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Wheeler v. Idaho Transp. Dept. Appellant's Brief Dckt. 35839

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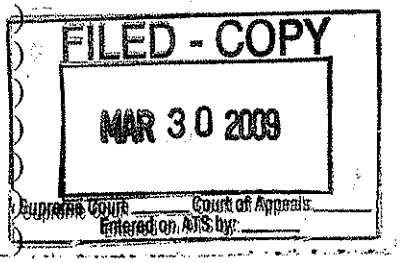
IN THE SUPREME COURT OF THE STATE OF IDAHO

In the Matter of the Suspension of the Driver's License of DAVID O. WHEELER Petitioner-Appellant v. STATE OF IDAHO, Department of Transportation, a governmental agency of the State of Idaho, Respondent.	Docket No. 35839-2008



APPELLANT'S OPENING BRIEF

Appeal from the Fourth Judicial District Court of the State of Idaho,
In and for Ada County

Hon D. Duff McKee, District Judge

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITY

CASE AUTHORITY

STATEMENT OF THE CASE

I.

Nature of the Case

The matter presently before this Appellate Court of the State of Idaho concerns the Memorandum Decision issued September 24, 2008, by the District Court, Senior District Judge D. Duff McKee, presiding, that affirmed the suspension Order rendered by the Department of Transportation, Administrative Hearing Examiner, Michael B. Howell, resulting in the suspension of Petitioner-Appellant's driving privileges, pursuant to the Findings of Fact and Conclusions of Law found and entered by the Hearing Officer on December 14, 2007 (Ad. R, p. 21-23).

Appellant's Petition for Judicial Review was filed with the District Court to review the Agency's Findings of Fact, Conclusions of Law and Final Order entered by that Hearing Examiner, and by that process, to preserve Mr. Wheeler's right of appeal to the Idaho Supreme Court on those issues of concern relating to the wrongful suspension of Licensee's driving privileges and right to operate a motor vehicle under Idaho law. The substance of this Appeal concerns the factual findings and conclusions made by the Hearing Officer, leading to the Decision suspending the driver's license of Mr. Wheeler on December 14, 2007, which sustained the proposed suspension set forth in the Notice of Suspension (Ad. R, p. 1 (Exhibit #1), with a resulting permanent impact to the license status and history of Petitioner-Appellant with the Idaho Department of Transportation.

II.

Course of Proceedings Below

Mr. Wheeler was issued a Notice of Suspension on November 3, 2007, at which time his driver's license was seized from his possession by the arresting officer, and Mr. Wheeler was issued a Temporary Driving Permit pursuant to that Notice of Suspension. The Boise City Officer, M. Ruffalo, arrested Mr. Wheeler for the alleged offense of DUI, but admittedly had never once observed the actual operation of the vehicle (Ad. R, p.3). Arguably, Mr. Wheeler may have been observed as the operator of a motor vehicle by a different Boise City Officer, Officer Robinson, (Ad. R, p.3), but we have no affidavit or any sworn statements from Officer Robinson at any time in the Record of this Administrative Proceeding to provide for credible and admissible evidence for purposes of accomplishing the necessary compliance with Due Process of law prior to taking a constitutionally protected property right.

Pursuant to § 18-8002 (a), Idaho Code, Mr. Wheeler immediately requested the Department of Transportation schedule an administrative hearing on the issue of the proposed suspension of his driver's license and operating privileges (Ad. R, p. 8-11), as Mr. Wheeler challenged the issue of probable cause and the presence of any reasonable, articulable suspicion to support any legal cause for the stop, and furthermore articulated his challenge to the reliability and credibility of the test results. The hearing was initially set for a telephone conference, under the authority of § 18-8002, Idaho Code, scheduled before the Department's authorized Hearing Examiner, for November 28, 2007, at 11:30 a.m. This Hearing was changed because of a schedule conflict (Ad. R, p. 16-17), and (Ad. R, p. 20),

and the Hearing was then re-scheduled to December 6, 2007, at 4:00 p.m. (Ad. R, p. 19); (see also T. p.3).

The matter came on for that telephone hearing scheduled for December 6, 2007, (though the Record will show the Hearing Officer's Order has incorrectly identified the Hearing date in the Order, (Ad. R, p. 21).

At this hearing, held on December 6, 2007, Mr. Wheeler argued the actual proceeding should be conducted at an on-site in person hearing, rather than a telephone setting, and stated:

MR. SMITH: "I would have -- let me first begin at this time to say that I have a reservation and an objection in that we are currently scheduled for a telephonic hearing, and it would appear from my understanding of the evidence we would have to present there would be an issue of credibility raised by Mr. Wheeler in his testimony challenging the connotation of what purportedly Officer Robinson claims to have seen regarding a failure to maintain a lane. And it's further complicated by the fact that Officer Ruffalo is the only individual who has filed a Probable Cause Affidavit, and in there he states that he did not witness any crime being committed in his presence and rather indicates the information, if any, he received came from Officer Robinson who has not filed any Probable Cause Affidavit. Therefore, we have no sworn testimony relative to the issue of probable cause and the testimony that will be given from Mr. Wheeler will be in the nature and in the context of challenging the hearsay statement contained in the Probable Cause Affidavit.

Consequently, it is going to raise an issue of credibility. My concern then is that we may fall squarely within the mandates of the recent Decision determined by Judge D. Duff McKee back on August 18, 2005, in the matter of Furtado versus ITD, Case No. CV000407007D, wherein Judge McKee then held that when issues of credibility are raised and a Hearing Officer must render a Decision based upon those elements of credibility, it is not appropriate to proceed with a telephonic, but rather must have an onsite, in-person hearing where observations can be made of those functional facets of credibility that can come only from observation as opposed through the telephone. So that's my first concern:

And, secondly, another issue I have raised or would be raising here is that the test results produced as an element of evidence in this case indicate that the lot-solution used, the number of tests conducted from that lot solution relative to this defendant, Mr. David Wheeler, was number 117, and the policy and procedure or practice requirements for this particular type of Intoxilyzer Alcohol Analyzer, Permit Serial No. 66-004835, would require that the solution be changed every 30 days or every 100 tests, whichever comes first; and it would appear here 117 is far after the 100, and, therefore, we question its admissibility because we would challenge reliability in light of the standard practice and procedures

adopted by the Department of Health and Welfare and by the Department of Law Enforcement.

So those are the two matters of concern, and so it might be appropriate to address those, if, in fact, we should consider an onsite, in-person hearing first as opposed to proceeding with a telephonic hearing, because I don't want to have to repeat this process later if at all possible." (T. p.5-7).

This hearing went forward, over Petitioner-Appellant's objection, and no live sworn testimony was produced by either Officer Ruffalo or Officer Robinson, to create a record of adequate probable cause or reasonable suspicion for the stop, and with the admission of the Breath Test "print-out", Exhibit 2, the record demonstrated the failure of the State to maintain and operate the machine to meet the requirements of the solution to assure credibility and reliability of the test results for use in these proceedings.

The Findings of Fact, Conclusions of Law and Decision were then entered December 14, 2007 (Ad. R, p. 21-24) from which a Petition for Judicial Review was filed with the District Court. On September 24, 2008, the District Court, Honorable D. Duff McKee presiding Senior District Judge, issued his Memorandum Decision, (R. p.27), affirming the license suspension. On the issue of probable cause presented by an officer who did not observe any operation of the motor vehicle, the District Court ruled:

This is an administrative hearing, and is not governed by the formal rules of evidence. That the affidavit was based in part on the recital of another officer is not, in and of itself, a fatal defect. In administrative proceedings, that the administrative affidavit is compiled from the observations of several officers on the scene does not invalidate the affidavit on that basis alone. Wheeler has not shown any material defect in the affidavit or in the recital of facts contained therein, other than the subjective contradiction offered by Wheeler himself to the conclusions stated. This is not sufficient to defeat consideration of the affidavit. The hearing officer explained the weight he was giving to it and why; and there is no basis to overturn his findings in this area. I conclude that the evidence was more than sufficient to support the hearing officer's findings in this case. (R. p.30).

On the issue of the BAC test results, and non-compliance with the calibration check and operating procedures, the District Court ruled:

Wheeler objects to the BAC test results arguing that because the calibration check solution was too old, the tests were not usable. According to the operating procedures, the calibrating solution should be changed after approximately every 100 calibration checks, or every 30 days, whichever is sooner. In this case, the calibration check in this case was within 30 days but was the 117th calibration check since the solution had been changed. The hearing officer concluded that the "should" in the operating procedure did not mean "shall"- that the term was a recommendation, not a mandatory requirement. Further, the procedure provides that the change of solution should be after "approximately" every 100 checks, which indicates that the 100th check is not necessarily a bright-line boundary. Finally, I note that the tests results here were substantially over twice the legal limit. While the calibration check might be more critical if it was a close call, here, the tested levels were so far over the legal limit that the degree of precision in the final result is not material. I find no basis to disturb the hearing officer's conclusions at this point. (R. p.30-31).

Statement of Facts at Hearing

The only witness who testified before the Hearing Examiner was Mr. Wheeler, appearing and testifying in behalf of himself, as the Licensee. The officer who purportedly made the observation of driving, and the officer needed to establish any legal basis for the stop, neither testified nor submitted any affidavit. Mr. Wheeler testified, as identified in the Administrative transcript, (T. p. 8-13), confirming the fact he, at all times, maintained his lane of travel, and there was never any reasonable, articulable suspicion, or probable cause existing to stop him for the encounter, resulting detention, and subsequent arrest. The hearing examiner was presented with only a Probable Cause Affidavit of Officer Ruffalo, who confirmed in his Probable Cause Affidavit he never witnessed any driving pattern, and admittedly expressed in the affidavit the fact no crime was ever committed in his presence. That document was admitted under the hearing regulations as Exhibit #3 in the proceedings (Ad. R. p. 3).

The Probable Cause Affidavit, being a hearsay document in itself, is not subject to cross-examination, and that hearsay document served only to contain further hearsay within it that presented statements that were taken from unsworn testimony, and that

affidavit became the only basis for any finding Mr. Wheeler was the operator of the vehicle. That document did not provide any form of admissible evidence, or demonstrate Mr. Wheeler was lawfully stopped and detained for a valid claim of a traffic regulation.

The Administrative Record (Exhibit 2), contained the print out from the BAC evidentiary test results, demonstrating the test performed on Mr. Wheeler was number 117 test result for that Lot Solution. (Ad. R., p.2).

ISSUES PRESENTED ON APPEAL

I.

WHETHER THE DECISION OF THE DEPARTMENT'S HEARING OFFICER TO SUSPEND PETITIONER-APPELLANT'S DRIVER'S LICENSE WAS ERRONEOUS IN VIEW OF THE RECORD; IS ARBITRARY, CAPRICIOUS, AND/OR EXCEEDS AGENCY AUTHORITY, MADE UPON UNLAWFUL PROCEDURE OF SPECULATION, PRESUMPTION, UNSWORN TESTIMONY, HEARSAY UPON HEARSAY, UNSUPPORTED BY SUBSTANTIAL, COMPETENT, AND ADMISSABLE EVIDENCE SO AS TO CONSTITUTE AN ERROR IN FACT AND LAW.

II.

WHETHER THE DEPARTMENT'S FINDINGS OF FACT AS TO THE OPERATION OF THE VEHICLE AND PROBABLE CAUSE FOR THE STOP ARE SUPPORTED BY SUBSTANTIAL AND COMPETENT AND ADMISSABLE EVIDENCE.

III.

WHETHER PETITIONER-APPELLANT'S OBJECTION TO A TELEPHONE HEARING SHOULD HAVE BEEN SUSTAINED, AND A LIVE TESTIMONY HEARING SCHEDULED TO ALLOW FOR THE STATE TO PRESENT ADMISSABLE EVIDENCE.

IV.

WHETHER THE TEST RESULTS OF THE INTOX 5000 PRESENTED IN THIS ADMINISTRATIVE HEARING (EXHIBIT 2) CAN BE CONSIDERED CREDIBLE, RELIABLE, AND ADMISSABLE EVIDENCE, OR A VIOLATION OF

THE OPEERATION PROCEDURES FOR LICENSE SUSPENSION PURPOSES UNDER IDAHO LAW.

V.

WHETHER APPELLANT-PETITIONER IS ENTITLED TO ATTORNEY FEES ON APPEAL.

STANDARD OF REVIEW

The Idaho Department of Transportation is an agency subject to administrative review. See In Re Mahurin, 140 Idaho 656, 99 P.3d 125 (App 2004); see Archer v. State, 145 Idaho 617, 181 P. 3d, 543(App. 2008), see also § 67-5201 (2), Idaho Code.

The Idaho Administrative Procedures Act (IDAPA) governs the review of department decisions to deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. See §§ 49-201, 49-330, 67-5201(2), 67-5270, Idaho Code. In an appeal from the decision of the district court acting in its appellate capacity under IDAPA, this Court reviews the agency record independently of the district court's decision. See Knight v. Dep't of Ins., 124 Idaho 645, 862, P. 2d 337 (App. 1993); see Marshall v. Idaho Dep't of Transp., 137 Idaho 337, 340, 48 P.3d 666, 339(App. 2002); see Archer v. State, supra.

This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. § 67-5279(1), Idaho Code; see Marshall, supra. This Court defers to the agency's findings of fact unless they are clearly erroneous. Castaneda v. Brighton Corp., 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998); see Marshall, supra, see Archer v. State, supra.

The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. Urrutia v. Blaine County, ex

rel. Bd. of Comm's, 134 Idaho 353,357, 2 P.3d 738, 742 (2000); see Marshall v. Idaho Dep't of Transp., 137 Idaho at 340, 48 P.3d at 669; see In Re Mahurin; see also Archer v. State, supra.

An Administrative Hearing Officer's decision is subject to challenge through a Petition for Judicial Review. See § 18-8002 A (8), Idaho Code; see Kane v. State, Dep't of Transp., 139 Idaho 586, 590, 83 P.3d 130, 134 (App. 2003); see In Re Mahurin, supra, 140 Idaho 656, 99 P. 3d 125 (App.2004).

Upon review, the court will overturn an agency's decision where the hearing officer's findings, inferences, conclusions or decisions:

(a) violate constitutional or statutory provisions;

(b) exceed statutory authority of the agency;

(c) are made upon unlawful procedure;

(d) are not supported by substantial evidence in the record; or

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

See § 67-5279(3), Idaho Code; see In Re Mahurin, supra; see also Archer v. State, supra.

The party challenging the agency decision must demonstrate that the agency erred in a manner specified in § 67-5279(3), Idaho Code, and that a substantial right of that party has been prejudiced. Price v. Payette County Bd. of County Comm'rs, 131 Idaho 429, 958 P.2d 583, (1998); see Marshall v. Idaho Dep't of Transp., 137 Idaho 337, 48 P.3d 666, see also Archer v. State, supra. If the agency's decision is not affirmed on appeal, "it shall be set aside . . . and remanded for further proceedings as necessary." § 67-5279(3), Idaho Code.

The court may not substitute its judgment for that of the hearing officer as to the weight of the evidence on questions of fact. See § 67-5279(1), Idaho Code.

The Administrative Code, established in Chapter 52, Title 67, Idaho Code, does address the hearing proceedings and agency relief in administrative proceedings, which therein provides for an aggrieved person to seek judicial review of any act, order or proceeding of an agency. See § 67-5270, Idaho Code. In such a proceeding for judicial review, the *Idaho Administrative Procedures Act* (IAPA) and its standard of review would apply.

The Court exercises free review over all questions of law and any legal conclusions reached by the agency. See Qualman v. State Department of Employment, 129 Idaho 92, 922 P.2d 389 (1996); see Crooks v. Inland 465 Ltd. Partnership, 129 Idaho 43, 921 P.2d 743 (1996).

Erroneous conclusions of law made by an agency may be corrected on appeal. See Peterson v. Franklin County, *supra*; Love v. Board of County Comm'rs of Bingham County, 105 Idaho 558, 671 P.2d 417 (1983); Von Jones v. Board of County Com'rs, Cassia County, 129 Idaho 683 931 P.2d 1201 (1997); Greenfield Village Apts. v. Ada County, 130 Idaho 207, 938 P. 2d 1245 (1997).

A decision cannot rest on speculation or conjecture. Peterson v. Parry, 92 Idaho 647, 652, 448 P.2d 653, 658 (1968); Ryan v. Beisner, 123 Idaho 42, 46, 844 P.2d 24, 28 (Ct. App. 1992).

ARGUMENT PRESENTED ON ISSUES I, II, & III, RAISED ON APPEAL

ISSUE I.

WHETHER THE DECISION OF THE DEPARTMENT'S HEARING OFFICER TO SUSPEND PETITIONER-APPELLANT'S DRIVER'S LICENSE

WAS ERRONEOUS IN VIEW OF THE RECORD; IS ARBITRARY, CAPRICIOUS, AND/OR EXCEEDS AGENCY AUTHORITY, MADE UPON UNLAWFUL PROCEDURE OF SPECULATION, PRESUMPTION, UNSWORN TESTIMONY, HEARSAY UPON HEARSAY, UNSUPPORTED BY SUBSTANTIAL, COMPETENT, AND ADMISSABLE EVIDENCE SO AS TO CONSTITUTE AN ERROR IN FACT AND LAW.

ISSUE II.

WHETHER THE DEPARTMENT'S FINDINGS OF FACT AS TO THE OPERATION OF THE VEHICLE AND PROBABLE CAUSE FOR THE STOP ARE SUPPORTED BY SUBSTANTIAL AND COMPETENT AND ADMISSABLE EVIDENCE.

ISSUE III.

WHETHER PETITIONER-APPELLANT'S OBJECTION TO A TELEPHONE HEARING SHOULD HAVE BEEN SUSTAINED, AND A LIVE TESTIMONY HEARING SCHEDULED TO ALLOW FOR THE STATE TO PRESENT ADMISSABLE EVIDENCE.

In an Administrative hearing, the burden of proof rests upon the driver to prove the grounds to vacate the suspension. See § 18-8002A (7), Idaho Code; see also Kane v. State, Dep't of Transp., 139 Idaho 586, 590, 83 P. 3d 130,134 (app. 2003); see In re Mahurin, 140 Idaho 656, 658, 99 P. 3d 125, 127 (App. 2004); see Archer v. State, 145 Idaho 617, 181 P. 3d 543 (App. 2008). The hearing officer must uphold the suspension unless by a preponderance of the evidence, the driver has shown one of the several grounds enumerated in § 18-8002A (7), Idaho Code, for vacating the suspension. Those grounds include:

(a) The peace officer did not have legal cause to stop the person; or
(b) The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004(c) 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, 18-8004(c) 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 fundamental questions raised in these issues on appeal from this administrative proceeding is whether the Agency Record has established, by substantial and competent evidence, the presence of probable cause §18-8002 A (7) (a), Idaho Code, to conclude Mr. Wheeler failed to maintain his lane of travel, giving rise to a basis to stop and detain him. The testimony of Mr. Wheeler said no, and the absence of testimony from Officer Ruffalo has confirmed he did not have any personal observation of a driving pattern. The hearsay reference to what Officer Ruffalo said he was by Officer Robinson was an unsworn comment and not subject to cross-examination, a critical element of a constitutional right, (6th Amendment), when your constitutionally protected property right being , and it cannot be infringed upon, except through Due Process of law, being the presence of both substantive and procedural due process of law. When the Department was faced with the specific objection for going forward with a hearing because of only hearsay contained within a hearsay document of the officer, after demonstrating no observation was made by Officer Ruffalo who alone submitted the affidavit, the proceeding should have been vacated to avoid the rendition of this inadequate record. Essentially, the Hearing Officer chose to accept a hearsay affidavit of Officer Ruffalo, declined the opportunity to recess the hearing to allow for live testimony of Officer Robinson who might be able, or willing, to claim to have been an eye witness to a driving pattern, to afford the licensee a right to cross examination in accordance with the provisions of the 6th Amendment, which could establish a complete record. The Hearing Officer chose to go forward with the telephone hearing, and merely assume there was a lawful basis for the stop, based only upon the hearsay contained

from Officer Robinson's comment, contained in the affidavit of Officer Ruffalo, despite the fact the record is void of testimony to support a probable cause basis. Officer Ruffalo's affidavit confirmed he saw no operation of the vehicle at any time, and offered the comment to the effect Officer Robinson claimed to see the lane change, thereby constituting a production of hearsay within the hearsay document. The Hearing Officer's ruling there is no "lack of credibility", appears to be an illogical, speculative, and conclusory reasoning, as that was also based on the circular reasoning the Intox test results was ruled as being reliable, and that overcomes the potential of a conflict in credibility. The test results should not by used as a substitute for the state's obligation to have probable cause for the stop, and especially so when the licensee demonstrates there exists no probable cause for the stop, and the test was procedurally non-compliant on its face.

The way the Hearing Officer elected to dispense with this objection to the presentation of evidence by way of "hearsay on hearsay" in order to artificially create an observation, was to determine:

> "The driver argued that the hearing should be in person because there were issues of credibility of the witnesses which could only be determined by an in person hearing where the hearing examiner could observe the witnesses. However, no witnesses were called and the driver was the only one to testify. The only conflict was he stated he did not weave out of his lane or break any traffic laws and officer gave his grounds for stopping him as his failing to maintain his lane. There is no issue of credibility since the breath test showed that the driver was over twice the legal limit and likely not aware that he was weaving out of his lane of traffic, making the testimony of the officer more credible without having to observe the demeanor of the witness." (Ad. R, p. 21-22) (Emphasis added).

The Hearing Officer elected to substitute the absence of probable cause for the stop by using the challenged and unreliable test results to bolster and sustain the unjustified stop. You cannot get to a test, or its results, until you demonstrate the presence of probable cause actually did exist as a basis for the stop. There was no admissible "testimony of the officer"

to allow for a conclusion that probable cause existed, and there was no basis to say the officer was more credible without having to observe the demeanor of the witness, when no such admissible evidence was in the affidavit to get to an issue of credibility. Officer Robinson chose not to testify, and did not give any sworn statement, and Officer Ruffalo made no observation of any driving pattern. This misplaced reasoning constitutes an arbitrary and capricious abuse of discretion, and is wrong from the inception.

There is no basis for the Hearing Officer to conclude Mr. Wheeler failed to maintain his lane of travel by relying upon what is not in the Record, and not offered as admissible evidence. The Hearing Officer has no authority or basis to speculate, presume or assume facts not in evidence, and should not be allowed to give credible reliance to an unsworn statement of another Officer who could have produced a sworn statement or testified. It constitutes hearsay upon hearsay, and goes so far in relaxing the procedural requirements under the Due Process Clause required to protect a property right. This "credibility" assessment by the Hearing Officer over non-existent testimony that includes speculation, presumption, and assumption of what was not properly made part of the Record is nothing less than an arbitrary and erroneous finding, in view of the actual live testimony of Mr. Wheeler, and the limited value of the probable cause affidavit presented by Officer Ruffalo precludes such speculation about what was never said under oath, let alone not presented properly by a valid affidavit, and must be seen to result in the capricious conclusion and abuse of discretion of the agency in evaluating what constitutes credible sworn testimony.

Mr. Wheeler has shown the affidavit, Exhibit 2, is void of any admissible or credible observation of a requisite driving pattern, and raised the challenge to the presentation of

evidence by the form of unsworn hearsay in a hearsay document, and did insist upon live testimony, because of the potential of this credibility issue.

Consequently, and unfortunately, the Hearing Officer chose to accept the inadequate affidavit of Officer Ruffalo, and exclude the credible testimony of Mr. Wheeler, by accepting unsworn statements contained in a hearsay document over the testimony given under oath by Mr. Wheeler in the proceeding.

The determination of any issue of credibility is a matter to be considered by the trier of fact, but to be considered, it must be exercised in the elements essential for its intelligent analysis. A trier of fact's determination will not be disturbed except for manifest abuse, and to deny the needed elements to exercise such an analysis would seem to be an abuse in itself. The circumstance here is an abuse of discretion warranting reversal because the logic used to find probable cause and deny the need to address the elements of credibility is flawed and entirely misplaced, as the Hearing Officer chose instead to focus on an incompetent and unreliable test results for a supporting basis to assume alcohol presence impaired Mr. Wheeler's ability to remember he failed to maintain his lane, despite the lack of probable cause presented for the stop, and that circular reasoning itself is questionable, and serves to set up an even greater abuse of discretion in the analysis of these elements in this dispute.

The Hearing Officer erred in attempting to resolve the credible evidence issue by concluding the evidence could not be in conflict because of the misplaced reliance on an incompetent test result that violates the BAC operating procedures on its face. Without the personal involvement of the "observing" officer with his presentation of a sworn statement, or his live testimony, the licensee is denied his substantive and procedural due process rights under the Due Process Clause of the 14th Amendment, and any doctrine of fundamental

fairness required by constitutional law is eliminated in the process. The need for protection of a person's property rights (driver's license) is at issue, and at a minimum should require substantial and competent evidence to be presented in a due process forum of any administrative hearing. A driver's license is a property right protected under the United States Constitution and Idaho Constitution, as announced in Adams v. City of Pocatello, 91 Idaho 99, 101, 416 P. 2d 4648(1966); see also Arrow Transportation Co. v. IPVC, 85 Idaho 307,379, P.2d 422 (1963); see State v. Kouni, 58 Idaho 493, 76 P.2d 917 (1938).

Should it ever get to the need for a determination of credibility, even on a complete record, it becomes a complex process, requiring evaluation of multiple factors, but before you can even get there to evaluate the factors, you must have a fact in dispute created from admissible evidence, and this process of allowing hearsay on top of a hearsay document, attempting to simplify the complexity of an Administrative Hearing Process, appears to be going too far in the eyes of a logical application of the Due Process Clause. The very idea of cross-examination is a critical component in the evaluation of a witnesses' veracity, and that in itself is an element comprised within and protected under the 6th Amendment of the U.S. Constitution and a fundamental part of the due process of law under the 14th Amendment criteria. There can be no fundamental due process if you cannot allow a procedural right of confrontation because you are not allowed to have witness testimony to cross-examine, as contemplated under the 6th Amendment. The record becomes flawed when the situation is thus compounded when you are left with the comparison between a "live" testimony (Mr. Wheeler) under oath, witness and a hearsay document that contains unsworn hearsay, and neither the affiant nor the hearsay source is made available for cross-examination.

Where the circumstances of an administrative proceeding require a Hearing Officer to determine the fundamental issue of veracity of what is a non-existent witness, it is arbitrary for the Hearing Officer to rule against a testifying witness, and rule in favor of what is absent. It becomes capricious to make a decision on "credibility" and "probable cause" without the need to have facts in dispute, presented from an admissible source.

Where issues of credibility are being created, which here was an attempt to present hearsay of Officer Robinson with his unsworn comment to Officer Ruffalo, through a hearsay document, it becomes arbitrary, if not capricious, and is reversible error, and cannot form the basis to take a property right when their sole affidavit is lacking the requisite probable cause expected and required under Idaho law to be provided.

The Hearing Officer would have better served this process had he elected to conclude a telephone hearing would not be sufficient, as the record was void of any lawful basis for a stop, and it would better serve the mandates of the Due Process clause to reset that matter to a time where all parties, including the arresting and claimed observing officer, could be present to offer their testimony in the presence of the Hearing Officer, as was requested by Petitioner-Appellant. At a minimum, to properly exercise a discretion upon a factual record, the Hearing Officer should have recessed the hearing to a time when the officer claiming to have made an observation could be made available to participate, either in person, by telephone, or upon presentation of a sworn statement to explain his claim of what is being said by way of a driving pattern. The suspension order, finding the existence of probable cause for the stop, and any issues on credibility, must be vacated and set aside by virtue of § 18-8002 A(7)(a), Idaho Code.

ISSUE IV.

WHETHER THE TEST RESULTS OF THE INTOX 5000 PRESENTED IN THIS ADMINISTRATIVE HEARING (EXHIBIT 2) CAN BE CONSIDERED CREDIBLE, *RELIABLE, AND ADMISSABLE EVIDENCE, OR A VIOLATION OF THE* OPEERATION PROCEDURES FOR LICENSE SUSPENSION PURPOSES UNDER IDAHO LAW.

The Hearing Officer held in his Order: "There is no issue of credibility since the breath test showed that the driver was over twice the legal limit and likely not aware that he was weaving out of his lane of traffic, making the testimony of the officer more credible without having to observe the demeanor of the witnesses." (Cl. R., p. 21-22). (Emphasis added).

With all due respect to Mr. Howell, this appears to be a fallacy of logic, in that it **assumes** the breath test mechanism had produced an admissible test result, when the operating procedures of this machine, as promulgated by the Idaho Department of Law Enforcement (IDLE), and the Idaho State Police(ISP) have declared they must first meet the procedural requirements for the use of the machine, and before any reliance can be placed on any such test results, from the machine **must** have first procedurally complied with the mandate the Lot Solution used must be changed (approximately) every 100 tests, or every 30 days, whichever is sooner. Despite the procedural operations requirement, the hearing Officer went on to say:

"The driver argued that the breath test should be dismissed for failure to observe the standard operating procedures for the operation of the Intoxylizer 5000 had not been followed because the calibration check solution had been used 117 times. The standard operating procedures for the operation of the Intoxylizer 5000 state, "Solutions should be changed approximately every 100 calibration checks..." (Emphasis added.) Should is a recommendation and not a mandatory requirement. Furthermore, the term "approximately" is never defined, leaving the suggested times subject to broad interpretation. Using the same solution for 117 checks does not invalidate the results of the subject test." (Ad.R. p.22).

As stated above, a Hearing Officer's decision may not be upheld if, by a preponderance of the evidence, the driver has shown one of the several grounds enumerated in § 18-8002 A(7) exists for vacating the suspension. As stated above, those grounds include:

(d) The tests for alcohol concentration, drugs, or other intoxicating substances administered at the direction of the peace were not conducted in accordance with the requirements of § 18-8004 A (4), Idaho Code, or the testing equipment was not functioning properly when the test was administered... § 18-8002 A (7)(d); Idaho Code; see also In Re Mahurin, 140 Idaho 656,658,99 P.3d, 125,127 (App. 2004), see also Archer v. State, 145 Idaho 617, 181 P. 3d 543 (App. 2008).

One critical issue of Mr. Wheeler's appeal concerns the fact the Intoxilyzer 5000 machine used for his test samples had a solution in it that was not maintained and calibrated properly in compliance with applicable standards for the operation of the equipment.

§ 18-8004(4), Idaho Code provides for the tests to determine alcohol concentration of blood, urine or breath, and that statute mandates it must be performed in facilities and by methods approved by the Idaho State Police and must be in compliance with standards set by the State Police. To carry out the authority conferred by that statute, the Idaho State Police issued operating manuals, establishing procedures for the maintenance and operation of the breath testing equipment, including the Intoxilyzer 5000. See Idaho Administrative Code (IDAPA) 11.03.01.013.03. Noncompliance with these procedures would be one of the grounds for vacating an administrative license suspension as identified in § 18-8002A (7) (d), Idaho Code. See In re Mahurin, supra at Idaho 659-660; see also Archer v. State, supra.

The manual for the Intoxilyzer 5000 states the following, concerning solutions to be used for calibration checks of the equipment:

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. Calibration check solutions should only be used prior to the expiration date as marked on the label. Solutions should only be used as long as values produced are within the designated acceptable range. *Solutions should be changed approximately every 100 calibration checks or every month whichever comes first*. (Standard Operating Procedure, Breath Alcohol Testing, Pg. II-2 (emphasis added). See In Re Mahurin, supra.

This "calibration check solution" of testing machines became an issue in the In Re Mahurin matter (supra). It addressed an issue only with reference to the 30 day aspect of the procedure, where it says: "solutions should be changes approximately every 100 calibration checks, or every month, whichever comes first". In Mahurin, supra, the Court said:

> "Next, we address Mahurin's contention that the maintenance logs that were produced and placed in evidence showed that the calibration check solution for the Intoxilyzer 5000 had not been changed within the preceding month as prescribed in the manual. According to Mahurin, the directive in the Intoxilyzer 5000 manual that "solutions should be changed approximately every 100 calibration checks or every month whichever comes first," creates a strict requirement that solutions be changed no less than every thirty days. The hearing officer concluded that the language relied upon by Mahurin was recommendatory, not mandatory, and inferred that a solution change occurred on May 30 when the equipment was placed in service. On appeal, Mahurin contends that the hearing officer's interpretation of the manual was incorrect and that the inference drawn by the hearing officer is unsupported by the evidence.
>
> We need not decide the merit of either of Mahurin's contentions because on the record presented, Mahurin failed to meet his burden to prove that the calibration check solution was not changed when the equipment was placed back in service on May 30. (Emphasis added).
> Mahurin's argument is predicated on a misperception that the ITD bore the burden of proof at the hearing to show that the equipment was properly calibrated and maintained. To the contrary, as noted above, the person requesting a hearing on a license suspension bears the burden under I.C. § 18-8002A(7)(d) to prove one of the enumerated grounds to vacate the suspension. Hence, if the evidentiary record is insufficient to establish whether the solution was changed on May 30, it is Mahurin, not the ITD, who failed in the burden of proof. Here, the machine was placed in service thirty-one days prior to Mahurin's test, and there is ambiguity as to whether the solution was changed on that date. As previously noted, Mahurin

did not subpoena a witness to testify about the procedures conducted on May 30. Because Mahurin presented no affirmative evidence showing that the calibration check solution had not been changed within one month before his June 30 test, any error in the hearing officer's finding or in his interpretation of the manual was harmless." (Emphasis added).

The situation presented in Archer v. State, supra, was somewhat different, as it addressed the Alco-Sensor III machine, instead of the Intoxilyzer 5000. However, that court said:

> Archer argues that, because a calibration record was not attached to his subject test, his test was not conducted in accordance with the methods approved by the ISP. Specifically, Archer contends that, because § 18-8004(4), Idaho Code requires that "analysis of . . . breath for the purpose of determining alcohol concentration shall be performed . . . by any . . . method approved by the Idaho state police" and because the ISP has issued materials stating that a calibration test needs to be attached to a subject test, the district court was correct in vacating his license suspension pursuant to § 18-8002A(7)(d), Idaho Code.
>
> To the extent that Archer is arguing that a calibration check was not performed within twenty-four hours of his breath test on the Alco-Sensor III, again his argument fails. Much like the drivers in Mahurin and Kane, Archer presented no evidence demonstrating that a calibration check had not been performed or that the machine was not operating correctly. Archer bore the burden of proof at the ALS hearing and, because he produced no evidence regarding the lack of a calibration check or the reliability of the Alco-Sensor III, he failed to meet his burden of proof. (Emphasis added).
>
> The district court reversed the hearing officer's decision because it concluded that Archer was arguing that, by not attaching the calibration record, the "tests for alcohol concentration . . . administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code.

Both of these cases were rendered by the Idaho Court of Appeals, and they hold for the proposition that:

> If an evidentiary hearing record is insufficient to establish whether the calibration check solution was changed as required for a subject test-a directive contained in the Intoxilyzer 5000 operation manual-it is the driver, not the ITD, who has failed to meet the burden of proof, see In re Mahurin, supra; see Archer v. State, supra.

Mr. Wheeler unconditionally met his burden of proof required by § 18-8002A (7) (d), Idaho Code, because there is a sufficient record to establish the fact the solution was not changed as required. The Hearing Officer so found it was the 117th test result, but notwithstanding that finding of fact, he made the arbitrary, capricious, and contrary to law conclusion that it did not invalidate the test results and elected to suspend the license. Exhibit 2 is the test results, and is the relevant document that demonstrated the fact the procedural and operational requirements were not met, and the test samples are non-compliant by the contents of the very exhibit itself (Exhibit 2) as it confirmed Mr. Wheeler's breath test samples were calibration test number 117, thereby proving "by the evidentiary record", and "by a preponderance of the evidence", that the calibration check solution used in the Intoxilyzer 5000 machine for him had gone beyond the approximate "100 calibration checks", and in fact went 17% beyond the required use of that Lot solution, and consequently Mr. Wheeler did prove, beyond reasonable doubt, by the exhibit and the introduced evidence itself , that the Breath Testing equipment was not properly calibrated and maintained as required by Idaho Statute, and the promulgated rules of IDLE and ISP. This evidentiary record is sufficient to establish the solution was not changed at approximately 100 calibration checks, because it conclusively demonstrates it states it was number 117, and was not changed as was required under the operating procedures.

In response to that undisputed fact, regarding the evidence of the calibration check test number 117, the Hearing Officer simply elected to conclude:

> "[the use of the word] should is a recommendation and not a mandatory requirement. Furthermore, the term "approximately" is never defined, leaving the suggested times subject to broad interpretation." (Ad.R. p.22, Par VI).

That's an interesting comment by a hearing officer, and is precisely what we find the hearing Officer said in that order that gave rise to In Re Mahurin, supra, as the officer there explained the 30 day requirement was perceived by him to be only recommendatory, not mandatory. The Court of Appeals did not address that aspect of the agency finding, but it may become necessary to do so here, as Appellant would argue that aspect is part of the rule and procedure being subject to the appeal here. That choice of calling it recommendatory only may constitute an abuse of discretion as the agency is attempting to interpret the Rules in a way contrary to the Doctrine of Lenity.

Under the Rule of Lenity, criminal statutes must be strictly construed in favor of the accused. State v. Barnes, 124 Idaho 379, 380, 859 P.2d 1387, 1388 (1993). The same principles of construction that apply to criminal statutes apply also to rules and regulations promulgated by administrative agencies. See Rhodes v. Industrial Comm'n, 125 Idaho 139, 142, 868 P.2d 467, 470 (1993); see Bingham Memorial Hospital v. Dept. of Health and Welfare, 112 Idaho 1094, 1096, 739 P.2d 393, 395 (1987); see Sate v. Mills, 128 Idaho 426,429,913 P. 2d 1196, 1199 (App 1996).

"Should is not a recommendary suggestion; "approximately" is not meant to allow going 17% beyond the required procedure, especially when we are relying on a sensitive, perishable solution to generate a quantitative analysis.

Beginning with the definition of "may", we find Black's Law Dictionary, Eighth Edition, to identify the following meanings:

MAY: To be a possibility, Loosely, is required to; shall; must. In dozens of cases, courts have held *may* to be synonymous with *shall* or *must*, in an effort to effect legislative intent. p. 1000.

Proceeding to the definition of "must" and "should", we find even in the earlier version of Black's Law Dictionary, Fourth Edition, to identify the following meanings:

MUST: This word, like the word "shall", is primarily of mandatory effect; and in the sense that it is used in antithesis to "may". But this meaning of the word is not the only one, and it is often used in a merely sense. p. 1171.

SHOULD: The **past tense of shall,** ordinarily implying duty or obligation; Although usually no more than an obligation of propriety or expediency, or a moral obligation, thereby distinguishing it from "ought", not normally synonymous with "may". p. 1549.

We find the definition of "approximate" has been around almost forever, and is well described in the New Twentieth Century Dictionary, as follows:

APPROXIMATE: To come near, to approach; to be meant to come near to ot to approach, but certainly not to be away from or beyond.

The word, "Approximately" though it may not be defined in the context of the Operator's Manual of the Intox machine, is certainly subject to what has long been defined by the New Twentieth Century Dictionary, to mean: "used in the sense of an estimate, meaning more or less, but about and near the amount, quantity, or distance specified." (Emphasis added).

Clearly, "should" is the past tense of "shall", and "shall" must be recognized, even by the Hearing Officer, to be of a mandatory effect. The rule of lenity requires the strict construction of an administrative rule when applied in a property right context, and especially where a property right, protected by the Constitution and protected by the substantive and procedural due process rights under the Due Process clause of a constitution, would expect procedural compliance strictly applied in this testing process. The word "approximately" is not the word you would use to allow a state of being that would be 17% out of compliance, and as construed, should not be allowed to be outside 1%, and the test

solution should be required to be changed before 100, between 99 and 101, but not more than that.

The Standard Operating Procedure for the operation of the Intox 5000 has been cited in In Re Mahurin, supra, for further specific reference and Judicial Notice.

Clearly, 99 to 101 is more or less, and is about and near the amount, and as such, may arguably be within the range of lenity for being approximate to the number 100, but no stretch of lenity would allow you to go out of compliance for a distance of 17% of the range, when the acceptable range of 100 is what was declared in the manual to be a reliable solution margin in the required procedure of a reliable test.

This Solution had been used 116 times, **before** Appellant arrived at the Intoxilizer Room, and it was already out of compliance before they began his analysis to produce number 117 (Ad. R., p. 2, Exhibit 2). Consequently, the Lot Solution was out of calibration under the required procedural operation of the machine, and must be found to have been out of service, and should not have been relied upon in this hearing for any accuracy, and to then attempt to use that test result, which itself is unreliable by definition, to then give some level of reliability to a non-compliant test, to find a logical means to rule over the disputed basis for the stop, or the assumed presence of a "reasonable articulable suspicion" serves only to add a layer of incompetent evidence to support the lack of any admissible factual basis to support for the stop. The suspension order should be set aside and vacated as a result of this violation of Idaho Code, § 18-8004 A(7)(d).

ISSUE V.

WHETHER APPELLANT-PETITIONER IS ENTITLED TO ATTORNEY FEES ON APPEAL.

When administrative findings are made without a reasonable basis in fact or law, and violate constitutional or statutory provisions, or in excess of authority, or were made upon unlawful procedure, or were clearly erroneous or arbitrary and capricious, attorney fees and costs are awarded pursuant to § 12-117, Idaho Code. See Roeder Holdings, L.L.C. v. Ada County, 136 Idaho 809, 41 P.3d 237 (2001).

§ 12-117, Idaho Code, provides for attorney fees to a person, in any administrative or civil judicial proceeding, involving adverse parties with a state agency, a city, a county or other taxing district. That statute allows award of reasonable attorney fees, witness fees and reasonable expenses to the party, if the Court finds in favor of the person, and finds the agency, city or county acted without a reasonable basis in fact or law.

Appellant would respectfully claim a right to recover such fees and costs incurred in this appeal, as the Order of suspension, was pursued and granted without a basis in law, or fact, contrary to admissible evidence, and in violation of the Rules of Lenity and the required operating procedures established by the Idaho Department of Law Enforcement 9IDLE) and the Order of Suspension should be reversed, as there existed no basis to support the entry of an order.

CONCLUSION

The final order of this Hearing Officer is arbitrary, capricious, and an abuse of discretion, which has resulted in suspending the license of Appellant, and for the reasons stated herein, constitutes reversible error, and the Order must be vacated. The Order was made upon an unlawful procedure, unsupported by fact and contrary to current Statute, Administrative Rules, and Idaho law, and must be set aside and reversed, and the matter remanded to the State agency for entry of an order reinstating Appellant's driving privileges,

and rescinding the order of suspension. The seizure and proposed suspension in the notice of suspension should not have been sustained, as no substantial evidence supports such order of suspension. This Court should enter an order for an award of attorney fees and costs to Appellant as provided for under the statutes and laws of the State of Idaho, specifically provided for in § 12-117, Idaho Code.

Dated this 25th day of March, 2009.

Vernon K. Smith
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 25th day of March 2009, I caused a true and correct copy of the above and foregoing to be delivered to the following persons at the following addresses as follows:

Michael J. Kane	( )	U.S. Mail
Special Deputy Attorney General	( )	Fax
P.O. Box 2865	( )	Hand Delivery
Boise, Idaho 83701-2865		

Vernon K. Smith