

2-1-2016

Hamilton v. State of Idaho, Department of Transportation Respondent's Brief Dckt. 43510

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"Hamilton v. State of Idaho, Department of Transportation Respondent's Brief Dckt. 43510" (2016). *Not Reported*. 2732.
https://digitalcommons.law.uidaho.edu/not_reported/2732

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT
OF THE
STATE OF IDAHO

PATRICK GLEN HAMILTON,)	SUPREME COURT NO. 43510
)	
Petitioner-Appellant,)	
)	
v.)	
)	
STATE OF IDAHO,)	
TRANSPORTATION DEPARTMENT,)	
)	
Respondent.)	
_____)	

RESPONDENT'S BRIEF

APPEAL FROM SECOND JUDICIAL DISTRICT, NEZ PERCE COUNTY

THE HONORABLE JAY GASKILL, PRESIDING

Edwin L. Litteneker
Special Deputy Attorney General
322 Main Street
Lewiston, Idaho 83501
Attorney for Respondent

Charles M. Stroschein
Clark and Feeney
1229 Main Street
Lewiston, Idaho 83501
Attorney for Appellant

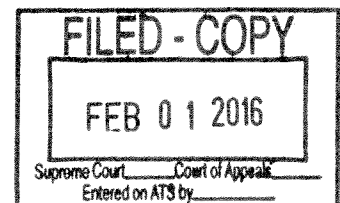


TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
STATUTES.....	iii
I. STATEMENT OF THE CASE.....	1
a. Nature of the Case.....	1
b. Party References	1
c. Reference to the Administrative Record.....	1
d. Factual Statement and Procedural History.....	1
II. ISSUES ON APPEAL.....	3
III. STANDARD OF REVIEW.....	4
IV. ARGUMENT.....	6
1. Legal cause exists to stop Mr. Hamilton’s motor vehicle, I.C. § 18-8002A(7)(a).....	6
2. Idaho Code §§ 49-428 and 49-443 are not unconstitutionally vague.....	10
3. The effect of Idaho State Police’s adoption of Proposed and Temporary Rules for Breath Alcohol Testing.....	13
V. CONCLUSION.....	17

TABLE OF CASES AND AUTHORITIES

CASES	PAGE(S)
 Cases	
<i>Bell v. Idaho Transp. Dept.</i> , 151 Idaho 659, 262 P.3d 1030 (Ct. App. 2011).	18
<i>Burton v. State, Dept. of Transp.</i> , 149 Idaho 746, 240 P.3d 933 (Ct. App. 2010).....	11, 12
<i>Druffel v. State, Dept. of Trans.</i> , 136 Idaho 853, 41 P.3d 739 (2002).....	5
<i>Hern v Idaho Transportation Department</i> 2015 Opinion Number 87, December 30, 2015.....	14
<i>Howard v. Canyon County Board of Commissioners</i> , 128 Idaho 479, 915 P.2d 709 (1996).....	4
<i>In re Suspension of Driver's License Gibbar</i> , 155 P.3d 1176 (Ct. App. 2006).....	6, 10
<i>Kugler v. Drowns</i> , 119 Idaho 687, 809 P.2d 1116 (1991).....	3
<i>Marshall v. Idaho Transportation Department</i> , 137 Idaho 337, 48 P.3d 666 (2002).....	5
<i>State v. Besaw</i> , 155 Idaho 134, 306 P.3d 219 (Ct. App. 2013).....	17
<i>State v. Colvin</i> , 151 Idaho 881, 341 P.3d 598 (Ct. App. 2014).....	12
<i>State v. Freitas</i> , 157 Idaho 257, 335 P.3d 597 (Ct. App. 2014).....	11
<i>State Transp. Dept. v. Kalani-Keegan</i> , 155 Idaho 297, 311 P.3d 309 (Ct. App. 2013).....	5
<i>State v Martin</i> 148 Idaho 31, 218 P.3d 10, (Ct. App. 2009).....	12, 13
<i>Village of Hoffman Estate v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489, 495 102 S. Ct. 1186 (1982).....	11
<i>Wheeler v. IDHW</i> , 147 Idaho 257, 207 P.3d 988, 996 (2009).....	3

TABLE OF CASES AND AUTHORITIES (CONT.)

STATUTES

Idaho Code § 18-8002A(a)	3, 6
Idaho Code § 18-8002A(a) & (d).....	3
Idaho Code § 18-8002A(7)	1, 2, 4, 5, 17
Idaho Code § 18-8002A(7)(b, c or e).....	3
Idaho Code § 18-8002A(7)(d)	13, 16
Idaho Code § 18-8004.....	4, 13, 14, 16
Idaho Code § 18-8004(4)	4, 13, 16
Idaho Code § 18-8004C	4
Idaho Code § 18-8006.....	4
Idaho Code § 49-110(4).....	9
Idaho Code § 49-236(2)	9
Idaho Code § 49-428.....	7, 8, 10, 11, 12, 13
Idaho Code § 49-428(2)	7
Idaho Code § 49-429.....	3
Idaho Code § 49-443.....	3, 8, 10, 11, 12, 13
Idaho Code § 49-443(4).....	6, 8
Idaho Code § 49-456.....	8, 9
Idaho Code § 49-808.....	11, 12
Idaho Code § 67-5226.....	16
Idaho Code § 67-5277.....	4
Idaho Code § 67-5279(1).....	4
Idaho Code § 67-5279(3).....	4, 5, 10

OTHER AUTHORITY

Idaho Administrative Bulletin, October 1, 2014 14-10, p. 171	15
--	----

I. STATEMENT OF THE CASE

a. Nature of the Case.

This is an Appeal by Patrick Glen Hamilton of the District Court's decision that an Idaho Transportation Department Hearing Examiner had correctly determined that Mr. Hamilton had not met his burden to demonstrate a basis under I.C. § 18-8002A(7) to set aside the Idaho Transportation Department's Administrative License Suspension. The District Court affirmed the Hearing Examiner's decision to suspend Mr. Hamilton's driving privileges as a result of a failed evidentiary test for breath alcohol concentration.

b. Party References.

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

c. Reference to the Administrative Record.

The Department's Administrative Record and the Transcript of the Department's Administrative Hearing is referred to in the Exhibits to Clerk's Record (Ex. CR.) and are identified by page number.

d. Factual Statement and Procedural History.

On September 6, 2014 at approximately 2305 hours, Idaho State Police Trooper Jeffory Talbott stopped a blue 2001 Dodge R15 for an improper display of registration stickers southbound on 21st Street near 17th Ave, Lewiston, Idaho (Ex. CR. p. 006).

Upon contact with the driver, Trooper Talbott could smell a strong odor of an alcoholic beverage coming from the vehicle. Trooper Talbott further noticed that the driver, identified as Patrick G. Hamilton appeared to have glassy eyes (Ex. CR. p. 006).

Mr. Hamilton admitted to consuming alcohol prior to driving. Trooper Talbott asked Mr. Hamilton to exit the vehicle and perform standardized field sobriety evaluations. Mr. Hamilton failed to perform the field sobriety evaluations satisfactorily (Ex. CR. p. 006).

Trooper Talbott played the ALS advisory and monitored Mr. Hamilton for the mandatory fifteen minutes before obtaining breath samples. Mr. Hamilton provided two breath samples with results of .108 and .111 (Ex. CR. p. 006).

Mr. Hamilton timely requested a hearing with the Idaho Department of Transportation's Administrative Hearing Examiner (Ex. CR. pp. 012-018).

A hearing was held telephonically on October 1, 2014 (Ex. CR. p. 053). The Department's Hearing Examiner entered Findings of Fact, Conclusions of Law and Order sustaining the suspension of Mr. Hamilton's driving privileges (Ex. CR. pp. 358-365).

Mr. Hamilton timely filed a Petition for Judicial Review (R. pp. 369-371).

The District Court accepted briefing and heard oral argument. The District Court entered a Memorandum Decision on July 31, 2015 determining that Mr. Hamilton had failed to demonstrate that a basis existed pursuant to I.C. § 18-8002A(7) to set aside the Department's Hearing Examiner's suspension of Mr. Hamilton's driving privileges (R. pp. 102-110).

Ms. Hamilton timely appealed the District Court's decision and the suspension of Mr. Hamilton's driving privileges has been stayed pending appeal.

II. ISSUES ON APPEAL

The issues for the Court's review are characterized as follows:

1. Legal cause exists for the stop of Mr. Hamilton's vehicle, I.C. § 18-8002A(7)(a).
2. Idaho Code §§ 49-429 and 49-443 are not unconstitutionally vague.
3. The effect of adoption of Proposed and Temporary Rules for Breath Alcohol Testing Standard Operating Procedures.

Mr. Hamilton only raised issues pursuant to I.C. § 18-8002A(7)(a)&(d). Any other issue which could have been raised pursuant to I.C. § 18-8002A(7)(b-c or e) are waived. *Kugler v. Drowns*, 119 Idaho 687, 809 P.2d 1116 (1991), *Wheeler v. IDHW*, 147 Idaho 257, 207 P.3d 988, 996 (2009).

III. STANDARD OF REVIEW

Idaho Code § 18-8002A(7) sets out the burden of the driver to demonstrate to the Hearing

Examiner 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 review of disputed issues of fact must be confined to the agency record for judicial review. Idaho Code § 67-5277.

Idaho Code § 67-5279(1) sets out the scope of review by the Court. “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 Board of Commissioners*, 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 Idaho Supreme Court has held that the decision of the Department’s Hearing Examiner 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. Idaho Transportation Department*, 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 Idaho Code § 67-5279(3) and that a substantial right of that party has been prejudiced. *Druffel v. State, Dept. of Trans.*, 136 Idaho 853, 41 P.3d 739 (2002).

Further, the grounds for vacating a license suspension on judicial review are limited to those set out in I.C. § 18-8002A(7), *State Transp. Dept. v. Kalani-Keegan*, 155 Idaho 297, 311 P.3d 309 (Ct. App. 2013).

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).

Mr. Hamilton has not provided a sufficient legal basis to set aside the administrative action of the Department suspending Mr. Hamilton’s driving privileges.

IV. ARGUMENT

ISSUE I.

Legal cause exists to stop Mr. Hamilton's motor vehicle, I.C. § 18-8002A(7)(a).

Mr. Hamilton argues that he has met his burden pursuant to I.C. § 18-8002A(7)(a) demonstrating that legal cause did not exist for Trooper Talbott's stop of Mr. Hamilton's vehicle.¹

Trooper Talbott stopped Mr. Hamilton's vehicle for improperly displayed registration stickers. The condition of Mr. Hamilton's license plates at the time of Trooper Talbott is not factually disputed (Ex. CR. p. 332).

Idaho Code § 18-8002A(7)(a) requires Mr. Hamilton show by a preponderance of the evidence that legal cause did not exist to stop Mr. Hamilton's vehicle. Legal cause for these purposes is a

...reasonable and articulable suspicion that the vehicle is being driven contrary to traffic laws. The reasonableness of the suspicion must be evaluated upon the totality of the circumstances at the time of the stop. The reasonable suspicion standard requires less than probable cause the more than mere speculation or instinct on the part of the officer, *In re Suspension of Driver's License Gibbar*, 155 P.3d 1176 (Ct. App. 2006), *State v. Wheeler*, 149 Idaho 364, 233 P.3d 1286 (Ct. App. 2010).

Mr. Hamilton engages in a somewhat convoluted analysis of Idaho Code's motor vehicle registration provisions concluding that the Legislature has not made the circumstances of the display of registration stickers unlawful. Trooper Talbott indicates that he stopped Mr. Hamilton's vehicle "for improper registration stickers (obstructed white colored sticker in lower right-hand corner and a red colored sticker near the bottom edge near the middle), I.C. § 49-443(4)", (Ex. CR. p. 006).

¹ It is Mr. Hamilton's burden to demonstrate that:
"The peace officer did not have legal cause to stop the person."

The Hearing Examiner carefully considers Mr. Hamilton's argument entering Findings of Fact and Conclusions of Law (FFCLO) consistent with the record before him.²

In particular the Hearing Examiner's analysis of the motor vehicle registration statutory provisions is an appropriate legal analysis. I.C. § 49-428 provides "the annual registration sticker for the current registration year shall be displayed on each license plate". Idaho Code § 49-428(2) goes on to provide in pertinent part "... all registration stickers shall be securely attached

2

1.

Did Senior Trooper Jeffery Talbott have Legal Cause to Stop the vehicle Hamilton was driving?

1. Senior Trooper stopped the vehicle driven by Hamilton for having an improper registration sticker, a violation of Idaho Code §49-443(4).
2. An obstructed white colored registration sticker was in the license plate's lower right hand corner.
3. A red colored registration sticker was placed near the license plate's middle bottom edge.
4. **Hamilton argued Idaho Code §49-433(4) was not a traffic infraction violation and therefore Senior Trooper Talbott did not have legal cause to enact a traffic stop.**
5. Idaho Code §49-428(2) provides [e]very license plate shall at all times be securely fastened to the vehicle to which it is assigned to prevent the plate from swinging, be at a height not less than twelve (12) inches from the ground, measuring from the bottom of the plate, be in a place and position to be clearly visible, and shall be maintained free from foreign materials and in a condition to be clearly legible, and ***all registration stickers shall be securely attached to the license plate and shall be displayed as provided in section 49-443(4), Idaho Code*** (emphasis added).
6. Idaho Code §49-443(4) sets forth that [I]license plates issued for vehicle required to be registered in accordance *with the provisions of section 49-402 and 49-402A, Idaho Code, shall be issued color coded red, white or blue registration validation stickers showing the year of registration. Each registration validation sticker shall bear a number from 1 through 12, which number shall correspond to the month of the calendar year in which the registration of the vehicle expires and shall be affixed to the lower right-hand corner of the plates within the outlined rectangular area* (emphasis added).
7. Idaho Code §49-428(2) clearly notes a vehicle is not properly registered if the registration sticker is not located on the license plate as set forth in Idaho Code §49-443(4).
8. Idaho Code §49-443(4) is more specific in directing where a registration sticker needs to be placed on a license plate.
9. Exhibit O provides Hamilton did not place the license plat sticker as required by Idaho Code §49-443(4).
10. Hamilton was not only in violation of Idaho Code §49-443(4), he was also in violation of Idaho Code §49-428(2) when he placed the registration sticker in the incorrect area on the license plate.
11. Even if Idaho Code §49-443(4) is not an infraction traffic violation, Exhibit O shows Hamilton was still driving a motor vehicle in violation of this statute.
12. Additionally, Hamilton did not present any proof by the preponderance of the evidence indicating Senior Trooper Talbott was prevented by any Idaho Code, Idaho court decision, or IDAPA Rule from stopping any vehicle for being in violation of Idaho Code §49-443(4).
13. Although the owner of the license plate noted in Exhibits L. M. and O failed to display a current registration sticker, the owner of this license plate could be stopped by Senior Trooper Talbott or any other law enforcement officer for violating Idaho Code §49-456(1).
14. Senior Trooper Talbott had legal cause to stop the vehicle driven by Hamilton.

Findings of Fact and Conclusions of Law and Order, pp. 4-5, R. pp.361-362. Emphasis original.

to the license plates and shall be displayed as provided in I.C. § 49-443(4)”. The Hearing Examiner correctly cites the applicable code provisions and analyzes those code provisions appropriately, (FFCLO 1.5, 1.7 and 1.10 FN 2).

Idaho Code § 49-443(4) again in pertinent part provides that the registration sticker “shall be affixed to the lower right-hand corner of the plates within the outlined rectangular area”. The Hearing Examiner correctly analyzes the requirement that Mr. Hamilton was to place the registration stickers in a designated place, (FFCLO 1.6, 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12 FN 2).

The Hearing Examiner correctly determines that Mr. Hamilton’s registration stickers are not within the “outlined rectangular area” at the time of the stop. Mr. Hamilton does not contend that the registration stickers are not in the right place, Mr. Hamilton just argues that the improper display of registration stickers simply cannot be the basis for a motor vehicle stop.

Unfortunately the Department’s Hearing Examiner appears to have had a difficult time with Mr. Hamilton’s argument as to the application of I.C. § 49-456. I.C. § 49-456 is not helpful to determine whether the failure to comply with I.C. § 49-428 and I.C. § 49-443 constitutes a violation of the law (See FFCLO 1.14 FN2).

There is no question that the improper display of registration stickers is a violation of traffic laws, justifying Trooper Talbott's stop of Mr. Hamilton's vehicle. Idaho Code § 49-236(2) provides that "it is an infraction for any person to violate any of the provisions of chapters 3, 4 and 6-9 of this title unless otherwise specifically provided". Idaho Code § 49-456 calls out other acts involving vehicle license plate display which are clearly not at issue here.³

An infraction is "a civil public offense, not constituting a crime which is not punishable by incarceration and for which there is no right to trial by jury or right court appointed counsel, and which is punishable by a penalty not exceeding \$300 and no imprisonment" I.C. § 49-110(4). The Court's Infraction Rules clearly recognize such traffic infractions and the corresponding penalty for an unlawful act.⁴

The Idaho Legislature has clearly described the circumstances under which a license plate and the annual registration stickers are to be displayed. The nonmoving infraction of failing to

³ Idaho Code § 49-456 provides:

VIOLATIONS OF REGISTRATION PROVISIONS. It shall be unlawful for any person:

(1) To operate or for the owner to permit the operation upon a highway of any motor vehicle, trailer or semitrailer which is not registered and which does not have attached and displayed the license plates assigned to it for the current registration year, subject to the exemptions allowed in sections 49-426, 49-431 and 49-432, Idaho Code.

(2) To operate or for the owner to permit the operation on state and federal lands or upon highways, or sections of highways, as permitted under section 49-426(3) and (4), Idaho Code, any all-terrain vehicle, utility type vehicle or motorbike that does not have a valid and properly displayed restricted license plate issued pursuant to this chapter and attached registration sticker issued pursuant to section 67-7122, Idaho Code, subject to the exemptions allowed in section 49-426(2), Idaho Code.

(3) To display or cause or permit to be displayed, or to have in possession any registration card or license plate knowing the same to be fictitious or to have been canceled, revoked, suspended or altered.

(4) To lend or knowingly permit the use by one not entitled to any registration card or license plate issued to the person so lending or permitting that use.

(5) To fail or refuse to surrender to the department, upon demand, any registration card or license plate which has been suspended, canceled or revoked.

(6) To use a false or fictitious name or address in any application for the registration of any vehicle or for any renewal or duplicate, or knowingly to make a false statement or conceal a material fact or otherwise commit a fraud in any application.

⁴ Non-moving traffic infractions. (Fixed penalty \$10.50, court costs \$16.50, County Justice fund fee \$5.00, peace officer's training fee \$15.00, ISTARS technology fund fee \$10.00 and emergencies surcharge fee \$10.00) \$67.00. Idaho Infraction Rules 9(23).

properly display registration stickers is a law violation justifying the stop of Mr. Hamilton's vehicle.

There is no factual question about the condition of the license plate on the motor vehicle driven by Mr. Hamilton. The Record clearly demonstrates that Mr. Hamilton's 2015 registration sticker is improperly placed and that the area in which the registration sticker is to be placed is obstructed (Ex. CR. p. 332).

The Department's Hearing Examiner makes thorough and detailed Findings and Conclusions as to Mr. Hamilton's failure to demonstrate that legal cause did not exist when Trooper Talbott stopped Mr. Hamilton's motor vehicle (FN 2).

The Hearing Examiner's FFCLC are based on the record as a whole and are not arbitrary and capricious or clearly erroneous.⁵

Mr. Hamilton's vehicle was being driven "contrary to traffic laws", *Gibbar at p. 942*.

Trooper Talbott clearly had legal cause to stop Mr. Hamilton's vehicle.

ISSUE 2.

Idaho Code §§ 49-428 and 49-443 are not unconstitutionally vague.

Mr. Hamilton contends that I.C. §§ 49-428 and 49-443 are either facially unconstitutionally vague or unconstitutionally vague as applied to Mr. Hamilton's conduct. This issue is not before the Court on judicial review. Mr. Hamilton has failed to preserve this issue for judicial review by failing to argue the vagueness of I.C. §§ 49-428 and 49-443 before the Department's Hearing Examiner.

The Idaho Courts have required participants in the Administrative License Suspension process to raise issues of constitutionality before the Department's Hearing Examiner even if the

⁵ Mr. Hamilton fails to provide in his opening brief the basis for setting aside the Hearing Examiner's decision based on I.C. § 67-5279(3).

Hearing Examiner does not have the regulatory or statutory authority to deal with and resolve the constitutional issue, *Bell v. Idaho Transp. Dept.*, 151 Idaho 659, 262 P.3d 1030 (Ct. App. 2011).

Alternatively, it is clear that I.C. § 49-428 and 49-443 are not facially unconstitutionally vague. Clearly I.C. §§ 49-428 and 49-443 impose a civil sanction “worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited” and is “worded in a way that does not allow arbitrary and discriminatory enforcement”, *Burton v. State, Dept. of Transp.*, 149 Idaho 746, 240 P.3d 933 (Ct. App. 2010).

As to the vagueness as applied challenge, I.C. §§ 49-428 and 49-443 avoid any problem with arbitrary and discriminatory enforcement by “identifying a core of circumstances to which the statute unquestionably could be constitutionally applied (citations omitted). It has long been held the statute should not be held void for uncertainty if it can be given any practical application,” *State v. Freitas*, 157 Idaho 257, 335 P.3d 597 (Ct. App. 2014). To be successful Mr. Hamilton must demonstrate that I.C. §§ 49-428 and 49-443 are impermissibly vague in all of their applications.

Mr. Hamilton has failed to show that I.C. §§ 49-428 and 49-443 are impermissibly vague in all of their applications. Clearly registration stickers are to be displayed in the area designated by I.C. § 49-443. There should be no reasonable confusion about what is necessary to properly display the current registration sticker. Mr. Hamilton clearly displays the registration sticker in a place that the sticker should not be, (Ex. CR. p. 332).⁶

The Court of Appeals has dealt with an argument that I.C. § 49-808 is unconstitutionally vague as applied to the use of turn signals as two lanes of travel merge into one, *Burton*, *id.*

⁶ It is not necessary to consider the hypotheticals that Mr. Hamilton proposes. The Idaho Court has indicated that the person who engages in some conduct which is clearly prescribed cannot complain of the vagueness of the law as applied to the conduct of others. It is necessary first to examine the conduct of Mr. Hamilton before analyzing other hypothetical applications of the law, *Village of Hoffman Estate v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 102 S. Ct. 1186 (1982), *State v. Freitas*, 157 Idaho 257, 335 P.3d 597, 603 (Ct. App. 2014).

Initially the Court of Appeals characterizes the police officer's description of Ms. Burton's driving as "cryptic" indicating that the police officer stopped Ms. Burton after observing her fail to signal when merging lanes. The Court finds that I.C. § 49-808 when applied to Ms. Burton's driving does not clearly indicate that a signal is required when two lanes merge with neither lane clearly ending and neither lane clearly continuing, *Burton at 749*.⁷

When I.C. § 49-443 is applied to the condition of Mr. Hamilton's license plate there is nothing cryptic about what Trooper Talbott observes and describes.

Mr. Hamilton also fails to advise the Court of a recent decision interpreting I.C. § 49-808, where the Court of Appeals found that I.C. § 49-808 was not unconstitutionally vague as applied, *State v. Colvin, 151 Idaho 881, 341 P.3d 598 (Ct. App. 2014)*.

Specifically dealing with an unconstitutionally vague challenge to I.C. § 49-428, the Court of Appeals has concluded that language requiring that the "license plate be securely fastened and in a place to be clearly visible and maintained free of foreign materials and in the condition to be clearly legible" is constitutionally clear and unambiguous language, *State v Martin 148 Idaho 31, 218 P.3d 10, (Ct. App. 2009)*. The Court concluded there that a reasonable articulable suspicion existed based on the display of Martin's license plate in contravention of I.C. § 49-428, making the stop of the Martin's vehicle appropriate.

⁷ Judge Gratton's specially concurring opinion is helpful here:

"The hearing officer did not expressly find that Burton steered her vehicle to the left. There is no evidence in the record that Burton steered her vehicle and a leftward movement at the point where the right and left lanes become one she testified that she did not turn at any time. Nothing from the police officer indicated that the vehicle was physically move to the left at the point where the two lanes became one. Although Burton testified that the left lane ended the hearing officer made no finding regarding which Lane and did."

Burton v. State, Dept. of Transp., 149 Idaho 746, 240 P.3d 933 (Ct. App. 2010).

Here the Hearing Examiner details specifically and clearly the analysis of the unlawfulness of Mr. Hamilton's registration sticker placement.

Mr. Hamilton fails to analyze the effect of *Martin*, id. here.

The Record created by Mr. Hamilton clearly indicates that Mr. Hamilton failed to properly display the current registration sticker (Ex. CR. p. 332). The failure to do so is an infraction as defined by Idaho law.

There is nothing about the I.C. §§ 49-428 and 49-443 read individually or together which is facially unconstitutionally vague or unconstitutionally vague as applied to Mr. Hamilton's conduct.

ISSUE 3.

The effect of Idaho State Police's adoption of Proposed and Temporary Rules for Breath Alcohol Testing.

Mr. Hamilton can meet his burden pursuant to I.C. §18-8002A(7)(d) by demonstrating that the tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of Trooper Talbott were not conducted in accordance with the requirements of I.C. §18-8004(4), or that the testing equipment was not functioning properly when the test was administered.

Mr. Hamilton does not argue that the breath testing equipment was not properly functioning at the time the evidentiary test for alcohol concentration was administered to him. Instead Mr. Hamilton argues that the evidentiary test for breath alcohol concentration was not conducted in accordance with requirements of I.C. § 18-8004(4).

Mr. Hamilton argues that the Idaho State Police did not adopt Breath Alcohol Testing Standards consistent with the Idaho Administrative Procedures Act or as required by I.C. § 18-8004. The Department's Hearing Examiner concluded that Mr. Hamilton had not met his burden

to demonstrate that the Idaho State Police had not adopted the Breath Alcohol Testing Standards by administrative rule.⁸

The Department's Hearing Examiner correctly observes that Mr. Hamilton's evidentiary breath test failure occurred on September 7, 2014.

On September 2, 2014, the Idaho State Police adopted the Breath Alcohol Testing Standards as a Temporary and Proposed Rule consistent with the requirements of the Idaho Administrative Procedures Act. Attached hereto as Exhibit A is the Notice of the Idaho State Police's Notice of Rulemaking as published in the Idaho Administrative Bulletin.

The Hearing Examiner correctly concludes that Mr. Hamilton's argument regarding the Idaho State Police Alcohol Breath Testing Standards that might have existed prior to September 2, 2014 have no relevance since the Idaho State Police (ISP) adopted the breath testing standards by administrative rule prior to the evidentiary test for breath alcohol concentration administered to Mr. Hamilton. Mr. Hamilton's evidentiary test for breath alcohol concentration was administered 5 days after ISP's notice of Temporary and Proposed Rulemaking.

The Court of Appeals in *Hern v Idaho Transportation Department* 2015 Opinion Number 87, December 30, 2015 concluded that a driver could meet his burden by demonstrating that the evidentiary test was not conducted in accordance with the requirements of I.C. §18-8004, the

8

7.

Additional Issue

1. **Hamilton argued ISPFs and had not adopted the SOP into IDAPA Rules.**
2. Hamilton failed an evidentiary breath test on September 7, 2014.
3. On September 02, 2014 ISPFs adopted the SOP into IDAPA Rules. See <http://www.isp.idaho.gov/isp/citizen/legislation.html> isp.idaho.gov/isp/citizen/legislation and <http://adminrules.idaho.gov/bulletin/2014/10.pdf#page=> (pages 171 to 178).
4. Hamilton's arguments regarding SOP and the emails about the SOP are irrelevant in this ALS hearing since Hamilton submitted to an evidentiary breath test after the SOP had already been adopted into IDAPA Rules.

Findings of Fact and Conclusions of Law and Order, p. 7, R. pp. 363-364. Emphasis original.

IDAPA rules, and ISP's Alcohol Breath Testing Standards by demonstrating that ISP's approved method of breath testing was not adopted in compliance with IDAPA.⁹

Here, there is no evidence in the record that the Proposed and Temporary Rules adopted by ISP on September 2, 2014 were not properly adopted. The Notice of Rulemaking sets out the statutorily required justification for the implementation of a temporary rule. The Notice of Temporary Rulemaking recites the Governor's finding that the temporary adoption of rules governing alcohol testing is appropriate.¹⁰

9

Because Hern's breath test was not conducted in accordance with requirements of Idaho Code Section 18-8004 (4), "Hern successfully demonstrated that the grounds enumerated in Idaho Code Section 18-8002A (7)(D) for vacating the suspension were met. Thus, the hearing officer's decision upholding the license suspension was contrary to Idaho Code Section 18-8002A (7)(D) and unsupported by evidence in the record".

The Court observes that it's reliance on the *Haynes* and *Riendeau* decisions addressed the SOP's existing in 2013 which are applicable to Mr. Hern's petition for judicial review. The Court also observes that the SOPs had since been promulgated as rules.

¹⁰ The Governor finds that:

The need for the temporary rule change is due to ongoing criminal cases and appeals in the Idaho judicial system to suppress blood alcohol results based on the current process of having rules governing breath alcohol testing in the ISP forensic services standard operating procedure (SOP) rather than administrative rule. If the breath alcohol results are suppressed by the courts because of the current wording, DUI cases with breath test results would not be able to be prosecuted in Idaho. Not prosecuting DUI cases presents a significant public safety threat. See Ex.A Idaho Administrative Bulletin, October 1, 2014 Volume 14-10 p. 171.

The Administrative Procedures Act permits the Idaho State Police to adopt a temporary rule effective upon its publication in the Idaho Administrative Bulletin, I.C. § 67-5226.¹¹ The Governor's finding clearly justifies ISP's Temporary Rulemaking.

The effective date of the temporary rule is September 2, 2014.

The effect of the *Hern* decision in the Administrative License Suspension context simply as a matter of law does not apply to Mr. Hamilton's evidentiary test for breath alcohol concentration administered on September 7, 2014.

The Idaho State Police five days before the administration of Mr. Hamilton's evidentiary test for breath alcohol concentration appropriately implemented a Temporary Rule, adopting the then existing Breath Alcohol Testing Standards as an administrative rule. ISP notes that the Temporary Rules had been part of the Breath Alcohol Testing Standard's previously published by ISP for use in court testimony as Standard Operating Procedures.

ISP's adoption of Breath Alcohol Testing Standards as an administrative rule even if done on a temporary basis complies with the Idaho State Police's obligation pursuant to I.C. § 18-8004.

Mr. Hamilton cannot demonstrate based on this record that the evidentiary test for breath alcohol concentration was not administered pursuant to I.C. § 18-8002A(7)(d). Mr. Hamilton's evidentiary test for breath alcohol concentration was conducted in accordance with the requirements of I.C. § 18-8004(4) upon ISP's adoption of standards for alcohol analysis and breath testing by administrative rule.

¹¹

If the governor finds that: (a) protection of the public health, safety, or welfare; or (b) compliance with deadlines in amendments to governing law or federal programs; or (C) conferring a benefit; requires a rule to become effective before it has been submitted to the legislature for review the agency may proceed with such notice as is practicable and a dock a temporary rule, except as may otherwise be provided in section 67 5229 (1) (d), Idaho code The agency may make the temporary rule immediately effective. The agency shall incorporate the required finding in a concise statement of its supporting reasons in each rule adopted in reliance upon the provisions of this subsection, I.C. § 67-5226 (1).

The Idaho Court of Appeals has consistently determined that without more than the argument made in this case, there is no showing that the use of the ISP's Breath Testing Standards will produce an inaccurate breath alcohol concentration result.¹²

Mr. Hamilton offers nothing more than the same unsubstantiated argument consistently rejected by the Court.

Mr. Hamilton does not meet his burden.

V. CONCLUSION

Mr. Hamilton has not demonstrated that he met his burden before the Hearing Examiner or that a basis in law exists to set aside the Administrative License Suspension pursuant to I.C. §18-8002A(7).

The Hearing Examiner's decision does not violate statutory or constitutional provisions and is not based on an unlawful procedure. Sufficient evidence exists in the record as a whole to support the Hearing Examiner's decision.

¹²

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).

The suspension of Mr. Hamilton's driving privileges should be affirmed and Mr. Hamilton's driving privileges should be suspended for ninety days.

DATED the 27 day of January, 2016.



Edwin L. Litteneker
Special Deputy Attorney General for
Idaho Transportation Department

I DO HEREBY CERTIFY that a true
and correct copy of the foregoing
Document was:

☒ Mailed by regular first class mail,
And deposited in the United States
Post Office

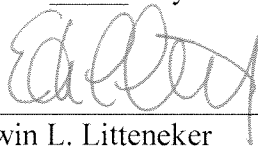
☐ Sent by facsimile and mailed by
Regular first class mail, and
Deposited in the United States
Post Office

☐ Sent by Federal Express, overnight
Delivery

☐ Hand delivered

To: Charles M. Stroschein
Clark and Feeney
P.O. Drawer 285
Lewiston, Idaho 83501

On the 27 day of January, 2016.



Edwin L. Litteneker

Exhibit A

Idaho Transportation Department

**IDAPA 11 - IDAHO STATE POLICE
ISP FORENSIC SERVICES**

11.03.01 - RULES GOVERNING ALCOHOL TESTING

DOCKET NO. 11-0301-1401

NOTICE OF RULEMAKING - TEMPORARY AND PROPOSED RULE

EFFECTIVE DATE: The effective date of the temporary rule is September 2, 2014.

AUTHORITY: In compliance with Sections 67-5221(1) and 67-5226, Idaho Code, notice is hereby given that this agency has adopted a temporary rule, and proposed rulemaking procedures have been initiated. The action is authorized pursuant to Section 67-2901, Idaho Code.

PUBLIC HEARING SCHEDULE: Public hearing(s) concerning this rulemaking will be scheduled if requested in writing by twenty-five (25) persons, a political subdivision, or an agency, not later than October 15, 2014.

The hearing site(s) will be accessible to persons with disabilities. Requests for accommodation must be made not later than five (5) days prior to the hearing, to the agency address below.

DESCRIPTIVE SUMMARY: The following is the required finding and concise statement of its supporting reasons for adopting a temporary rule and a nontechnical explanation of the substance and purpose of the proposed rulemaking:

This rule adds current standard operating procedures published by Idaho State Police Forensic Services (ISPFS) for alcohol analysis and breath testing to administrative rule. These rules have previously been part of the standard operating procedure documents published by ISPFS for use in court testimony.

The following procedures will be added to administrative rule:

- Breath alcohol instrument training requirements for operators and specialists;
- Breath alcohol instrument performance verification and calibration requirements and rules;
- Breath alcohol testing requirements and procedures;
- Alcohol laboratory approval and operational standards;
- Minor in possession/minor in consumption (MIP/MIC) testing methods; and
- Passive testing procedures.

TEMPORARY RULE JUSTIFICATION: Pursuant to Section 67-5226(1)(a), Idaho Code, the Governor has found that temporary adoption of the rule is appropriate for the following reasons:

The need for the temporary rule change is due to ongoing criminal cases and appeals in the Idaho judicial system to suppress blood alcohol results based on the current process of having the rules governing breath alcohol testing in ISP Forensic Services' Standard Operating Procedure (SOP) rather than administrative rule. If the breath alcohol results are suppressed by the courts because of the current wording, DUI cases with breath test results would not be able to be prosecuted in Idaho. Not prosecuting DUI cases presents a significant public safety threat.

FEE SUMMARY: The following is a specific description of the fee or charge imposed or increased: None.

FISCAL IMPACT: The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year: NA

NEGOTIATED RULEMAKING: Pursuant to Section 67-5220(2), Idaho Code, negotiated rulemaking was not conducted because there is no change to the process for alcohol testing, the change is merely adding the current standard operation procedure to administrative rule.

INCORPORATION BY REFERENCE: Pursuant to Section 67-5229(2)(a), Idaho Code, the following is a brief synopsis of why the materials cited are being incorporated by reference into this rule: NA

ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS: For assistance on technical questions concerning the temporary and proposed rule, contact Matthew Gamette, Director of Forensic

Services at (208) 884-7217.

Anyone may submit written comments regarding the proposed rulemaking. All written comments must be directed to the undersigned and must be delivered on or before October 22, 2014.

DATED this 29th Day of August, 2014.

Colonel Ralph W. Powell, Director
Idaho State Police
700 S. Stratford Drive
Meridian, ID 83642
(208) 884-7003 / (208) 884-7090

**THE FOLLOWING IS THE TEMPORARY RULE AND THE PROPOSED TEXT
OF DOCKET NO. 11-0301-1401
(Only those Sections being amended are shown.)**

010. DEFINITIONS AND ABBREVIATIONS.

01. Alcohol. "Alcohol" shall mean the chemical compounds ~~of ethyl alcohol, methyl alcohol, or isopropyl alcohol.~~ methyl alcohol, or (7-1-93)(9-2-14)T

02. Approved Vendor. "Approved vendor" shall mean a source/provider/manufacturer of an approved standard. (9-2-14)T

03. Blood Alcohol Analysis. "Blood alcohol analysis" shall mean an analysis of blood to determine the concentration of alcohol present. (7-1-93)

04. Breath Alcohol Analysis. "Breath alcohol analysis" shall mean an analysis of breath to determine the concentration of alcohol present. (7-1-93)

05. Breath Alcohol Test. "Breath alcohol test" shall mean a breath sample or series of separate breath samples provided during a breath testing sequence. (9-2-14)T

06. Breath Alcohol Testing Sequence. "Breath alcohol testing sequence" shall mean a sequence of events as determined by the Idaho State Police Forensic Services, which may be directed by the instrument, the Operator, or both, and may consist of air blanks, performance verification, internal standard checks, and breath samples. (9-2-14)T

07. Breath Testing Certification Class. "Breath testing certification class" shall mean a department approved training class for prospective or uncertified breath alcohol Operators/Breath Testing Specialists. (9-2-14)T

08. Breath Testing Specialist (BTS). "Breath Testing Specialist" shall mean an operator who has completed advanced training approved by the department and are certified to perform routine instrument maintenance, teach instrument operation skills, proctor proficiency tests for instrument Operators, and testifying as an expert on alcohol physiology and instrument function in court. (9-2-14)T

09. Calibration. "Calibration" shall mean a set of laboratory operations which establish under specified conditions, the relationship between values indicated by a measuring instrument or measuring system, or values represented by a material, and the corresponding known values of a measurement. (9-2-14)T

10. **Certificate of Analysis.** "Certificate of analysis" shall mean a certificate stating the standards used for performance verification have been tested and approved for use by the ISPFS or are manufactured by an ISO 17025:2005 vendor and are traceable to N.I.S.T. standards. (9-2-14)T

11. **Certificate of Instrument Calibration.** "Certificate of instrument calibration" shall mean a certificate stating that an individual breath alcohol testing instrument has been evaluated by the ISPFS and found to be suitable for forensic alcohol testing. The certificate bears the signature of the calibration analyst at Idaho State Police Forensic Services, and the effective date of the instrument approval. (9-2-14)T

12. **Changeover Class.** "Changeover class" shall mean a training class for currently certified Operators during which the Operator is taught theory, operation, and proper testing procedure for a new make or model of instrument being adopted by their agency. Breath Testing Specialists complete BTS training that qualifies them to perform BTS duties related to the new make or model instrument. (9-2-14)T

~~0413.~~ **Department.** "Department" shall mean the Idaho State Police. (7-1-93)

14. **Evidentiary Test.** "Evidentiary test" shall mean a blood, breath, or urine test performed on a subject/individual for potential evidentiary or legal purposes. A distinction is made between evidentiary testing and non-quantitative screening/monitoring. (9-2-14)T

15. **Idaho State Police Forensic Services (ISPFS).** "Idaho State Police Forensic Services" shall mean a division of the Idaho State Police. ISPFS is dedicated to providing forensic science services to the criminal justice system of Idaho. ISPFS is the administrative body for the blood and breath alcohol testing programs in Idaho. (9-2-14)T

~~0416.~~ **Laboratory.** "Laboratory" shall mean the place at which specialized devices, instruments and methods are used by trained personnel to measure the concentration of alcohol in samples of blood, vitreous humor, or urine, or beverages for law enforcement purposes. (4-7-11)(9-2-14)T

17. **MIP/MIC.** "MIP/MIC" shall mean an abbreviation used to designate minor in possession or minor in consumption of alcohol. (9-2-14)T

18. **Operator Certification.** "Operator certification" shall mean the condition of having satisfied the training requirements for administering breath alcohol tests as established by the department. (9-2-14)T

19. **Operator.** "Operator" shall mean an individual certified by the department as qualified by training to administer breath alcohol tests. (9-2-14)T

20. **Performance Verification.** "Performance verification" shall mean a verification of the accuracy of the breath testing instrument utilizing a performance verification standard. Performance verification should be reported to three decimal places. While ISPFS uses the term performance verification, manufacturers and others may use a term such as "calibration check" or "simulator check." (9-2-14)T

21. **Performance Verification Standard.** "Performance verification standard" shall mean an ethyl alcohol standard used for field performance verifications. The standard is provided or approved, or both, by the department. (9-2-14)T

~~0622.~~ **Proficiency Testing.** "Proficiency testing" shall mean a periodic analysis of blood, urine, or other liquid specimen(s) whose alcohol content is unknown to the testing laboratory, to evaluate the capability of that laboratory to perform accurate analysis for alcohol concentration. (3-19-99)(9-2-14)T

~~0723.~~ **Quality Control.** "Quality control" shall mean an analysis of referenced samples whose alcohol content is known, which is performed with each batch of urine or blood, vitreous humor, urine or beverage analysis to ensure that the laboratory's determination of alcohol concentration is reproducible and accurate. (3-19-99)(9-2-14)T

24. **Recertification Class.** "Recertification class" shall mean a training class offered by the department for currently certified personnel, completion of which results in uninterrupted continuation of their BTO or BTS

status for an additional 2 years.

(9-2-14)T

0025. Urine Alcohol Analysis. "Urine alcohol analysis" shall mean an analysis of urine to determine the concentration of alcohol present. (7-1-93)

26. Waiting Period/Monitoring Period/Deprivation Period/Observation Period. "Waiting Period/Monitoring Period/Deprivation Period/Observation Period" shall mean individual titles used for the time period prior to administering a breath alcohol test, in which an officer monitors the test subject/individual. (9-2-14)T

011. ABBREVIATIONS (RESERVED)

There are no abbreviations or acronyms in this chapter.

(4-7-11)

(BREAK IN CONTINUITY OF SECTIONS)

013. REQUIREMENTS FOR LABORATORY ALCOHOL ANALYSIS.

01. Laboratory. Any laboratory desiring to perform urine alcohol, vitreous humor, ~~or blood alcohol, or beverage~~ analysis shall meet the following standards: (3-10-99)(9-2-14)T

a. The laboratory shall prepare and maintain a written procedure governing its method of analysis, including guidelines for quality control and proficiency testing. ~~A copy of the procedure shall be provided to ISPFS for initial approval. Whenever procedure, protocol, or method changes (however named) are adopted by a laboratory, a copy of the update with the changes clearly indicated shall be approved by ISPFS before implementation;~~ (7-1-93)(9-2-14)T

b. The laboratory shall provide adequate facilities and space for the procedure used. ~~The laboratory alcohol related functions shall be subject to an assessment by either an accrediting body or the department each calendar year, and the results from the annual audit shall be submitted to the department. The assessment shall be at the expense of the laboratory;~~ (7-1-93)(9-2-14)T

c. Specimens shall be maintained in a limited access and secure storage area prior to analysis. ~~A chain of custody shall be maintained while the evidence is in the laboratory;~~ (7-1-93)(9-2-14)T

d. All instrumentation, equipment, reagents and glassware necessary for the performance of the chosen procedure shall be on hand or readily available on the laboratory premises. ~~Instrument maintenance documentation shall be available for review by the department;~~ (7-1-93)(9-2-14)T

e. The laboratory shall participate in approved proficiency testing and pass this proficiency testing according to standards set by the department. ~~Laboratories must participate in proficiency testing from a department approved provider at least once a calendar year. Approved providers include National Highway Transportation Safety Administration (NHTSA) and Collaborative Testing Services (CTS). Each test consists of at least four (4) blood samples spiked with an unknown concentration of ethyl alcohol, and possibly other volatiles, for qualitative determination. Participating laboratories must obtain proficiency tests from approved providers and are responsible for all costs associated with obtaining and analyzing such tests. Results from proficiency tests must be submitted by the due date to the test provider and ISPFS. Results not submitted to a test provider within the allowed time do not qualify as a proficiency test. An alcohol concentration range is determined from the target value and ± 3.0 standard deviations as provided by the proficiency test provider. Reported values must fall within this range. If a laboratory determines more than one (1) alcohol value for a given sample, the mean value of results will be submitted and evaluated. Upon satisfactory completion of an approved proficiency test, a certificate of approval will be issued by the department to the participating laboratory. Approval to perform legal blood alcohol determinations is continued until the results of the next proficiency test are reviewed and notification is sent to the respective laboratory by ISPFS. Failure to pass a proficiency test shall result in ~~disapproval until the problem is corrected and a proficiency test is successfully completed~~ immediate suspension of testing by an analyst or laboratory in the form of a written inquiry from the department. The test is graded as a unsuccessful when the mean results are outside the tolerance range established from the accepted mean values. The laboratory shall have thirty (30) calendar days to respond to the~~

~~department inquiry. The department shall notify the laboratory within fourteen (14) calendar days regarding corrective action steps necessary to lift the testing suspension, or the department may issue a written revocation. The department shall not lift a proficiency testing related suspension or revocation until a successful proficiency test has been completed by the individual analyst or laboratory.~~ (7-1-93)(9-2-14)T

f. For a laboratory performing blood, or urine, vitreous humor, or beverage analysis for alcohol analysis, approval shall be awarded to the laboratory director or primary analyst responsible for that laboratory. The responsibility for the correct performance of tests in that laboratory rests with that person; however, the duty of performing such tests may be delegated to any person designated by such director or primary analyst. ~~The department may temporarily suspend or permanently revoke the approval of a laboratory or analyst if the listed requirements are not met. The department will issue the suspension or revocation in writing to the laboratory director or primary analyst responsible;~~ (3-19-99)(9-2-14)T

g. ~~Urine samples shall be collected in clean, dry containers. Reinstatement after revocation requires completed corrective action of any items listed on the revocation documentation issued by the department. Documentation of corrective actions taken to address the nonconformities shall be submitted to the department for review. Once the department is satisfied that the laboratory is in compliance with all requirements, the department will issue written approval for the resumption of testing by that laboratory or analyst. A laboratory may appeal a suspension or revocation to the Director of the department.~~ (7-1-93)(9-2-14)T

02. Blood Collection. Blood collection shall be accomplished according to the following requirements: (7-1-93)

a. Blood samples shall be collected using sterile, dry syringes and hypodermic needles, or other equipment of equivalent sterility; (7-1-93)

b. The skin at the area of puncture shall be cleansed thoroughly and disinfected with an aqueous solution of a nonvolatile antiseptic. Alcohol or phenolic solutions shall not be used as a skin antiseptic; (7-1-93)

c. Blood specimens shall contain at least ten (10) milligrams of sodium fluoride per cubic centimeter of blood plus an appropriate anticoagulant. (4-4-13)

03. Results Blood Reported. The results of analysis on blood for alcohol concentration shall be reported in units of grams of alcohol per one hundred (100) cubic centimeters of whole blood. (3-19-99)(9-2-14)T

04. Urine Collection. ~~Urine samples shall be collected in clean, dry containers.~~ (9-2-14)T

045. Urine Reported. The results of analysis on urine for alcohol concentration shall be reported in units of grams of alcohol per sixty-seven (67) milliliters of urine. Results of alcohol analysis of urine specimens shall be accompanied by a warning statement about the questionable value of urine alcohol results. (3-19-99)(9-2-14)T

056. Records. All records regarding proficiency tests, quality control and results shall be retained for three (3) years. (7-1-93)

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. ~~The department will maintain a list of benchtop and portable instruments approved for evidentiary testing use in Idaho. Each individual breath testing instrument must be certified by the department. The department may, for cause, remove a specific instrument by serial number from evidential testing and suspend or withdraw certification thereof.~~ (4-7-11)(9-2-14)T

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 ~~Idaho administrative rules, ISPS~~ analytical methods, and ~~ISPS~~ standard operating procedures. ~~(4-7-11)(9-2-14)T~~

a. ~~The breath alcohol test must be administered by an operator (BTO or BTS) currently certified in the use of the instrument.~~ (9-2-14)T

b. ~~Prior to administering the observation period, any foreign objects/materials which have the potential to enter the instrument/breath tube or may present a choking hazard should be removed. If a foreign object/material (e.g. dental work, gum, chewing tobacco, food, piercing) is left in the mouth during the entirety of the fifteen (15) minute monitoring period, any potential external alcohol contamination should not interfere with the results of the subsequent breath alcohol tests.~~ (9-2-14)T

c. ~~Prior to evidentiary breath alcohol testing, the subject/individual should be observed for fifteen (15) minutes. The operator should be alert for any event that might influence the accuracy of the breath alcohol test. During the observation period the subject/individual should not be allowed to smoke, drink, eat, or belch/burp/vomit/regurgitate.~~ (9-2-14)T

d. ~~If mouth alcohol is suspected or indicated by the testing instrument, the operator should begin another fifteen (15) minute observation period before repeating the testing sequence. If during the observation period the subject/individual vomits or regurgitates material from the stomach into the breath pathway, the observation period should start over. If there is doubt as to the events occurring during the observation period (e.g. silent burp, belch, vomit, regurgitation), the officer should evaluate the instrument results for any indication of mouth alcohol.~~ (9-2-14)T

e. ~~A complete breath alcohol test includes two (2) valid breath samples taken during the testing procedure and preceded by air blanks. The subsequent breath samples performed with a portable breath testing instrument should be approximately two (2) minutes apart or more. If the subject/individual fails or refuses to provide a subsequent, adequate sample as requested by the operator, the single test result shall be considered valid. If only a single test result is used, then a fifteen (15) minute observation period must be observed. For hygienic reasons, the operator should use a new mouthpiece for each series of tests.~~ (9-2-14)T

f. ~~The operator has the discretion to end breath testing, repeat breath testing, or request a blood draw at any point during the testing process as the circumstances require (including but not limited to lack of sample correlation, lack of subject participation or cooperation, subject is incoherent or incapable of following instructions, subject incapacitation). If a subject/individual fails or refuses to provide a subsequent, adequate sample as requested by the operator, the results obtained are still considered valid, provided the failure to supply the requested samples was the fault of the subject/individual and not the operator.~~ (9-2-14)T

g. ~~A third breath sample should be collected if the first two (2) results differ by more than 0.02 g/210L alcohol. Unless mouth alcohol is indicated or suspected, it is not necessary to repeat the observation period prior to obtaining a third breath sample.~~ (9-2-14)T

h. ~~The results for subsequent breath samples should correlate within 0.02 g/210L alcohol to show consistent sample delivery, indicate the absence of RFL and to indicate the absence of alcohol contamination in the subject/individual's breath pathway as a contributing factor to the breath results.~~ (9-2-14)T

i. ~~In the event of an instrument failure, the operator should attempt to utilize another instrument or have blood drawn.~~ (9-2-14)T

04. **Training.** Each individual operator (BTO or BTS) 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 ~~on each instrument model utilized by the operator. Officers must retrain periodically as required by the department.~~ Operator certifications issued after July 1, 2013 are valid for two (2) calendar years from the course completion date. The department may revoke individual operator (BTO/BTS) certification for cause. ~~(7-1-93)(9-2-14)T~~

05. Performance Verification Checks. Each breath testing instrument shall be checked ~~on a schedule established by the Department~~ for accuracy with a ~~simulator solution provided by or~~ performance verification standard approved by the department. ~~These Performance verification checks shall be performed according to a procedure established by the department and shall be documented. The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log. (4-7-11)(9-2-14)T~~

a. A performance verification check shall occur within twenty-four (24) hours before or after an evidentiary test. The benchtop instrument requires a performance verification check as part of the testing sequence. On the portable instrument, multiple breath alcohol tests may be covered by a single performance verification. (9-2-14)T

b. A performance verification on a portable instrument consists of two (2) samples at either the 0.08 or 0.20 level. Both samples must be run with the same performance verification standard. Three (3) attempts at obtaining an acceptable performance verification are allowed. Troubleshooting measures may be employed during this process. If the third performance verification fails, the instrument shall be taken out of service. The instrument shall not be returned to service until it has been calibrated and certified by ISPFS. (9-2-14)T

c. A performance verification acquired during a breath testing sequence on an approved benchtop instrument consists of one (1) sample at either the 0.08 or 0.20 level. A performance verification acquired outside the breath testing sequence on an approved benchtop instrument consists of two (2) samples at either the 0.08 or 0.20 level. Three (3) attempts at obtaining an acceptable performance verification are allowed. Troubleshooting measures may be employed during this process. If the third performance verification fails, the instrument must be taken out of service. The instrument must not be returned to service until it has been calibrated and certified by ISPFS. (9-2-14)T

d. Performance verification checks must be within +/- 10% of the performance verification standard target value. (9-2-14)T

e. A wet bath 0.08 performance verification standard should be replaced with fresh standard approximately every twenty-five (25) verifications or every calendar month, whichever comes first. For a closed loop, recirculating system (e.g. the Intox 5000 series), the 0.08 performance verification standard should be replaced with fresh standard approximately every one hundred (100) verifications or every calendar month, whichever comes first. (9-2-14)T

f. A wet bath 0.20 performance verification standard should be replaced with fresh standard approximately every twenty-five (25) verifications. (9-2-14)T

g. Dry gas performance verification standards may be used continuously without replacement until the canister is spent or the expiration date is reached. (9-2-14)T

h. Performance verification standards should not be used beyond the expiration date. (9-2-14)T

i. If Section 18-8004C, Idaho Code, (excessive alcohol concentration) is applicable, then a 0.20 performance verification must be run and results documented once per calendar month. Failure to perform a 0.20 performance verification will not invalidate any tests where Section 18-8004C, Idaho Code, is not applicable. A performance verification with a 0.20 standard does not need to be performed within twenty-four (24) hours of an evidentiary breath test in excess of 0.20 g/210L alcohol. (9-2-14)T

j. Temperature of the wet bath simulator shall be between thirty-three point five degrees Celsius (33.5°C) and thirty-four point five degrees Celsius (34.5°C) in order for the performance verification results to be valid. (9-2-14)T

k. An agency may run additional performance verification standard levels at their discretion. (9-2-14)T

06. Records. Operators must document and retain test results (i.e. written log, printout, or electronic database). All records regarding maintenance and results shall be retained for three (3) years. ISPFS is not responsible

for storage of documentation not generated by ISPFES.

(3-19-09)(9-2-14)T

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. (4-7-11)

08. Standards. Premixed alcohol simulator solutions shall be from an approved vendor and explicitly approved in writing by the department before distribution within Idaho. Dry gas standards from ISO 17025:2005 certified providers are explicitly approved by the department for use in Idaho without evaluation by the department. (9-2-14)T

09. MIP/MIC. The presence or absence of alcohol is the determining factor in the evidence in an MIP/MIC case. The instrumentation used in obtaining the breath sample is often the same instrumentation utilized for acquiring DUI evidence. The different standard of evidence requires different standards for the procedure. (9-2-14)T

a. Fifteen (15) minute observation period. The monitoring/observation period is not required for the MIP/MIC procedure. (9-2-14)T

b. The breath alcohol test must be administered by an operator currently certified in the use of that instrument. (9-2-14)T

c. The instrument used must be certified by ISPFES. The instrument only needs to be initially certified by ISPFES. Initial certification shows that the instrument responds to alcohols and not to acetone. The instrument does not need to be checked regularly or periodically with any of the 0.08 or 0.20 standard. (9-2-14)T

d. The officer should have the individual being tested remove all loose foreign material from their mouth before testing. False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test. The officer may allow the individual to briefly rinse their mouth out with water prior to the breath testing. Any alcohol containing material left in the mouth during the entirety of the breath test sampling could contribute to the results in the breath testing sequence. (9-2-14)T

e. A complete breath alcohol test includes two (2) valid breath samples taken from the subject and preceded by an air blank. The subsequent breath samples do not need to be consecutive samples from the same subject. The individual breath samples should be approximately two (2) minutes apart or more. A deficient or insufficient sample does not automatically invalidate a test sample. The operator should use a new mouthpiece for each individual. (9-2-14)T

f. A third breath sample is required if the first two (2) results differ by more than 0.02 g/210L alcohol. In the event that all three (3) samples fall outside the 0.02 g/210L alcohol correlation, and testing indicates or the officer suspects mouth alcohol, they must administer a fifteen (15) minute observation period and then retest the subject. If mouth alcohol is not suspected or indicated by the test results, then the officer may retest the subject without administering an observation period. (9-2-14)T

g. The operator should manually log test results and/or retain printouts for possible use in court. (9-2-14)T

h. The instrument must not be in passive mode for the testing of subjects for evidential purposes. (9-2-14)T

i. The passive mode of testing using the Lifeloc FC20 or ASIII should be used for testing liquids or containers of liquid for the presence or absence of alcohol. (9-2-14)T