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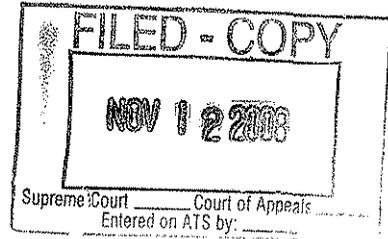
In Re Schroeder Respondent's Brief Dckt. 35496

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IN THE SUPREME COURT OF THE STATE OF IDAHO

GORDON C. SCHROEDER,
Petitioner/Appellant,
vs.
STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION
Respondent/Respondent.

Supreme Court No. 35496
D.C. No. CV 2008-469-C
(Canyon County District Court)

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON

HONORABLE STEPHEN W. DRESCHER
District Judge

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I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the district court's decision to dismiss Gordon Schroeder's ("Schroeder") appeal from the Idaho Transportation Department of the State of Idaho's ("Department") administrative license suspension of Schroeder's driver's license for driving under the influence of alcohol.

B. COURSE OF PROCEEDINGS BELOW

Schroeder's driver's license was suspended after he was stopped for suspected driving under the influence and after failing evidentiary testing administered by the Canyon County Sheriff's Office. (R. 02; R. 028). Schroeder requested a hearing as to the administrative license suspension, which was held on December 4, 2007 by Hearing Officer Michael Howell ("Hearing Officer"). (R. 010-011). Schroeder argued that the breath test was flawed because he belched during the fifteen-minute wait period. *Administrative License Suspension Hearing Transcript* at p. 8. On December 18, 2007, the Hearing Officer issued Findings of Fact and Conclusions of Law and Order upholding the administrative license suspension. (R. 017-022). In support of his decision, the Hearing Officer found that Schroeder did not claim to have "regurgitated any substance into his mouth that could have affected the test." (R. 018). The Hearing Officer then cited the relevant language from the Standard Operating Procedures for Breath Alcohol Testing ("SOP") which requires beginning the fifteen-minute observation period again if "the subject vomits or is otherwise suspected of regurgitating material from the stomach." (R. 018). The Hearing Officer stated that after reviewing the audio tape, there was no indication that Schroeder had regurgitated stomach material into his mouth. (R. 018). In addition, the Hearing Officer stated that the Intoxilyzer 5000 detects the presence of mouth

alcohol and thus would have indicated that Schroeder had regurgitated stomach material. (R. 018). Thus, the Hearing Officer found the testimony of Schroeder that he belched to be insufficient to “rebut the record that the test was properly conducted” and he held that the police officer followed the proper procedures in accordance with Idaho Code. (R. 018).

On December 27, 2007, Schroeder filed a Motion to Reconsider Administrative License Suspension, arguing that the Hearing Officer ignored the Intoxilyzer 5000 Operator’s Training Manual (“Training Manual”) which requires the fifteen-minute observation period to begin again if the subject belches. (R. 030-033). On January 5, 2008, the Hearing Officer denied Schroeder’s Motion for Reconsideration, and issued an Order stating the SOP and Training Manual are not inconsistent and should be read together. (R. 021-022). He also stated that “[f]or belching sufficient to require a re-commencement of the 15 minute waiting period, there must be stomach contents brought up to the mouth which then requires removal of the substance and an additional 15 minute waiting period.” (R. 021). The Hearing Officer further stated that after reviewing the record and the audio recording, there was no indication that stomach contents were regurgitated. (R. 021). Schroeder filed a Petition for Judicial Review on January 13, 2008. (R. 034-036). On July 3, 2008, the district court entered a Memorandum Decision and Order affirming the decision of the Hearing Officer. This appeal followed.

C. STATEMENT OF FACTS

On October 24, 2007, Police Officer Ian Takashige (“Officer”) observed a vehicle traveling westbound on Highway 19 at forty-six (46) mph in a posted thirty-five (35) mph zone. (R. 004). The Officer stopped the vehicle and made contact with Schroeder. (R.004; R. 028). The Officer noted a strong odor of an intoxicating beverage coming from the vehicle, and

Schroeder admitted to consuming at least one alcoholic beverage as well as prescription medication prior to drinking. (R. 004; R. 028). The Officer had Schroeder perform the gaze nystagmus test, the walk and turn test, and the one leg stand test. (R. 004; R. 028). Schroeder failed all three (3) field sobriety tests. (R. 004; R. 028). At approximately 1:58 a.m., the Officer placed Schroeder under arrest for driving under the influence and transported him to the Canyon County Sheriff's Office ("CCSO"). (R. 003; R. 028). After arriving at the CCSO, the Officer observed Schroeder for fifteen (15) minutes and played the audio advisory tape as required by Idaho law. (R. 028). Prior to submitting a breath sample, and during the fifteen (15) minute observation period, Schroeder made some sort of sound consistent with what would commonly be called a burp, belch or hiccup. (R. 028). Schroeder submitted an evidentiary breath sample of .149/.139 BAC. (R. 02; R. 028). The Officer issued Schroeder a temporary permit and seized his driver's license. (R. 001).

D. STANDARD OF REVIEW

In reviewing the discretionary decision of a lower court, the appellate court must review the lower court's decision for an abuse of discretion. In its review, the appellate court must determine: "(1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason." *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). If these factors are met, the lower court's decision should be upheld.

II.

ISSUE PRESENTED ON APPEAL

Whether the district court exercised sound judicial discretion in upholding Schroeder's administrative license suspension.

III.

ARGUMENT

The issues properly before a hearing officer in a given case are found in Idaho Code § 18-8002A(7):

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. IDAHO CODE § 18-8002A(7).

Schroeder argues that the Training Manual required re-commencement of the fifteen-minute observation period because he belched shortly before providing a breath sample. Since the observation period was not started over, Schroeder claims that the breath test was not conducted in accordance with Idaho Code § 18-8004(4). Thus, he argues that the Hearing Officer should have vacated the suspension of his driver's license.

As the Hearing Officer correctly stated in his Order on Motion for Reconsideration, the Training Manual and the SOP "are not inconsistent and must be read together." (R. 021). The SOP states that the fifteen-minute observation period must begin again if "the subject vomits or is otherwise suspected of regurgitating material from the stomach." See SOP, p. 14, § 3.1.4.1 (the SOP is attached hereto as Exhibit A). The Training Manual states that "[i]f belching or vomiting does occur or something is found in the mouth, have it removed and wait an additional 15 minutes." See Training Manual, p. 8 (the Training Manual is attached hereto as Exhibit B). The SOP clearly intends to only require re-commencement of the observation period if stomach material is brought into the mouth. Thus, reading the SOP with the Training Manual, a belch that causes regurgitation of stomach material requires the observation period to begin again. Schroeder's argument that a belch requires re-commencement of the observation period, regardless of whether stomach material was regurgitated, would mean that anything resembling a belch, such as a mere hiccup, throat-clearing or other similar bodily function would be sufficient to require re-commencement of the observation period. Clearly this was not the intended result of the SOP and the Training Manual requirements for breath alcohol testing. In addition, the word "belch" is defined as follows: "to expel gas suddenly from the stomach through the mouth." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1990). This definition further supports the Hearing

Officer's decision that a belch requires regurgitation of stomach material if the observation period is to begin again.

Schroeder also argues that the administrative rules governing alcohol testing require that the "standards in the Intoxilyzer 5000 training manual, specific to the machine used and specific as to requiring a new fifteen-minute waiting period should belching occur, control over the more general language in the SOP for breath testing machines generally." *Appellant's Brief*, p. 5. Schroeder's Appellant's Brief cites the administrative rules regarding breath alcohol testing in their entirety, but specifically, the portion relied on by Schroeder reads as follows:

03. Administration. Breath tests shall be administered in conformity with standards established by the department. Standards shall be developed for each type of breath testing instrument used in Idaho, and such standards shall be issued in the form of standard operating procedures and training manuals.

IDAPA 11.03.01.

Schroeder bases his argument that the Training Manual controls over the SOP on the above language. However, such language does not support Schroeder's argument. In fact, the language states that the standards must be issued in the form of standard operating procedures *and* training manuals. It does not state that one controls over the other, and further supports the Department's position that both documents should be read together.

In addition, the Intoxilyzer 5000 is designed to detect the presence of mouth alcohol and will indicate that the test is invalid if mouth alcohol is present. In *State v. Charan*, 132 Idaho 341, 342, 971 P.2d 1165, 1166 (1999), this issue was discussed and it was argued that the breath test results should be excluded from evidence because the officer did not follow appropriate procedures pursuant to the Training Manual. Specifically, it was argued that the

officer did not observe the defendant for fifteen (15) minutes prior to administering the test to be sure the defendant did not “smoke, consume alcohol, belch, vomit, use chewing tobacco, or have any other substance in the mouth.” *Id.* (quoting Operator’s Training Manual for the Intoxilyzer 5000). In its decision, the court relied upon the testimony of Officer William Bones, and stated that:

the fifteen-minute observation period for administering breath tests was originally required because the Intoxilyzer 3000, a predecessor to the Intoxilyzer 5000, could not detect the presence of mouth alcohol such as that which might be introduced by ingesting something or by burping. Since mouth alcohol could produce an invalid sample, but dissipates within fifteen minutes, the fifteen-minute observation period was mandated to prevent inaccurate test results. According to Officer Bones, although this observation period is required in the Operator’s Training Manual as an additional safeguard, it is not really necessary to ensure accurate tests from the Intoxilyzer 5000 because that instrument has a ‘negative slope indicator’ that detects when mouth alcohol is present and indicates that the breath sample is invalid. It was his opinion that, because the negative slope indicator did not detect mouth alcohol in [defendant’s] breath samples, the test was accurate.

Id. at 343, 1167. As a result, the court found it unnecessary to review the magistrate’s finding that the officer complied with the fifteen-minute observation period. *Id.*

In this case, there was no indication by the Intoxilyzer 5000 that the breath test was invalid. Had mouth alcohol been present, the Intoxilyzer 5000 would have indicated that fact. This safeguard, combined with the Officer’s observation of Schroeder to be sure he did not regurgitate stomach material into his mouth, sufficiently demonstrates that all procedures were followed in accordance with Idaho Code § 18-8004(4).

IV.

ATTORNEYS' FEES

Schroeder claims that he should be awarded attorneys fees and costs because “the record is clear that he ‘belched’ during the fifteen-minute waiting period prior to giving a breath sample on the Intoxilyzer 5000 and another breath sample was not taken pursuant to the Intoxilyzer 5000 training manual.” *Appellant’s Brief*, p. 3. Schroeder fails to cite any authority to support this claim, but the Department will assume that Idaho Code § 12-121 and Idaho Appellate Rule 41 are the statutes relied upon by Schroeder. Idaho Appellate Rule 41 itself does not permit an award of attorneys’ fees, but simply sets forth the proper procedure to be followed when attorneys’ fees are sought on appeal. “Idaho Code § 12-121 permits an award of attorney fees in a civil action to the prevailing party if the court determines the case was brought, pursued or defended frivolously, unreasonably or without foundation.” *Dominguez ex rel. Hamp v. Evergreen Resources, Inc.*, 142 Idaho 7 (2005) (citing *Mutual of Enumclaw Ins. Co. v. Pedersen*, 133 Idaho 135, 139 (1999)). Schroeder fails to show that the Department pursued or defended this case frivolously, unreasonably or without foundation. As stated above, the language in the SOP and Training Manual support the Department’s arguments and both the Hearing Officer and district court agree with the Department’s position. Thus, Schroeder should not be awarded attorneys’ fees.

V.

CONCLUSION

It is respectfully submitted that the decision of the district court dismissing Schroeder’s appeal should be upheld.

Dated this 12 day of November, 2008.

MICHAEL KANE & ASSOCIATES, PLLC

BY: Michael Kane
MICHAEL J. KANE
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of November, 2008, 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. Matthew J. Roker
Lovan & Roker, P.C.
717 S. Kimball Avenue, Suite 200
Caldwell, ID 83605
[Facsimile: 459-6908]

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile

Michael Kane
MICHAEL J. KANE

Standard Operating Procedure

Breath Alcohol Testing

**Idaho State Police
Forensic Services
August 1994
(Rev. 11/06)**

Revised 11/06

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

Contents:

- Section 1: Operator and Instrument Certification, pages 1-4**
- Section 2: Calibration Checks of Breath Testing Instruments, pages 5-7**
- Section 3: Testing Procedure, pages 8-9**

3. Testing Procedure

Proper testing procedure by certified operators is necessary in order to provide accurate results that will be admissible in court. Instruments used in Idaho measure alcohol in the breath, not the blood, and report results as grams of alcohol in 210 liters of breath.

- 3.1 **Prior to evidential breath alcohol testing**, the subject must be **monitored for fifteen (15) minutes**. During this time the subject may not smoke, drink, or chew gum, candy, food, or any tobacco product. Any material which absorbs/adsorbs or traps alcohol should be removed from the mouth prior to the start of the 15 minute waiting period.
 - 3.1.1 The monitor should be a certified breath test operator as described in Section I.C.
 - 3.1.1.1 The breath test must be administered by an operator currently certified in the use of the specific model of instrument used.
 - 3.1.2 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test.
 - 3.1.3 If in doubt, the operator may elect a blood test in place of the breath alcohol test.
 - 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-minute waiting period before repeating the testing sequence.
- 3.2 A **breath alcohol test** normally includes **two (2)** breath samples taken during the testing sequence and separated by air blanks.
 - 3.2.1 If the subject fails or refuses to provide a second or third sample as requested by the operator, the single test result may be considered **valid**.
 - 3.2.1.1 Refer to 3.2.3.3, below.

- 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.

INTOXILYZER 5000

OPERATOR'S TRAINING MANUAL

Idaho Department of Law Enforcement
Idaho State Police
Forensic Services
August 1, 1999
(March, 2007)

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GENERAL INFORMATION

Depending on their physical size and structure, molecules absorb energy of specific frequencies. For example, alcohol molecules absorb certain frequencies of infrared energy. Accordingly, the Intoxilyzer 5000 breath analysis instrument uses an infrared energy absorption technique to find the alcohol concentration of a breath sample.

The heart of the Intoxilyzer 5000 instrument is its sample chamber. At one end of the chamber, a quartz iodide lamp emits infrared energy, which is directed through the chamber by a lens. At the opposite end of the chamber, a second lens focuses the energy leaving the chamber through three rotating filters and onto an infrared energy detector. The filters however, allow only certain wavelengths through.

Initially, the instrument establishes a zero reference point by measuring the amount of infrared energy striking the detector when the sample chamber is filled with room air. During a breath test, as the amount of alcohol vapor in the chamber rises, the amount of infrared energy reaching the detector falls.

Therefore, by finding the difference between the zero reference point and the breath test measurement, the instrument determines breath alcohol concentration. The unit displays the result in grams of alcohol per 210 liters. To assure accurate test results, the Intoxilyzer 5000 breath analysis instrument also detects and compensates for acetone which absorbs the same infrared frequencies as alcohol.

FIFTEEN MINUTE WAITING PERIOD

The mucous lining of the mouth cavity and nasal passages stores alcohol for some time after a person consumes alcohol. Normal body processes eliminate residual mouth alcohol within 15 minutes.

Monitor the subject for 15 minutes. During this time, the subject may not smoke, consume alcohol, eat, belch, vomit, use chewing tobacco, or have gum or candy in the mouth. If belching or vomiting does occur or something is found in the mouth, have it removed and wait an additional 15 minutes.

OPERATING PROCEDURE FOR A BREATH TEST:

Observe subject for 15 minutes.

The subject should not drink, smoke or use any type of oral medication during this time.

Insert a new mouthpiece in the end of the BREATH TUBE.

To conduct a breath test, push the green START TEST button and respond to the displayed messages and commands.

REFUSAL: If the subject refuses to provide a sample during the test sequence wait until the message “PLEASE BLOW/R” is displayed and then press the green START TEST button. After the message “PLEASE BLOW/R” is displayed the instrument will automatically printout a refusal if a sample is not obtained within (3) three minutes.

The print card will show:

SUBJECT TEST REFUSED

TIME

SUBJECT REFUSED TO CONTINUE

<u>TEST SEQUENCE</u>	<u>DISPLAY READS</u>	<u>REQUIRED OPERATOR ACTION</u>
1. Push Green Start Button	“INSERT CARD” (flashing)	Insert an evidence card into the card slot located on the front panel of the instrument
2. Question series for Idaho	See question series on page 15	Answer each question and press the return/enter button to save the information
3. Air blank	“AIR BLANK”, displayed then scrolls through the time (TIME HR:MIN ZONE), the date (DATE MM/DD/YY), and then displays the result of the air blank (AIR BLANK .##) where .## is the alcohol concentration obtained during the air blank.	No action needed
<u>TEST SEQUENCE</u>	<u>DISPLAY READS</u>	<u>REQUIRED OPERATOR</u>