

1986

# Vicki Moon v. Fred C. Schwendiman : Brief of Appellant

Utah Supreme Court

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COURT OF APPEAL  
BRIEF

UTAH  
DOCK  
KF  
50  
A.C.

IN THE SUPREME COURT OF THE STATE OF UTAH

DOCKET NO.

860080

VICKI MOON,

:

Appellant,

:

BRIEF OF APPELLANT

:

ED C. SCHWENDIMAN, in his  
Official capacity as Director  
of the Office of Driver  
License Services of the  
State of Utah, and the OFFICE  
OF DRIVER LICENSE SERVICES  
of the State of Utah,

:

:

:

:

Case No. 20323

860080-CA

Respondents.

:

BRIEF OF APPELLANT

Appeal from a judgment revoking the appellant's driving  
privileges in the Third Judicial District Court in and for Salt  
Lake County, State of Utah, the Honorable Dean E. Conder,  
Presiding.

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MAR 14 1985

IN THE SUPREME COURT OF THE STATE OF UTAH

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VICKI MOON,	:	
Appellant,	:	
-v-	:	BRIEF OF APPELLANT
FRED C. SCHWENDIMAN, in his	:	
official capacity as Director	:	
of the Office of Driver	:	
License Services of the	:	
State of Utah, and the OFFICE	:	
OF DRIVER LICENSE SERVICES	:	
of the State of Utah,	:	Case No. 20323
Respondents.	:	

---

BRIEF OF APPELLANT

Appeal from a judgment revoking the appellant's driving privileges in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Dean E. Conder, presiding.

---

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. WAS IT ARBITRARY AND CAPRICIOUS TO RECEIVE INTO EVIDENCE THE INTOXILYZER TEST RESULT WHEN ONLY ONE SECTION 41-6-44.3 AFFIDAVIT WAS INTRODUCED?
2. WAS THE INTOXILYZER AFFIDAVIT IMPROPERLY RECEIVED BECAUSE IT WAS NOT ACCOMPANIED BY A CUSTODIAN'S CERTIFICATE?
3. WAS IT ARBITRARY AND CAPRICIOUS FOR THE HEARING OFFICER TO RECEIVE INTO EVIDENCE THE INTOXILYZER TEST RESULT WHEN HE FAILED TO MAKE FINDINGS IN COMPLIANCE WITH UTAH CODE ANNOTATED SECTION 41-6-44.3(1) AND (2)?
4. WAS APPELLANT'S ARREST UNLAWFUL BECAUSE IT WAS UNSUPPORTED BY REASONABLE GROUNDS?
5. DO UTAH CODE ANNOTATED SECTIONS 41-2-19.6 AND 41-2-20 DENY UTAH DRIVERS PROCEDURAL DUE PROCESS BECAUSE THEY FAIL TO PROVIDE MINIMUM SAFEGUARDS AGAINST AN ERRONEOUS DEPRIVATION OF A LICENSE?
6. WAS THE APPELLANT DENIED DUE PROCESS OF LAW BECAUSE THE SAME EMPLOYEE OF RESPONDENT ACTED BOTH AS PROSECUTOR AND JUDGE?
7. DO UTAH CODE ANNOTATED SECTION 41-2-19.6 AND 41-2-20 DENY UTAH DRIVERS WHO SUBMIT TO CHEMICAL TESTS EQUAL PROTECTION OF THE LAW?

### SUMMARY OF ARGUMENT

The appellant contends that the intoxilyzer test result was improperly received into evidence since only one § 41-6-44.3 affidavit was introduced. Appellant submits that logic and § 41-6-44.3 require that two affidavits, one prior to and one after the intoxilyzer test was administered, must be introduced before a test result can be received. Appellant also submits that the affidavit was improperly received because it was not accompanied by a custodian's certificate. In the absence of such a document, the affidavit does not satisfy the requirements set forth by § 41-6-44.3 or Murray City v. Hall, 663 P.2d 1314 (Ut. 1983). Appellant also argues that the test result was improperly received since no findings were made that the challenged affidavit was generated under circumstances indicating trustworthiness. Similarly, no findings were made that the machine complied with standards promulgated by the commissioner of public safety. Appellant also submits that viewing all the evidence, her arrest was not supported by probable cause. Appellant also submits that the hearing she received failed to afford her due process of law. Not enough safeguards against error were incorporated into the hearing. Additionally, the hearing officer was not impartial. Because the hearing officer acted as both prosecutor and judge, no independent judicial determination was made. Finally, appellant submits that she was denied equal protection of the law. Although she agreed to submit to a chemical test, she received far less due process than the uncooperative driver who refuses to submit to such a test.



IN THE SUPREME COURT OF THE STATE OF UTAH

---

VICKI MOON,	:	
Appellant,	:	
-v-	:	BRIEF OF APPELLANT
FRED C. SCHWENDIMAN, in his	:	
official capacity as Director	:	
of the Office of Driver	:	
License Services of the	:	
State of Utah, and the OFFICE	:	
OF DRIVER LICENSE SERVICES	:	
of the State of Utah,	:	Case No. 20323
Respondents.	:	

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a judgment suspending appellant's driving privileges for ninety days in the Third District Court in and for Salt Lake County, State of Utah, the Honorable Dean E. Conder, presiding.

In a review authorized by U.C.A. § 41-2-20, the Honorable Dean E. Conder of the Third Judicial District Court found that the suspension of appellant's driving privileges was not arbitrary or capricious.

STATEMENT OF FACTS

On July 29, 1984, Utah Highway Patrol Trooper K. Craig Allred observed the appellant driving westbound on Interstate 80.

Appellant's vehicle was observed making an abrupt lane change as it entered the freeway. The Trooper estimated the appellant accelerated to 80 miles per hour. The Trooper initiated a traffic stop of the appellant (Transcript of Hearing, 4). The Trooper detected an odor of alcohol and requested the appellant to submit to field agility tests (T.5).

The first test was the alphabet test. On her first attempt, appellant became nervous, and asked if she could perform the test a second time (T.21). On her second attempt, the Trooper testified she recited correctly until the letter "U". At that point the Trooper stated the appellant said, "U, N, V, W, X, Y, Z," (T.5). The appellant explained that her use of "N" in between the letters "U" and "V" was a Utah colloquialism for the article of speech, "and" (T.21). Appellant denied that she had confused the letters.

The second test was the finger count. Appellant performed this test correctly two out of three times (T.16). The next test was a balance test where the subject tilts her head back and closes her eyes. The Trooper observed her move a little bit (T.18). The Trooper conceded that everyone who performs that test moves a little (T.18). The next test was the finger to nose test. The appellant touched the tip of her nose with the first digit of her index finger on her first attempt. This deviated from the direction to touch tip to tip (T.18). On her second attempt, appellant touched tip to tip with her thumb.

On the heel-to-toe test, the appellant took the correct number of steps in each direction, turned correctly, but left

several inches between her heel and her toe on a few steps (T.19). The last test was the key drop. The object of this test is for the subject to move her foot after the officer drops the keys, but before the keys hit the subject's foot. One out of three times the appellant moved her foot so the keys did not strike it (T. 6).

Appellant did not slur her speech throughout her contact with Trooper Allred (T.13). She was cooperative, but nervous and over-anxious (T.13). During the performance of the tests, appellant told the Trooper that she had sore feet from hiking all day (T.14).

At the conclusion of the tests, the appellant was arrested for driving under the influence. An intoxilyzer test was administered with a .10 result (T.9).

Appellant received a "per se" hearing before respondent. The hearing was conducted by Dennis Hicks, an employee of respondent (T. 1). One affidavit dated July 25, 1984 was introduced at the hearing to establish the trustworthiness of the machine used to test the appellant's blood alcohol content. (Appendix 1). Appellant's driver's license was suspended for ninety days after the hearing pursuant to U.C.A. §41-2-19.6.

On appeal to the district court, the matter was submitted to the court after legal arguments and memoranda were submitted. No additional evidence was offered by either party to supplement the record. Respondent's suspension of appellant's driver's license was affirmed by the district court. The appellant's request to have her license reinstated pending the outcome of her appeal in this Court was denied.

## ARGUMENT

### POINT I

IT WAS ARBITRARY AND CAPRICIOUS TO  
RECEIVE INTO EVIDENCE THE INTOXILYZER  
TEST RESULT WHEN ONLY ONE § 41-6-44.3  
AFFIDAVIT WAS INTRODUCED

At the appellant's administrative per se hearing, only one affidavit (Appendix 1) was introduced which purported to attest to the accuracy and trustworthiness of the intoxilyzer test result in the case at bar. That affidavit is dated July 25, 1984. No other affidavit was introduced attesting to the accuracy and proper functioning of the machine at any time after the appellant's arrest date.

It is the appellant's position that in the absence of some evidence of the accuracy and proper functioning of the intoxilyzer machine after appellant's arrest, no proper foundation was laid for the receipt into evidence of the intoxilyzer test result. It is elementary that the proponent of the intoxilyzer must show that the machine was functioning properly before test results can be received. Although an intoxilyzer may be operating properly on a given date, it does not necessarily follow that the machine is still operating accurately four days later. Both the case law and standards promulgated by the Commissioner of Public Safety pursuant to U.C.A. § 41-6-44.3 recognize this logic.

U.C.A. § 41-6-44.3 (Appendix 2) set forth the foundational requirements for affidavits to be introduced in lieu of an officer's testimony regarding the maintenance and proper

functioning of a breath testing instrument. The statute incorporates into its foundational requirements the Commissioner's Breath Testing Regulations (Appendix 3). Regulation III(A), Tests for Checking Calibration, provides: "Breath testing instruments must be certified on a routine basis not to exceed forty (40) days."

The logic behind this requirement must certainly be that if a machine was functioning before and after a particular test was administered, then an inference can be drawn that the machine functioned properly on the date of the subject test if the operator followed the steps properly. In the absence of such testimony which "bookends" the subject test, a finder of fact is left to speculate and conjecture whether the machine functioned properly on the subject date. Regardless of whether the breath test is utilized in a criminal or civil setting, this minimum foundational requirement inheres.

## POINT II

### THE INTOXILYZER AFFIDAVIT WAS IMPROPERLY RECEIVED BECAUSE IT WAS NOT ACCOMPANIED BY A CUSTODIAN'S CERTIFICATE

The challenged July 25th affidavit (Appendix 1) was introduced into evidence at the administrative per se hearing by the Hearing Officer. No explanation is offered on the face of the document which explains where it came from, who maintained it, whether it was maintained in the regular course of anyone's official duties, or even how it appeared in the Hearing Officer's

possession. It was not included in the packet of documents mailed to the Department of Public Safety by the arresting officer. It was not accompanied by a "Custodian's Certificate." Although Troopers Nielsen and Koorring have signed the document underneath the words "Breath Test Technician(s)", there is nothing on the face of the affidavit to attest to the authenticity of any such training or expertise. Furthermore, although the affidavits states that the test of the machine was done according to standards established by the Commissioner of the Department of Public Safety, there is nothing on the face of the document to verify the assertions of Troopers Koorring and Nielsen.

Appellant submits that a Custodian's Certificate (Appendix 4) is a necessary predicate for the admissibility of the July 25th affidavit. Custodian's Certificate could serve to explain the source of the July 25th affidavit. It could also explain where the original document was located. But perhaps most importantly, it could certify the qualifications of the breath test technicians. Nothing on the July 25th affidavit asserts that either Trooper Koorring or Trooper Nielsen have met any of the requirements for breath test technicians as set forth in Regulation V of the Breath Testing Regulations. (Appendix 3). In the absence of such information, the affidavit alone does not establish that a qualified technician, as mandated by U.C.A. § 41-6-44.3(1), has examined the machine.

Because the affidavit simply appeared at the hearing below without an accompanying Custodian Certificate, its genesis is a mystery. Appellant submits that the "indications of trust-

worthiness" requirement of § 41-6-44.3(2)(b) precludes the admission of the July 25th affidavit without some additional foundation. Again, the Custodian's Certificate would appear to remedy the defect since such a document could help to support a finding that the method and circumstances of the affidavit's preparation were such as to indicate its trustworthiness.

§ 41-6-44.3 requires such findings before an affidavit may be received. If there was some basis to conclude that the technician was an expert, as required by statute, then a finding could be made consistent with the mandate of § 41-6-44.3(2)(a) and (b) that the testing procedure was trustworthy. Absent such information, the July 25th affidavit alone does not satisfy the minimum foundational requirements imposed by § 41-6-44.3.

In Murray City v. Hall, 663 P.2d 1314 (Ut. 1983), this court stated that § 41-6-44.3 was a codification of the business records exception. In State v. Bertul, 644 P.2d 1181 (Ut. 1983), the Supreme Court discussed the foundational requirements for the business records exception to the hearsay rule. In Bertful, one of the requirements set forth for a business record to be admitted was that "the evidence must support a conclusion that after recordation the document was kept under circumstances that would preserve its integrity." In the instant matter, only speculation can lead to such a conclusion. For these reasons, appellant submits that the receipt into evidence of the intoxilyzer test result was arbitrary and capricious.

### POINT III

BECAUSE THE HEARING OFFICER FAILED TO  
MAKE FINDINGS IN COMPLIANCE WITH SUB-

SECTIONS (1) AND (2) OF § 41-6-44.3,  
THE RECEIPT OF THE INTOXILYZER TEST  
RESULT WAS ARBITRARY AND CAPRICIOUS

The administrative hearing officer failed to make any findings as mandated by subsections (1) and (2) of § 41-6-44.3. The trial judge also failed to make any such findings. The trial judge did, however, refer to "reliability" in Conclusion of Law #3:

The Court concludes that the intox-  
ilyzer machine was reliable and the  
results admissible before the De-  
partment pursuant to the presumption  
set forth in U.C.A. § 41-6-44.3 and  
44.3, and Murray City v. Hall.

This reference does not satisfy the strict requirement that such findings be made before § 41-6-44.3 affidavits can be received into evidence. In Murray City v. Hall, supra, this court noted that such findings would not be implied. Accordingly, since no such findings were made, the July 25th affidavit was inadmissible, and its receipt into evidence was arbitrary and capricious.

POINT IV

APPELLANT'S ARREST WAS NOT SUP-  
PORTED BY REASONABLE GROUNDS  
AND WAS THEREFORE UNLAWFUL

The appellant's driving pattern consisted of speeding and one abrupt lane change. This driving pattern does not in itself amount to probable cause to arrest the appelalnt for driving under the influence. In addition to the driving pattern,



the arresting officer also testified that he detected the odor of alcohol on appellant's breath. These facts were also insufficient to rise to the level of probable cause.

The only other evidence to support a finding of probable cause was the appellant's performance on the field agility tests. Judging a driver's performance on field agility tests is a subjective task at best. In the case at bar, the appellant submits that her performance on the field tests did not give rise to a finding of probable cause that she was appreciably impaired as a result of the consumption of an alcoholic beverage. Although the appellant made some minor errors on the tests, her over-all performance was satisfactory. Indeed, appellant submits that this was a case where the arresting officer continued to administer tests until the appellant finally failed a test. Viewing all the evidence, appellant submits that her arrest was not supported by reasonable grounds to believe she was under the influence. Because the arrest was unlawful, the suspension of her license was arbitrary and capricious.

#### POINT V

UTAH CODE ANNOTATED SECTIONS 41-2-19.6  
AND 41-2-20 DENY UTAH DRIVERS OF PRO-  
CEDURAL DUE PROCESS

Procedural due process imposes constraints on governmental decisions which deprive citizens of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth Amendment to the United States Constitution and Article I,

Section 7 of the Utah Constitution. Board of Regents v. Roth, 408 U.S. 564, 569-571 (1972), Ballard v. State, 595 P.2d 1302 (Utah 1979). In our mobile society, the retention of a driver's license is an important right to every person who has obtained such a license.

Although the United States Supreme Court once recognized a distinction between "rights" and "privileges" in determining whether to afford due process protection to asserted property rights, the Court has now abandoned the artificial distinction between rights and privileges. Instead, the Court has expressed a preference for a flexible definition of property:

"Property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings."

Perry v. Sindermann, 408 U.S. 593 (1972).

And in Board of Regents v. Roth, supra, 408 U.S. at 577, the Court observed:

It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

The Utah Supreme Court has also adopted this reasoning in Celebrity Club, Inc. v. Utah Liquor Control Commission, 657 P.2d 1293 (1979). In that case, the Liquor Commission argued that a liquor license constituted a privilege revocable at the pleasure or whim of the Liquor Commission rather than a right protected by the full panoply of due process guarantees. The

Utah Supreme Court eschewed this logic.

Thus, appellant's driver's license is indisputably a property interest subject to due process protection:

Suspension of issued licenses. . . involved state action that adjudicates important interests of the licenses. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. Bell v. Burson, 402 U.S. 535, 539 (1971), and Dixon v. Love, 431 U.S. 105, 112 (1977). Also see Ballard v. State, 595 P.2d 1302 (1979), which cites with approval Bell v. Burson, supra.

Once due process is implicated by a property interest, then the issue becomes what kind of notice and hearing are constitutionally required to permit the deprivation of such an interest. The United States Supreme Court has stated that the quantum and quality of the notice and the hearing vary depending upon the property interest implicated by the deprivation. Thus, the Court noted in Morrissey v. Brewer, 408 U.S. 471, 481 (1972), that it was axiomatic that due process "is flexible and calls for such procedural protections as the particular situation demands."

Because of the severe personal and economic hardships which can and do ensue in our travel-oriented society from suspension of a driver's license, even for a 90 day period, appellant submits that she is constitutionally entitled to a more meaningful hearing than she received pursuant to Utah Code Annotated Section 41-2-19.6 and a more meaningful review than she received under Utah Code Annotated Section 41-2-20.

#### A. OVERVIEW OF UTAH'S PER SE REVOCATION STATUTES

After a driver has been arrested for driving under the influence by a police officer who has reasonable grounds to

believe a violation has occurred, the officer is authorized by Utah Code Annotated Section 41-2-19.6 to request a chemical test to determine the driver's blood alcohol content. If the driver submits to the test and the results indicate a blood alcohol content of .08% or more, then the arresting officer is authorized to notify the driver of the Driver License Services' intention to suspend the driver's license for 90 days. The driver is issued a temporary license valid for 30 days. The driver is notified of his right to request a hearing regarding the suspension of his license. The request must be made in writing within 10 days of his arrest.

If a hearing is held, it is held before an officer employed by the respondent. The scope of the hearing is limited to 1) whether a peace officer had reasonable grounds to believe the person to have been operating a motor vehicle under the influence, 2) whether the person submitted to a chemical test, and 3) if so, the results of the test.

In addition to this administrative review, Utah Code Annotated Section 41-2-20 authorizes the driver to file a petition for review in the district court in the county in which he resides. The statute specifically circumscribes the scope of the district court's review:

The court's jurisdiction is limited to a review of the record to determine whether or not the department's decision was arbitrary or capricious.

B. WHAT IS THE CHARACTER OF A SECTION  
41-2-19.6 ADMINISTRATIVE HEARING

The resolution of whether the procedures provided under Utah Code Annotated Section 41-2-19.6 and Section 41-2-20 are constitu-

tionally permissible requires close scrutiny of the nature of the administrative hearing. Utah Code Annotated Section 41-2-19.6 provides that the arresting officer must submit a copy of the citation issued regarding the offense, as well as a sworn report indicating the chemical test result, if any, and other bases for officer's belief that the driver was under the influence. The sworn report is also endorsed by the chief of police, or a person authorized by him. The endorsement of the arresting officer's report by the chief of police presumably lends credence or integrity to the accuracy of that report. However, the actual safeguarding benefit of this measure seems highly questionable.

C. MACKEY V. MONTRYM

In Mathews v. Eldridge, 424 U.S. 319, 335 (1976), the Supreme Court enunciated the factors which a court must balance when evaluating what process is constitutionally due to protect against an erroneous deprivation of a protectible property interest:

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

The Supreme Court applied these factors to a review of the Massachusetts implied consent law in Mackey v. Montrym, 443 U.S. 1 (1979). The license revocation in Massachusetts occurs

whenever a driver refuses to submit to a chemical test. The revocation is based upon a report from a peace officer filed with the state licensing agency. The post-revocation review system provides multiple levels of review. The first review is an appearance before the Registrar of Motor Vehicles. The second review is before an administrative body known as the Board of Appeal. The final review is a judicial review.

Applying the Mathews v. Eldridge test in Montrym, the court identified the private interest as the driver's interest in continued possession and use of his license pending the outcome of the revocation hearing. Citing Dixon v. Love, 431 U.S. 105 (1977), the court noted that the property interest was a substantial one because a state could not make a driver whole for any personal inconvenience and economic hardship suffered by reason of an erroneous suspension. However, the court also pointed out that the actual weight given to a private interest depended upon weighing three factors: 1) the duration of the revocation; 2) the availability of hardship relief; and 3) the availability of post-revocation review. The court concluded that the ninety day suspension combined with the availability of immediate post-revocation review outweighed any constitutional deficiency which was implicated by the absence of any hardship relief in the Massachusetts statute.

In considering the second prong of the Mathews v. Eldridge test, the court reviewed the likelihood of an erroneous deprivation and emphasized that the Due Process Clause does not mandate error-free governmental decisions:

Thus, even though our legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error, the "ordinary principle" established by our prior decisions is that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." Dixon v. Love, supra, (431 U.S.) at 113 (97 S.Ct. at 1728). And, when prompt postdeprivation review is available for correction of administrative error, we have generally required no more than that predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.  
Id. at 13.

Thus, the Court was satisfied that the Massachusetts procedure provided enough due process because it provided a "reasonably reliable basis" for concluding whether a driver had refused to submit to a chemical test. Significantly, the Court was satisfied that the risk of erroneous deprivation seemed minimal where the determination of whether there was a refusal depended upon "objective facts." 443 U.S. at 13. Additionally, the Court felt that any administrative error could be cured by a prompt post deprivation evidentiary hearing.

The third factor analyzed in Montrym was the public interest. The Montrym court concluded that keeping the roads safe and free of drunk drivers together with avoiding fiscal and administrative burdens outweighed the private interest and the risk of erroneous deprivation.

D. UTAH STATUTES FAIL TO PROVIDE THE MINIMUM SAFEGUARDS  
MANDATED BY MONTRYM AND DUE PROCESS

Comparing Montrym to the facts and statutes implicated in the case at bar compels the conclusion that Utah Code

Annotated Section 41-2-19.6 and Section 41-2-20 deprive Utah Drivers of their licenses without due process of law. By subjecting the Utah statutory scheme to a Mathews v. Eldridge analysis, two defects emerge. First, the postdeprivation review, although prompt, is constitutionally inadequate. Second, the risk of erroneous deprivation is substantial. These factors combine under the Utah statutory scheme in such a fashion that a driver never receives a meaningful hearing in a due process sense either before or after the deprivation of his license.

In Montrym, the Court was impressed by the availability of prompt postdeprivation review. Under the Massachusetts statute, a driver is afforded two tiers of administrative review as well as a judicial review. 443 U.S. at 6, Footnote 4. The Montrym court emphasized that the availability of a prompt postdeprivation evidentiary hearing was critical to upholding the Massachusetts statute:

Thus, even though our legal tradition regards the adversay process as the best means of ascertaining truth and minimizing the risk of error, the "ordinary principle" established by our prior decisions is that "something less than an evidentiary hearing is sufficient prior to adverse administrative action. 443 U.S. at 13.

Emphasis supplied.

In contrast, under the Utah statutes, the appellant had one administrative evidentiary hearing followed by a judicial review limited to an arbitrary and capricious standard of review. In the context of reviewing a Section 41-2-19.6 hearing, an arbitrary and capricious review of the record is tantamount to no review at all. In Utah Department of Administrative Services



v. Public Services Commission, 658 P.2d 601 (Utah 1983), the court makes it clear that fact finding from an administrative hearing will not be reversed unless the record is bereft of any evidence to support the finding.

Thus, in reviewing decisions on unemployment compensation. . . we have declared that we will sustain the finding of the Industrial Commission if "there is evidence of any substance whatever which can reasonably be regarded as supporting the determination made. . . ."

Id. at 609

Because a Section 41-2-19.6 hearing will always include the arresting officer's testimony, and because that testimony will realistically always include the officer's testimony that he detected the odor of an alcoholic beverage, the hearing officer's determination will always be supported by some evidence.

In a similar context, the California Supreme Court mandated in Berlinghieri v. Director of Motor Vehicles, 657 P.2d 383 (Calif. 1983), that the judicial review of administrative decisions suspending a driver's license under California's implied consent law requires application of the independent judgment standard rather than the substantial evidence standard. In reaching this conclusion, the California court stressed that the retention of a driver's license was such an important right to citizens in our travel-oriented society that the stricter standard of review was constitutionally required. The substantial evidence test in Berlinghieri is the equivalent of the arbitrary and capricious standard of review in Section 41-2-20. This standard is constitutionally inadequate to buttress the sum-

mary nature of a Section 41-2-19.6 hearing. These statutes offend due process as that phrase has been construed by the Utah Supreme Court. Our high court has observed that "the essential requirement of due process is that every citizen be afforded his 'day in court'. It has always been the policy of our law to resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy." Celebrity Club, Inc. v. Utah Liquor Control Commission, 657 P.2d 1293 1296 (Utah 1979). Sections 41-2-19.6 and 41-2-20 prevent a Utah driver from ever receiving a hearing on the merits.

In other United States Supreme Court decisions, due process has been satisfied because of the adequacy of post-deprivation review. In Mathews v. Eldridge, supra, disability-benefit termination procedures were upheld where the recipient was afforded an opportunity to make extensive written submissions to the decision-maker before the initial termination decision was made. Additionally, the recipient was entitled to a full evidentiary hearing after termination of benefits. In Dixon v. Love, supra, the challenged statute permitted summary revocation of a driver's license based on the strength of a cumulative record of traffic convictions. In upholding the statute, the court stressed that a driver "had the opportunity for a full judicial hearing in connection with each of the traffic decisions on which the . . . decision was based." 431 U.S. at 113.

The other factor which the Montrym court stressed, and which distinguishes the case at bar, is that the risk of erroneous deprivation is certainly not minimal under the Utah

statutory scheme. The Montrym court emphasized, when considering the second prong of the Mathews v. Eldridge test, that the combination of prompt postrevocation review plus the "reasonably reliable basis" of ascertaining objective facts in the context of a refusal to submit to a chemical test conferred sufficient due process upon a driver to save the Massachusetts scheme from constitutional infirmity.

In sharp contrast, the Utah statutory scheme fails in both regards. As already discussed, the post-deprivation review is inadequate and the initial Section 41-2-19.6 hearing does not provide a "reasonable reliable basis" for ascertaining objective facts. Unlike Montrym, where the hearing officer's inquiry is limited to a simple resolution of whether a driver refused to submit to a chemical test, the Utah hearing officer must inquire into the realm of contested and subjective facts. Utah Code Annotated Section 41-2-19.6 requires the hearing officer to ascertain 1) whether he had probable cause to believe the driver was under the influence and 2) whether the blood alcohol result of .08% or more was accurate. Notwithstanding Montrym, the Supreme Court has never held a police officer's version of a disputed encounter between the police and a private citizen is inevitably accurate and reliable. Because the officer is involved in the competitive enterprise of ferreting out crime, his perceptions are not necessarily unbiased. However, in the instant action, the trooper's subjective opinion about the appellant's performance on the field agility tests was accepted by the hearing officer, and the appellant's own opinion was

rejected. Additionally, although the determination of whether a particular blood alcohol test result is accurate may be ascertainable from "objective facts," the record in the instant matter discloses that that incompetent evidence was received to reach that determination. Moreover, even in the absence of the intoxilyzer test result, the facts in evidence do not support a conclusion that the respondent established that the appellant was under the influence by a preponderance of the evidence.

The scope of the inquiry at the Section 41-2-19.6 hearing clearly exceeds the scope of the Montrym inquiry. It also exceeds the scope of the hearing discussed in Dixon v. Love, supra. There the focus of the hearing centered simply on reviewing routinely maintained records of traffic convictions. Clearly there is a significant difference between ascertaining objective facts, such as adjudicated convictions in Dixon, and refusals in Montrym, and subjective facts under Section 41-2-19.6, such as a driver's performance on field sobriety tests, a driver's driving pattern, or the accuracy of a blood alcohol test result.

The appellant submits that a driver is constitutionally entitled to a trial de novo review in the district court under the challenged statutory scheme. Only if the driver receives a full evidentiary judicial review can it be said that he has received a constitutionally "meaningful" hearing. In the absence of a trial de novo in the district court, appellant submits she was denied due process of law.

E. THE APPELLANT WAS DENIED DUE PROCESS OF LAW  
BECAUSE THE SAME EMPLOYEE OF RESPONDENT  
ACTED BOTH AS PROSECUTOR AND JUDGE

At appellant's administrative hearing, Dennis Hicks, an employee of the Driver's License Division, presided as the hearing officer. At said hearing, Mr. Hicks asked appellant numerous questions. Appellant submits that Mr. Hicks was not an impartial decisionmaker since he also acted as prosecutor eliciting evidence and presenting the respondent's case against the appellant.

In Vali Convalescent & Care Institution v. Industrial Commission, 649 P.2d 33 (Ut. 1982), this court observed that the practice of an agency acting both as prosecutor and judge at an administrative hearing was not unconstitutional if those distinct functions were kept separate within the agency. Appellant submits that Vali mandates that if an agency is going to perform both a prosecutorial and a judicial function, then a different person employed by that agency must perform those distinct functions. The same person cannot serve both roles and retain his impartiality as the judicial decisionmaker.

In Paoli v. Cottonwood Hospital, 656 P.2d 420 (Ut. 1982), this Court observed that the Second Injury Fund must be treated as a separate entity from the Industrial Commission notwithstanding the fact that the Industrial Commission directs the Institution of the Second Injury Fund.

. . . the Second Injury Fund needs to have independent administrative direction within the Industrial Commission from some official not responsible for the adjudicative functions of the commission that "direct its distribution."

Id. at 422.

The administrative hearing officer employed by the respondent who conducted the § 41-2-19.6 hearing in this case

does not have the necessary separation of judicial and prosecutorial functions. Because the judge and prosecutor are one and the same individual, in administrative § 41-2-19.6 hearings, independent judicial decisions are not made after the adversarial system has had an opportunity to present competent evidence.

Due process requires a fair trial in a fair tribunal. In re Murchison, 349 U.S. 133 (1955). The appellant did not receive a fair trial at her § 41-2-19.6 hearing because the tribunal was not impartial.

#### POINT VI

UTAH CODE ANNOTATED SECTION 41-2-19.6  
AND 41-2-20 DENY UTAH DRIVERS WHO SUBMIT  
TO CHEMICAL TESTS EQUAL PROTECTION OF  
THE LAW

If a Utah driver submits to a chemical test and the test result exceeds .08%, his license is subject to suspension under U.C.A. Sections 41-2-19.6 and 41-2-20. In contrast, if a Utah driver refuses to cooperate and refuses to submit to a chemical test, his license is subject to suspension under U.C.A. Section 41-6-44.10(2). However, the suspension under the implied consent law takes place only after the department has notified the driver of a "refusal" hearing. The arresting officer is subpoenaed by the Department and appears in person at the hearing. His sworn testimony is subject to cross-examination by the driver. This decision of the administrative hearing can be appealed to the district court where the court "is vested with jurisdiction, and it shall set the matter for trial de novo upon 10 days written

notice to the department and thereupon take testimony and examine into the facts of the case and determine whether the petitioner's license is subject to revocation under the provisions of this act." Thus, the uncooperative driver receives a full evidentiary hearing at the judicial level. Additionally, because of the de novo nature of the refusal hearing under the implied consent law, the driver who refuses to submit to a chemical test also receives the reinstatement of his license pending the outcome of his appeal in the district court or the Supreme Court, Cullimore v. Schwendiman, 652 P.2d 915 (Ut. 1982). In contrast, Sections 41-2-19.6 and 41-2-20 do not provide for the reinstatement of the driver's license during the pendency of the judicial review.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution does not deny to States the power to treat different classes of persons in different ways. However, it does deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to a legitimate objective of the statute:

A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Eisenstadt v. Baird, 405 U.S. 438 (1972).

The question therefore becomes whether there is some ground of difference that rationally explains the different treatment of drivers who submit to a chemical test and drivers

who refuse to submit to a chemical test. The plaintiff submits that the State's different treatment of the two categories of drivers does not bear any reasonable or rational relationship to the State's legitimate interest in removing drunken drivers from the Utah highways.

In Montrym, the court was persuaded that by affording a driver a presuspension hearing, public safety would be undermined because the drunk driver would receive an incentive to refuse to take a chemical test and demand a presuspension hearing as a dilatory tactic. However, in the case at bar, both the driver who refuses and the driver who submits receive a presuspension hearing. The only difference is that the driver who refuses receives significantly more due process than the driver who cooperates and submits to the test. The legitimate state interest in offering incentives to take a test which can provide reliable evidence of intoxication is clearly not served by rewarding the driver who refuses to take the test. Because the different treatment of the two classes of Utah drivers in no way rationally furthers the State's interest in convicting and keeping impaired drivers off the highways of Utah, the challenged statutes violate the Equal Protection Clause.

#### CONCLUSION

Appellant seeks a reversal of the judgment suspending her driving privileges for ninety days. Appellant also seeks a determination by this court that U.C.A. § 41-2-19.6 and § 41-2-20



deny Utah drivers both the due process of the law and the equal protection of the law.

Respectfully submitted this 7 day of March, 1985.

3/14/85

Walter F. Bugden, Jr.  
Walter F. Bugden, Jr.

WALTER F. BUGDEN, JR.  
Attorney for Appellant  
#8 East Broadway  
Judge Building, Suite 426  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7282

CERTIFICATE OF SERVICE

I hereby certify that on the 11 day of March, 1985, I served four (4) copies of the foregoing Brief of Appellant on Bruce Hale, Attorney for Respondent, Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114.

3/14/85

Walter F. Bugden, Jr.  
Walter F. Bugden, Jr.

"APPENDIX 1"

undersigned, being first duly sworn, state that:

Breath testing instrument, INTOXILYZER, serial number 27-102560  
located at SO. SALT LAKE PD was properly checked by me/us in the course  
of official duties, on 25 JULY 1984 at 1430 PM.

2. This was done according to the standards established by the Commissioner of the Utah Department of Public Safety.
3. This is the official record and notes of this procedure which were made at the time these tests were done.

THE FOLLOWING TESTS WERE MADE:

	YES	NO
( <u>4</u> ) Electrical power check: (Power switch on, power indicator light is on)	( <u>4</u> )	( )
( <u>4</u> ) Temperature check (Ready light is on)	( <u>4</u> )	( )
( <u>4</u> ) Internal purge check: (Air pump works, runs for approximately 35 seconds)	( <u>4</u> )	( )
( <u>4</u> ) Zero set, Error indicator, and Printer check:		
(Zero set at .000, .001, .002, .003.)	( <u>4</u> )	( )
(With proper zero set, printer works properly)	( <u>4</u> )	( )
(Error light comes on when operated with wrong zero set)	( <u>4</u> )	( )
(Printer deactivated when error light is on)	( <u>4</u> )	( )
<u>19</u> ( ) Fixed absorption calibrator test (if equipped) <u>NOT EQUIPPED</u> (Reads within $\pm .01\%$ of calibration setting)	( )	( )
( <u>4</u> ) Checked with known sample: (Simulator, 3 tests within $\pm .01\%$ )	( <u>4</u> )	( )
( <u>4</u> ) Gives readings in percent blood alcohol by weight, based upon grams of alcohol per 100 cubic centimeters of blood.	( <u>4</u> )	( )
REPAIRS REQUIRED <u>NONE</u>	( )	( <u>4</u> )
(If yes, explain)		
The simulator solution was of the correct kind and properly compounded.	( <u>4</u> )	( )
( <u>4</u> ) The results of this test show that the instrument is working properly.	( <u>4</u> )	( )
Last prior check of this instrument was done on <u>19 JULY</u> 19 <u>84</u> .		

BREATH TEST TECHNICIAN(S)

Trooper Mark Nielsen  
TPR Christian Nielsen

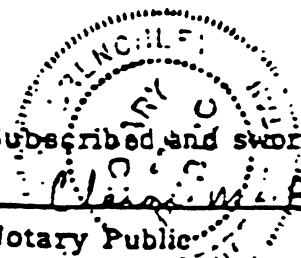
STATE OF UTAH )

COUNTY OF Salt Lake )

I/we, on oath, state that the foregoing is true.

Trooper Mark Nielsen  
TPR Christian Nielsen

Subscribed and sworn before me this 25 day of July 1984  
Clair M. Breuchley City of residence Murray  
Notary Public County of residence Salt Lake  
My commission expires 16 June 1988.



## "APPENDIX 2"

Section 41-6-44.3 provides as follows:

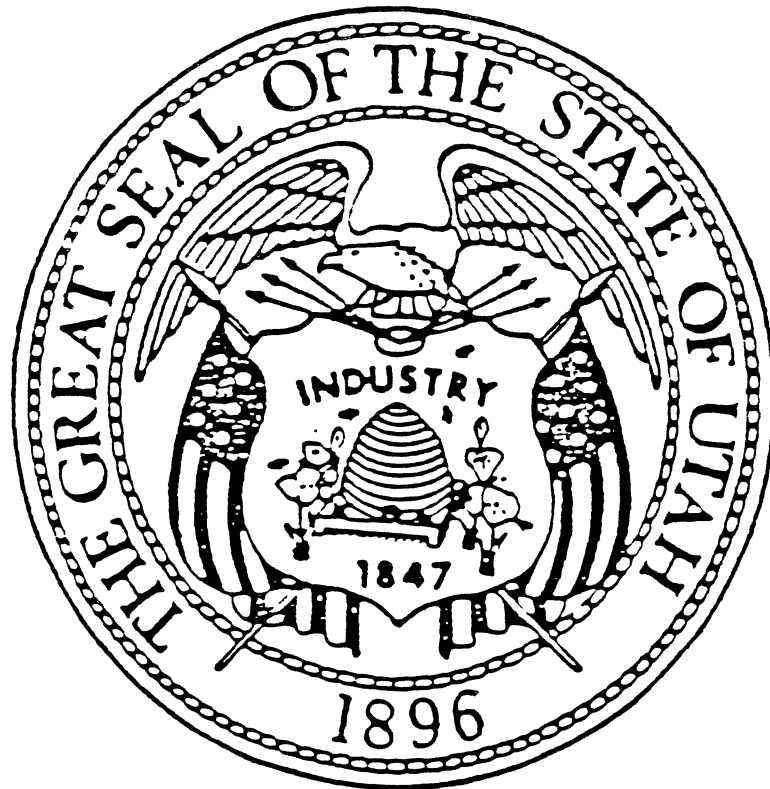
- (1) The commissioner of public safety shall establish standards for the administration and interpretation of chemical analysis of a person's breath including standards of training.
- (2) In any action or proceeding in which it is material to prove that a person was driving or in actual physical control of a vehicle while under the influence of alcohol or driving with a blood alcohol content of ,10% or greater, documents offered as memoranda or records of acts, conditions or events to prove that the analysis and accuracy of the instrument were made pursuant to standards established in subsection (1) shall be admissible if:
  - (a) The judge finds that they were made in the regular course of the investigation at or about the time of the act, condition or event; and
  - (b) The source of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness.
- (3) If the judge finds that the standards established under subsection (1) and the provisions of subsection (2) have been met, there shall be a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

"APPENDIX 3"

Revised: April 1, 1981  
Archives file# 4714

BREATH TESTING REGULATIONS

Revised: November 4, 1983  
Archives file# 6734



DEPARTMENT OF PUBLIC SAFETY

*Jerry E. Luchen*  
Jerry E. Luchen  
Commissioner



*M. Kuen Fay*

## I. TECHNIQUES OR METHODS

- A. Tests to determine the concentration of alcohol in a persons blood, may be applied to blood, breath or other bodily substances. Results shall be expressed as equivalent to grams of alcohol per one hundred (100) cubic centimeters of blood. The results of such tests shall be entered in a permanent record book.
- B. Written check lists, outlining the method of properly performing the tests in use under division A of this regulation, shall be available at each location where tests are given. The check list and the test record shall be retained by the operator administering the test or the arresting officer.

### Definition :

A check list sets forth the steps, in sequence, that a breath test operator must follow. A square is provided by each of the steps for the operator to check each one as it is performed to insure proper operation of the test instrument.

## II. BREATH TESTS

- A. Breath samples of alveolar air shall be analyzed with instruments specifically designed for the analysis of breath. The calculation of the blood alcohol concentration shall be on the basis of aveolar air to blood ratio of 2100:1. Breath samples shall be analyzed according to the methods described by the manufacturer of the instrument or instructions issued by the office of the Commissioner of Public Safety.



### III. TESTS FOR CHECKING CALIBRATION

- A. Breath testing instruments must be certified on a routine basis not to exceed forty (40) days.
- B. Calibration tests must be performed by a technician using appropriate solutions of ethyl alcohol, and using methods and techniques for checking calibration recommended by the manufacturer of the instrument or the office of the Commissioner of Public Safety.
- C. Results of test for calibration shall be kept in a permanent record book. A report of each calibration test shall be recorded on the appropriate form and sent to the supervisor of the Breath Testing Program. The supervisor of the Breath Testing Program is hereby designated as the official keeper of said records.

### IV. PROCEDURE FOR CERTIFICATION OF INSTRUMENTS

#### A. Breathalyzer

- 1. Instrument heating properly:
  - a. between 47 and 53 degrees centigrade
- 2. Collection chamber output:
  - a. COLD between 55 and 58 cc's
  - b. WARM between 50 and 54 cc's
- 3. NULL meter functioning properly:
  - a. Must be able to achieve a balance and swing freely in both directions.

4. READ LIGHT IN MECHANICAL CENTER:

Place two ampoules of the same control number in the holders, turn on the read light, balance galvanometer and check for mechanical center. Switch the ampoules, turn on the read light. The null meter should not swing more than  $\frac{1}{4}$  inch in either direction.

5. BLOOD ALCOHOL POINTER SLIPPAGE CHECK:

Balance the instrument with ampoules in the holders. Set the blood alcohol pointer on .20%, or center of the Blood Alcohol scale. Using the light carriage adjustment, and with the read light on, run the B. A. needle to .00% and back to .20%, observing to see that the null meter balances at the same time the B. A. needle reaches .20%. Then run the B. A. needle to .40% and back to .20% observing to see that the null meter balances at the .20% line on the blood alcohol scale.

6. SIMULATOR CHECK:

At least three (3) simulator checks of a known value shall be run on the instrument. The results must be within .01 plus or minus of the actual value of the known solution.

7. AMPOULE CHECK:

A series of simulator tests with the accumulated total of .60% shall be run on an ampoule from each control number on hand with the instrument. The results of each simulator test must be within .01 plus or minus of the actual value. The ampoule should then be observed to see if there is a slight yellow color, indicating the presence of potassium dichromate. If it meets the above standards, the chemicals are correct or within allowed tolerances.

## B. Intoxilyzer

1. ELECTRICAL POWER CHECK: With the power switch on, observe to see that the power indicator light comes on, indicating there is electrical power to the instrument.
2. TEMPERATURE CHECK: If the instrument is already warmed up, check to see that the ready light is on. If it is not warmed up, wait approximately 10 minutes to see that the ready light comes on. (This light indicates that the sample chamber is heated to the proper temperature).
3. INTERNAL PURGE CHECK: Put the mode selector in the air blank mode. Place thumb on the end of the pump tube to see that it is pumping air. Time the pumping sequence to see that it pumps for approximately 35 seconds.
4. ZERO SET AND ERROR INDICATOR CHECK: (As Model)  
Set the mode selector in the zero set mode. Depress the zero adjust knob and adjust the digital display to a plus .000, .001, .002 or .003 to see that you can achieve a proper zero set. Re-set the digital display above the acceptable plus .000 to .003. Place the mode selector to the test mode and observe to see that the error light comes on. Repeat, placing the digital display at minus .000 and observe to see that the error light comes on when the mode selector is placed in the test mode.

(ASA Model)

Advance the test cycle to the zero set mode and see that the unit registers a reading of plus .000, .001, .002, or .003. If this reading is not observed, advance to the next cycle and see that the error light comes on.

5. FIXED ABSORPTION CALIBRATOR CHECK: With the test card in the printer, run a test on the fixed absorption calibrator to see that the instrument gives the correct reading on the digital display and the printed test card. THIS CHECK NOT REQUIRED ON INSTRUMENTS NOT EQUIPPED WITH THE FIXED ABSORPTION CALIBRATOR.
6. SIMULATOR CHECK: Run three tests on a simulator solution of a known value and an air blank before each one. Observe to see that the correct readings, within plus or minus .01 of the actual value is indicated on the digital display and printed on the test card for each simulator test and a .00 reading for each air blank.
7. PRINTER DEACTIVATOR CHECK: (AS Model) Run a simulator test with the zero set NOT in the proper zero set range, to see that the printer is deactivated and will not print.

(ASA Model)

This check must be performed before the unit is to operating temperature. (before the ready lamp is on) Advance the unit to the first purge cycle (air blank). Observe the error light to see that it is lit. At the end of the test cycle (approximately 35 seconds), see that the pump stops and that the printer is deactivated and will not print.

## **V. QUALIFICATIONS OF PERSONNEL**

**A. Breath test shall be performed by a qualified operator who shall have completed the operators course prescribed by the Commissioner of Public Safety. Operators shall use only those instruments which they are certified to operate.**

**B. Breath test operator certification requirements:**

- 1. Must have successfully completed training for each type of instrument and pass the required test, as approved by the Commissioner of Public Safety.**
- 2. Operators must complete an approved recertification training course and pass a test every two (2) years to maintain their certification.**

**C. Breath test technician requirements:**

- 1. Must comply with one of the following:**
  - a. Must successfully complete the Breath Testing Supervisors course offered by Indiana State University.**
  - b. A manufacturers repair technician course for the breath testing instruments in use in the State of Utah.**
  - c. Be qualified by the nature of his employment or training to maintain and repair the breath testing instrument in question and to instruct in the proper operation of the instrument.**

## **VI. REVOCATION OF CERTIFICATION**

**A. The Commissioner of Public Safety may on the recommendation of a technician, revoke the certification of any operator:**

1. Who obtains a certification card falsely or deceitfully.
2. Who fails to comply with the foregoing provisions governing the operation of breath test instruments.
3. Who fails to demonstrate satisfactory performance in operating breath testing instruments.

#### VII. PREVIOUSLY QUALIFIED PERSONNEL

The foregoing regulations shall not be construed as invalidating the qualification of personnel previously qualified as either breath test operators or breath test technicians under programs existing prior to the promulgation of these regulations. Such personnel shall be deemed certified until such time as retraining would have been required were these regulations not in effect.

This provision shall take effect as if enacted contemporaneously with the other Breath Testing Regulations of the Department of Public Safety on June 11, 1979.

In the opinion of the Department of Public Safety, it is necessary to the peace, health and welfare of the inhabitants of the State of Utah that this regulation become effective immediately.

- A. Training for original certification is to be conducted by a Breath Test Technician and should include the following:

- 1 hour...Welcome, registration, preview of Alcohol and Traffic Safety.
- 3 hours...Effects of Alcohol in the Human Body.
- 3 hours...Operational Principles of Breath Testing.
- 2 hours...Alcoholic Influence Report Form.
- 2 hours...Testimony of the Arresting Officer.
- 3 hours...Legal Aspects of Chemical Testing.
- 1 hour...Detecting the Drinking Driver.
- 8 hours...Laboratory Participation. (Running Simulator tests on the instruments and tests on actual drinking subjects).
- 1 hour...Examination and Critiques of Course.

- B. Training for recertification is to be conducted by a Breath Testing Technician and should include the following:

- 2 hours...Effects of alcohol in the Human Body.
- 2 hours...Operational principles of Breath Testing.
- 1 hour...Alcohol Influence Report Form and Testimony of arresting officer.
- 2 hours...Legal Aspects of Chemical Testing and Detecting and the Drinking Driver.
- 1 hour...Exam.

- C. Anyone having previously successfully completed a twenty-four (24) hour operators school, may be recertified at anytime by successfully completing an eight (8) hour recertification course, and also may be certified to operate another type of breath testing instrument after eight (8) hours instruction pertaining to the instrument in question.



ADMINISTRATIVE RULE MAKING  
NOTICE OF AGENCY ACTION

Agency File #

<b>1 Agency Name and Address</b>  TRAINING DIVISION UTAH HIGHWAY PATROL 5757 SOUTH, 320 WEST MURRAY, UTAH 84107		<b>2 Type of Notice (Mark one box only)</b> <input checked="" type="checkbox"/> Intent to Adopt <input type="checkbox"/> Final Adoption													
<b>4 Title of Rule</b>  BREATHTESTING REGULATIONS		<b>3 Action</b> <input type="checkbox"/> New Rule <input type="checkbox"/> Emergency Adoption <input checked="" type="checkbox"/> Amending an existing Rule <input type="checkbox"/> Compliance with Federal Requirement <input type="checkbox"/> Repeal of an existing Rule <input type="checkbox"/> Non-Compliance per UCA 63-46-7 (3)													
<b>5 Public may participate in rule making by</b> <table border="1"><tr><td><input type="checkbox"/> Public Hearing Date _____ Time _____ Place _____</td><td><input type="checkbox"/> Public Appearance at Agency Office until _____</td><td><input checked="" type="checkbox"/> Written comments until 15 OCTOBER, 1984</td></tr></table> <p>NOTE Public may request hearings in accordance with UCA 63-46-5 (b)</p>				<input type="checkbox"/> Public Hearing Date _____ Time _____ Place _____	<input type="checkbox"/> Public Appearance at Agency Office until _____	<input checked="" type="checkbox"/> Written comments until 15 OCTOBER, 1984									
<input type="checkbox"/> Public Hearing Date _____ Time _____ Place _____	<input type="checkbox"/> Public Appearance at Agency Office until _____	<input checked="" type="checkbox"/> Written comments until 15 OCTOBER, 1984													
<b>6 Rule may be inspected at</b> <input type="checkbox"/> Agency <input checked="" type="checkbox"/> State Archives <input type="checkbox"/> Other															
<b>7 Person to contact for additional information</b> SGT CLARON M. BRENCHELEY			<b>8 Phone</b> 965 4550												
<b>9 Description of issues involved and brief extract of rule</b> UNDER AUTHORITY OF TITLE 41-6-44.3 UCA, AS AMENDED - BREATHTESTING REGULATIONS, DATED JUNE 11, 1979. PARAGRAPH 6, SECTION IV IS AMENDED TO READ: THE RESULTS MUST BE WITHIN .01 PLUS OR MINUS OF THE ACTUAL VALUE OF THE KNOWN SOLUTION. PARAGRAPH 7, SECTION IV IS AMENDED TO READ: THE RESULTS OF EACH SIMULATOR TEST MUST BE WITHIN .01 PLUS OR MINUS OF THE ACTUAL VALUE. PARAGRAPH 1, PART B, SECTION IV IS DELETED. PARAGRAPH 6, PART B, SECTION IV IS AMENDED TO READ: --- , WITHIN PLUS OR MINUS .01 OF THE ACTUAL VALUE IS INDICATED ON THE DIGITAL DISPLAY AND PRINTED ON THE TEST CARD FOR EACH SIMULATOR TEST AND A .00 READING FOR EACH AIR BLANK.															
<b>10 Reason for emergency adoption (UCA 63-46-5 (2)), Non-compliance (UCA 63-46-5 (3)), or reference to Federal requirement</b>															
<b>11 Signature of Agency Representative</b>  LT A. B. WEBB, TRAINING DIRECTOR, UTAH HIGHWAY PATROL			<b>12 Date</b> 4 SEPT. 1984												
<b>13 Archives Filing Information</b> <table><tr><td>Filed at request of</td><td>Lt. A. B. Webb</td><td>Agency</td><td>Public Safety, Training Division</td></tr><tr><td>Date</td><td>Sept 4, 1984</td><td>Time</td><td>11:13 a.m.</td></tr><tr><td colspan="2">Received by</td><td colspan="2"> R. L. ... - File and Archives</td></tr></table>				Filed at request of	Lt. A. B. Webb	Agency	Public Safety, Training Division	Date	Sept 4, 1984	Time	11:13 a.m.	Received by		 R. L. ... - File and Archives	
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**"APPENDIX 4"**



DEPARTMENT OF PUBLIC SAFETY  
UTAH HIGHWAY PATROL  
4501 South 2700 West  
Salt Lake City, Utah, 84119



SCOTT M. MATHESON  
GOVERNOR

Telephone: (801) 965-4518 By

Deputy Clerk DENNIS J. NORDELL  
SUPERINTENDENT

LARRY E. LUNNEN  
COMMISSIONER

### CUSTODIAN'S CERTIFICATE

I, the undersigned, being first duly sworn, state that:

- 1- I am the Breath Testing Supervisor of the Utah Highway Patrol and the official keeper of and responsible for the maintenance check records of the breath testing instruments maintained in the State of Utah.
- 2- Attached are true and correct copies of the records of maintenance and certification for the Intoxilyzer serial number 27-102768 located at Murray PD of which the originals are kept on file by me, in the course of official business, for the State of Utah, Department of Public Safety and in accordance with the current regulations of the Commissioner of Public Safety.
- 3- The attached tests were done before and after the date of March 24 1984
- 4- The breath test technician(s) whose signature(s) appear on the attached affidavits are certified by the State of Utah and have met one or more of the following requirements as required by the Department of Public Safety:
  - a. have successfully completed the Breath Testing Supervisors course at Indiana University, or
  - b. a manufacturer's repair technician course for breath testing instruments in use in the State of Utah, or
  - c. is qualified by nature of his employment or training to maintain and repair the breath testing instrument in question and to instruct in the proper operation of the instrument.

E. Brent Munson

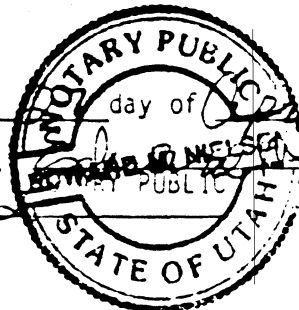
Sgt. E. Brent Munson  
Breath Testing Supervisor  
Utah Highway Patrol

STATE OF UTAH )  
COUNTY OF DC )

Subscribed and sworn before me this

Term expires 7-5-87

Residing: WVC County DC



day of April 1984

Howard G. Welsch  
Notary Public