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Ewing v. State Respondent's Brief Dckt. 42599

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IN THE SUPREME COURT
OF THE
STATE OF IDAHO

JEREMY C. EWING, Plaintiff-Appellant, v. STATE OF IDAHO, TRANSPORTATION DEPARTMENT, Respondent.	SUPREME COURT NO. 42599

RESPONDENT'S BRIEF

APPEAL FROM SECOND JUDICIAL DISTRICT, NEZ PERCE COUNTY

THE HONORABLE JAY P. GASKILL, PRESIDING

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I. STATEMENT OF THE CASE

a. Nature of the Case.

This is an Appeal of the District Court's decision that an Idaho Transportation Department Hearing Examiner had correctly determined that Mr. Ewing had not met his burden to demonstrate a basis existed under I.C. § 18-8002A(7) to set aside the Department's Administrative License Suspension.

b. Party References.

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

c. Reference to the Administrative Record.

The references to the Department's Administrative Record are made to the Appellate Record page number not the Administrative Record page number. The Transcript of the Department's Administrative hearing is included in the Record on Appeal as an exhibit. The transcript of that hearing is referred to as the Administrative License Suspension Transcript (ALS Tr.) by page and number.

d. Factual Statement and Procedural History.

On March 16, 2014 at Corporal Levi Frary was patrolling north near mile post 3.5 on Lindsay Creek Road, Lewiston, Nez Perce County, Idaho. Corporal Frary observed a vehicle traveling south toward him speeding 44 mph in a posted 35 mph zone. Corporal Frary turned around and caught up to the vehicle and conducted a traffic stop (R. p. 42).

Corporal Frary made contact with the driver of the vehicle later identified as Jeremy C. Ewing. While talking to Mr. Ewing, Corporal Frary noticed the smell of an alcoholic

beverage coming from the vehicle. Mr. Ewing's eyes appeared bloodshot and watery and his speech was slurred (R. p. 42).

Corporal Frary asked Mr. Ewing if he'd had anything to drink, Mr. Ewing denied having anything to drink. Based on the smell of alcohol coming from the vehicle and Corporal Frary's observations of Mr. Ewing, Corporal Frary asked Mr. Ewing to step outside of the vehicle to complete evidentiary testing. Mr. Ewing then admitted to consuming alcoholic beverages earlier in the evening (R. p. 42).

Corporal Frary asked Mr. Ewing to perform the Horizontal Gaze Nystagmus, the Walk and Turn and One Leg Stand, Mr. Ewing failed the evidentiary testing (R. p. 43). Corporal Frary advised Mr. Ewing that he was detaining him for driving under the influence. Corporal Frary then began the 15 minute monitoring period and played the advisory audio recording. Mr. Ewing provided breath samples of .145 and .142. Corporal Frary then placed Mr. Ewing under arrest for driving under the influence (R. p. 43).

Mr. Ewing timely requested a hearing with the Idaho Department of Transportation's administrative Hearing Examiner (R. pp. 51-55).

A hearing was held telephonically on April 10, 2014 (R. p. 89). The Department's Hearing Examiner entered Findings of Fact, Conclusions of Law and Order sustaining the suspension of Mr. Ewing's driving privileges (R. pp. 281-290).

Mr. Ewing timely filed a Petition for Judicial Review of the Department's Hearing Examiner's decision (R. pp. 302-304).

The District Court determined that Mr. Ewing had not met his burden pursuant to I.C. § 18-8002A(7) sustaining the Administrative License Suspension entered by the Department's Hearing Examiner (R. p. 496).

Mr. Ewing timely filed his Notice of Appeal of the District Court's decision. The suspension of Mr. Ewing's driving privileges have been stayed pending the conclusion of the Court's judicial review.

II. ISSUES ON APPEAL

Mr. Ewing identifies four issues on appeal. For purposes of the Department's response, the issues are characterized as follows:

Issue 1: The validity of the Idaho State Police Breath Alcohol Testing Standard Operating Procedures.

Issue 2: Due Process in the Administrative License Suspension Hearing process.

Issue 3: Mr. Ewing's equal protection rights.

Issue 4: Mr. Ewing's burden pursuant to Idaho Code Section 18-8002A(7)(d).

Mr. Ewing raises no challenge to the Hearing Examiner's decision that Mr. Ewing has failed to meet his burden pursuant to I.C. § 18-8002A(7)(a-c) and (e). Any issue which could have been raised pursuant to I.C. § 18-8002A(7) has been waived. *Kugler v. Drowns, 119 Idaho 687, 809 P.2d 1116 (1991), Wheeler v. IDHW, 147 Idaho 257, 207 P.3d 988, 996 (2009).* However, Mr. Ewing did not raise any I.C. § 18-8002A(7) issues before the Hearing Examiner.

III. STANDARD OF REVIEW

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.

The burden of proof rests on the driver to prove any of the grounds to vacate the suspension of I.C. § 18-8002A(7), *Kane v. State, Dept. of Transp., 139 Idaho 586, 83 P.3d 130 at 143 (Ct. App. 2003).*

The review of disputed issues of fact must be confined to the agency record for judicial review, I.C. § 67-5277.

Idaho Code § 67-5279(1) sets out the scope 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." *Howard v. Canyon County Bd. of Com'rs, 128 Idaho 479, 915 P.2d 709 (1996).*

Idaho Code § 67-5279(3) provides:

> When the agency was required by the provisions of this chapter or by other provision 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.

The appropriate remedy pursuant to the Idaho Administrative Procedures Act is: ". . . if the agency action is not affirmed, it shall be set aside, in whole or in part and remanded for further proceedings as necessary." Idaho Code § 67-5279(3).

The decision of the Transportation Department must be affirmed unless the order violates statutory or constitutional provisions, exceeds the agency's authority, is made upon unlawful procedure, is not supported by substantial evidence or is arbitrary, capricious or an abuse of discretion. *Marshall v. Department of Transp., 137 Idaho 337, 48 P.3d 666 (2002).* The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial right of that party has been prejudiced. *Druffel v. State, Dept. of Transp., 136 Idaho 853, 41 P.3d 739 (2002).*

Appellate review of the District Court's decision requires the Court to review "the agency record independently of the District Court's decision", *Marshall v. Dept. of Transp. 137 Idaho 337, 340, 48 P.3d 666,669 (Ct. App. 2002).*

IV. ARGUMENT

ISSUE 1

The validity of the Idaho State Police Standard Operating Procedures.

Mr. Ewing argues that the Idaho State Police Breath Alcohol Testing Standard Operating Procedures (BATSOPs) have no force or effect in law or that the Idaho State Police failed to engage in proper rulemaking when the BATSOPs were adopted.

Mr. Ewing suggests without authority that this Court in an appeal from the District Court's decision on judicial review can determine that the BATSOPs adopted by the Idaho State Police (ISP) are invalid. Mr. Ewing does so without asking the Court pursuant to Idaho Code §67-5278 for a declaratory judgment of the validity of the ISPs BATSOPs.

Mr. Ewing failed to name or include the Idaho State Police as a party to the original Petition for Judicial Review.

Mr. Ewing's failure to name the ISP as a party to this action is dispositive of any claim that the Court can consider the administrative action of the ISP in adopting Idaho's BATSOP in this judicial review of the action of the Department. Clearly, ISP must be a party for the Court to consider the action of ISP, "the agency shall be made a party....", I.C. § 67-5278.[1]

[1] Simply naming the State of Idaho as a party is not sufficient. The State of Idaho operates an agency model of administrative procedure, "agency means State Board, Commission, Department or Officer authorized by law to make rules or determine contested cases..." I.C. § 67-5201(2).

A collateral attack on the BATSOPs adopted by the Idaho State Police simply cannot be made in the judicial review of the action of the Department of Transportation's Hearing Examiner.[2]

The Department's Hearing Examiner hears the five issues of pursuant to I.C. §18-8002A(7) and any appropriate constitutional challenges.[3]

Mr. Ewing invites the review of Idaho's BATSOPs by submitting information made available to Mr. Ewing apparently based upon a request pursuant to the Idaho Public Records Act of the Idaho State Police, not the record of the Idaho State Police's adoption of Idaho's BATSOPs.

Mr. Ewing suggests that what he provided the Hearing Examiner demonstrates that the Idaho State Police did not engage in sufficient rulemaking.

Mr. Ewing does not tell the Department's Hearing Examiner or the District Court what weight to place on any of the Idaho State Police documents or why the Court should conclude that Idaho's BATSOPs are invalid. Mr. Ewing supplies the assembled information, asserting that if the Court considers the information submitted, the Court

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[2] The Idaho Administrative Procedures Act permits the Court's review of an *agency's* decision.

Idaho Code § 67-5270 provides:

(1) Judicial review of *agency action* shall be governed by the provisions of this chapter unless other provision of law is applicable to the particular matter.
(2) A person aggrieved by *final agency action* other than an order in a contested case is entitled to judicial review under this chapter if the person complies with the requirements of sections 67-5271 through 67-5279, Idaho Code.
(3) A party aggrieved by a final order in a contested case decided by an *agency* other than the industrial commission or the public utilities commission is entitled to judicial review under this chapter if the person complies with the requirements of sections 67-5271 through 67-5279, Idaho Code. *Emphasis added.*

[3] I.C. § 18-8002A(7) specifies that the hearing officer "shall not vacate the suspension unless he finds" one of the five enumerated bases to set aside a suspension. Therefore, a hearing officer is not authorized to vacate a suspension based upon technical flaws in documents delivered to the ITD. *Kane v. State, Dept. of Transp., 139 Idaho 586 at 590, 83 P.3d 130 at 134 (Ct. App. 2003).*

would find that the assembled information means that Idaho's BATSOPs are not valid. Mr. Ewing does not offer an affidavit, citation to scientific treatise, deposition or testimony of an expert for the Court to consider.[4]

Mr. Ewing offers no factual or legal basis for the challenge to the "science" of Idaho's BATSOPs.[5]

Mr. Ewing fails to sufficiently raise and address the issue of the BATSOPs before the Hearing Examiner, thereby failing to preserve the issue for this Court's review, "error is never presumed on appeal," *In re Suspension of Driver's License of Gibbar, 143 Idaho 937 at 946, 155 P.3d 1176 (Ct. App. 2006).*

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[4] Mr. Ewing cannot tell the Court what the Idaho State Police may have relied on in adopting Idaho's BATSOPs and does not produce a record of the Idaho State Police's adoption of Idaho's BATSOPs. Mr. Ewing is responsible for the condition of the Record he has supplied the Court, *In re Mahurin, 140 Idaho 656, 99 P.3d 125 (Ct. App. 2004).*

[5]

> Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court. *Randall v. Ganz, 96 Idaho 785, 788, 537, P.2d 65, 68 (1975).* A general attack on the findings and conclusions of the district court, without specific references to evidentiary or legal errors, is insufficient to preserve an issue. *Michael v. Zehm, 74 Idaho 442, 445, 263 P.2d 990, 993 (1953).* This Court will not search the record on appeal for error. *Suits v. Idaho Bd. Of Prof'l Discipline, 138 Idaho 307, 400, 64 P.3d 323, 326 (2003).* Consequently, to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived. *Suitts v. Nix, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).*

Bettwieser v. New York Irrigation District, 154 Idaho 317, 297 P.3d 311 (2013).

Consistent with ISP's rule making authority, ISP has adopted requirements for performing breath alcohol testing by rule, IDAPA 11.03.01.014.[6]

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014. REQUIREMENTS FOR PERFORMING BREATH ALCOHOL TESTING.

01. Instruments. Each breath testing instrument model shall be approved by the department and shall be listed in the "Conforming Products List of Evidential Breath Measurement Devices" published in the Federal Register by the United States Department of Transportation as incorporated by reference in section 004 of this rule. (4-7-11)

02. Report. Each direct breath testing instrument shall report alcohol concentration as grams of alcohol per two hundred ten (210) liters of breath. (7-1-93)

***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 analytical methods and standard operating procedures. (4-7-11)*

04. Training. Each 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. (7-1-93)

05. Checks. Each breath testing instrument shall be checked on a schedule established by the Department for accuracy with a simulator solution provided by or approved by the department. These checks shall be performed according to a procedure established by the department. (4-7-11)

06. Records. All records regarding maintenance and results shall be retained for three (3) years. (3-19-99)

07. Deficiencies. Failure to meet any of the conditions listed in Sections 013 and 014. Any laboratory or breath testing instrument may be disapproved for failure to meet one (1) or more of the requirements listed in sections 013 and 014, and approval may be withheld until the deficiency is corrected.

IDAPA 11.03.01 *Emphasis added*

The Idaho State Police has adopted Idaho's BATSOPs consistent with the authority found at IDAPA 11.03.01.014.03, as permitted by I.C. § 18-8004. The BATSOPs are not the standards of the Idaho Transportation Department.[7]

Further, judicial review is not available of the Idaho State Police's action in adopting the BATSOPs as a Standard Operating Procedure, IDAPA 11.03.01.[8]

Mr. Ewing cannot demonstrate based on this Record that the action of the Idaho State Police is in any way deficient. Nor can Mr. Ewing demonstrate that there is a basis for the Court's review of the Idaho's BATSOPs in this judicial review of the decision of the Department's Hearing Examiner.

Mr. Ewing does not provide any evidence which supports a finding that the breath alcohol testing was not conducted within the requirements of I.C. § §18-8004(4) or I.C. § 18-8002A(7)(d).

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[7] I.C. § 18-8002A(3) provides:

> Rulemaking authority of the Idaho state police. The Idaho state police may, pursuant to chapter 52, title 67, Idaho Code, prescribe by rule:
> (a) What testing is required to complete evidentiary testing under this section; and
> (b) What calibration or checking of testing equipment must be performed to comply with the department's requirements. Any rules of the Idaho state police shall be in accordance with the following: a test for alcohol concentration in breath as defined in section 18-8004, Idaho Code, and subsection (1)(e) of this section will be valid for the purposes of this section if the breath alcohol testing instrument was approved for testing by the Idaho state police in accordance with section 18-8004, Idaho Code, at any time within ninety (90) days before the evidentiary testing. A test for alcohol concentration in blood or urine as defined in section 18-8004, Idaho Code, that is reported by the Idaho state police or by any laboratory approved by the Idaho state police to perform this test will be valid for the purposes of this section. *Emphasis added.*

[8] "There is no provision for administrative appeals before the Idaho State Police under this chapter."

IDAPA 11.03.01.003

The District Court correctly determined that ISP's rules at IDAPA 11.03.01.014 permitting the utilization of standard operating procedures to determine the appropriate testing standards for each breath testing instrument was lawful.[9]

Mr. Ewing simply argues that ISP should do something more or something different than what has been done.

The Court's discussion in *Tomorrows Hope, Inc., v. IDHW, 124 Idaho 843, 864 P.2d 1130 (1993)* may be helpful here. There the Court was attempting to determine whether the Idaho Department of Health and Welfare's adoption of a policy interpretation by manual was an interpretation of a statutory term or a regulatory term.

Mr. Ewing does not argue that ISP has in some fashion changed or redefined the original statutory directive by the adoption of standard operating procedures pursuant to ISP's rules. ISP may prescribe by rule what testing is required to complete evidentiary testing and what calibrations must be performed to comply with ISP's requirements, I.C. § 18-8002A(3). There is no requirement that breath testing instrument approval or that laboratory approval by ISP must occur in some fashion other than what ISP has done. [10]

ISP adopts by rule the authority to create standard operating procedures permitted by I.C. § 67-5201(21).

ISP is simply authorized to adopt breath testing procedures by rule. The choice of the form of breath alcohol testing procedures is clearly within the province of ISP. ISP is

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[9] A standard is a "manual guideline, curriculum, specification, requirement, measurement or other administrative principle providing a model or pattern in comparison with which the correctness or appropriateness of specified actions, practices or procedures may be determined," I.C. § 67-5201(21).

[10] Nor does Mr. Ewing argue that ISP's BATSOPs are really rules which inappropriately interpret I.C. § 18-8002A(3).

under no requirement to do something else. [11]

Mr. Ewing asks that the Court consider a District Court's decision determining that the State failed to meet its burden in a criminal case to properly lay a foundation for the admissibility of a breath test, however, Mr. Ewing does not provide any authority for such an analysis in the Administrative License Suspension setting. Mr. Ewing only argues that the BATSOPs are not valid.

Finally there is no showing that the Department's Hearing Examiner should not have relied on the current BATSOPs. ITD's Hearing Examiner appropriately relied on Idaho's current BATSOPs.

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[11] The Court of Appeals has previously and clearly rejected this argument:

> Although Besaw has exposed some troubling information about the manner in which the SOPs for breath testing have been developed or amended, we are not persuaded that he has demonstrated that the SOP procedures are incapable of yielding accurate tests. Besaw contends that the SOPs are so strewn with " weasel words" and " wiggle room" that they lack scientific basis and permit testing procedures that will not yield accurate tests, but there is no evidence in the record to support that conclusion. To be sure, the emails and memos to and from ISP personnel are disturbing, for some comments and suggestions lacked any apparent regard for the way proposed changes could affect the validity of the tests. As Besaw alleges, some participants seemed to view the ISP's task as being to thwart all possible defense challenges to the admission of breath tests rather than to adopt standards that will maximize the accuracy of tests upon which individuals may be convicted of serious crimes and deprived of their liberty. Further, it appears that there was a conscious avoidance of any opportunity for suggestions or critiques from persons outside the law enforcement community. While we do not endorse or condone such an approach to the ISP's statutorily-assigned duty to define breath testing procedures and standards, we cannot say that the emails in and of themselves, or any other evidence in the record, establishes that the test procedures actually authorized by the SOPs and applied in Besaw's case are incapable of producing reliable tests. Therefore, we find no error in the magistrate court's denial of Besaw's motion to exclude the test results from evidence.

State v. Besaw, 155 Idaho 134, 306 P.3d 219 (Ct. App. 2013).

ISSUE 2

Due Process in the Administrative License Suspension Hearing process.

Mr. Ewing argues that his due process interest in his driving privileges was in some fashion harmed, injured, damaged or affected by either the scheduling of the Administrative License Suspension hearing by the Department's Hearing Examiner or the Hearing Examiner's failure to issue subpoenas. Mr. Ewing offers no showing of an unconstitutional deprivation by the Department's Hearing Examiner's scheduling of the hearing or failure to issue subpoenas. Mr. Ewing makes no showing of how he suffered irreparable harm, let alone demonstrating any harm.[12]

The constitutional issue characterized by Mr. Ewing is apparently now that the Department has responded to the Court of Appeals concern in *Bell v. Idaho Transp. Dept.*, that the Department waited too long after the receipt of the discovery requested by Mr. Ewing, to schedule the hearing, not that the hearing was scheduled too soon prior to the receipt of the requested discovery.

The original notice of suspension was issued to Mr. Ewing on March 16, 2014. The thirty days of temporary driving privileges as provided in the original Notice of Suspension expired April 15, 2014, R. pp. 32-33.

The Hearing Examiner scheduled Mr. Ewing's hearing to take place by telephone conference call on April 10, 2014. R. p. 91 and p. 261.

On March 24, 2014 the Hearing Examiner issues a *show cause letter* indicating that

[12] It is difficult to determine whether Mr. Ewing argues that he was denied due process or if the Administrative License Suspension process is bereft of due process. This Court has continually upheld the Department's Administrative License Suspension process as constitutional, see for example *Bell v. Idaho Transp. Dept., 151 Idaho 659, 262 P.3d 1030 (Ct. of App. 2011).*

the hearing date has been extended beyond the 30 days set out in the original notice of suspension. R. p. 231. Mr. Ewing then objects to the show cause letter, R. pp. 95-96.[13]

On April 16, 2014 Ewing requests a stay of the pending suspension and the Department's Hearing Examiner stays the pending suspension, stopping the withdrawal period effective April 15, 2014, R. p. 93. On May 12, 2014 the Department's Hearing Examiner entered Findings of Fact, Conclusions of Law and Order (FFCLO), making the Administrative License Suspension effective May 14, 2014 (R. p. 15).

The Show Cause Letter clearly indicates that the scheduling of the hearing does not operate as a stay of the suspension. Mr. Ewing was advised that temporary driving privileges expire thirty days after the service of the Notice of Suspension. The Record reflects that Mr. Ewing timely made a request for a stay of the effective date of the suspension pending the Hearing Examiner's decision (R. pp. 49-55).

Mr. Ewing claims that the one day suspension of April 16, 2014 results in a deprivation of a property right without due process which should then result in a finding by the Court that the remaining 89 day suspension should be vacated because the Department did not timely schedule the Administrative License Suspension hearing within thirty days of the date of the Notice of Temporary Driving Privileges.[14]

Mr. Ewing does not indicate that he suffered any harm or consequence as a result of the apparent one day suspension of his driving privileges, nor does Mr. Ewing indicate

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[13] The Department issued what is termed a "show cause" letter. The title of the letter is unfortunate, however, Mr. Ewing's show cause letter does not require that Mr. Ewing "show cause." Instead the letter notifies Mr. Ewing that the date of the hearing has been extended to permit the receipt of subpoenaed evidence requested by Mr. Ewing and in spite of its title, is clearly the Hearing Examiner's determination that good cause exists to extend the hearing date to accommodate the requested discovery.

[14] The Department's Hearing Examiner gave Mr. Ewing one day credit for the one day of suspension served by Ewing, R. p. 15.

that the Hearing Examiner back dated the stay of the order suspending Mr. Ewing's driving privileges and gave Mr. Ewing credit for one day of suspension. Mr. Ewing also fails to advise the Court that the Department stayed the effectiveness of the suspension pending the Hearing Examiner's decision, Notice of Pending Action R. p. 278.

The Idaho Court has not yet dealt with a suspension entered after the expiration of the thirty days of temporary driving privileges resulting in a deprivation sufficient to consider setting aside the entire suspension entered by the Department's Hearing Examiner.[15]

The one day at issue here is not a significant, substantial or erroneous deprivation constituting a constitutionally cognizable harm requiring the Court to set aside the entire suspension of Mr. Ewing's driving privileges.[16]

The United States Supreme Court in *Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 242, 108 S.Ct. 1780, 1788-89, 100 L.Ed.2d 265, 279 (1988)* analyzes the effect of the delay of a decision dealing with the proposed suspension of a professional banking license.

In *Mallen,* the Supreme Court inquired as to whether the proposed suspension hearing provided a "prompt proceeding and a prompt disposition of the merits." The *Mallen* Court specifically indicates that an unjustifiable delay in holding a hearing could

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> We are not unmindful of the cumbersomeness of the above-outlined procedures. However, absent modification of ITD's rules and procedures, we are aware of no other method that may be employed to avoid a potential due process deprivation.

Platz v. State, 154 Idaho 960, 303 P.3d 647 at 657 (Ct. App. 2013).

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> However, an undue delay in holding a post-suspension hearing or issuing a decision may constitute a deprivation of due process. Delays in administrative proceedings may not violate due process if the person requesting the administrative proceeding contributed to the delay. (Citations omitted).

Bell v. Idaho Transp. Dep't, 151 Idaho 659, 670, 262 P.3d 1030, 1041 (Ct. App. 2011).

become a constitutional violation; however, the significance of such a delay cannot be evaluated in a vacuum, *486 U.S. 241.* "In determining how long a delay is justified in affording a post suspension hearing and decision, it is appropriate to examine the importance of the private interests and the harm to this interest occasioned by the delay" *486 US 242.*

The apparent deprivation here is that Mr. Ewing contends he did not have driving privileges for one day; however, Mr. Ewing makes no other showing of the harm as a result of allegedly not having driving privileges for one day.

There is no erroneous deprivation here because Mr. Ewing did not raise any of the I.C. § 18-8002A(7) basis for setting aside the Administrative License Suspension before the Department's Hearing Examiner.

Since Mr. Ewing did not ask the Department's Hearing Examiner to find that Mr. Ewing failed to meet his burden pursuant to I.C. § 18-8002A(7), it is unlikely that the Hearing Examiner's decision can be set aside (see Argument, Issue IV). When Mr. Ewing makes no attempt to demonstrate before the Hearing Examiner that he met his burden pursuant to the factors of I.C. § 18-8002A(7) in the administrative hearing, there can be no erroneous deprivation justifying setting aside the Administrative License Suspension, *Mallen, id.*

Mr. Ewing made a challenge before the District Court to the Hearing Examiner's decision based on an exhibit attached to Mr. Ewing's opening brief on judicial review, R. pp. 464-466. Exhibit 8 was not made part of the record before the Department's Hearing Examiner and is not part of the administrative record or for that matter is nothing more than an exhibit to Mr. Ewing's opening brief. The administrative record was not augmented

as permitted by statute.

Without a demonstration before the Department's Hearing Examiner of Mr. Ewing meeting his burden pursuant to I.C. § 18-8002A(7), Mr. Ewing has not demonstrated that the alleged one day suspension was erroneous.[17]

Mr. Ewing does not analyze either the *Mathews* factors or the factors set out in *Mallen* for purposes of determining whether the apparent one day suspension is a constitutionally cognizable harm.[18]

It is appropriate for the Hearing Examiner to ensure that Mr. Ewing has the discovery he requested prior to the Hearing. As the Court of Appeals cautioned in *Bell v. Idaho Transp. Dept. 151 Idaho 659, 262 P.3d 1030 (Ct. App. 2011)*, it is unreasonable to expect that a driver could be sufficiently prepared for the Administrative License Suspension hearing without the requested discovery information.

Finally, Mr. Ewing does not indicate that he suffered any actual harm or that there was a violation of any fundamental right.[19]

In a different setting, the Idaho Supreme Court analyzed harm related to a parties standing concluding that even the existence of a known or anticipated injury may be

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[17] The Record before the Department's Hearing Examiner indicates that Mr. Ewing did not offer any evidence, did not call any witness except to seek to have the presiding Hearing Examiner testify about the process of issuing subpoenas or setting hearings.

[18]

> Courts must consider three factors in procedural due process challenges: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

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

[19] The US Supreme Court also considers that the possible length of a wrongful deprivation of benefits is an important factor in assessing the impact of the public action on the private interest, *Mathews at p. 342.*

"characterized as nonjusticiable because it is too remote to be ripe for review on one hand, or too remote to constitute the requisite concrete harm to satisfy the injury-in-fact requirement of standing" (citations omitted) *Boundary Backpackers v. Boundary County, 128 Idaho 371 at 381, 913 P.2d 1141 (1996).*

The Idaho Supreme Court in *Boise Tower Associates, LLC v. Hogland, 147 Idaho 774, 215 P.3d 494, (2009)* discussed the potential due process violation in the context of a stop work order prohibiting further construction of a building in downtown Boise. The Court indicates there that interim suspensions of licenses and temporary seizures of property may be undertaken without a pre deprivation hearing provided there is a sufficient factual basis for the action and that prompt administrative or judicial review of the merits of the decision is available. There, the Boise City's Building Official's decision to issue a stop work order was merely a temporary suspension of the right to perform work on the project.

In analyzing the nature of the impact on private interest of *Boise Tower Associates*, the Idaho Court concluded that the effect was minor because the decision to issue the stop work order was merely intermittent until a course of action could be agreed upon by the parties. Obviously the *Boise Tower Associates* suffered a potentially substantial injury by not being able to proceed with construction without a finding of a constitutional violation. Mr. Ewing on the other hand does not demonstrate that he suffered any consequence as a result of the one day suspension, particularly when Mr. Ewing did not create a record regarding his burden pursuant to I.C. § 18-8002A(7) before the Department's Hearing Examiner.[20]

Clearly the potential impact of an alleged one day suspension of driving privileges awaiting the determination of whether the driving privileges should be suspended for 90 days is not an erroneous unconstitutional deprivation. Mr. Ewing simply asks the Court to set aside the entirety of the 90 day suspension because there was arguably one day in which Mr. Ewing argues he did not have driving privileges in spite of the Hearing Examiner staying the effective date of the suspension.

Further, the sufficiency and detail of the Hearing Examiner's FFCLO were appropriately acknowledged by the District Court. The thoroughness and completeness of those findings are what the *Mallen* Court anticipates will be made in an administrative hearing. Here, in this administrative setting, the Department's Hearing Examiner extended to Mr. Ewing the process due him in regards to his property interest in his continued driving privileges.

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[20] Previously the Idaho Court has determined that Dennis McNeely's interest in driving privileges was not so substantial as to require a pre suspension hearing, although the interest may be affected by the length of the suspension period and the timeliness of a post suspension review proceeding, *McNeely v. State, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990)*

Mr. Ewing's argument concerning the potential unconstitutional deprivation by the Hearing Examiner's scheduling of the Administrative License Suspension Hearing was considered and thoroughly rejected by the Court of Appeals *In re Beyer, 155 Idaho 40, 304 P. 1206 (Ct. App. 2013).*

Additionally, "invited error" compels the same result as the Court of Appeals decision in *Beyer.*[21]

Mr. Ewing simply makes an unsupported policy and hypothetical argument of the worst of what could happen without demonstrating that he specifically suffered any loss, injury, harm or consequence as a result of the scheduling of the hearing or the Hearing Examiner's failure to issue subpoenas or to timely schedule the hearing.

The District Court correctly analyzed the due process claim of Mr. Ewing. Mr. Ewing was provided with notice and an opportunity to be heard, *Aberdeen-Springfield Canal Co. v. Peeper, 133 Idaho 82, 982 P.2d 917 (1999)* and in a meaningful manner, *Castaneda v. Brighton Corp., 130 Idaho 923, 950 P.2d 1262 (1998).*

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> The doctrine of invited error applies to estop a party from asserting an error when his or her own conduct induces the commission of the error. *Thompson v. Olsen, 147 Idaho 99, 106, 205 P.3d 1235, 1242 (2009).* One may not complain of errors one has consented to or acquiesced in Id. In short, invited errors are not reversible. Id. Thus, given that Beyer affirmatively accepted the Hearing Examiner's remedy at the time of the hearing, even if the hearing officer erred by not requiring the video to be produced until the day of the hearing, Beyer cannot complain of that error.[7]

The Court continues in the footnote:

> We have previously criticized a Hearing Examiner's practice of issuing subpoenas requiring compliance on the day before the scheduled hearing. We stated that such a practice is "strongly discouraged," but that it does not amount to a per se violation of procedural due process. *Bell v. Idaho Transp. Dept., 151 Idaho 659, 666, 262 P.3d 1030, 1037 (Ct. App. 2011).* The ALS hearing in this case was held prior to our decision in *Bell* but, here, compliance was ordered on the day of the hearing. We continue to strongly discourage this practice. We see no reason for this practice except to cause a disadvantage to the driver who has the burden of proof at the Administrative License Suspension hearing.

In re Beyer, 155 Idaho 40, 304 P.3d 1206, 1213 (Ct. App. 2013).

There is no unconstitutional deprivation as a result of the process extended to Mr. Ewing. The suspension of Mr. Ewing's driving privileges was stayed pending the decision of the Department's Hearing Examiner.[22]

Mr. Ewing was afforded sufficient due process.

ISSUE 3

Mr. Ewing's equal protection rights.

Mr. Ewing contends that the Hearing Examiner's decision regarding the scheduling of the hearing or the issuance of subpoenas violates Mr. Ewing's equal protection rights. Mr. Ewing does not contend that the Idaho Legislature created two classes of individuals who are treated differently, only that he is treated differently from drivers in an Administrative License Suspension hearing who do not request that the Department's Hearing Examiners issue subpoenas.

Mr. Ewing must first identify the challenged classification, then determine the standard by which to review the classification, *Tarbox v. Tax Com'n, 107 Idaho 957, 959, 695 P.2d 342 (1984)*. The third step is to determine whether the standard has been satisfied, *State v. Breed, 111 Idaho 497, 500, 725 P2d 202, 205 (1986)*.

Mr. Ewing makes a "class of one" argument that he is singled out based upon "a distinction that fails the rational basis test where the challenged treatment does not follow a suspect classification or punish the exercise of fundamental rights," *Anderson v. Spalding, 137 Idaho 509, 50 P.3d 1004 (2002)*. Mr. Ewing correctly identifies the standard

[22] The stay Order was backdated so that Mr. Ewing's suspension, if any, would not be effective until after the entry of the Hearing Examiner's decision. The Hearing Examiner even gives Mr. Ewing credit for the one day suspension, imposing an 89 days suspension, even though he had previously backdated the effectiveness of the stay, R. p. 289.

under which the classifications would be reviewed, but does not indicate how he is singled out by the Department's action and then fails to analyze the *Tarbox* standard.

As a result of the Idaho Court of Appeals analysis *in Bell*, the Department's Hearing Examiner here did two things. The Hearing Examiner initially set the hearing far enough in advance to ensure that the requested discovery was made available to Mr. Ewing based on his request for discovery (R. p. 58-70). Secondly, the Hearing Examiner at Mr. Ewing's request entered a stay of the Administrative License Suspension until the effective date of the Hearing Examiner's decision (R. p. 93).

Mr. Ewing does not provide any facts about the nature of the subpoenas requested or refused. The Hearing Examiner did issue some subpoenas, however, Mr. Ewing does not show how the denial of the issuance of other subpoenas limited his ability to meet his burden as required by I.C. § 18-8002A(7), particularly when he makes no effort to meet his burden pursuant to I.C. § 18-8002A(7). Further there is no record that Mr. Ewing ever served the subpoenas which he now contends the Hearing Examiner's process for issuing denied him equal protection.

Mr. Ewing has the burden of demonstrating that an unconstitutional deprivation occurred, *State v. Rhoades, 121 Idaho 63, 822 P.2d 960 (1991)*. Just as Mr. Ewing fails to meet his burden pursuant to I.C. § 18-8002A(7), Mr. Ewing fails to meet his burden to demonstrate that an unconstitutional deprivation of Mr. Ewing's equal protection occurred.

Mr. Ewing does not identify any fundamental right or identify any suspect classifications based on drivers who request the Hearing Examiner to issue subpoenas and those drivers that do not request discovery or subpoenas. There is no showing that the Department's Hearing Examiner unduly burdened the exercise of a fundamental right for

equal protection purposes or that a suspect classification exists which singles out drivers who do discovery or request the issuance of administrative subpoenas.

The application of the Equal Protection Clause only requires that the classification to the extent that a classification exists, rationally furthers a legitimate state interest, *Anderson, 519.* The Department's interest in complying with the Court of Appeals decision in *Bell v. Idaho Transp. Dept. infra,* is clearly a legitimate state interest.

Further, Mr. Ewing is apparently suggesting that the Department's Hearing Examiner should not consider a driver's discovery request and a request for the issuance of subpoenas when scheduling an Administrative License Suspension hearing. The Hearing Examiner appropriately issued subpoenas and scheduled the administrative hearing.

Finally, Mr. Ewing's claim is disposed of by the Court of Appeal's "invited error" analysis in *Beyer, infra.*

Mr. Ewing does not meet his burden to demonstrate either that he is a legitimate class of one or that any suspect classification exists. Mr. Ewing's equal protection interests are not in play and were not affected by the Hearing Examiner's decision in scheduling the Administrative License Suspension hearing or in the denial of the issuance of subpoenas.

ISSUE 4

Mr. Ewing's burden pursuant to I.C. § 18-8002A(7)(d).

Mr. Ewing challenges initially on judicial review pursuant to I.C. § 18-8002A(7)(d) whether Mr. Ewing's evidentiary test was administered pursuant to I.C. § 18-8004(4).

Mr. Ewing did not create a record before the Hearing Examiner demonstrating that the evidentiary test for breath alcohol did not comply with I.C. § 18-8004(4).[23]

Mr. Ewing then attaches as an Exhibit to his opening brief in support of judicial review to the District Court, what purports to be a Breath Testing Instrument Operations Log (previously referred to as Exhibit 8). Mr. Ewing asked the District Court without a supporting affidavit and without any additional foundation to consider the Breath Testing Instrument Operations Log which was not made available to the Hearing Examiner as proof of Mr. Ewing's having met his burden pursuant to I.C. § 18-8002A(7).

Mr. Ewing does not seek to augment the Record or explain why Exhibit 8 to the Brief in Support of Judicial Review was not made part of the Administrative Record, I.C. § 67-5276. Disingenuously Mr. Ewing argues that the performance verification, found in the Breath Testing Instrument Operations Log, (which demonstrates that a timely performance verification was performed) demonstrates that Mr. Ewing has met his burden since there was no proof of a timely performance verification in the administrative record.

Mr. Ewing's argument to the Hearing Examiner was that there was no evidence in

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> It was not the ITD's burden at the administrative hearing to prove legal cause for the stop, to prove the reliability of the blood alcohol tests, or to disprove any of the possible grounds for challenging a suspension under § 18–8002A(7). To the contrary, the statute directs that "[t]he burden of proof shall be on the person requesting the hearing." I.C. § 18–8002A(7). Thus, it was Kane's burden to present evidence affirmatively showing one or more of the grounds for relief enumerated in § 18–8002A(7). That is, it was his burden to prove that, *in fact,* the officer lacked legal cause to stop Kane's vehicle or that the blood test was, *in fact,* not conducted in accordance with legal requirements. This burden is not met by merely showing that documents in the hands of the ITD are inadequate or inadmissible to reveal whether legal cause existed or whether the blood test was conducted properly. Kane presented no evidence to meet his burden; his challenge to the suspension consisted solely of a technical attack upon the adequacy of the ITD's documentation. Because Kane made no prima facie showing, the ITD had no burden to present any evidence at all to the hearing officer.

Kane v. State, Dept. of Transp. 139 Idaho 586, 83 P.3d 130 (Ct. App. 2003).

the record which demonstrates that a timely and sufficient performance verification was conducted.

The circumstances of the performance verification are not required to be provided to ITD to commence the Administrative License Suspension. Mr. Ewing on the other hand has the burden to demonstrate that the results of the evidentiary test for alcohol concentration should not be a basis to suspend Ewing's license as a result of the breath testing equipment's operation not meeting the BATSOPs.

Idaho Code § 18-8002A(5)(b), which outlines the requirements for providing service of suspension, states in relevant part:

> [T]he peace officer shall forward to the department . . . a certified copy or duplicate original of the results of all tests for alcohol concentration, as shown by analysis of breath *administered at the direction of the peace officer*, and *a sworn statement of the officer*, which may incorporate any arrest or incident reports relevant to the arrest and evidentiary testing setting forth:
>
> . . . .
>
> (vi) That the person was tested for alcohol concentration, drugs or other intoxicating substances as provided in this chapter, and that the results of the test indicated an alcohol concentration or the presence of drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code. Emphasis added.

Corporal Frary is not required to provide ITD with a sworn statement that a performance verification was performed at a particular time under particular circumstances or for that matter the results of the performance verification. Deputy Frary provided ITD with the information required by I.C. § 18-8002A(5)(b).

Mr. Ewing apparently asks the Court now to substitute its judgment for that of the Hearing Examiner without providing any explanation as to why the Hearing Examiner's conclusions were not supported by sufficient evidence or that any evidence exists in the

Administrative Record, I.C. § 67-5279, *In re Trottier, 155 Idaho 17, 304 P.3d 292 (Ct. App. 2013).*

Mr. Ewing has simply not met his burden pursuant to I.C. § 18-8002A(7).

V. CONCLUSION

The validity or reliability of the Idaho State Police's BATSOPs are not before the Court on judicial review of the Department's Hearing Examiner's decision suspending Mr. Ewing's driving privileges.

Failing to challenge the Department's Hearing Examiner's decision pursuant to I.C. § 18-8002A(7) and failing to demonstrate that the Hearing Examiner's Decision was arbitrary or capricious or that the Hearing Examiner's Decision was not supported by substantial evidence in the Record eliminates the availability of any relief to Mr. Ewing.

Mr. Ewing suffered no constitutionally cognizable harm and such process and equal protection due him was provided.

The Hearing Examiner's decision to suspend Mr. Ewing's driving privileges should be sustained and Mr. Ewing's driving privileges should be suspended for eighty nine days.

DATED this 27 day of February, 2015.

Edwin L. Litteneker
Special Deputy Attorney General

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On this 27 day of February, 2015.

Edwin L. Litteneker