administration of breath tests which standards include specific directions on a 15 minute observation period prior to the test administration. While the driver testified that the officer was in and out of the room during the waiting period, no specific testimony was produced to show that the 15 minute period was not present. The driver had the burden to do so if she were to successfully challenge the officer's statement that he had properly observed the waiting period.

See Hearing Officer's Findings of Fact and Conclusions of Law and Order, R. p. 47, ¶ VII.

⁷ Even if it were argued that the Hearing Officer inappropriately placed too much weight on the affidavit of Police Officer Krasselt, there would be no reason to believe based on this Record that such emphasis is misplaced and therefore an abuse of discretion. The District Court's analysis was rejected in *Archer v. State, Dept. of Transp.*, 145 Idaho 617, 181 P.3d 543, Idaho App. (2008). Just as here, Ms. Bennett provides no convincing evidence that the breath test was not properly administered.

breath sample with the presence of mouth alcohol. There is no evidence that Ms. Bennett's evidentiary test for alcohol concentration was affected by the presence of mouth alcohol.⁸

The Record indicates that Ms. Bennett was arrested at 0236, (R. p. 18) and was tested at 0316, (R. p. 20). There is more than a sufficient waiting period, particularly in light of the ambiguity of Ms. Bennett's testimony.

The District Court places emphasis on two facts based on Ms. Bennett's testimony; Ms. Bennett was suffering from a deep cough, coughing constantly during the fifteen minutes and that the officer left the room twice during the fifteen minute monitoring period. The only other evidence that the Court references is the affidavit of the police officer that the tests had been performed consistently with the standards required by the Idaho State Police. It's not enough for the Court to put more weight on Ms. Bennett's testimony. Since the Intoxilyzer results did not indicate the presence of mouth alcohol, there is substantial competent evidence in the Record supporting the Hearing Officer's Decision.

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- 3.1.4 During the waiting period, the monitor must be alert for any event that might influence the accuracy of the breath test.
 - 3.1.4.1 If, during the 15-minute waiting period, the subject vomits or is otherwise suspected of regurgitating material from the stomach, the 15-minute waiting period must begin again.
 - 3.1.4.2 The operator must be aware of the possible presence of mouth alcohol as indicated by the testing instrument.
 - 3.1.4.3 If mouth alcohol is suspected or indicated, the operator must begin another 15-minutes waiting period before repeating the testing sequence.

Idaho State Police Standard Operating Procedure Breath Alcohol Testing, Section 3: Testing Procedure, p.8, Appendix A.

Coughing is not a condition or event that requires the police officer to do anything different other than observe the driver for fifteen minutes.

The District Court cites *State v. DeFranco*, 143 Idaho 335, 144 P.3d 40, Idaho App. (2006) for the proposition that the officer risks that the breath test would be rendered inadmissible if the waiting period was insufficient. However, *DeFranco* was based upon the proposition in a criminal case that the State has the burden. That is not the situation here. Here, Ms. Bennett has the burden and because she has the burden, she has to do more than submit ambiguous testimony as to the circumstances of the administration of the evidentiary test for alcohol concentration in light of the other substantial competent evidence in the Record.

The officer does not risk that the breath test would be inadmissible. Instead Ms. Bennett risks a suspension if she does not persuade the Hearing Officer that the breath test was not administered properly. The question of “admissibility” of the breath alcohol test is not related to the driver’s burden. The Hearing Officer must consider the breath test results. Ms. Bennett’s burden to show that the evidentiary test for alcohol concentration did not meet the provisions of Idaho Code § 18-8004(4) requires the Hearing Officer to consider the breath test result.

The driver’s burden is focused specifically on demonstrating non compliance with the Idaho State Patrol Standard Operating Procedures for the administration of a breath test, Idaho Code § 18-8004(4). The only evidence that the tests were not performed in accordance with the requirements of Idaho Code § 18-8004 is Ms. Bennett’s ambiguous testimony that she was coughing during the fifteen minute observation period (Tr. LL. 9-25 p. 13) and that Officer Krasselt left the room, (Tr. L. 4 p. 14) (Tr. LL. 9-17 p. 15). None of Ms. Bennett’s testimony gets to the issue of whether the breath test was as a matter of fact administered consistent with the requirements of Idaho Code § 18-

8004(4). The evidence considered by the District Court only indicates that there “could” be something wrong with the administration of the breath test. The testimony that an event “could have happened” does not meet Ms. Bennett’s burden. *In re Mahurin*, 140 Idaho 656, 99P.3d 125, Idaho App. (2004). Ms. Bennett did not call a witness to testify about the effect of coughing or having a chest cold on the presence of mouth alcohol.

Neither is there any evidence that Officer Krasselt was not alert to the Intoxilyzer result indicating the presence of mouth alcohol. (Exhibit to R. p. 002, and Idaho State Police Standard Operating Procedures § 3.1.4, 3.1.4.1, 3.1.4.2 and 3.1.4.3, Appendix A.)

The extent of monitoring effecting compliance with the Idaho State Patrol Manual for Standard Operating Procedures is a factual question and the District Court substituted its opinion of the evidence for the findings of the Hearing Officer. The Court decided which evidence would be more competent and having done so substitutes its judgment for the judgment of the Hearing Officer. *In re Suspension of Driver’s License of Gibbar*, 143 Idaho 937, 155 P.3d 1176 (2006), *Archer v. State, Dept. of Transp.*, 145 Idaho 617, 181 P.3d 543, Idaho App. (2008).

The District Court is not to reweigh the evidence as the District Court did here. The District Court’s role is to determine whether there is enough evidence in the Record to support the Hearing Officer’s Decision even if the District Court would disagree with the result reached by the Hearing Officer.

ISSUE 2

Ms. Bennett’s driving privileges should be suspended pursuant to the decision of the Department’s Hearing Officer.

Ms. Bennett’s driving privileges should be suspended pursuant to the Decision of

the Hearing Officer. Ms. Bennett has not met her burden pursuant to Idaho Code § 18-8002A(7). The Hearing Officer as set out in Findings, VII, VII & VIII makes findings consistent with the substantial competent evidence in the Record. The Findings of the Hearing Officer that Ms. Bennett did not meet her burden is based on the entirety of the Record including the provisions of Idaho State Police Standard Operating Procedures Manual.

Ms. Bennett's burden to show that any of the circumstances of Idaho Code § 18-8002A(7) had been met. It is insufficient to place ambiguous evidence in the Record demonstrating that an event could have occurred which could have effected the evidentiary test result. Instead she is required to show that an event or circumstance occurred demonstrating that the breath test was not administered consistent with Idaho Code § 18-8004(4).

VI. CONCLUSION

Ms. Bennett has not met her burden pursuant to Idaho Code § 18-8002A(7) to demonstrate that the Hearing Officer's Decision was arbitrary or capricious or that the Hearing Officer's Decision was not supported by substantial competent evidence on the Record.

The Hearing Officer's decision to suspend Ms. Bennett's driving privileges should be sustained and Ms. Bennett's driving privileges should be suspended for ninety days.

DATED this 11th day of July 2008.



Edwin L. Litteneker
Special Deputy Attorney General

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Lewiston, Idaho 83501

On this 11th day of July 2008.



Edwin L. Litteneker

APPENDIX A

Standard Operating Procedure
Breath Alcohol Testing

Standard Operating Procedure

Breath Alcohol Testing

**Idaho State Police
Forensic Services
August 1994
(Rev. 9/07)**

Glossary

Breath Test: A series of separate breath samples provided during a breath testing sequence.

Breath Testing sequence: A sequence of events as determined by the Idaho State Police Forensic Services which may be directed by either the instrument or the operator, but not both, and may consist of air blanks, calibration checks, internal standard checks, and breath samples.

Breath Testing Specialist (BTS): An operator who has completed an advanced training class taught by an employee of the Idaho State Police Forensic Services. BTS certification is valid for 26 calendar months and expires on the last day of the 26th month. (1.4)

Idaho State Police Forensic Services (ISPFS): Formerly known as the Bureau of Forensic Services, the ISPFS is dedicated to providing forensic science services to the criminal justice system of Idaho. ISPFS employees are qualified to perform all duties of a BTS. (1)

Calibration check (Intermediate check): A check of the accuracy of the breath-testing instrument utilizing a simulator and ethanol solution(s) provided by the ISPFS or approved vendor(s) and standardized by the ISPFS. Calibration checks should be reported to three decimal places. (2)

Certificate of Approval: A certificate stating that an individual breath alcohol-testing instrument has been evaluated by the ISPFS and found to be suitable for forensic alcohol testing. The certificate bears the signature of the Idaho State Police Forensic Services Manager/Major, and the effective date of the instrument approval. (1.1)

Changeover Class: A training class for currently certified personnel during which they are taught theory, operation, and proper testing procedure for a new make or model of instrument being adopted by their agency. Breath Testing Specialists attend BTS training that qualifies them to perform BTS duties related to the instrument. (1.5)

Operator Certification: The condition of having satisfied the training requirements for administering breath alcohol tests as established by the ISPFS. Operator certification is valid for 26 calendar months and expires on the last day of the 26th month. (1.3)

Operator: An individual certified by the ISPFS as qualified by training to administer breath alcohol tests. (1.3)

Operator Class: An ISPFS-approved training class for prospective or uncertified breath test operators. (1.3)

Recertification Class: A training class for currently certified personnel, completion of which results in uninterrupted continuation of their Operator or BTS status for an additional 26 months. (1.3)

Simulator Check (SIM CHK): Is a type of calibration check that is run with each individual breath test. (2)

Waiting Period: Mandatory 15-minute period prior to administering a breath alcohol test. (3.1)

Breath Alcohol Standard Operating Procedure List of Revisions

<u>SOP Section</u>	<u>Topic</u>	<u>Date of Revision</u>
2	Delete reference to ALS	June 1, 1995
2	0.02/0.20 solutions	June 1, 1995
2		June 1, 1995
3.2.1	Valid breath tests	October 23, 1995
2.1	Alco-Sensor calibration checks	May 1, 1996
2.2	Intoxilyzer 5000 Calibration Checks Effective June, 1996	May 1, 1996
2.1.2	0.003 agreement	June 1, 1996
2.1.2	Operators may run calibration checks	July 1, 1996
2.1.2	Re-run a solution within 24 hours	September 6, 1996
2.1	All 3 solutions run within a 24-hour period	September 6, 1996
2	All 3 solutions run within a 24-hour period	September 6, 1996
2.1.2	Re-running of a solution	September 26, 1996
2.1	All solutions run within a 48-hour period Reference to "three" removed	September 26, 1996 Oct. 8, 1996
2	All 3 solutions run within a 48-hour period	September 26, 1996
2	More than three calibration solutions	October 8, 1996
2	Solution values no longer called in to BFS	April 1, 1997
2.1	Alco-Sensor and Intoxilyzer 5000 calibration check	August 1, 1998
2.2	Calibration checks for the Intoxilyzer 5000	February 11, 1999
	Name change, all references made to the Bureau of Forensic Services were changed to Idaho State Police Forensic Services.	August 1999
1.6	Record Management	August 1, 1999

2	Deleted sections on relocating, repairing, recalibrating, and loaning of instruments from previous revision.	August 1, 1999
1.2, 2.1, 2.2	Alco-Sensor and Intoxilyzer 5000 calibration checks	August 1, 1999
3	Deleted sections on blood and urine samples for alcohol determination	August 1, 1999
1.6	Operator certification record management	January 29, 2001
1,2, and 3 2.1, 2.2	Reformat numbering Requirement for running 0.20 simulator solution	August 18,2006
2.2.1.1.2.2	Changed 3-sample to “two print cards”.	November 27, 2006
2.2.1.1.2.2 2.1.2.1 and 2.2.4	Deleted “simulator port” and “two print cards”. Simulator temperature changed from “should” to “must”.	May 14, 2007 May 14, 2007
2.2.1.1.2.2	Clarification of 0.20 calibration checks.	September 18, 2007

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Section 2: Calibration Checks of Breath Testing Instruments, pages 5-7

Section 3: Testing Procedure, pages 8-9

1. Operator and Instrument Certification

To ensure that minimum standards are met, individual breath testing instruments, operators, and breath testing specialists (BTS) must be approved by the Idaho State Police Forensic Services (ISPFS).

1.1 Each breath-testing instrument is individually certified by the ISPFS. The individual instrument approval does not carry an expiration date, but may be subject to reevaluation and/or suspension under circumstances including but not limited to frequent failure of calibration checks, electrical or mechanical damage, an unusual frequency of repairs, or when considered advisable by the ISPFS.

1.1.1 If an instrument's certificate of approval is suspended, the instrument may be recertified after re-evaluation by the ISPFS.

1.2 Each approved breath-testing instrument is approved or disapproved for evidentiary testing based on the results of calibration checks performed as described in Section II.

1.2.1 If a calibration check produces results within the acceptable range of values, the instrument is approved for evidentiary use for all breath tests associated with that calibration check.

1.2.1.1 For Alco-Sensor instruments, a valid calibration check must be performed within 24 hours of a breath test.

1.2.1.2 For Intoxilyzer 5000 instruments, a valid calibration check must be performed with every breath test.

1.2.2 If a calibration check produces results outside the acceptable range of values, the instrument may not be approved for evidentiary use for those breath tests associated with that calibration check.

1.2.2.1 For the Alco-Sensor instruments, any breath test falling within the overlapping time frame of an a valid calibration check may be covered by that calibration check.

1.3 Operators become certified by completing a training class taught by an ISPFS certified Breath Testing Specialist (BTS). Certification is for 26 calendar months and expires the last day of the 26th month unless renewed. Certification will allow the operator to perform all functions required to obtain a valid breath test. It is the responsibility of the individual operator to maintain current certification; the ISPFS will not notify operators that their certification is about to expire.

1.3.1 Recertification for another 26-month period is achieved by completing an ISPFS approved recertification class prior to the end of the 26th month.

1.3.1.1 If the individual fails to satisfactorily complete the class (including the written and practical tests), he/she must retake the operator class in order to become certified.

1.3.1.1.1 Current Operator certification is voided, and the individual is not certified to run evidentiary breath tests on the instrument in question until the operator class is completed.

1.3.1.1.2 Persons who must leave the class unexpectedly may retake another recertification class prior to expiration of their current certification.

1.3.2 When certification expires, an operator must retrain by attending the operator class.

1.3.3 There are no grace periods or provisions for extension of operator certification.

1.4 Breath Testing Specialists (BTS) are operators who have completed an advanced training class and are ISPFS-certified to perform instrument maintenance, and provide both basic and recertification training for instrument operators.

1.4.1 To obtain **initial** BTS certification, an individual must be currently certified as an operator of that particular instrument. BTS certification is then obtained by completing an approved ISPFS training class.

1.4.1.1 Certification is valid for 26 calendar months.

1.4.1.2 If BTS certification is allowed to expire, the individual reverts to certified operator status for 12 calendar months for that instrument. He/she may no longer perform any BTS duties relating to that particular instrument.

1.4.1.2.1 Operator certification will expire at the end of 12 calendar months but may be continued by completing a recertification class as described in Section 1.3.1.

1.4.1.3 BTS certification is renewable by attending an approved ISPFPS training class.
The only exception is described in Section 1.5.1.

1.4.1.4 The Idaho State Police Forensic Services may revoke BTS certification for cause.

1.4.1.4.1 Examples include falsification of records, failure to perform required calibration checks, and failure to meet standards in conducting operator training.

1.5 Adoption of a new instrument by an agency will require updating any BTS and Operators in that agency.

1.5.1 A currently certified BTS may become a certified BTS for a new instrument by completing an instrumentation class.

1.5.1.1 The new instrument must utilize the same type of technology (fuel cell or infrared) as the instrument for which the BTS holds current certification.

1.5.1.1.1 If the principle of operation is different, the BTS must complete an operator changeover class as described in 1.5.2, followed by a BTS instrumentation class for the new instrument.

1.5.1.2 BTS certification will be valid for 26 months upon completion of the class.

1.5.2 A currently certified operator may certify on a new instrument by completing an ISPFPS approved instrument changeover class.

1.5.2.1 The operator shall be certified for 26 calendar months after completion of the class.

1.5.2.2 Individuals not currently certified as operators must complete a basic operator class as described in Section 1.3.

1.6 Record maintenance and management. 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.

1.6.1 It is the responsibility of the agency to see that the said records are stored and maintained a minimum of (3) years in accordance with IDAPA 11.03.01.

1.6.2 The Idaho State Police Forensic Services will not be responsible for the storage of such records not generated by it.

1.6.2.1 Records may be subject to periodic review by the Idaho State Police Forensic Services.

2. Calibration Checks of Breath Testing Instruments

Calibration checks aid the Breath Testing Specialist (BTS) and the Idaho State Police Forensic Services (ISPFS) in determining if a breath-testing instrument is functioning correctly. Calibration checks are performed using ethanol-water, wet-bath simulator solutions prepared and analyzed by the ISPFS or an approved vendor. The ISPFS analyses establish the target value and acceptable range of the solutions used for the checks. The acceptable range is $\pm 10\%$ of the solution target value, or ± 0.01 grams alcohol/210 liters of simulator vapor, whichever is greater.

2.1 Alco-Sensor Calibration Checks

2.1.1 Alco-Sensor instruments must be checked **within 24 hours** of a subject test to be approved for evidentiary use.

2.1.1.1 The official time and date of the calibration check is the time and date recorded on the tape by the printer, or in the absence of the printer, the time and date recorded in the log.

2.1.2 The Alco-Sensor calibration check is run using a solution or solutions provided by the Idaho State Police Forensic Services or approved vendor and following the procedure outlined in the Alco-Sensor manual.

2.1.2.1 The **simulator temperature** must be between **33.5°C** and **34.5°C** in order for the calibration check results to be valid.

2.1.2.1.1 The operator should check the simulator temperature prior to the calibration check.

2.1.2.2 Target values and ranges of acceptable readings are included in a Certificate of Analysis prepared by, and available from, the ISPFS.

2.1.2.2.1 Solutions may be rerun if the initial values are not within acceptable range. If the results of the repeated calibration checks are satisfactory, the instrument is approved for evidentiary use.

2.1.2.2.1.1 If results after a total of three (3) runs for any solution (two tests per run) are still unsatisfactory, contact the appropriate ISPFS laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and calibration check results are within range.

2.1.3 The instrument must give calibration check results falling within the acceptable range for the solution. Unsatisfactory readings for a solution will result in a disapproval of the instrument.

2.1.3.1 An agency may run additional calibration checks at their discretion.

2.1.4 Calibration check solutions should only be used prior to the expiration date on the label.

2.1.4.1 Solutions will only be used as long as values produced are within the designated range.

2.1.4.1.1 The 0.08 solutions should be changed approximately every 15-20 calibration checks or every month whichever comes first.

2.1.4.1.2 A 0.20 simulator solution must be run, and results logged each time the 0.08 solution lot number is changed, *or* once per calendar month at a minimum.

2.1.4.1.2.1 The 0.20 calibration check consists of two samples separated by air blanks.

2.2 Intoxilyzer 5000 Calibration Checks.

2.2.1 An Intoxilyzer 5000 calibration check consists of using a wet-bath simulator to analyze solutions supplied by the Idaho State Police Forensic Services or an approved vendor.

2.2.1.1 Target values and ranges of acceptable readings are included in a Certificate of Analysis prepared by, and available from, the ISPFS.

2.2.1.1.1 Calibration check solutions should only be used prior to the expiration date as marked on the label.

2.2.1.1.2 Solutions should only be used as long as values produced are within the designated acceptable range.

2.2.1.1.2.1 The 0.08 solution should be changed approximately every 100 calibration checks or every month whichever comes first.

(continued on the next page)

2.2.1.1.2.2 Whenever the 0.08 solution is changed, a four-sample calibration check using the 0.20 solution must be run. A total of four 0.20 calibration check results are required, whether via the breath hose, simulator port, or a combination of the two.

2.2.1.1.2.2.1 Recommended procedure: After running the 0.20 solution, rinse and dry the simulator, refill with fresh 0.08 and run <Escape> <Escape> <C> before putting the instrument back in service.

2.2.2 Intoxilyzer 5000 instruments in evidentiary use must have a 0.08 calibration check with each subject test.

2.2.2.1 During a breath test a 0.08 calibration check will be performed as directed by the instruments testing sequence. This will show up on the print card as a SIM CHK.

2.2.2.1.1 If the SIM CHK is within the acceptable range for the solution the testing sequence will continue.

2.2.2.1.2 If the SIM CHK is not within the acceptable range for the solution the testing sequence will abort and no breath samples will be obtained.

2.2.3 If the SIM CHK is acceptable the instrument will be approved and the resulting breath samples will be deemed valid for evidentiary use by the Idaho State Police Forensic Services.

2.2.3.1 Calibration check information should be entered in the instrument log.

2.2.4 The **simulator temperature** must be between **33.5°C** and **34.5°C** in order for the calibration check results to be valid.

2.2.4.1 Operators must check the simulator temperature prior to the testing sequence.

3.2.2 Section 18-8002, Idaho Code, defines "evidentiary testing" as "a procedure or test or series of procedures or tests."

3.2.2.1 The operator may repeat the testing sequence as required by circumstances.

3.2.2.2 The operator should use a **new mouthpiece** for each series of tests.

3.2.3 A **third breath sample** is required if the first two results differ by more than 0.02.

3.2.3.1 Unless mouth alcohol is indicated or suspected, it is **not** necessary to repeat the 15 minute waiting period.

3.2.3.2 The operator should log test results and retain printouts for possible use in court.

3.2.3.2.1 If there is no printout, the log page becomes the legal record of the test results.

3.2.3.3 If a subject fails or refuses to provide a second or third sample as requested by the operator, the results obtained are still considered valid by the ISPFS, **provided** the failure to supply the requested samples was the fault of the subject and not the operator.

3.2.3.3.1 The operator should note the circumstances in his report.

3.2.3.3.2 If the second or third samples are lacking due to instrument failure, the operator should attempt to utilize another instrument or have blood drawn.

3.2.3.3.3 The operator should log all test results, including refusals, and retain all printouts.

3.2.3.3.3.1 If there is no printout, the log page becomes the legal record of the test results.

3.2.3.3.3.2 Intoxilyzer 5000 test results may be recovered via the modem.

3.2.4 A deficient sample does not automatically invalidate a test.