

1986

Vicki Moon v. Fred C. Schwendiman, Driver License Services of teh State of Utah : Brief of Respondent

Utah Supreme Court

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COURT OF APPEALS
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.A10 IN THE SUPREME COURT OF THE STATE OF UTAH
DOCKET NO. 860080

VICKI MOON, :

Appellant, :

-v- :

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, :

Respondents. :

860080-CA
Case No. 20323

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT REVOKING THE APPEL-
LANT'S DRIVING PRIVILEGES IN THE THIRD JUDI-
CIAL DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE DEAN E.
CONDER, PRESIDING

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APR 11 1985

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

VICKI MOON,	:	
Appellant,	:	
-v-	:	
FRED C. SCHWENDIMAN, in his	:	Case No. 20323
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,	:	
Respondents.	:	

BRIEF OF RESPONDENT

- - - - -

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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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	v
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	2
SUMMARY OF ARGUMENT.....	4
ARGUMENT	
POINT I THE INTOXILYZER MACHINE IS PRESUMED TO FUNCTION PROPERLY FOR FORTY DAYS.....	6
POINT II THE INTOXILYZER AFFIDAVIT WAS PROPERLY ADMITTED.....	9
POINT III THE ADMINISTRATIVE FINDINGS ARE PROPER.....	11
POINT IV THE ARRESTING OFFICER HAD REASONABLE GROUNDS TO BELIEVE THAT THE APPELLANT WAS DRIVING UNDER THE INFLUENCE.....	12
POINT V UTAH'S DUI LAWS SATISFY DUE PROCESS GUARANTEES.....	13
A. THE UTAH SYSTEM MINIMIZES THE CHANCE OF ERRONEOUS DEPRIVATION.....	16
B. POST-DEPRIVATION RELIEF IS SIGNIFICANT AND CONSTITUTIONALLY SUFFICIENT.....	18
POINT VI THE DRIVER LICENSE SUSPENSION HEARING ADMINISTERED BY A DEPARTMENT OF PUBLIC SAFETY EMPLOYEE MAINTAINS CONSTITUTIONAL SEPARATION OF ADJUDICATORY AND PROSECUTORIAL ROLES.....	22
POINT VII ALL IMPAIRED DRIVERS IN UTAH ARE TREATED ON A RATIONAL BASIS IN ACCORD WITH THE LEGISLATIVE PURPOSE.....	30
CONCLUSION.....	34
ADDENDUM.....	37

TABLE OF AUTHORITIES

CASES CITED

<u>Berlingheieri v. Director of Motor Vehicles</u> , 657 P.2d 383, 387 (Cal. 1983)	. . . 30
<u>Black v. Corporation Division</u> , 634 P.2d 1383 (Or. App. 1981)	. . . . 27, 28
<u>Citizens, etc. v. Local Agency Formation Com'n</u> , 654 P.2d 193, 197 (Cal. 1982)	. . . 31
<u>Davis v. Colorado Department of Revenue</u> , 623 P.2d 874 (Colo. 1981)	. . 20
<u>DeScala v. Motor Vehicle Department of Revenue</u> , 667 P.2d 1360 (Colo. 1983)	. . . 33
<u>Drake v. Colorado Department of Revenue</u> , 667 P.2d 1360 (Colo. 1983)	. . . . . 30
<u>Gibson v. Berryhill</u> , 411 U.S. 564 (1973)	. . . . . 28
<u>Hernandez v. Department of Motor Vehicles</u> , <u>supra</u>	. . 30, 33
<u>Hodel v. Indiana</u> , 452 U.S. 314, 332 (1981)	. . . . . 31
<u>In re Murchison</u> , 349 U.S. 133 (1955)	. . . . . 28
<u>Mackey v. Montrym</u> , 443 U.S. 1 (1979)	. . . . . 13, 14, 15 16, 17, 18
<u>Martin v. Superior Court</u> , 660 P.2d 859, 860 (Ariz. 1983)	. . . . . 24
<u>Mason v. State</u> , 653 P.2d 803 (Idaho App. 1982)	. . . 20
<u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976)	. . . . . 14, 15
<u>Murray City v. Hall</u> , 663 P.2d 1314 (Utah 1983)	. . . 10
<u>Richard v. Perales</u> , 402 U.S. 389 (1971)	. . . . . 27
<u>Sandy State Bank v. Brimhall</u> , 636 P.2d 481 (Utah 1981)	. . . . . 10
<u>State v. Peterson</u> , 674 P.2d 1251 (Wash. 1984)	. . . . 7, 8

<u>State v. Thompson</u> , 674 P.2d 895 (Ariz. App. 1983) . . .	30
<u>State, Department of Motor Vehicles v. Gober</u> , 513 P.2d 391 (N.W. 1973)	21
<u>Svedliund v. Municipality of Anchorage</u> , 671 P.2d . . . 378 (Alaska App. 1983)	30, 33
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968)	12
<u>T.T.N.P. Co. v. State, etc.</u> , 665 P.2d 1133 (Utah 1982)	30
<u>U.S. v. Carolene Products</u> , 304 U.S. 144, N. 4	30
<u>Utah Department of Administrative Services v.</u> <u>Public Service Commission</u> , 658 P.2d 601 (Utah 1983)	19, 20, 21, 33
<u>Vali Convalescent and Care Institute v.</u> <u>Industrial Commission</u> , 649 P.2d 33 (Utah 1982)	28
<u>Ward v. Monroeville</u> , 409 U.S. 57 (1972)	28
<u>Williams v. Schwendiman</u> , Third Judicial District . . . Memorandum Decision, Judge Russon, Civil No. C84-2196, June 12, 1984	19
<u>Withrow v. Larkin</u> , 421 U.S. 35, 55 (1975)	24, 25, 26, 27, 29

STATUTES

Utah Code Ann. § 41-2-19.6 (1953, as amended)	1, 3, 5, 8, 11, 12, 14, 16, 31, 32, 35
Utah Code Ann. § 41-2-20 (1953, as amended)	1, 5, 19, 32, 35
Utah Code Ann. § 41-6-44.10 (1953, as amended)	5, 21, 32
Utah Code Ann. § 41-6-44.5 (1953, as amended)	10
Utah Code Ann. § 41-6-44.3 (1953, as amended)	10, 11
Utah Code Ann. § 41-2-19.6(5) (1953, as amended) . . .	17

Utah Code Ann. § 41-2-19.5(5) (1953, as amended) . . .	22
Utah Code Ann. § 41-2-19.5 (1953, as amended)	31
Utah Code Ann. § 41-6-44 (1953, as amended)	31
New Mexico Stat. § 66-8-112(F) (1978)	21
Section 5 of the Administrative Procedure Act, . . .	23
5 U.S.C. at 554(d)	
Rule 803(6), Utah Rules of Evidence	10
Rule 803(8), Utah Rules of Evidence	10

(Hereinafter, all statutory references are to
Utah Code Ann. (1953), as amended.)

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. WHETHER THE ADMINISTRATIVE AGENCY MAY RELY ON THE ACCURACY OF THE INTOXILYZER TEST RESULT WHERE REGULATIONS MANDATE A CALIBRATION CHECK AT LEAST EVERY FORTY DAYS AND WHERE DOCUMENTARY EVIDENCE (INTOXILYZER AFFIDAVIT) SHOWS THE INTOXILYZER MACHINE WAS TESTED FOR CALIBRATION ACCURACY FOUR DAYS PRIOR TO THE TEST AT ISSUE.
2. WHETHER OR NOT THE INTOXILYZER AFFIDAVIT SHOULD BE ACCOMPANIED BY A CUSTODIAN'S CERTIFICATE, TO BE CONSIDERED BY THE AGENCY IN A CIVIL ADMINISTRATIVE HEARING.
3. WHETHER OR NOT SECTIONS 41-6-44.3(1) AND (2), AS APPLIED IN CRIMINAL DUI CASES SHOULD ALSO APPLY TO CIVIL, ADMINISTRATIVE PRE-SUSPENSION HEARINGS.
4. WHETHER THE ARRESTING OFFICER HAD REASONABLE GROUNDS TO BELIEVE THAT THE APPELLANT WAS OPERATING A VEHICLE WHILE UNDER THE INFLUENCE, WHERE BOTH THE DEPARTMENT AND THE TRIAL COURT FOUND THAT REASONABLE GROUNDS TO BELIEVE WERE ESTABLISHED.
5. WHETHER SECTIONS 41-2-19.6 AND 41-2-20 PROTECT DRIVERS' CONSTITUTIONAL DUE PROCESS GUARANTEES.
6. WHETHER THE HEARING OFFICER MAINTAINED A CONSTITUTIONAL SEPARATION OF ADJUDICATORY AND PROSECUTORIAL ROLES IN ACTING WITHOUT BIAS.
7. WHETHER SECTIONS 41-2-14.6 AND 41-2-20 PROTECT THE EQUAL PROTECTION RIGHTS OF UTAH DRIVERS.

IN THE SUPREME COURT OF THE STATE OF UTAH

VICKI MOON,	:	
Appellant,	:	
-v-	:	Case No. 20323
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,	:	
Respondents.	:	

BRIEF OF RESPONDENT

- - - - -

STATEMENT OF THE CASE

This is an appeal from a judgment rendered by the Third District Court in and for Salt Lake County, State of Utah, the Honorable Dean E. Conder presiding.

The Third District Court judgment affirmed the Department of Public Safety's decision to suspend the appellant's driving privileges for 90 days (R. at 112). In accordance with Sections 41-2-19.6 and 41-2-20, both the agency and the trial court found that:

1. The arresting officer had reasonable grounds to believe that the appellant was operating a vehicle while under the influence.

2. The intoxilyzer test results indicated the appellant's blood alcohol content (BAC) was .08% or greater (R. at 110, and Hearing Decision).

The district court also found that:

3. The documentary and testimonial evidence relied on by the department was sufficient to support the suspension (R. at 3-4).

STATEMENT OF FACTS

Vicki Moon was arrested for driving under the influence on July 29, 1984. The arresting officer, Trooper Craig Allred, testified at the administrative hearing that he initially pulled the appellant's car over because it made an abrupt lane change and was speeding, going faster than 80 miles per hour (T. at 4).

After Trooper Allred stopped and approached the car, he noted the smell of an alcoholic beverage and, after asking her to step out of her car, he determined that Ms. Moon was the individual from whom the scent pervaded. Thus, the trooper requested Ms. Moon to voluntarily submit to some field sobriety tests (T. at 5).

Ms. Moon's performance on the field sobriety tests was less than satisfactory. She had difficulty in performing every type of test which the trooper demonstrated and requested the appellant attempt. The first time the appellant attempted to recite the alphabet, she said, "P, Q, W, S, T, U, M, V" (T. at 5). Although Ms. Moon testified that she thought she did fine on these tests (T. at 21), she miscounted her fingers on the finger count test, and even failed to touch her nose on the finger-to-nose test (T. at 5-6). She could not coordinate thought and action together. The standing balance test and heel-to-toe showed that her balance was impaired (T. at 6). Additionally,

two out of three times she failed to move her foot in time on the key-drop test (T. at 6).

Because of the appellant's driving pattern, the odor of alcohol about her and her unsatisfactory performance on the field sobriety test, Trooper Allred arrested Ms. Moon and requested that she submit to a chemical test. She consented and agreed to the test, and was transported to the South Salt Lake Police Department (T. at 8).

Trooper Allred, a certified intoxilyzer machine operator, also gave the appellant the chemical test (T. at 8). The trooper testified that he followed the operational checklist and that the machine was functioning properly. He also testified that he warned and admonished Ms. Moon prior to her submission to the test (T. at 9).

The test results indicated a blood alcohol content (BAC) of .10 percent (T. at 9).

Because the test results indicated a BAC of .08% or greater, Ms. Moon was notified of the department's intent to suspend her driving privileges and given notice of her right to an administrative pre-suspension hearing pursuant to Section 41-2-19.6, with her Notice of Intent to Suspend. She made a timely request for a hearing.

At the hearing, documentary evidence was introduced including the sworn DUI Report Form, the Intoxilyzer Affidavit and Intoxilyzer Checklist and Result. Additionally, Trooper

Allred testified and was cross-examined by counsel for the appellant. Ms. Moon also had an opportunity to testify under oath, and did so.

Based on the evidence received at the hearing, the department determined that the trooper had reason to believe that Ms. Moon was driving while under the influence and that the test results indicated a BAC of .08% or greater. The Department accordingly suspended her privilege to drive for 90 days.

SUMMARY OF ARGUMENT

The arresting officer properly arrested the appellant, Vicki Moon, for driving under the influence of an intoxicating substance. Her driving pattern, the odor of alcohol about her person and her poor performance on the field sobriety tests gave him reasonable grounds, or probable cause, for the arrest.

At the ensuing pre-suspension hearing, the Department of Public Safety properly received and considered the evidence presented, including the intoxilyzer test given by a certified operator. In particular, the department properly considered the intoxilyzer affidavit, showing the machine was functioning properly prior to the subject test. The affidavit was received in the ordinary course of business, regular on its face and showed all indicia of trustworthiness. A second Technician's Affidavit, showing that the machine was functioning properly after the subject test, was unnecessary. The intoxilyzer machine, under regulatory, statutory and case law, is presumed to function

properly for a 40-day period, within which the subject test was administered.

The hearing was also proper, in that there was a constitutional combination of prosecutorial and adjudicatory fact-finding roles in the hearing officer. Likewise, there was no particular or specific bias or benefit evidenced by the hearing officer.

The appellant's due process rights have been protected by Sections 41-2-19.6 and 41-2-20. The pre-suspension process minimizes the chance of erroneous deprivation. Pre- and post-deprivation review sufficiently checks any chance of administrative error.

Likewise, the appellant's right to equal protection has been preserved. She made a choice and was treated the same as all other Utah drivers. She received a hearing similar to those who refuse, rather than submit, to a chemical breath test and suffer a longer consequence (a one-year license revocation compared to a 90-day suspension). The distinctions which exist between suspension cases like this, under Sections 41-2-19.6 and 20, and implied consent cases, under Section 41-6-44.10, are rationally related to the legitimate government purpose of public health, safety and welfare. The greater deprivation involved in refusal cases, as well as the lack of chemical test results, suggest that de novo review, rather than a review of the administrative record, is appropriate in refusal cases. This overall

statutory system protects the due process and balances equal protection rights of both those who submit to a scientific test and the driver who refuses to submit to exculpating chemical breath tests. The statutes rationally provide drivers with impetus to submit to a scientific test. It represents a rational, reasonable means of swiftly and efficiently removing hazardous drivers from Utah's highways.

ARGUMENT

POINT I

THE INTOXILYZER MACHINE IS PRESUMED TO FUNCTION PROPERLY FOR FORTY DAYS.

A notarized intoxilyzer affidavit was introduced at appellant's pre-suspension hearing (T. at 2, 4). This document shows that, on July 25, 1984, four days prior to the appellant's arrest and test, the intoxilyzer machine was checked and found to be functioning properly. Two "breath test technicians" tested the machine and signed the intoxilyzer affidavit.

Although this document shows that the intoxilyzer machine was working properly a mere four days prior to the appellant's breath test, no such document was presented at the hearing to show that the machine was functioning properly after the appellant's test. This, according to the appellant, is fatal to the suspension decision. Case law, however, clearly indicates otherwise.

In State v. Peterson, 674 P.2d 1251 (Wash. 1984), a criminal case, the Washington Supreme Court addressed this same issue. The defendant had submitted to a test three days after the test machine had been checked and calibrated, but no evidence was introduced to show that the machine was functioning properly after the test. But the Washington Supreme Court ruled that such "bookending" was unnecessary.

Regulations which required breath testing machines to be checked and calibrated at least once every three months were significant to the Peterson court's reasoning. The check and calibration regulations existed prior to the passage of the DUI law under which the defendant had been charged. Thus the Washington legislature was presumed to have knowledge of the regulations. Additionally, the regulations went unchanged after passage of the new DUI law. Id. at 1253. These regulations thus allowed the Peterson court to find, for the purpose of criminal DUI prosecutions, that the legislature had created a presumption that the breath test machines would function properly for three months. Id. at 1254. Because the test machine had been checked within three months prior to the defendant Peterson's test, the court upheld the conviction. Id.

As the appellant knows, Utah has regulations guiding the maintenance and calibration of intoxilyzer machines. See Appellant's Brief at Appendix 3. These regulations require that all intoxilyzer machines be checked at least once every 40 days.

Further, these same regulations and time period were in effect prior to the passage of Section 41-2-19.6. See Respondent's Brief at Appendix 1. It should, therefore, be presumed, as it was in Peterson, id., that the legislature had knowledge of the 40-day calibration and check requirement in enacting Section 41-2-19.6. Accordingly, intoxilyzer machines are presumed to be functioning properly for a 40-day period, or between 40-day checks.

Necessity, as well as logic, dictates these presumptions. A pre-suspension hearing, requested pursuant to Section 41-2-19.6, must be given within 30 days of the arrest. The 30-day requirement facilitates the statutory purpose of quickly removing dangerous drivers from the road. It also may help the driver by disposing of the matter quickly so that he or she may swiftly re-obtain the license rather than continue to use the temporary permit. However, in many hearings such as this one, a second, "bookend" breath test machine affidavit will not be available at the time of the hearing. Thus, logic and necessity also require that a presumption of accuracy be accorded tests from machines checked within a 40-day period.

In this case, the test machine was checked just four days prior to the test at issue. It was checked well within the 40 days allowed by the regulations. Because the machine was checked within this 40-day period, it is presumed to have been functioning properly when the appellant's breath sample was

taken. Since the intoxilyzer machine is presumed to be functioning properly at the time of the appellant's test, the department could rely on the .10% BAC results in suspending the appellant's license.

POINT II

THE INTOXILYZER AFFIDAVIT WAS PROPERLY ADMITTED.

The intoxilyzer affidavit was properly admitted for two reasons. First, the document probably would be admissible in a criminal trial. Second, even if the document would not be admissible in a criminal trial, its inherent trustworthiness permits its consideration in the administrative proceeding.

First, the intoxilyzer affidavit itself evidences trustworthiness. The Department receives such affidavits through the ordinary course of business. The affidavit is regular on its face. It has been signed twice by two trained troopers with a duty to do so. Each trooper signed once under the words "breath test technician(s)", indicating that they have met the requirements of breath test technicians. Each trooper also signed under the statement: "I/we, on oath, state that the foregoing is true." This oath increases the reliability of the affidavit, as does the fact that the signatures were notarized.

All the above indicates that the intoxilyzer affidavit is trustworthy and is a properly admissible business entry or official record, and received by the department as it would be in

a criminal trial. The above reasons are also what apparently led the district court to find that the evidentiary requirements for admissibility imposed by Murray City v. Hall, 663 P.2d 1314 (Utah 1983) and Section 41-6-44.5 and 44.3 been met (R. at 112). It is also a business entry admissible under Rule 803(6) or an official record admissible under Rule 803(8) of the formal Utah Rules of Evidence.

However, even if the intoxilyzer affidavit would not be admissible in a criminal trial, its admission into evidence in the administrative proceeding was still proper. It has long been recognized that the rules of evidence "do not" strictly apply to administrative hearings like the one at issue here. Sandy State Bank v. Brimhall, 636 P.2d 481 (Utah 1981). Because the strict rules of evidence do not apply, the agency need not meet the formal foundational requirements of evidence presented in a criminal case such as Murray City v. Hall, 663 P.2d 1314 (Utah 1983), but may use common sense and reasonableness.

Murray City v. Hall, *id.*, and corresponding Section 41-6-44.3, as cited by the appellant, relate only to criminal trials. That is, Murray City v. Hall, *id.*, is a criminal DUI case. In that case, this Court discusses the requirements of Section 41-6-44.3. This statute uses, exclusively, the term "judge" rather than, for instance, "agency" or "hearing officer", thus making it, likewise, inapplicable to administrative proceedings. Because Murray City v. Hall and Section 41-6-44.3 relate only to

criminal proceedings, they serve mainly as "guideline precedent" for the requirements of this civil, administrative pre-suspension hearing.

As discussed above, the intoxilyzer affidavit had every reasonable indication of trustworthiness, and no contrary indications. It is regular on its face. It has been signed twice by two troopers--once as "breath test technicians" and once under an oath. The document is also notarized. Because the strict rules of evidence do not apply to administrative proceedings, such as the one at issue here, and because the intoxilyzer affidavit evidences trustworthiness, it was properly considered by the department. This court, as did the court below, should affirm the affidavit's admission.

POINT III

THE ADMINISTRATIVE FINDINGS ARE PROPER.

The statute under which the appellant's license was suspended, Section 41-2-19.6, requires the Department to make only two findings in support of any suspension decision. It requires that the Department find, first, that the arresting officer had reason to believe that the driver was operating a vehicle while under the influence and, second, that the chemical test results indicated a BAC of .08% or greater. Section 41-2-19.6 does not require the department to make the same strict foundational findings dictated by a criminal DUI penalty or Section 41-6-44.3, which by definition does not apply to civil administrative hearings guided by a distinct civil statute.

Because the department made its findings in accordance with the narrow and civil scope of Section 41-2-19.6, based on substantial and competent sworn testimony, the civil suspension of the appellant's license should be upheld.

POINT IV

THE ARRESTING OFFICER HAD REASONABLE GROUNDS
TO BELIEVE THAT THE APPELLANT WAS
DRIVING UNDER THE INFLUENCE.

The appellant's driving pattern, her abrupt lane change and speeding in excess of 80 miles per hour (T. at 4) gave Trooper Allred grounds to stop the appellant. After the trooper stopped the appellant, the odor of alcohol he detected about her person certainly justified his request that she volunteer some field sobriety tests (T. at 5). Terry v. Ohio, 392 U.S. 1 (1968).

The trooper requested that the appellant perform five different field sobriety tests, aside from the nystagmus test (T. at 6, 15). Although each test was first demonstrated for her, the appellant had problems with each of these tests. The first time she misrecited the alphabet, saying, "P, Q, W, S, T, U, M, V" (T. at 5). On the second finger count test, she mixed up her fingers (T at 5-6). She swayed during the balance and heel-to-toe tests, and had trouble touching her nose while performing the finger-to-nose test. She performed the key-drop test incorrectly two out of three times (T. at 6).

Although Ms. Moon's performance of the field sobriety tests was not terrible, it was certainly not satisfactory. Her driving pattern, the smell of alcohol about her person, and the numerous problems she had in performing the field sobriety tests gave Trooper Allred, as both the department and the trial court found, "grounds to believe" that the appellant was under the influence.

POINT V

UTAH'S DUI LAWS SATISFY DUE PROCESS GUARANTEES.

The United States Supreme Court has sanctioned DUI/IMPLIED consent laws. In Mackey v. Montrym, 443 U.S. 1 (1979), the Court upheld Massachusetts' implied consent system under which the petitioner's driver license was revoked for refusing to take a breath test.

Under the Massachusetts system, the "registrar" summarily revokes the driver's license on receipt of a police officer's report of that driver's refusal to submit to a chemical test. Only after revocation has occurred is the Massachusetts driver entitled to an administrative hearing. Id. at 2615. This post-suspension hearing is similar to Utah's pre-suspension hearing in that it covers a few narrow issues, namely: (1) whether or not the officer had reason to believe the driver was operating a vehicle while under the influence; (2) whether or not the driver was arrested; and (3) whether or not the driver re-

fused to submit to a test. Id. at F.N.5. After this initial hearing, which is the post-deprivation hearing, the Massachusetts driver may seek additional administrative and judicial review. Id. at 6-8.

In analyzing the constitutional sufficiency of the Massachusetts' system, the Montrym Court, following the Mathews v. Eldridge, 424 U.S. 319 (1976), balancing test, considered three factors. It considered: (1) the private interest at stake--the driver's license; (2) the risk of erroneous deprivation, and value of alternative procedural safeguards; and (3) the governmental interest at stake.

In considering the first of these three factors, the Court recognized that drivers do have an interest in their licenses. More specifically, the Court found "the driver's interest is in continued possession and use of his license pending the outcome of the hearing due him." Id. at 11. The "hearing due him" in Montrym is the administrative post-deprivation hearing, the first hearing available to the Massachusetts driver after the summary revocation of his license. Because Utah drivers, like the appellant, are initially afforded a pre-suspension hearing, the individual interest is, accordingly, decreased. That is, because under Section 41-2-19.6 the appellant had continued possession of her (temporary) license until the "hearing due [her]", her interest is less than that of the Massachusetts driver.

The Montrym court also unqualifiedly recognized the substantial governmental interest, the third factor, in promptly removing impaired and dangerous drivers from the road, and keeping them off through an efficient administrative process. Id. at 17-19. Indeed, the state's interest is so strong that it led the Montrym court to find a pre-suspension hearing unnecessary.

In discussion of the second leg of the Eldridge balancing test, the risk of erroneous deprivation, the Montrym court found that the flexible due process clause does not require a risk-free system. The Court stated:

The Due Process Clause simply does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations. Greenholtz v. Nebraska Penal Inmates, supra at 7. 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 at 113. And, when prompt post-deprivation review is available for correction of administrative error, we have generally required no more than that the pre-deprivation procedures used be designed to provide a reasonable reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be. See, e.g. Barry v. Barchi, post, at 65-66; Mathews v. Eldridge, 424 U.S. at 334. [Id. at 13.]

Thus, in considering the second prong of the Eldridge test, the nature of the administrative suspension system should be examined, as should the nature of relief from or judicial review of an adverse agency decision.

A. The Utah System Minimizes the
Chance of Erroneous Deprivation.

As the Montrym court stated, the Due Process Clause does not require an "error-free" system. And, so long as prompt judicial review of the suspension decision is available, it does not require an evidentiary hearing prior to the suspension of an individual's driver license.

In Utah, prompt judicial relief from an adverse suspension decision is available. Under Section 41-2-19.6, Utah Code Ann. (1953) as amended, drivers may file or petition to the reviewing court within 30 days after the suspension. Not only is relief prompt, but the chance that the license of a driver operating a vehicle with a BAC of less than .08% will be suspended is very rare. The risk is minimized by the police department check, public safety reviews of the record, an opportunity for a hearing, and prompt review by the Court.

Utah's administrative license suspension system protects drivers against the risk of erroneous deprivation. First, unlike the system at issue in Montrym, in Utah a driver license is not suspended until after the driver has been afforded an opportunity for a hearing. Although the Constitution does not require an evidentiary hearing prior to adverse administrative action, Montrym, id. at 13, at the hearing in issue evidence was taken. Documentary evidence was taken, and both the appellant and the officer testified.

The Montrym court found that the arresting officer's written report was reliable enough to support a summary revocation. The court characterized the report as containing "objective facts". But those "objective facts" of significance in Montrym are only those facts within the personal knowledge of the arresting officer. Id. at 13, 14. Characterizing the arresting officer as a "trained observer and investigator", id. at 14, the Montrym Court found it easy to uphold the Massachusetts system which predicated license revocation on "objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him." Id. at 13. Likewise, the officer's objective testimony in this case provides a "reasonably reliable basis" for the suspension which was based in part on objective testimony.

The risk of erroneous deprivation is also minimized through requiring the agency to address only relatively simple issues. Section 41-2-19.6(5) narrowly only requires the department to determine: (1) whether the arresting officer had reasonable cause to believe that the driver was operating a vehicle under the influence; and (2) whether the driver's BAC test results, "if any", indicated a .08% BAC or greater. The DUI Report Form, Breathalyzer Operational Checklist and Results along with the officer's and driver's testimonies permit ready determination of these two issues.

For these reasons, the risk of erroneous deprivation under Utah's new DUI laws is slight, and it is much less, because the suspension is based on an evidentiary hearing rather than exclusively on an officer's report, than that sanction in Montrym. This minimal risk, combined with the added safeguard of post-deprivation judicial review, make Utah's DUI suspension system constitutionally sound.

B. Post-Deprivation Relief is Significant
and Constitutionally Sufficient.

As previously mentioned, under the Massachusetts system a driver receives a hearing only after his or her license has been summarily revoked by the registrar on receipt of a police report. This post-suspension hearing, administrative in form and the first available to the Massachusetts driver, is the "prompt post-deprivation relief" the Montrym Court emphasizes. The Utah pre-suspension hearing mirrors the Massachusetts post-deprivation hearing. Both are administrative and cover similar issues. The major difference is, of course, the Utah driver's license is not suspended, if at all, until after the hearing. In Massachusetts, the license will have been summarily revoked prior to the hearing.

Because the post-deprivation of significance in Montrym is administrative in nature, appropriate standards of judicial review were not discussed. Thus, in examining Utah's system of post-deprivation relief, it may be useful to consider the judi-

cial review available in Utah against administrative review. Judicial review generally carries with it greater weight than does an administrative hearing.

However, on any scale, the Utah standard of administrative hearing and judicial review of license suspension decisions is more than sufficient. Section 41-2-20 requires the reviewing court to determine whether or not the department's suspension decision was "arbitrary and capricious." The Utah Supreme Court has approved the arbitrary and capricious standard. Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601 (Utah 1983). The Administrative Services court discussed two standards of review which it denoted "arbitrary and capricious." Under the first such standard discussed, the agency is afforded great deference. Under this standard the agency decision should be upheld if "there is evidence of any substance whatever which can reasonably be regarded as supporting the determination made." (Citation omitted.) Administrative Services, id. at 609.

This standard has been held to provide a constitutionally sufficient level of review by Utah district courts. See, e.g., Williams v. Schwendiman, Third Judicial District Memorandum Decision, Judge Russon, Civil No. C84-2196, June 12, 1984. In these administrative drivers license decisions, it has frequently been applied by district courts in examining, and even occasionally reversing, departmental suspension decisions. The fact

that the courts use this standard in reversing departmental decisions demonstrates that it is meaningful.

Other western states, pursuant to their implied consent laws, afford agency revocation and suspension decisions great deference. For example, both Idaho and Colorado limit judicial review to a review to the agency record, and apply the "clearly erroneous" or "arbitrary and capricious" standard of review. See, e.g. Davis v. Colorado Department of Revenue, 623 P.2d 874 (Colo. 1981), Mason v. State, 653 P.2d 803 (Idaho App. 1982).

Although this "arbitrary and capricious" standard of review sufficiently protects the appellant's constitutional guarantee to due process, the Utah Administrative Services court articulated another "arbitrary and capricious" standard which could also be employed by a court in reviewing license suspension decisions.

Under the second and stricter standard set forth in Administrative Service, a court will not uphold an agency decision if there is simply "evidence of any substance whatever" supporting the determination. Rather, the reviewing court must determine whether or not the agency decision "falls within the limits of reasonableness or rationality." Administrative Services, supra at 610. This standard of reasonableness and rationality, which the Administrative Services court denotes as a standard of "arbitrary and capricious" review, applies to agency decisions involving mixed fact and law questions. Id. at 609-

610. Thus, if the court finds, for example, that the issue of whether or not the arresting officer had reasonable cause to believe that the driver was driving while under the influence is a mixed fact/law question, the court may apply the stricter "arbitrary and capricious" standard of review testing the reasonableness and rationality of the administrative decision.

Testing the reasonableness and rationality of the departmental suspension decision based on the agency record is a significant and sufficient form of review. So significant is this form of review that the New Mexico implied consent scheme employs it for the review of the one-year license revocations. State, Department of Motor Vehicles v. Gober, 513 P.2d 391 (N.W. 1973), New Mexico Stat. Section 66-8-112(F) (1978). Where one-year revocations are concerned, Utah, on the other hand, grants a de novo review of the revocation decision--a form of review affording the agency even less deference. Section 41-6-44.10.

To summarize, Administrative Services articulates two standards of review which it denotes "arbitrary and capricious." The first standard, allowing greater agency deference is, as other states have found, constitutionally sufficient. If, however, the Court finds that this standard is lacking, Administrative Services makes available a stricter standard of review under which the reasonableness and rationality of the agency decision is tested. Both standards provide drivers, like the appellant, whose licenses have been temporarily administratively suspended, with meaningful judicial review of the suspension decision.

POINT VI

THE DRIVER LICENSE SUSPENSION HEARING ADMINISTERED BY A DEPARTMENT OF PUBLIC SAFETY EMPLOYEE MAINTAINS CONSTITUTIONAL SEPARATION OF ADJUDICATORY AND PROSECUTORIAL ROLES.

Although administered by a single hearing officer, a license suspension hearing incorporates an adequate separation of prosecutorial and adjudicatory functions. Three points, which will be discussed below, are pertinent here. First, the hearing officer acts only in an adjudicatory and not prosecutorial capacity. Second, even if the hearing officer functions, to some extent, in both roles, the constitution permits this combination. Third, to make out a constitutional claim, a specific bias, due to the combination of functions, must be demonstrated. The appellant has not shown and cannot show any specific bias.

First, to understand that the hearing officer functions exclusively as a judicial officer, the nature of the privilege suspension hearing must be considered. The issues at the hearing are narrow. They are only whether or not the arresting officer had "reasonable grounds to believe" that the driver was in physical control of the vehicle while under the influence, and whether or not the blood alcohol test "results, if any" indicated a BAC of .08% or greater. Section 41-2-19.5(5).

The hearing officer is very familiar with these issues. He or she knows the basic factors that go to each point. Any questioning in which the hearing officer participates is only to

speed up the hearing process, help ferret out these factors and develop a complete record. For example, in this case, the hearing officer said to the officer, "I would like to go back to the driving pattern itself. What caught [sic] your attention to the vehicle itself?" (T. at 4.) Thus the hearing officer elicited pertinent information from the peace officer in a very objective manner.

All parties, if they do not refuse to testify, may be questioned by the hearing officer as a judge may question various witnesses. The hearing officer takes all testimony into account. Questioning and prosecution are not synonymous. Simply because the hearing officer is familiar with the narrow issues and may ask questions hearing on these issues does not mean that the hearing officer is taking on a prosecutorial role. The hearing officer acts in an adjudicatory truth-finding role exclusively.

However, even if the hearing officer combines both judicial and prosecutorial roles, this combination is constitutionally sound. In fact, the importance and use of this combination in the administrative process has been recognized and sanctioned by Congress. Section 5 of the Administrative Procedure Act, 5 U.S.C. at 554(d) specifically provides that agencies and their members who "engage in investigating or prosecuting may also participate or advise in the adjudicating function." (Emphasis added.)

The combination of prosecutorial and judicial roles is well suited for hearings in which the determinative issues are relatively narrow and simple. It is not surprising that other states, like Utah, have chosen to employ this method in their implied consent/DUI revocation and suspension procedures.

In Arizona, for example, if a driver refuses to submit to a blood alcohol test, his license is immediately suspended. The driver may request a hearing, which covers three narrow issues: (1) whether or not the arresting office had reasonable grounds to believe that the driver was in violation of the Arizona implied consent law; (2) whether or not the driver was arrested; and (3) whether or not he refused to submit to the blood-alcohol test. See Martin v. Superior Court, 660 P.2d 859, 860 (Ariz. 1983). As in Utah, a hearing officer presides over the hearing. There is no separate prosecutor. The hearing officer therefore must ask questions. Id.

In Martin v. Superior Court, id., the Arizona Supreme Court considered the constitutionality of this system which incorporated prosecutorial and adjudicatory roles in one individual. The same issue is presented here. Noting first that the similar statutory schemes of other western states have withstood constitutional attack, the Martin court went on to discuss the merits of the system. Id. at 861. Citing Withrow v. Larkin, 421 U.S. 35, 55 (1975), it found that the presumed fairness of hearing officers taken together with the state's interest in a swift

and efficient method of handling impaired drivers, and the tremendous burden which would be imposed on the state if prosecutors were required to attend each of these civil hearings, lead to only one answer--the court upheld the hearing system, stating:

There is nothing prejudicial about a hearing officer handling a non-criminal license suspension hearing without a prosecutor present to move the case forward. Given the limited scope of the hearing, the adequacy of judicial review and the presence of the respondent's counsel, this combination of adjudicative and prosecutorial functions does not violate due process or equal protection.

Id. at 862. Considering the above-mentioned factors demonstrates that the combination of administrative functions is well suited for Utah's driving privilege suspension system. Like Arizona's, the Utah procedure should be upheld, for it maintains fairness and impartiality while facilitating government efficiency.

Much more extreme administrative function combinations have been upheld by the United States Supreme Court. Withrow v. Larkin, 421 U.S. 35 (1975), presented the issue of whether the combined investigatory and judicial functions of a Wisconsin state examining board complied with the Due Process Clause. The board had the statutory authority to "investigate, hear and act upon practices of [medical practitioners] . . . inimical to the public health." It even had the authority to instigate criminal proceedings if it found probable cause of criminal behavior. Id. at 38, N.1.

In Withrow, id., the board held two investigative hearings. The first of these was closed to the public. The accused and his attorney were allowed to attend. However, they were not allowed to cross-examine witnesses. After the second investigative hearing the board issued its finds and conclusions and suspended the doctor's license to practice medicine. Id. at 39-42.

In examining the Wisconsin system, the United States Supreme Court first stated that biased decision-makers are constitutionally unacceptable. It identified situations in which impermissible prejudice could occur, such as "those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism of the party before him." (Footnotes omitted.) (Emphasis added.) Id. at 47. However:

The contention that the combination of investigative and adjudicatory functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicatorial powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden.

Id. at 47. (Emphasis added.)

Emphasizing the necessity of actual bias, the court went on to discuss cases involving similar issues. One of these

was Richard v. Perales, 402 U.S. 389 (1971). There the Court "sustained against due process objection a system in which a Social Security examiner has responsibility for developing the facts and making a decision as to disability claims, and observed that the challenge to this combination of functions 'assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity.'" Withrow v. Larkin, *supra* at 49-50.

The high court found nothing inherently unconstitutional with the agency decision-maker having taken on another administrative role. In fact, it stated that such a combination of functions is often necessary. It promotes efficient government while protecting individual rights. Thus, the court sanctioned the Wisconsin system which combined investigative and adjudicatory functions in a single body, responsible for suspending the physician's license to practice medicine. The petitioner's inability to show actual prejudice or bias was significant to the decision.

Another case in which a hearing officer's potential bias was at issue, and which demonstrates the significance of actual bias, is Black v. Corporation Division, 634 P.2d 1383 (Or. App. 1981). In Black, the commissioner held a hearing on the petitioner's allegedly fraudulent sale of securities. As in the present case, the petitioner in Black claimed that the hearing violated his due process rights by combining the roles of prose-

cutor and adjudicator, in that the hearing officer questioned witnesses. Id. at 1384. After noting that the petitioner must show actual bias, the court stated:

No prejudice resulted. The hearing officer's questions did not, in form or in substance, evidence bias or tend to influence witnesses. Petitioner had the opportunity to, and did, examine and cross-examine witnesses. The hearing officer merely performed his duty to develop a full record for the Commissioner's review. [Id. at 1384.]

As in Black, the driver/appellant in this case has demonstrated no actual bias on the part of the hearing officer. Additionally, the appellant, as in Black, had an opportunity and did (through her attorney) question witnesses. The appellant also had the opportunity to testify herself and add more to the record.

The Utah Supreme Court also apparently requires a showing of actual prejudice in cases like the present one. In Vali Convalescent and Care Institute v. Industrial Commission, 649 P.2d 33 (Utah 1982) the Utah Supreme Court examined an employer's claim that he was denied due process due to prejudice, because his good cause hearing was held before employees. Stating that federal due process law is "highly persuasive" in interpreting the due process clause of the Utah Constitution, id. at 35, 36, the Utah Supreme Court cited In re Murchison, 349 U.S. 133 (1955), Gibson v. Berryhill, 411 U.S. 564 (1973), Ward v. Monroeville, 409 U.S. 57 (1972), and other cases relied on by the

United States Supreme Court in Withrow v. Larkin, supra, in which combined agency functions and prejudice were at issue. Id. at 37. The Utah court examined the system for risk of actual bias derived from an actual, direct pecuniary interest of the decision-maker in the decision. Finding no such interest, the Utah Supreme Court upheld the agency decision.

Thus, in Utah, a due process claim such as the appellant's, necessitates a showing of actual prejudice and not merely a claim of combined functions. No such specific bias has been claimed or shown in this case.

To summarize, the hearing received by the appellant granted due process and an opportunity for a pre-suspension hearing for three reasons. First, there was no combining of prosecutorial and adjudicative roles. The hearing officer functioned objectively and compatibly with his statutory duty. Second, even if the hearing officer had performed in both capacities, the combination was not constitutionally impermissible and is, in fact, employed successfully by other states as well. Finally, the appellant has not met her burden of proving actual bias, or showing specifically that she received prejudiced treatment. The departmental decision temporarily suspending Ms. Moon's driving privileges should, therefore, be upheld.

POINT VII

ALL IMPAIRED DRIVERS IN UTAH ARE TREATED
ON A RATIONAL BASIS IN ACCORD WITH
THE LEGISLATIVE PURPOSE.

In examining equal protection claims, courts employ either the "strict scrutiny" or the "rational relationship" standard of review. The strict scrutiny standard is appropriate where statutory distinctions involve either a "suspect class" or "fundamental right."

In this case, neither a "suspect class" nor "fundamental right" is involved. That is, because the public safety statutes, and health, safety and welfare issues involved here do not affect an interest specifically guaranteed by the Constitution, the integrity of the political process, or have a disproportionate impact on a discrete and insular minority, U.S. v. Carolene Products, 304 U.S. 144, N. 4, Berlingheieri v. Director of Motor Vehicles, 657 P.2d 383, 387 (Cal. 1983), the "rational relationship" test should be applied. See also, T.T.N.P. Co. v. State, etc., 665 P.2d 1133 (Utah 1982). Further, the "rational relationship" test has been uniformly employed by courts in upholding driver laws against equal protection claims. See, e.g., Svedliund v. Municipality of Anchorage, 671 P.2d 378 (Alaska App. 1983), State v. Thompson, 674 P.2d 895 (Ariz. App. 1983), Hernandez v. Department of Motor Vehicles, supra, Drake v. Colorado Department of Revenue, 667 P.2d 1360 (Colo. 1983).

Under the "rational relationship" test, the statute is valid if the statutory distinctions at issue are rationally related to any legitimate, conceivable statutory goal or legislative purpose. Hodel v. Indiana, 452 U.S. 314, 332 (1981), Citizens, etc. v. Local Agency Formation Com'n, 654 P.2d 193, 197 (Cal. 1982).

In this case, the legislative goals are readily apparent. See Section 41-2-19.5. The purpose of Utah's new DUI laws is to swiftly and efficiently remove impaired, hazardous and unsafe drivers from Utah's highways. Undoubtedly this goal is legitimate. Thus the remaining question is whether or not the mechanics of the statute, the statutory distinctions, are rationally related to the legitimate purpose of making Utah's highways safer.

Under Section 41-6-44 the license of a driver who refuses to submit to a blood alcohol test is revoked for one year. On the other hand, under Section 41-2-19.6, a driver who consents to take a blood alcohol test faces only a 90-day suspension for the first offense. The choice is the driver's. Both the driver whose license is revoked for a year and the driver whose privilege is suspended for 90 days are entitled to a hearing and judicial review of the administrative revocation or suspension decision. Refusal and pre-suspension hearings are substantially the same. At least one of the peace officers involved routinely appears and testifies at each hearing. In

both types of hearings, the driver has an opportunity for the presentation of evidence and cross-examination. Under Section 41-2-20, suspension cases are reviewed to determine whether the agency decision was arbitrary and capricious. De novo review is, by statute, accorded "refusal" cases because of the longer consequence. Further, there is no automatic rule regarding the reinstatement of licenses pending appeal in either case. In both cases, reinstatement is left to the individual court's discretion on a statewide basis.

Thus, the significant distinctions made under Sections 41-2-19.6, 41-2-20 and 41-6-44.10 are the degree of deprivation (90 days suspension or one year revocation) and the type of judicial review available in each case. Both of these distinctions are rationally related to the statutory plan to logically gain the legitimate goal of keeping Utah's highways safe by swiftly and efficiently removing scientifically-proven dangerous drivers through the administrative process.

Blood alcohol test results are integral in implementing civil and criminal DUI systems. The statutorily required warning of a longer sanction for refusing to take a blood alcohol test stimulates driver cooperation in submitting to a test. The implied consent laws would serve little purpose if they did not provide impetus to submit to a scientific blood alcohol test. The significantly longer sanction for refusal logically provides such impetus. The blood alcohol test in turn facilitates evi-

dence gathering, promoting the efficiency and accuracy of subsequent civil, administrative and criminal hearings, and enhancing the administrative removal of dangerous drivers.

For these reasons, the harsher consequences for refusal have withstood constitutional attack on equal protection grounds in many western states. See, e.g. Svendland, supra (Alaska law making refusal a class A misdemeanor), Hernandez, supra (California law mandates six-month license suspension for refusal), DeScala v. Motor Vehicle Department of Revenue, 667 P.2d 1360 (Colo. 1983) (ineligibility for probationary license due to refusal).

Because of the necessary, different consequences to accomplish this legitimate governmental purpose, Utah grants different forms of judicial review. The constitutional sufficiency of the level of review in suspension cases has already been discussed. Point V.B. shows that review of a suspension decision to determine whether or not it is arbitrary and capricious protects drivers' due process rights. Other states employ similar modes of review, and in Utah, under Administrative Services, supra, this level of review is significant. Although this level of review is sufficient for suspension cases, because of the different nature of refusal cases it is obvious that a different form of review is in order.

In providing de novo review for refusal cases, the legislature took two significant factors into account. First,

drivers who refuse to take a blood alcohol test are warned and suffer a greater deprivation (a year-long license revocation) than those who do not. As previously discussed, this different sanction is necessary to the implied consent scheme. Secondly, although the officer testifies, less scientific evidence is available to the department when it revokes a license because of the lack of blood alcohol test results. Taken together, these two factors might indicate a need for a trial de novo rather than judicial review. This is all caused by the driver's choice, after warning. In other words, de novo review does not reward but rather insures the due process rights of those drivers who refuse to submit to a chemical test.

Under Utah's new DUI laws, both classes of drivers, those who refuse and those who consent to taking a test, are given warning and notice, and treated fairly, rationally, and logically. The statutory distinctions, the means chosen to implement the implied consent law, are rationally related to the state's purpose and are necessary in implementing the DUI/implied consent system.

CONCLUSION

The arresting officer had reasonable grounds to believe that appellant was driving under the influence, because of her driving pattern, the odor of alcohol about her person, and because of her unsatisfactory performance on the field sobriety test.

This affidavit, as well as other documentary evidence and the officer's testimony, show that one element under Section 41-2-19.6--that is, that the test results indicated a BAC of .08% or greater--was established at the administrative proceeding. The other element, the officer's reasonable grounds, was also established.

The intoxilyzer affidavit was properly admitted without an accompanying custodian's certificate. Because it evidenced sufficient trustworthiness to be admissible in a criminal proceeding, its admission in a civil, administrative proceeding where the strict rules of evidence do not apply, is particularly appropriate.

The administrative agency may rely on the accuracy of the intoxilyzer test result where regulations mandate a calibration check at least every 40 days, and where the intoxilyzer affidavit shows the intoxilyzer machine was tested for calibration four days prior to the subject test.

At the pre-suspension hearing, the hearing officer maintained a constitutional and unbiased hearing looking solely for the truth. There was substantial evidence and no showing of arbitrariness or capriciousness.

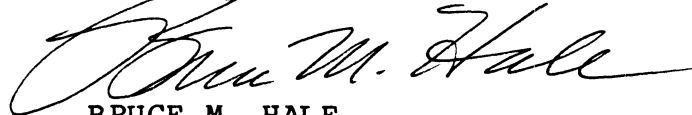
Likewise, the hearing process and subsequent right to judicial review actually received by this driver and all others under Sections 41-2-19.6 and 20, have more than protected the appellant's due process rights in this driving privilege matter.

The statutory scheme is rationally related to the legitimate state purpose of effectively and efficiently removing dangerous drivers from the road, while balancing all interests and consequences.

For these reasons, the 90-day suspension decisions of the department and district court should be affirmed.

DATED this 11th day of April, 1985.

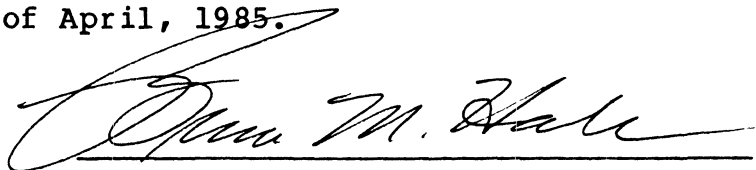
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CERTIFICATE OF MAILING

I hereby certify that four (4) true and exact copies of the foregoing Brief were mailed, postage prepaid, to Walter F. Bugden, Jr., attorney for appellant, Bugden, Collins & Keller, #8 East Broadway, Judge Building, Suite 426, Salt Lake City, Utah 84111, on this 11th day of April, 1985.



ADDENDUM

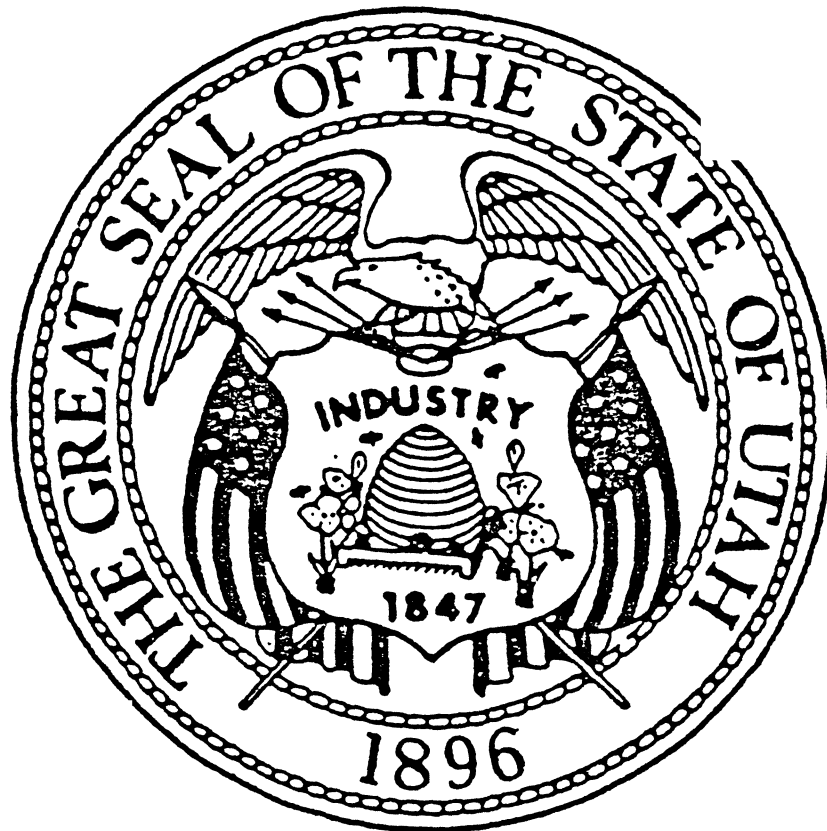
INDEX

	Page
APPENDIX 1 BREATH TESTING REGULATIONS.....	A-1
APPENDIX 2 INTOXILYZER AFFIDAVIT, DUI REPORT FORM, OPERATIONAL CHECKLIST.....	A-12
APPENDIX 3 HEARING DECISION.....	A-18
APPENDIX 4 DISTRICT COURT FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.....	A-23
APPENDIX 5 APPLICABLE STATUTORY LAW (ALL REFERENCES ARE TO UTAH CODE ANN. (1953), AS AMENDED)	
SECTION 41-2-19.5.....	A-28
SECTION 41-2-19.6.....	A-29
SECTION 41-6-44.3.....	A-31
SECTION 41-6-44.10.....	A-32

"APPENDIX 1"

Effective June 10, 1979
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BREATH TESTING REGULATIONS



DEPARTMENT OF PUBLIC SAFETY

Jerry E. Luchen
Jerry E. Luchen
Commissioner

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 each is done, in sequence, 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. CALIBRATION

(A) Breath testing instruments must be calibrated 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 calibration recommended by the manufacturer of the instrument or the office of the Commissioner of Public Safety.

(C) Results of tests 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 CALIBRATION OF INSTRUMENTS

(A) Breathalyzer

1. Machine heating properly:

a. between 47 and 53 degrees centigrade

2. Collection chamber output:
 - a. COLD between 55 and 58cc's
 - b. WARM between 50 and 54cc'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. Place the mode selector switch in the zero set mode.
2. 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.
3. 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.)

4. 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.
5. ZERO SET AND ERROR INDICATOR CHECK: 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.
6. 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.

7. **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.

8. **PRINTER DEACTIVATOR CHECK:** 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.

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, and pass a test approved by the Commissioner of Public Safety, for each

type of breath testing instrument for which he seeks certification.

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.

INTOXILYZER - BREATHALYZER OPERATOR TRAINING

- A. Training for original certification is to be conducted by a Breath Testing 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 Critique 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.

1. 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
Electrical power check: (Power switch on, power indicator light is on)	(X)	()
Temperature check (Ready light is on)	(X)	()
Internal purge check: (Air pump works, runs for approximately 35 seconds)	(X)	()
Zero set, Error indicator, and Printer check:		
(Zero set at .000, .001, .002, .003.)	(X)	()
(With proper zero set, printer works properly)	(X)	()
(Error light comes on when operated with wrong zero set)	(X)	()
(Printer deactivated when error light is on)	(X)	()
Fixed absorption calibrator test (if equipped) <u>Not Equipped</u>		
(Reads within \pm .01% of calibration setting)	()	()
Checked with known sample: (Simulator, 3 tests within \pm .01%)	(X)	()
Gives readings in percent blood alcohol by weight, based upon grams of alcohol per 100 cubic centimeters of blood.	(X)	()

AIRS REQUIRED NONE () (X)

(If yes, explain)

simulator solution was of the correct kind and properly compounded. (X) ()

The results of this test show that the instrument is working properly. (X) ()

prior check of this instrument was done on 19 JULY 1984.

BREATH TEST TECHNICIAN(S)

Trapper Mark Nielsen
TPR Christian Moore

STATE OF UTAH

CITY OF Salt Lake

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

Trapper Mark Nielsen
TPR Christian Moore

Subscribed and sworn before me this 25 day of July 1984
James M. Breckley City of residence Murray
County of residence Salt Lake
Commission expires 16 June 1988.

RECEIVED BY
DRIVER LICENSE

AUG 01 1984

CMI INTOXILYZER

OPERATIONAL CHECK LIST - A

SUBJECT Vicki G. Moon DATE 7/29/84 TIME 0250
MACHINE # 27102560 LOCATION So Salt Lake
OPERATOR K. Allred

MAKE CERTAIN POWER SWITCH IS IN THE "ON" POSITION. WAIT UNTIL THE READY LIGHT COMES ON.

- ☒ 1. INSERT TEST RECORD CARD.
- ☒ 2. CONNECT BREATH TUBE TO THE PUMP TUBE.
- ☒ 3. TURN MODE SELECTOR SWITCH TO ZERO SET. ADJUST ZERO SET KNOB SO THAT DISPLAY READS .003, .002, .001, or .000.
- ☒ 4. TURN MODE SELECTOR SWITCH TO AIR BLANK.
- ☒ 5. AFTER AIR BLANK CYCLE IS COMPLETED, TURN MODE SELECTOR SWITCH TO ZERO SET. READJUST ZERO SET KNOB TO OBTAIN PROPER ZERO. .002.
- ☒ 6. TURN MODE SELECTOR SWITCH TO BREATH MODE. DISCONNECT THE BREATH TUBE FROM THE PUMP TUBE. HAVE SUBJECT BLOW INTO BREATH TUBE UNTIL SAMPLE IS COMPLETED.
- ☒ 7. CONNECT BREATH TUBE TO THE PUMP TUBE. TURN MODE SELECTOR SWITCH TO AIR BLANK.

Burroughs

CMI INCORPORATED

INTOXILYZER TEST RECORD

% ALCOHOL IN BLOOD	INTOXILYZER PRINT CODE
	A - AIR BLANK
	B - BREATH
	C - CALIBRATOR (Simu)
	OBSERVED SUBJECT FOR REQUIRED OBSERVATION PERIOD AND FOLLOWED CHECK LIST
	<u>KA</u> OPERATOR'S INITIAL
	<u>So Salt Lake</u> INTOXILYZER LOCATION
	<u>27102560</u> INTOXILYZER SERIAL NUMBER
	<u>7/29/84</u> DATE
A 0 0	
B 1 0	
A 0 0	

Vicki G. Moon
SUBJECT'S NAME

0150
TIME FIRST OBSERVED

0252
TIME TEST STOP

K. Allred
OPERATOR

ADDITIONAL INFORMATION AND/OR REMARKS

DUI REPORT FORM

I. CASE IDENTIFICATION:

Date 7/29/84 Day Sun Accident 16 Case # 028111 Time Prepared 015
 Subject's Name Vicki G. Pearson Address 142 2nd Ave #2 SLC UT 84144
 Place of Employment US West Direct Address 1st So 500 E 13 Park
 Home Telephone Number 5214454 Work Telephone Number 322 8635
 D.O.B. 12/31/54 Driver License # 7730169 Time of Arrest 0150
 Place of Arrest SR 80 200W Charges DUI
 Arresting Officer K. Allegro Assisting Officers G. Benson SLC Fire
 Arresting Agency UHP

II. VEHICLE:

Year 83 Color Silver Make Honda Model Produce
 License# and state PVM 163 8515 Disposition TANE Smith
 Registered Owner Same Address _____

III. WITNESSES: (If passengers, indicate specifically)

Name	Address	Tele. #	Age/DOB
1. Bernice L. Jester	646 31st Ogden		01/25/53
2. Jennie Crosby	Ogden	392-6550	10/12/58
3.			
4.			
5.			

IV. ACTUAL PHYSICAL CONTROL:

The facts establishing the subject's actual physical control of a motor vehicle are: Trapper witnessed subject driving.

V. DRIVING PATTERN:

Subject's location when first observed SR 80 WB 700E Time: 0135
 The facts observed regarding driving pattern: Vehicle was west bound appeared that came on up on ramp 1300 E made an abrupt lane change from right lane to the inside left lane accelerated Trapper caught up were traveling in excess of 80 mph turned over headlight in 200 E then flashing headlight on at State she pulled right over after headlight flash.

VI. PRE-ARREST STATEMENTS OF SUBJECT:

I've only had a couple
The only reason I was going fast was that guy who made me mad

VII. PHYSICAL CHARACTERISTICS:

Odor of alcoholic beverage yes
 Speech loud
 Balance deliberate and slow, graceful
 Signs or complaints of injury or illness none
 Other physical characteristics none

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DRIVER LICENSE

AUG 01 1984

A-

FIELD SOBRIETY TESTS: (Describe subject's actions)

1. HS 1st ... Pew ST UNV
2nd ... UNV WXYZ
2. Finger Count 2x time mixed fingers and count mixed 43
3. REM
4. Rambert R.F.
5. Finger to nose RT 1st 1st joint to end 2nd 1/2 from end of finger
LT 1st End thumb to left pasted 2nd End of nose end of thumb
6. 8-9 heel to toe 8-8 march out of center 2x spaced 2-4" inches turn OK
7. Leg Lift for keys march her left 1 out of 3x
8. Neck Tuck 4 Flutts 4

Were tests demonstrated by officer? yes Subject's ability to follow instructions fair was over anxious trying to over perform used no shoes stated had been recent Climbing without shoes

SEARCHES

- A. Vehicle:
Was subject's vehicle searched? _____ Where? Scene Inventory
When? _____ Evidence _____
Person who performed the search _____
- B. Subject:
Was subject's person searched? _____ Where? SL Co. Jail
When? _____ Evidence Found None
Person who performed the search Jail

CHEMICAL TESTS:

Mr. or Mrs. Vicki, do you understand that you are under arrest for driving under the influence of alcohol (drugs)? Response, (if any) do unfortunately yes

I hereby request that you submit to a chemical test to determine the alcohol (drug) content of your blood. I request that you take a Breath test.
(blood-breath-urine)

☒ The following admonition was given by me to the subject before the chemical test was administered:

Results indicating .08% or more by weight of alcohol in your blood shall, and the existence of a blood alcohol content or presence of drugs sufficient to render you incapable of safely driving a vehicle can, result in suspension or revocation of your license or privilege to operate a motor vehicle.

What is your response to my request that you submit to a chemical test? Response: you bet

Did subject submit to a chemical test? yes Type of test Breathalyzer
Test Administered by K. H. [Signature] Where? So. Salt Lake
When? 0754 Results .10 Was subject notified of results? yes

(If the subject refuses the test, read the following)

☐ The following admonition was given by me to the subject:

If you refuse the test, it will not be given, however I must warn you that if you refuse, your license or permit to drive a motor vehicle can be revoked for one year with no provision for a limited driver's license. After you have taken this test, you will be permitted to have a physician of your own choice administer a test at your own expense, in addition to the one I have requested you to submit to, so long as it does no delay the test or tests requested by me. Upon your request, I will make available to you the results of the test if you take it.

The following admonition was given by me to the subject:

Your right to remain silent and your right to counsel do not apply to the implied consent law which is civil in nature and separate from the criminal charges. Your right to remain silent does not give you the right to refuse to take the test. You do not have the right to have counsel during the test procedure. Unless you submit to the test I am requesting, I will consider that you have refused to take the test. I warn you that if you refuse to take the test, your driver's license can be revoked for one year with no provision for a limited license.

I. CONSTITUTIONAL RIGHTS:

Was subject advised of the following rights? yes When? 0211
By Whom? K. Allard Where? My Vehicle

- ☒ 1. You have the right to remain silent.
☒ 2. Anything you say can and will be used against you in a court of law.
☒ 3. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
☒ 4. If you decide to answer questions now without having counsel present, you may stop answering questions at any time. Also, you may request counsel at any time during questioning.

Were the following waiver questions asked? yes

- ☒ 1. Do you understand each of these rights I have explained to you?
Response you bet
☒ 2. Having these rights in mind, do you wish to talk to us now?
Response you bet

INTERVIEW:

Were you operating a vehicle? yes I was
Where were you going? Home
What street or highway were you on? I have not time I get lost but 6005
Direction of travel? West would be my best guess
Where did you start from? 7200 So Highland Drive
When? 1/2 - 3/4 min What time is it now? 1:30
What is today's date? 28 or 29 Date of week? Saturday
(Actual time 2:14 Date 7/2 Day Sun)
What city or county are you in now? SL
What were you doing during the last three hours? Office Party

Have you been drinking? yes earlier
What? Brew & Soda How much? 3
Where? Camp Party
When did you have your first drink? 7:30 Last drink? 11:30
Are you under the influence of an alcoholic beverage (drugs) now? There is no way I can say no cause I know that alcohol stays with you for a long time

Are you taking tranquilizers, pills, medicines or drugs of any kind? absolutely not
(What kind? get sample) _____
When did you have the last dose? _____
Are you ill? NO

(If subject was in an accident, ask these questions:)

Were you involved in an accident today? NO
Have you had any alcoholic beverage or drugs since the accident? _____
If so, what? _____ When? _____
How much? _____

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DRIVER LICENSE

AUG 01 1984

OTHER OCCURRENCES OR GROUP: Blue shirt button up. no contacts yellow shorts
was very afraid of going on
very cooperative, and friendly
female passenger very upset has father to get home to.
Vicki states they were at a work party.

ATTACHED DOCUMENTS

I have attached the following documents to this report:

- 1. ☒ Copy of citation/temporary license
- 2. ☒ Subject's Utah driver's license or driver's permit.
- 3. ☐ Traffic accident report.
- 4. ☒ Other documents (specify) Intro. form

Date 7/30/84 Time 02AM Report was completed.

AUTHORIZED ENDORSING SIGNATURE:

[Signature] SS

I certify and swear that I am a sworn Utah peace officer and that I have prepared the above report form and that information on the report form and the attached documents are true and correct to my knowledge and belief that the report form was prepared in the regular course of my duties. It is my belief the subject was in violation of section 41-6-44 U.C.A. at the date, time and place specified in this report.

[Signature]
Signature of Peace Officer
Law Enforcement Agency: UHP
Date: 7/1/84 Time: 0848

COUNTY OF Salt Lake } SS.

Subscribed and sworn to before me this 1st day of August, 1984.

[Signature]
NOTARY PUBLIC
Residing at: Salt Lake City, Utah

Commission Expires:

November 19, 1984

The original of this form must be sent within five (5) days of the arrest of the subject to:

Officer of Driver License Services
4501 South 2700 West
Salt Lake City, Utah 84119

"APPENDIX 3"

DRIVER IMPROVEMENT AND CONTROL

HEARING DECISION

Date of Hearing	Time Set for Hearing	Name and Address of Driver	Hearing Officer
7-29-84	2:00 PM	VICKI G. MOON 179 W. RAY ST. OGDEN UT	DENNIS H. HICKS
Address of Attorney		Date of Birth	DL Number
TER. F. AUGDEN BROOKWAY # 426		12-31-54	7730169
Witness		Date of Arrest	Agency
		7-29-84	UHP
Witness		Location of Hearing	Witness
		WVC	

OPENING STATEMENT

Hearing is being conducted at the driver's request in accordance with Section 41-2-19 Code Annotated, having been arrested for driving while under the influence of alcohol or a combination of alcohol and drugs.

Rules of evidence and procedure shall not strictly apply. However, as the Hearing Officer, I will take sworn testimony and consider all relevant evidence presented at this hearing.

Provided for in UCA 41-2-20, if your driving privilege is suspended, you shall have the right to petition a court of record in the county in which you reside within thirty days of the effective date of such suspension for judicial review by the court.

Testimony will be sworn, and the hearing shall proceed.

Administrative notice is taken of the fact that the Office of Driver License Services is in possession of the following documents and information which are official records on file with the Department:

No

- ☐ The officer's sworn report in compliance with UCA 41-2-19.6.
- ☐ A citation indicating the driver's arrest for a violation of UCA 41-6-44.
- ☐ Notice served by the officer of the Department's intent to suspend, and information on how to receive a hearing by the Department.

Yes No

- ☒ ☐ Test machine record of test results.
- ☒ ☐ Operational checklist of test instrument.
- ☒ ☐ Utah Highway Patrol record of the chemical test machine maintenance test and affidavit pursuant to UCA 41-6-44.3.
- ☐ ☒ Other (ie. Documents and/or information received in behalf of the driver and/or other evidence received which is made official record for the purpose of this hearing). Explain:

The sworn testimony of Officer: K. ALLRED.

(a) Facts leading the peace officer to believe the driver had been driving or in actual physical control of a motor vehicle while under the influence of alcohol, any drug, or a combination of alcohol and any drug: *TROOPER ALLRED OBSERVED A VEHICLE MAKE AN ABRUPT LANE CHANGE AND ACCELERATE RAPIDLY AND WAS CLOCKED AT 80 MPH PLUS. THE VEHICLE WAS STOPPED AND THE DRIVER IDENTIFIED AS VICKI G. MOON. TROOPER ALLRED NOTICED AN ODOR OF ALCOHOL, FIELD SOBRIETY TESTS WERE GIVEN. AT THE CONCLUSION OF THE FIELD TESTS MS. MOON WAS PLACED UNDER ARREST FOR DWI AND TRANSPORTED TO SOUTH SALT LAKE PD. FOR AN INTOXILYZER TEST.*

(b) The driver was placed under arrest: no ☐ yes ☒
Charge: DUI.

(c) The driver submitted to a chemical test as requested by a peace officer which showed a test result of 1/0 %.

(d) The driver was advised prior to the chemical test that results could lead to suspension of his/her driving privilege: no ☐ yes ☒

(e) Officer who administered chemical test was certified to do so: no ☐ yes ☐

(f) Proper procedure was performed or observed by reporting officer in the administration of the chemical test: no ☐ yes ☒ (explain procedure): R/O TESTIFIED HE WAS CERTIFIED AND HE FOLLOWED THE OPERATIONAL CHECKLIST.

(g) Evidence and/or information received indicating the test machine was ☒ was not ☐ in proper working order at the time test was administered (explain): R/O'S TESTIMONY AND THE UHP INTOXILYZER TEST AND AFFIDAVIT DONE 7-25-84.

(h) DUI Report Form was properly notarized: no ☐ yes ☒ (explain):
R/O TESTIFIED HE SUBSCRIBED AND SWORE BEFORE THE NOTARY THAT THE CONTENTS OF THE DUI REPORT WERE TRUE AND CORRECT.
Testimony of witness officer or other witness for reporting officer:
NONE

Substance of testimony by driver: MRS. MOON TESTIFIED SHE WAS CREEPING AND WAS TERRIFIED WHEN TROOPER ALLOWED STOPPED HER. SHE WAS AFRAID SHE COULDN'T FUNCTION PROPERLY. IT WAS EMBARRASSING STANDING AT THE SIDE OF THE FREEWAY IN FRONT OF GOD AND EVERYBODY. SHE FELT SHE WAS NOT APPRECIABLY IMPAIRED AT ANYTIME. SHE WAS TOLD OF THE CONSEQUENCES OF HAVING A BLOOD ALCOHOL LEVEL OF OVER .08% AND COMPLIED TO THE REQUEST TO TAKE AN INTOXILYZER TEST.

Substance of statements and/or questions by driver's legal counsel:

COUNSEL ARGUED THERE WAS REALLY NO PROBABLE
CAUSE FOR ARREST MS. MOON WAS NOT TRYING
TO MISLEAD THIS HEARING OFFICER AND HER
TESTIMONY WAS BASICALLY THE SAME AS
TROOPER ALURED, SHE REALLY DIDN'T DO BAD
ON THE FIELD SOBRIETY TESTS. THIS CASE
IS REALLY TO CLOSE TO CALL AND MS. MOON
SHOULD NOT BE SUSPENDED BECAUSE SHE IS A
NICE PERSON.

HAVING HEARD AND RECEIVED EVIDENCE ADDUCED BY THOSE PRESENT AT THIS HEARING, THE
DEPARTMENT NOW MAKES THE FOLLOWING FINDINGS OF FACT:

- A. That the peace officer had reason to believe that the driver was ☒ was
not ☐ in violation of UCA 41-6-44.
- B. That the driver was ☒ was not ☐ placed under arrest for a
violation under UCA 41-6-44.
- C. That the chemical test was ☒ was not ☐ administered by an officer
certified to do so.
- D. That all operational procedures and requirements were ☒ were not ☐
met to insure proper working order of the test machine.
- E. That all procedures and requirements were ☒ were not ☐ followed by
the reporting officer pursuant to UCA 41-2-19.6. (Explain what procedures
were not followed if any):

F. That there was ☒ was not ☐ evidence of a chemical test and/or other basis for the officer's determination that the driver was in violation of 41-6-44. Test results 10 % or other (ie. drugs); explain:

G. Other (not covered above); explain:

CONCLUSIONS:

BASED UPON THE FOREGOING FINDINGS OF FACT, IT IS CONCLUDED THAT ALL OF THE STATUTORY PROVISIONS REQUIRED TO SUSPEND THE DRIVING PRIVILEGE PURSUANT TO UCA 41-2-19.6 WERE ☒ WERE NOT ☐ IN PLACE IN THIS CASE, AND THE FOLLOWING DECISION IS RENDERED:

☒ To suspend the driving privilege by authority of UCA 41-2-19.6

— ☐ To take no action

Comments by hearing officer:

Hearing Officer: *Adkins*

FOR CENTRAL OFFICE USE ONLY

proved by: *Smellie*

Title: *Asst. Mgr.*

Comments:

"APPENDIX 4"

DAVID L. WILKINSON
Attorney General
STEPHEN G. SCHWENDIMAN
Division Chief
BRUCE M. HALE
Assistant Attorney General
Tax and Business Regulation Division
130 State Capitol
Salt Lake City, UT 84114
Telephone: 533-5319

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY, STATE OF UTAH

VICKIE MOON,)	
)	
Petitioner,	)	FINDINGS OF FACT
	)	CONCLUSIONS OF LAW AND
vs.	)	ORDER
)	
FRED C. SCHWENDIMAN, Director	)	Case No. C84-5182
Driver License Services,)	
)	
Respondent.)	

The above-entitled matter having come before the Court for hearing on September 18, 1984, and the matter being argued and submitted on memorandum and the Court having received the record of the Department of Public Safety and having reviewed the matter and studied the memorandum and cases cited and being apprised in the premises now makes the following:

FINDINGS OF FACT

1. The Court finds that the agency record shows that there is substantial, competent evidence to support the

findings of the hearing officer of the Department of Public Safety. There is a residuum of evidence and the Court finds that the plaintiff was legally arrested for "driving under the influence of alcohol."

2. The Court further finds that all of the elements of Utah Code Ann. 41-2-19.6 were proven before the Agency. The Court specifically finds that the evidence before the Agency is competent and shows that the arresting officer had reasonable grounds to believe that plaintiff may have been in violation of Utah Code Ann. 41-6-44, arrested him, requested that he take an intoxilyzer test, and advised the plaintiff that a results indicating a .08% or more by weight of alcohol in the blood shall and can result in the suspension or revocation of the person's license or privilege to operate a motor vehicle, that a chemical test was voluntarily agreed to by plaintiff, and that it was properly given by a certified operator showing reliably a result of .11% of alcohol by weight by plaintiff's blood.

3. The Court further finds that the DUI report was properly signed, notarized, countersigned and forwarded to the Office of Driver License Services within five days of the arrest, that plaintiff requested a timely hearing which was held with the plaintiff, as well as the officer, offering sworn testimony.

4. The hearing was granted prior to 30 days from the date of the arrest and the statute grants the plaintiff the opportunity to appeal to this Court for a hearing on the record and a determination of whether or not the Department was arbitrary or capricious.

5. Pursuant to 41-2-19.6 the plaintiff's license was suspended. The plaintiff appealed that adverse decision to this Court for a review pursuant to Utah Code Ann. 41-2-19.6 and 41-2-20.

6. The Court further finds that the suspension of petitioner's driver license was not arbitrary and capricious and hereby affirms the suspension of petitioner's driver license.

Having made the foregoing findings of fact, the Court now makes its:

CONCLUSIONS OF LAW

1. The Court concludes that there was substantial competent evidence to support the Department's determination to sustain the Notice of Intention to Suspend plaintiff's privilege to operate a vehicle in the State of Utah served upon plaintiff when he was arrested.

2. There was competent evidence to support the finding and the Court concludes that the arresting officer had

reasonable grounds to believe that the plaintiff may have been in violation of Utah Code Ann. 41-6-44, and that there was reliable test results which indicated a blood alcohol content of .16% of blood alcohol in the plaintiff, or that the plaintiff had been operating a motor vehicle under the influence of alcohol rendering him incapable of safely driving the same.

3. The Court concludes that the intoxilyzer machine was reliable and the results admissible before the Department pursuant to the presumption set forth in Utah Code Ann. 41-6-44.5 and 44.3, and Murray City v. Hall, 663 P.2d 1314 (Ut. 1983).

4. The Court further concludes that under the definitions of arbitrary and capricious given in Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601, that the Department of Public Safety's decision was not arbitrary or capricious.

The Court having made the foregoing findings of fact and conclusions of law, now makes the following:

ORDER

1. The Court vacates its Order of Reinstatement and hereby Orders the suspension of petitioner's driving license forthwith.

2. The decision of the Department of Public Safety, Office of Driver License Services, is sustained and plaintiff's driving privileges are to be suspended or revoked as required by law.

DATED this 7 day of Nov., 1984.

/s/
HONORABLE DEAN E. CONDER
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify I mailed a true and exact copy of the foregoing Findings of Fact, Conclusions of Law and Order, first class postage prepaid to the following:

WALTER F. BUGDEN, JR.
#8 East Broadway
Judge Building, Suite 426
Salt Lake City, UT 84111

DATED this 6 day of Nov, 1984.

/s/
VICKIE L. WALKER
Legal Secretary

"APPENDIX 5"

Upon the conclusion of such examination the department shall take such action as may be appropriate and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restriction as permitted under section 41-2-9. Refusal or neglect of the licensee to submit to such examination shall be ground for suspension or revocation of his license.

(h) No report authorized by section 41-2-12.1 shall contain any evidence of a conviction for speeding on an interstate system located in this state if the conviction was for a speed of less than 71 miles per hour and did not result in an accident unless authorized in writing by the individual whose report is being requested.

(i) The department may suspend the license of a person when the department has been notified by a juvenile court that the person has outstanding against him or her an unpaid fine or uncomplished restitution requirement levied by order of a juvenile court, and the suspension shall remain in effect until the department is notified by the juvenile court that the order has been satisfied. No report authorized by section 41-2-12.1 shall contain any evidence of such suspension.

(j) The department may immediately suspend the license of a person if it has reason to believe that the person is the owner of a motor vehicle with respect to which a security is required under Chapter 41 of Title 31, and has operated the vehicle or permitted it to be operated within this state without the security being in effect. The provisions of sections 41-12-17.5 and 41-12-29 with respect to the surrender of license plates and registration of motor vehicles and the requirement of proof of financial responsibility apply to persons whose driving privilege is suspended under this subsection. If the department exercises the right of immediate suspension granted under this subsection (j), the notice and hearing provisions of subsection (b) apply. A person whose license suspension has been sustained or whose license has been revoked by the department under this subsection may file a petition within 30 days after the sustaining of the suspension or the revocation for a hearing in the matter which, if held, shall be governed by the provisions of section 41-2-20.

History: C 1953, 41-2-19, enacted by L 1983, ch 183, § 22, 1983, ch 187, § 3, 1983, ch 1978 (2nd S S), ch 9, § 2, L 1983, ch 99, § 4; 192, § 1

41-2-19.5. Purpose of revocation or suspension for driving under the influence. The legislature finds and declares that a primary purpose of the provisions in this code that relate to suspension or revocation of a person's license or privilege to operate a motor vehicle for driving with a blood alcohol content above a certain level or while under the influence of alcohol or any drug, or combination of alcohol and any drug, or for refusing to take a chemical test provided for in section 41-6-44.10, is safely protecting persons on roads and highways by quickly removing from those roads and highways persons who have shown they are safety hazards by driving with a blood alcohol content above a certain level or while under the influence of alcohol or any drug or combination of alcohol and any drug or by refusing to take a chemical test that complies with the requirements of section 41-6-44.10.

History: C 1953, 41-2-19.5, enacted by L 1983, ch 99, § 5

Title of Act.

An act relating to driving while intoxicated, establishing standards relating to, penalties for, and procedures to deal with, driving while intoxicated, repealing the section which formerly set the absolute minimum blood-alcohol content required to con-

vict for driving while intoxicated, and providing an effective date

This act amends sections 41-2-2, 41-2-20, and 41-2-28, Utah Code Annotated 1953, section 41-2-13, Utah Code Annotated 1953, as last amended by chapter 129, Laws of Utah 1981, section 41-2-18, Utah Code Annotated 1953, as last amended by chapter 152, Laws of Utah 1979, section 41-2-19, Utah Code Annotated 1953, as enacted by chapter 9, Laws of Utah 1978, Second Special Session,

sections 41-2-29 and 41-2-30, Utah Code Annotated 1953, as last amended by chapter 83, Laws of Utah 1967, section 41-6-43 10, Utah Code Annotated 1953, as last amended by chapter 78, Laws of Utah 1957, section 41-6-44, Utah Code Annotated 1953, as last amended by chapter 46, Laws of Utah 1982, sections 41-6-44 3 and 41-6-44 5, Utah Code Annotated 1953, as enacted by chapter 243, Laws of Utah 1979, section 41-6-44 10, Utah Code Annotated 1953, as enacted by chapter 126, Laws of Utah 1981, section 41-22-14, Utah Code Annotated 1953, as enacted by chapter 107, Laws of Utah 1971, section 63-43-10, Utah Code Annotated 1953, as last

amended by chapter 2, Laws of Utah 1980, section 73-18-12, Utah Code Annotated 1953, as last amended by chapter 183, Laws of Utah 1977, and section 76-5-207, Utah Code Annotated 1953, as last amended by chapter 63, Laws of Utah 1981, enacts sections 41-2-19 5 and 41-2-19 6, Utah Code Annotated 1953, repeals and reenacts section 41-6-43, Utah Code Annotated 1953, as enacted by chapter 242, Laws of Utah 1979, and repeals section 41-6-44 2, Utah Code Annotated 1953, as last amended by chapter 4, Laws of Utah 1982, Second Special Session. — Laws 1983, ch. 99.

41-2-19.6. Chemical test — Grounds and procedure for officer's request — Taking license — Report to department — Procedure by department — Suspension. (1) When a peace officer has reasonable grounds to believe that a person may be violating or has violated section 41-6-44 the peace officer may, in connection with his arrest of the person, request the person to submit to a chemical test to be administered in compliance with the standards set forth in section 41-6-44.10.

(2) The peace officer shall advise a person prior to the person's submission to a chemical test that results indicating .08% or more by weight of alcohol in the blood shall, and the existence of a blood alcohol content sufficient to render the person incapable of safely driving a vehicle can, result in suspension or revocation of the person's license or privilege to operate a motor vehicle.

(3) If the person submits to that chemical test and the results indicate a blood alcohol content of .08% or more, or if the officer makes a determination, based on reasonable grounds to believe that the determination is correct, that the person is otherwise in violation of section 41-6-44, the officer directing administration of the test or making the determination shall serve on the person, on behalf of the department, immediate notice of the department's intention to suspend the person's privilege or license to drive. If the officer serves that immediate notice on behalf of the department he shall take the Utah driver license or certificate or permit, if any, of the driver, issue a temporary license effective for only 30 days, and supply to the driver, on a form to be approved by the department, basic information regarding how to obtain a prompt hearing before the department. A citation issued by the officer may, if approved as to form by the department, serve also as the temporary license.

(4) The peace officer serving the notice shall send to the department within five days after the date of arrest and service of the notice the person's license along with a copy of the citation issued regarding the offense, and a sworn report indicating the chemical test results, if any, and any other basis for the officer's determination that the person has violated section 41-6-44, and the officer's belief regarding the person's violation of section 41-6-44. Each such report shall be on a form approved by the department and shall be endorsed by the police chief or his equivalent or by a person authorized by him, other than the officer serving the notice.

(5) Upon written request of a person who has been issued a 30-day license, the department shall grant to the person an opportunity to be heard within 30 days after the date of arrest and issuance of the 30-day license, but the request must be made within 10 days of the date of the arrest and issuance of the 30-day license. A hearing, if held, shall be before the department in the county in which the arrest occurred, unless the department and the person agree that the hearing may be held in some other county. The hearing shall be documented and its scope shall cover the issues of whether a peace officer had reasonable grounds to believe the person

to have been operating a motor vehicle in violation of section 41-6-44, whether the person refused to submit to the test, and the test results, if any. In connection with a hearing the department or its duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers. One or more members of the department may conduct the hearing, and any decision made after a hearing before any number of the members of the department shall be as valid as if made after a hearing before the full membership of the department. After the hearing, the department shall order, either that the person's license or privilege to drive be suspended or that it not be suspended. A first suspension, whether ordered or not challenged under this subsection, shall be for a period of 90 days, beginning on the 31st day after the date of the arrest. A second or subsequent suspension under this subsection shall be for a period of 120 days, beginning on the 31st day after the date of arrest. The department shall assess against a person, in addition to any fee imposed under subsection 41-2-8(7), a fee of \$25, which must be paid before the person's driving privilege is reinstated, to cover administrative costs, and which fee shall be cancelled if the person obtains an unappealed department-hearing or court decision that the suspension was not proper. A person whose license has been suspended by the department under this subsection may file a petition within 30 days after the suspension for a hearing in the matter which, if held, shall be governed by the provisions of section 41-2-20.

History: C 1953, 41-2-19 6, enacted by L. 1983, ch 99, § 6

41-2-20. Judicial review of license cancellation, revocation or suspension — **Scope of review.** Any person denied a license or whose license has been canceled, suspended or revoked by the department except where such cancellation or revocation is mandatory under the provisions of this act unless the suspension occurred pursuant to section 41-2-19 6 shall have the right to file a petition within thirty days thereafter for a hearing in the matter in a court of record in the county wherein such person shall reside and such court is hereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon ten days' written notice to the department; and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a license or is subject to cancellation, suspension or revocation of license under the provisions of this act. 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.

History: L 1933, ch 45, § 20, 1935, ch 47, § 2, C 1943, 57-4-23, L 1983, ch 99, § 7

41-2-21. New license after revocation. (1) Any person whose license has been revoked under this act shall not be entitled to apply for or receive any new license until the expiration of one year from the date such former license was revoked or longer as provided in sections 41-2-18 and 41-2-19. Licenses which have been revoked may not be renewed, but application for a new license must be filed as provided in section 41-2-8, and a license so issued shall be subject to all of the provisions of an original license. The department shall not grant the license until an investigation of the character, abilities and habits of the driver has been made to indicate whether it will be safe to again grant him the privilege of using the highways.

(2) Any resident or nonresident whose operator's ~~or chauffeur's~~ license to operate a motor vehicle in this state has been suspended or revoked as provided in this

(h) (8) A peace officer may, without a warrant, arrest a person for a violation of this section when ~~such~~ the violation is coupled with an accident or collision in which ~~such~~ the person is involved and when ~~such~~ the violation has, in fact, been committed, although not in his presence, if the officer has reasonable cause to believe that the violation was committed by ~~such~~ the person.

(i) (9) The department of public safety shall ~~revoke~~ suspend for a period of 90 days the operator's or chauffeur's license of any person convicted for the first time under subsection (1) of this section, and shall revoke for one year the license of any person otherwise convicted under this section, except that the department may subtract from any suspension period the number of days for which a license was previously suspended under section 41-2-19.6 if the previous suspension was based on the same occurrence which the record of conviction is based upon.

History: L. 1941, ch. 52, § 34; C. 1943, 57-7-111; L. 1949, ch. 65, § 1; 1957, ch. 75, § 1; 1967, ch. 88, § 2; 1969, ch. 107, § 2; 1977, ch. 268, § 3; 1979, ch. 243, § 1; 1981, ch. 63, § 2; 1982, ch. 46, § 1; 1983, ch. 99, § 13; 1983, ch. 103, § 1; 1983, ch. 183, § 33.

Compiler's Notes.

Laws 1983, ch. 183, discontinuing separate classification for chauffeur's license, is effective January 1, 1984.

The 1982 amendment increased the minimum term in subsec. (d) from 30 to 60 days; deleted "not less than \$100 nor more than" before "\$299" in subsec. (d); inserted subsec. (e); redesignated former subsec. (e) as (f); increased the period of work from not less than two nor more than 10 days to not less

than 10 nor more than 30 days in the first sentence of subsec. (f); added "or to obtain treatment at an alcohol rehabilitation facility" to the first sentence of subsec. (f); increased the periods in the second sentence of subsec. (f) from not less than 10 nor more than 30 days to not less than 30 nor more than 90 days; added "plus obtain treatment at an alcohol rehabilitation facility" to the second sentence of subsec. (f); inserted subsec. (g); redesignated former subssecs. (f) and (g) as (h) and (i).

Effective Date.

Section 2 of Laws 1982, ch. 46 provided that the act should take effect upon approval. Approved February 19, 1982.

41-6-44.2. Repealed.

Repeal.

Section 41-6-44.2 (L. 1973, ch. 80, § 2; 1982 (2nd S.S.), ch. 4, § 2), relating to driving with

blood alcohol content of .10% or higher, was repealed by Laws 1983, ch. 99, § 21.

41-6-44.3. Standards for chemical breath analysis — Evidence. (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 ~~statutorily prohibited~~, documents offered as memoranda or records of acts, conditions or events to prove that the analysis was made and ~~accuracy of the instrument were made pursuant to used was accurate, according 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~~ conditions of subsection (2) have been met, there ~~shall be~~ is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

History: C. 1953, 41-6-44.3, enacted by L. 1979, ch. 243, § 2; L. 1983, ch. 99, § 14.

41-6-44.5. Admissibility of chemical test results in actions for driving under the influence or with a prohibited blood alcohol content — Weight. (1) 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 with a blood alcohol content of .10% or greater statutorily prohibited, the results of a chemical test or tests as authorized in section 41-6-44.10 shall be admissible as evidence.

(2) If the chemical test was taken within two hours of the alleged driving or actual physical control, the blood alcohol level of the person at the time of the alleged driving or actual physical control shall be presumed to be not less than the level of the alcohol determined to be in the blood by the chemical test.

(3) If the chemical test was taken more than two hours after the alleged driving or actual physical control, the test result shall be admissible as evidence of the person's blood alcohol level at the time of the alleged driving or actual physical control, but the trier of fact shall determine what weight shall be given to the result of the test.

(4) The foregoing provisions of this section shall not be construed as limiting the consideration or application by the trier of fact of the presumptions set forth in section 41-6-44, nor shall they prevent a court from receiving otherwise admissible evidence as to a defendant's blood alcohol level at the time of the alleged driving or actual physical control.

History: C 1953, 41-6-44 5, enacted by L. 1979, ch 243, § 3, L 1983, ch. 99, § 15

41-6-44.8. Municipal attorneys authorized to prosecute for driving while license suspended or revoked. Alleged violations of section 41-2-28, which consist of the person driving while his operator's or chauffeur's license is suspended or revoked for a violation of section 41-6-44, a local ordinance which complies with the requirements of section 41-6-43, section 41-6-44.10, section 76-5-207, or a criminal prohibition that the person was charged with violating as a result of a plea bargain after having been originally charged with violating one of more of those sections or ordinances, may be prosecuted by attorneys of cities and towns as well as by prosecutors who are empowered elsewhere in this code to prosecute those alleged violations.

History: C 1953, 41-6-44 8, enacted by L. 1983, ch 102, § 1

attorneys of cities and towns to prosecute those alleged violations

Title of Act.

This act enacts section 41-6-44 8, Utah Code Annotated 1953 — Laws 1983, ch 102

An act relating to prosecution of alleged violations of section 41-2-28, empowering city

41-6-44.10. Implied consent to chemical tests for alcohol or drug — Refusal to allow — Warning, report, revocation of license — Court action on revocation — Person incapable of refusal — Results of test available — Who may give test — Evidence. ~~(a)~~ (1) Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was driving or in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug as detailed in section 41-6-44, provided that such so long as the test is or tests are administered at the direction of a peace officer having grounds to believe such that person to have been driving or in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and

any drug as detailed in section 41-6-44. A peace officer shall determine which of the aforesaid tests shall be administered.

No person, who has been requested pursuant to under this section to submit to a chemical test or tests of his breath, blood, or urine, shall have the right to select the test or tests to be administered. The failure or inability of a peace officer to arrange for any specific test shall is not be a defense with regard to taking a test requested by a peace officer nor and it shall not be a defense in any criminal, civil or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.

(b) (2) If ~~such~~ the person has been placed under arrest and has thereafter been requested by a peace officer to submit to any one or more of the chemical tests provided for in subsection (a) (1) of this section and refuses to submit to ~~such~~ the chemical test or tests, ~~such~~ the person shall be warned by a peace officer requesting the test or tests that a refusal to submit to the test or tests can result in revocation of his license to operate a motor vehicle. Following this warning, unless ~~such~~ the person immediately requests the chemical test or tests as offered by a peace officer be administered, no test shall be given and a peace officer shall submit a sworn report, within five days after the date of the arrest, that he had grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited or while under the influence of alcohol or any drug or combination of alcohol and any drug as detailed in section 41-6-44 and that the person had refused to submit to a chemical test or tests as set forth in subsection (a) (1) of this section. Within 20 days after receiving a sworn report from a peace officer to the effect that ~~such~~ the person has refused a chemical test or tests the department shall notify ~~such~~ the person of a hearing before the department. If at said that hearing the department determines that the person was granted the right to submit to a chemical test or tests and refused to submit to ~~such~~ the test or tests, or if ~~such~~ the person fails to appear before the department as required in the notice, the department shall revoke for one year his license or permit to drive. The department shall also assess against the person, in addition to any fee imposed under subsection 41-2-8 (7), a fee of \$25, which must be paid before the person's driving privilege is reinstated, to cover administrative costs, and which fee shall be cancelled if the person obtains an unappealed court decision following a proceeding allowed under this subsection that the revocation was not proper. Any person whose license has been revoked by the department under the provisions of this section shall have the right to file a petition within 30 days thereafter for a hearing in the matter in the district court in the county in which ~~such~~ the person shall reside resides. ~~Such~~ The court is hereby vested with jurisdiction, and it shall be its duty to set the matter for trial de novo upon 10-days' written notice to the department and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner's license is subject to revocation under the provisions of this act chapter.

(c) (3) Any person who is dead, unconscious, or in any other condition rendering him incapable of refusal to submit to any such chemical test or tests shall be deemed not to have withdrawn the consent provided for in subsection (a) (1) of this section, and the test or tests may be administered whether such person has been arrested or not.

(d) (4) Upon the request of the person who was tested, the results of such test or tests shall be made available to him.

(e) (5) Only a physician, registered nurse, practical nurse or person authorized under subsection 26-1-30 (19), acting at the request of a peace officer can withdraw blood for the purpose of determining the alcoholic or drug content therein. This limitation shall not apply to the taking of a urine or breath specimen. Any physician, registered nurse, practical nurse or person authorized under subsection 26-1-30 (19) who, at the direction of a peace officer, draws a sample of blood from

any person whom a peace officer has reason to believe is driving in violation of this chapter, or hospital or medical facility at which such sample is drawn, shall be immune from any civil or criminal liability arising therefrom, provided such test is administered according to standard medical practice.

(f) (6) The person to be tested may, at his own expense, have a physician of his own choosing administer a chemical test in addition to the test or tests administered at the direction of a peace officer. The failure or inability to obtain such additional test shall not affect admissibility of the results of the test or tests taken at the direction of a peace officer, nor preclude nor delay the test or tests to be taken at the direction of a peace officer. Such additional test shall be subsequent to the test or tests administered at the direction of a peace officer.

(g) (7) For the purpose of determining whether to submit to a chemical test or tests, the person to be tested shall not have the right to consult an attorney nor shall such a person be permitted to have an attorney, physician or other person present as a condition for the taking of any test.

(h) (8) If a person under arrest refuses to submit to a chemical test or tests under the provisions of this section, evidence of refusal shall be admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while under the influence of alcohol or any drug or combination of alcohol and any drug.

History: C 1953, 41-6-44 10, enacted by L 1981, ch 126, § 43, L 1983, ch 99, § 16.

Actual physical control.

To establish actual physical control of a vehicle for purposes of this section, it is unnecessary to show actual intent to control the vehicle, intent to control a vehicle may be inferred from the performance of those acts which constitute actual physical control. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

There was an adequate showing that motorist was in actual physical control of a motor vehicle where motorist occupied the driver's position behind the steering wheel of a motor vehicle with possession of the ignition key and with apparent ability to start and move the vehicle, fact that vehicle was blocked by a fence and another vehicle and could be moved only a few feet did not preclude a finding of actual physical control. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

The "actual physical control" language of this section should be read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive

occupants. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

Proceeding to revoke license for failure to submit to test.

Driver's license revocation proceeding for failure to submit to a requested chemical test requires proof only by a preponderance of the evidence. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

At a proceeding to revoke a driver's license for failure to submit to a requested chemical test, department of public safety has the burden to show arrested person was driving or in actual physical control of a motor vehicle in addition to showing that the arresting officer had grounds to believe that the arrested person was under the influence, the same evidentiary burden must be met in a trial de novo in the district court. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

Law Reviews.

Hansen v. Owens — Expansion of the Privilege against Self-Incrimination to Unknown Limits, 1981 Utah L Rev 447.

41-6-44.30. Seizure and impoundment of vehicles by category I peace officers. The legislature finds that it is contrary to the safety of the public to leave vehicles unattended on public roads.

(1) If a category I peace officer arrests or cites the driver of a vehicle for violating sections 41-6-43, 41-6-44, 41-6-44.2, or 41-6-44.10, the officer shall seize and impound the vehicle.

(2) Any such officer who impounds a vehicle under this section shall remove, or cause the vehicle to be removed, to the nearest accessible state impound yard that meets the standards set by rule by the state department of motor vehicles,