

1992

Judy A. Cordova v. G. Barton Blackstock, Bureau Chief, Records Bureau, Drivers License Division : Brief of Appellee

Utah Court of Appeals

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BRIEF

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920370

IN THE UTAH COURT OF APPEALS

JUDY A. CORDOVA,	*	
	*	BRIEF OF THE APPELLEE
Plaintiff-	*	
Appellee,	*	
	*	
v.	*	Case No. 920370-CA
	*	
G. BARTON BLACKSTOCK, Bureau	*	
Chief, Records Bureau, Drivers	*	
License Division,	*	
	*	Argument Priority No. 16
Defendant-	*	
Appellant.	*	

APPEAL FROM THE FINAL JUDGMENT OF THE THIRD
DISTRICT, SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE J. DENNIS FREDERICK, PRESIDING.

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COURT OF APPEALS

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G. BARTON BLACKSTOCK, Bureau	*	
Chief, Records Bureau, Drivers	*	
License Division,	*	
	*	Argument Priority No. 16
Defendant-	*	
Appellant.	*	

BRIEF OF THE APPELLEE

JURISDICTION

Jurisdiction is in the Court of Appeals based upon Utah Code Ann. Sec. 78-2A-3(2)(a) (1992).

ISSUES PRESENTED

A. Does the failure of an administrative agency to hold an informal adjudicative proceeding as required by statute deny a Petitioner's right to due process, and does it obviate the need for a trial de novo?

B. If the district court is required to conduct a trial de novo, is such review "on the record," and therefore subject to the "residuum rule"?

C. Is legally incompetent evidence rendered competent (for purposes of the residuum rule) by a Petitioner's failure to object to its admissibility, where no one appears on behalf of the State to offer such into evidence, and where no foundation for its introduction has been laid?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

A copy of the determinative statute, Utah Code Ann. Sec. 63-46b-15 (Supp. 1992) is attached as Addendum E.

STATEMENT OF THE CASE

This appeal is from the final judgment and decree of the Third Judicial District, Salt Lake County, The Honorable J. Dennis Frederick presiding.

Appellee Judy A. Cordova's driver's license was suspended for a period of ninety days following a proceeding before the Department of Public Safety, Drivers License Division (the "Department"), at which neither the appellee, the arresting officer, nor anyone else appeared.

Upon petition to the district court, Cordova's motion to vacate and set aside the administrative order suspending her license was granted. Final judgment was entered on May 15, 1992, and the Notice of Appeal was filed June 5, 1992.

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

Appellee does not dispute the Statement of Facts in the "Brief of the Appellant" (at pages 4-6), and herein incorporates the statement of facts by reference.

SUMMARY OF ARGUMENT

POINT I

Utah Code Ann. Sec 41-2-130(6)(a) (Supp. 1992) requires the Department to hold an administrative hearing at the request of an individual arrested for driving under the influence of drugs and/or alcohol, prior to the suspension of his or her driver's license. The failure of the Department to hold the hearing as Cordova requested, was a denial of her right to due process. Therefore, the district court's decision to vacate and set aside the administrative order should be upheld.

POINT II

Judicial review of the Department's informal adjudicative proceedings is by "on the record" trial de novo. Accordingly, the district court is entitled to set aside the action of the agency where there is not "a modicum of legally competent evidence" to satisfy the requirements of the "residuum rule."

ARGUMENT

I. DEPARTMENT'S FAILURE TO CONDUCT A HEARING DENIED CORDOVA'S RIGHT TO DUE PROCESS, AND WAS ADEQUATE GROUNDS FOR THE DISTRICT COURT'S ORDER VACATING AND SETTING ASIDE THE ADMINISTRATIVE ORDER OF THE DEPARTMENT.

A. UTAH CODE ANN. SEC. 41-2-130 REQUIRES THAT A HEARING BE HELD, IF REQUESTED, PRIOR TO THE SUSPENSION OF AN INDIVIDUAL'S DRIVER'S LICENSE.

Cordova was not provided with the administrative hearing which she requested pursuant to Utah Code Ann. Sec. 41-2-130(6)(a) (Supp. 1992). The statute entitles a person arrested for driving under the influence of alcohol (DUI), upon request, to an administrative hearing before the Department, prior to the suspension of his or her license. (The statute is attached as Addendum A.) The purpose of the statute is undoubtedly to ensure that an individual's right to operate a motor vehicle is not denied without adequate due process protection.

Although a time was set for the hearing, neither Cordova, her attorney, the arresting officer, the operator of the breathalyzer, nor anyone else appeared before the Department. (Findings of Fact and Conclusions of Law ("Findings") at 2; Record ("R") at 45, attached as Addendum B.) The hearing officer simply reviewed the information contained in the Department's file, and made a determination that there was a preponderance of evidence to support the suspension of Cordova's license. Department Of Public Safety, Driver License Division, Findings of Proceedings on Hearings for Administrative Suspension at 4; R. at 42 (Plaintiff's Exhibit 1, "Transcript").

The action taken by the Department did not provide the "hearing" guaranteed under Utah Code Ann. Sec. 41-2-130.

The term "hearing" implies that at least one party be heard.

A hearing is a:

Proceeding of relative formality (though generally less formal than a trial), generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and parties proceeded against have right to be heard, and is much the same as a trial and may terminate a final order.

Black's Law Dictionary 367 (5th Edition). If no parties are present, no testimony can be taken, no foundation for competent evidence laid, and generally insufficient grounds on which the hearing officer can base a decision. Had the arresting officer appeared, the Department could have conducted a "hearing." However, the failure of both parties to appear precluded the Department from holding any kind of meaningful hearing to which Cordova was entitled, even in her absence.

The Commission as an administrative body may be justified in taking the position that it is not necessarily bound to adhere to the technical rules of evidence and procedure as applied in the courts. Nevertheless, wherein it is performing a duty of a judicial nature in which the findings of facts and the adjudication of important rights is involved, care should be taken that the procedures should comport with standards of fairness and due process.

Club Stanyon Street v. Utah Liquor Control Commission, 615 P.2d 435, 436 (Utah 1980).

The statute controlling the Department's DUI "refusal" hearings lends support to the contention that the Department

did not hold a "per se" hearing as required.¹ With "refusal" cases, the Department may suspend a driver's license automatically upon a failure of the Petitioner to appear on the date set for the hearing.

(c) If a hearing is requested by the person and conducted by the division, and the division determines that the person was requested to submit to a chemical test or tests and refused to submit to the test or tests, or if the person fails to appear before the division as required in the notice, the division shall revoke his license or permit....

Utah Code Ann. Sec. 41-6-44.10(2)(f) (Supp. 1992) (emphasis added). No such provision is contained in the "per se" statute. Were it the intent of the Legislature to permit the Department to default the Petitioner and forego administrative hearings where the "per se" Petitioner fails to appear, it would have so indicated by including similar language in the "per se" statute.

The District Court recognized that "a hearing and findings supported by a modicum of competent legal evidence is an appropriate and necessary safeguard to protect Petitioner and persons similarly situated from having their driving privilege taken from them without due process of law." (R. at 46.) Having determined that Cordova was not accorded the due process rights to which she was

¹ "Refusal" hearings pertain to situations where the Petitioner fails to submit to chemical tests as required, and are governed by Utah Code Ann. Sec. 41-6-44.10 (Supp. 1992). (Attached as Addendum C.) "Per se" hearings are held subject to the requirements of Sec. 41-2-130 in situations where the petitioner does submit to the required chemical tests.

entitled, the court correctly vacated and set aside the administrative action. This comports with the scheme of the "per se" statute, Utah Code Ann. Sec. 41-2-130, in its recognition that the division has no authority to suspend except after a "hearing." "(g) After the hearing, the division shall order whether the person's license to operate a motor vehicle be suspended or not." Utah Code Ann. Sec. 41-2-130(6)(g).

B. JUDICIAL REVIEW OF THE DEPARTMENT'S INFORMAL ADJUDICATORY PROCEEDINGS BY TRIAL DE NOVO DOES NOT RELIEVE THE DEPARTMENT OF ITS OBLIGATION TO PROVIDE CORDOVA WITH AN ADMINISTRATIVE HEARING.

Appellant believes that Cordova's statutory right to a trial de novo before the district court relieves the Department of its obligation to conduct a hearing. That notion, however, is contrary to the administrative hearing concept, and compromises the entire administrative process.

The purpose of judicial review of administrative decision making is to ensure that agency determinations are not made arbitrarily, and that minimum due process standards are maintained. 2 Am.Jur.2d Administrative Law Sec. 555 (1962). When an agency fails to hold a hearing as required by statute, that agency has clearly failed to meet that minimum standard. Although a trial de novo review of an administrative hearing provides the Petitioner with an additional opportunity to present his or her case, it in no manner relieves the administrative agency of its obligation to conduct a hearing.

One purpose of the administrative hearing is to allow those with experience in a particular field to make a decision based on their specialized knowledge. That purpose is contravened when an agency can avoid responsibility by relying on the reviewing court to make decisions on its behalf. Judicial review should provide a "check" on the administrative system, not take the place of the system. Accordingly, the availability of judicial review by trial de novo cannot cure the procedural defect of the complete lack of a hearing at the administrative level. To hold that a trial de novo under such circumstances would satisfy the Petitioner's right to due process, would undermine the administrative process, and render informal adjudicatory proceedings superfluous. The district court has some responsibility to vouchsafe this notion, otherwise Utah Code Ann. Sec. 63-46b-17, attached as Addendum D, is meaningless. This statute clearly provides that in granting relief in either a formal or informal setting, it may, inter alia, set aside or modify agency action or otherwise order other agency action, including further agency proceedings.

C. THE DISTRICT COURT IS NOT REQUIRED TO HOLD A TRIAL DE NOVO WHERE ADEQUATE GROUNDS EXIST TO SET ASIDE THE DEPARTMENT'S ORDER WITHOUT THE NEED FOR A COMPLETE TRIAL.

Had the Department accorded Cordova the hearing to which she was entitled, the district court could have proceeded with a review by trial de novo. However, the lack of an administrative hearing precluded a trial de novo as there was no informal adjudicatory proceeding for the court

to review. This is particularly relevant where, as here, judicial review is by trial de novo "on the record."²

In University of Utah v. Industrial Commission, 736 P.2d 630 (Utah 1987), the Utah Supreme Court had an opportunity to comment on the adequacy of a trial de novo review of a decision of the Industrial Commission. The court ruled that in the context of an appeal of an antidiscrimination case, the district court could affirm the findings of the Industrial Commission, or make its own findings. The reviewing court "was not bound by the record, but may supplement the record, create an entirely new record, or elect to do a combination of these." Id. at 634. See also, Salt Lake City Corp. v. Confer, 674 P.2d 632 (Utah 1983).

The same rationale supports the district court's decision in regard to Cordova. The court reviewed the record, and made an independent determination that the procedures accorded Cordova and the evidence presented at the administrative hearing were insufficient to justify the suspension of her license. Accordingly, the court vacated and set aside the administrative order. The decision comports with the Utah Administrative Procedures Act (UAPA)³ statement that in granting relief from an agency

² The implications of "on the record" trial de novo are discussed in greater detail in "Point II", infra.

³ Utah Code Ann. Sec. 63-46-1 to -22 (1989).

adjudicatory proceeding, the district court may "set aside or modify agency action." Utah Code Ann. Sec. 63-46b-17(b)(iv) (1989).

Having decided thusly, it would have been a waste of judicial resources to hold a trial de novo where facts existed which enabled the district court to reach its conclusion that the agency action was improper. As stated in University of Utah v. Industrial Commission:

A trial judge is accorded broad discretion in determining how a trial shall proceed in his or her courtroom. If a trial can be held with expedience, i.e., if the days required for trial can be minimized without any compromise of the rights of the parties, certainly this is beneficial to the interests of judicial economy and resolution of disputes. The district court's procedure here, although falling somewhere between a new trial and a review of the record, was proper.

Id. at 633. As the above passage indicates, the district court is not required to hold a complete judicial review by trial de novo where it can reach a decision based on the information at its disposal.

II. ASSUMING THAT THE DISTRICT COURT IS REQUIRED TO CONDUCT JUDICIAL REVIEW BY TRIAL DE NOVO, THE DECISION TO VACATE AND SET ASIDE THE ADMINISTRATIVE ORDER SHOULD STILL BE UPHELD.

A. TRIAL DE NOVO REVIEW OF DEPARTMENT'S "PER SE" LICENSE SUSPENSION HEARINGS IS "ON THE RECORD."

All Department of Public Safety hearings are, by designation, informal adjudicative proceedings. Utah Admin. R. 708-17-6 (1992). Therefore, judicial review of the Department's hearings is governed by the UAPA as follows: "The district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from

informal adjudicative proceedings. Utah Code Ann. Sec. 63-46b-15(1)(a) (Supp. 1992).

The Utah Supreme Court has stated that the term "trial de novo" has two different meanings: "(1) A complete retrial upon new evidence; (2) a trial upon the record made before the lower tribunal." Denver & R.G.W.R. Co. v. Public Service Commission, 98 Utah 431, 436, 100 P.2d 552, 554 (1940). The form of trial de novo which is used in a particular instance is "dictated by the wording and context of the statute in which it appears and by the nature of the administrative body, decision and procedure being reviewed." Pledger v. Cox, 626 P.2d 415, 416-17 (Utah 1981).

The Pledger test, as applied to "per se" drivers license suspension hearings, makes it clear that judicial review of such actions is "on the record" within the second meaning of "trial de novo."

In Denver & R.G.W.R. Co., the Court placed particular emphasis on the wording of the statute at issue which provided for "plenary review" in the district court as a trial de novo. 98 Utah at 436, 100 P.2d at 554. The Utah Supreme Court interpreted that statute as requiring a trial de novo "on the record."

To review an action is to study or examine it again. Thus, "trial de novo" as used here must have a meaning consistent with the continued existence of that which is to be again examined or studied. If in these cases, the first meaning were applied to the use of the term "trial de novo" then one could not consistently speak of it as a review, as the Commission's action would no longer exist to be re-examined or re-studied.

Id. at 436, 100 P.2d at 555.

The wording and context of the UAPA supports a similar conclusion. As noted, the UAPA requires the district court to "review by trial de novo" all license suspension hearings. As in Denver & R.G.W.R. Co., the term "review" presupposes the continued existence of the Department's action, and therefore review should be "on the record."

On the record review of "per se" license suspension hearings also accords with the second prong of the Pledger test concerning "the nature of the administrative body, the decision and procedure being reviewed." Although Pledger held that, in the context of driver's license suspension hearings the term trial de novo should be "a complete retrial upon new evidence" as opposed to "on the record," that language is inapposite here inasmuch as Pledger involved a "refusal" hearing (as opposed to a "per se" hearing) decided prior to the enactment of the UAPA. 626 P.2d 415

Appellant incorrectly cites Brinkerhoff v. Schwendiman, 790 P.2d 587 (Utah App. 1990), as support for its argument that trial de novo in Cordova's situation is within the first Pledger definition. Brinkerhoff held that the Petitioner "was able to present his entire case before a new tribunal for an independent decision." Id. at 590. This reasoning, however, is more consistent with "on the record" trial de novo. Under either definition, the court has the discretion to hear new evidence from the parties. The primary distinction between the two forms of trial de novo

is that in an "on the record" review, the court may use the administrative record to assist in its determination.

The Administrative Regulations of the Department are consistent with an "on the record" trial de novo.

Record. The presiding officer may choose to make a verbatim recording or record the testimony, information and documents on forms provided by the division with "quotations of the verbatim testimony" sufficient for court review.

Utah Admin.R. 708-17-8(8) (1992). Furthermore, the presiding officer is required to make a brief written summary of the hearing containing material facts, his or her recommendation for agency action, findings of fact and conclusions, and reasons for the recommendation, "in any form calculated to facilitate the proceeding and review."

Utah Admin.R. 708-17-9(6) (1992). The fact that both of the cited regulations anticipate that the administrative record will be utilized on review, is evidence that the second prong of the Pledger test--the nature of the administrative body, decision and procedure being reviewed--also indicates that trial de novo review of the Department's informal adjudicatory proceedings should be "on the record."

Again a review of Utah Code Ann. Sec. 63-46b-17 (Addendum D) is enlightening, as it demonstrates the broad discretion which the district court has to fashion a remedy. This would not be so if the district court were left with absolutely no vestige of authority to inquire into agency proceedings and take action based solely thereon when appropriate and necessary.

B. SINCE DISTRICT COURT REVIEW OF "PER SE" LICENSE
SUSPENSION HEARINGS IS "ON THE RECORD," THE "RESIDUUM
RULE" IS APPLICABLE TO JUDICIAL REVIEW.

As discussed, trial de novo review of the Department's informal adjudicatory proceedings is "on the record". Accordingly, the district court may determine whether a modicum of legal evidence existed at the administrative hearing to satisfy the "residuum rule."

The residuum rule holds that, "Although administrative agencies may rely upon hearsay evidence, a residuum of competent legal evidence must support the agencies' findings." Kehl v. Schwendiman, 735 P.2d 413, 415 (Utah App. 1987). The agencies' findings, however, "cannot be based exclusively on hearsay evidence." Yacht Club v. Utah Liquor Control Comm'n, 681 P.2d 1224, 1226 (Utah 1984). While hearsay evidence may become legally competent, it first must be properly admitted. Industrial Power v. Industrial Commission, 187 Utah Adv. Rep. 29, 31 (Utah 1992). Such was not the case here.

Similar to Kehl, Cordova's arresting officer did not testify, nor did anyone else. Accordingly, all of the evidence considered by the hearing officer was inadmissible hearsay. While the evidence might have been admissible had a proper foundation been laid, the absence of any testimony to that effect rendered all of the evidence inherently unreliable.

In Kehl, the lack of foundational testimony as to whether the arresting officer's DUI report was prepared in

the regular course of business contemporaneously with the arrest of Kehl, led the appellate court to rule that the report could not be admitted as a business record exception to the hearsay rule. 735 P.2d at 417 (citing Utah R.Evid. 803(6)). Similarly, the absence of testimony as to the qualifications of the officer to administer the chemical test rendered the results of that test inadmissible under the public records exception. Id. (citing Utah R.Evid. 803(8)(B)).

As in Kehl, the fact that a proper foundation was not ascertained in regard to the evidence considered by Cordova's hearing officer, rendered the evidence inherently unreliable. Therefore, there was not "a residuum of competent legal evidence to support the agency's finding," (Findings at 3; R. at 46.), and the district court's ruling to that effect should be upheld.

C. CORDOVA'S FAILURE TO OBJECT TO INCOMPETENT EVIDENCE AT THE DEPARTMENT "HEARING" DOES NOT RENDER THE EVIDENCE LEGALLY COMPETENT AND SUFFICIENT TO SATISFY THE REQUIREMENTS OF THE RESIDUUM RULE.

Appellant argues that Cordova's failure to object to the evidence at the administrative proceeding rendered the evidence legally competent for purposes of the "residuum rule." That argument is without merit. The "residuum rule" is not a rule of evidence. It is a substantive legal requirement, which goes to the heart of the basis for the administrative order. To permit the Department to suspend Cordova's driver's license based on such evidence would be to allow form to triumph over substance. The import of the

residuum rule is more fundamental than the mere question of waiver of otherwise incompetent evidence.

The district court concluded that, "[Appellant's] argument is not compelling. Though it may have been had the arresting officer or other witnesses for the State appeared and testified." (Findings at 3; R. at 46.) Had such witnesses appeared, testimony could have been elicited as to the foundation for the evidence, and if satisfactory, the evidence could properly be admitted. Absent such testimony, the evidence is inherently unreliable, and therefore not legally competent regardless of whether or not Cordova objects. Kehl, 735 P.2d at 417.

CONCLUSION

The failure of the Department to hold an administrative hearing denied Cordova her right to due process prior to the suspension of her driver's license. The district court was correct in holding that Cordova was prejudiced thereby, and its judgment vacating and setting aside the administrative order should be affirmed.

If this court determines that the district court should have held a trial de novo, then judicial review is "on the record," and the "residuum rule" is applicable. Accordingly, the absence of a modicum of legally competent evidence provides sufficient grounds for the reversal of the administrative order. As neither side was prejudiced by the district court's failure to conduct a trial de novo, the judgment below should be affirmed.

RESPECTFULLY SUBMITTED this _____ day of October, 1992.

Herschel Bullen
Attorney for Plaintiff-
Appellee

CERTIFICATE OF MAILING

I hereby certify that on the ____ day of October, 1992, I caused to be served a true and accurate copy of the foregoing Brief of the Appellee by placing said copy in the United States mail, postage prepaid, addressed as follows:

Thom D. Roberts
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ADDENDUM A

UTAH CODE ANN. SEC. 41-2-130 (Supp. 1992)

the name of the chapter reference in Subsection (12)(a)

The 1991 amendment by ch 190, effective October 1, 1991 inserted 'suspension or' in Subsection (1)(a), subdivided Subsection (5)(a),

changed the style of the chapter references throughout, and made other stylistic changes

This section is set out as reconciled by the Office of Legislative Research and General Counsel

**41-2-130. Chemical test for driving under the influence —
Temporary license — Hearing and decision —
Suspension and fee — Judicial review.**

- (1) (a) 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 arresting the person, request that the person submit to a chemical test or tests to be administered in compliance with the standards under Section 41-6-44.10.
- (b) In this section, a reference to Section 41-6-44 includes any similar local ordinance adopted in compliance with Subsection 41-6-43(1)
- (2) The peace officer shall advise a person prior to the person's submission to a chemical test that a test result indicating a violation of Section 41-6-44 shall, and the existence of a blood alcohol content sufficient to render the person incapable of safely driving a vehicle may, result in suspension or revocation of the person's license to operate a motor vehicle
- (3) If the person submits to a chemical test and the test results indicate a blood or breath alcohol content in violation of Section 41-6-44, or if the officer makes a determination, based on reasonable grounds, 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 division, immediate notice of the division's intention to suspend the person's license to operate a vehicle
- (4) (a) When the officer serves immediate notice on behalf of the division he shall:
 - (i) take the Utah license certificate or permit, if any, of the operator;
 - (ii) issue a temporary license certificate effective for only 29 days, and
 - (iii) supply to the operator, on a form to be approved by the division, basic information regarding how to obtain a prompt hearing before the division
- (b) A citation issued by the officer may, if approved as to form by the division, serve also as the temporary license certificate
- (5) The peace officer serving the notice shall send to the division within five days after the date of arrest and service of the notice:
 - (a) the person's license certificate,
 - (b) a copy of the citation issued for the offense;
 - (c) a signed report on a form approved by the division indicating the chemical test results, if any, and
 - (d) any other basis for the officer's determination that the person has violated Section 41-6-44
- (6) (a) Upon written request, the division shall grant to the person an opportunity to be heard within 29 days after the date of arrest. The request shall be made within ten days of the date of the arrest

(b) A hearing, if held, shall be before the division in the county in which the arrest occurred, unless the division and the person agree that the hearing may be held in some other county.

(c) The hearing shall be documented and shall cover the issues of:

- (i) whether a peace officer had reasonable grounds to believe the person was operating a motor vehicle in violation of Section 41-6-44;
- (ii) whether the person refused to submit to the test; and
- (iii) the test results, if any.

(d) In connection with a hearing the division or its authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers.

(e) One or more members of the division may conduct the hearing.

(f) Any decision made after a hearing before any number of the members of the division is as valid as if made after a hearing before the full membership of the division.

(g) After the hearing, the division shall order whether the person's license to operate a motor vehicle be suspended or not.

(7) (a) A first suspension, whether ordered or not challenged under this subsection, is for a period of 90 days, beginning on the 30th day after the date of the arrest.

(b) A second or subsequent suspension under this subsection is for a period of one year, beginning on the 30th day after the date of arrest.

(8) (a) The division shall assess against a person, in addition to any fee imposed under Subsection 41-2-112(15), a fee under Section 41-2-103, which shall be paid before the person's driving privilege is reinstated, to cover administrative costs. This fee shall be cancelled if the person obtains an unappealed division hearing or court decision that the suspension was not proper.

(b) A person whose license has been suspended by the division under this subsection may file a petition within 30 days after the suspension for a hearing on the matter which, if held, is governed by Section 41-2-131.

History: C. 1953, 41-2-19.6, enacted by L. 1983, ch. 99, § 6; 1987, ch. 129, § 2; renumbered by L. 1987, ch. 137, § 30; 1990, ch. 30, § 6; 1992, ch. 21, § 1.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, redesignated the former second and third sentences of Subsection (3) as present Subsection (4), former Subsection (4) as present Subsections (5)(a) to (5)(d), former Subsection (5) as present Subsection (6), the second sentence in former Subsection (5)(b) as present Subsections (6)(c)(i) to (6)(c)(iii), the former third and fourth sentences of former Subsection (5)(b) as present Subsections (6)(d) and (6)(e), former Subsection (5)(c) as present Subsections (6)(f) and (6)(g), and former Subsections (5)(d) and (5)(e) as

present Subsections (7), (8)(a), and (8)(b); substituted "Subsection 41-2-112(14)" for "Subsection 41-2-112(6)" in the first sentence in present Subsection (8)(a); and made stylistic changes.

The 1992 amendment, effective April 27, 1992, in Subsection (4) added the (a) and (b) designations, redesignating former Subsections (4)(a) to (c) as Subsections (4)(a)(i) to (iii); in Subsections (4)(a)(ii) and (6)(a) substituted "29 days" for "30 days"; subdivided Subsection (7), substituted "30th day" for "31st day" in both subsections, and substituted "one year" for "120 days" in Subsection (7)(b); and in Subsection (8)(a) substituted "41-2-112(15)" for "41-2-112(14)."

ADDENDUM B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH
---oooOooo---

JUDY A. CORDOVA,

:

Petitioner,

:

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

vs.

:

G. BARTON BLACKSTOCK, Bureau
Chief, Records Bureau, Drivers
License Division,

:

Civil No. 920901040
Judge J. Dennis Frederick

:

Respondent.

:

---oooOooo---

The above captioned matter came on before the Honorable J. Dennis Frederick on the 30th day of April, 1992, at the hour of 9:00 a.m., Herschel Bullen appearing for the Petitioner and Thom Roberts, Assistant Attorney General, appearing for the Respondent. The Petitioner having made a Motion to Vacate and Set Aside the administrative Order suspending the driving privilege of the Petitioner, based upon the exhibits received, the pleadings and record of the case and having heard argument of counsel, the Court now makes and enters the following:

FINDINGS OF FACT

1. An administrative hearing regarding the Department of Public Safety Driver's License Division's intention to suspend the Petitioner's driving privileges as a result of Petitioner's arrest

for driving under the influence of alcohol or any drug on January 24, 1992, was scheduled pursuant to Petitioner's request on or about February 19, 1992, at the hour of 9:00 a.m., at 2780 West 4700 South, West Valley City, Utah.

2. The record of the administrative suspension hearing reflects that "no one appeared for the hearing", and no witnesses testified whatsoever, not the arresting officer, the operator of the breathalyzer, the Petitioner, nor anyone else. The evidence apparently considered at the hearing was the arresting officer's D.U.I. Report form, a copy of the operational check list, a breathalyzer test result, and the Utah Department of Public Safety's "record of intoxilyzer test and affidavit" for the day January 22, 1992.

3. The Department of Public Safety issued its Order suspending the Petitioner's driving privilege.

4. The Order of the Department of Public Safety, effective 12:01, a.m., on February 23, 1992, states that,

"the basis for such action is findings of fact and conclusion by the hearing officer for the Department that a peace officer had reasonable grounds that you were operating, or were in physical control of a motor vehicle while under the influence in violation of, or failed to request a hearing, contrary to U.C.A. 41-6-44 and U.C.A. 41-2-130."

Based upon the foregoing Findings of Fact the Court now makes and enters the following

CONCLUSIONS OF LAW

1. With respect to Respondent's argument that Petitioner's failure to appear at the administrative hearing constitutes a waiver of her right to object to the basis of the Respondent's Order of Suspension, the Court concludes that that argument is not compelling. Though it may have been had the arresting officer or other witnesses for the State appeared and testified.

2. The "residuum rule" set forth in Kehl v. Schwendiman, 735 P.2d 413 (Ct. of App. 1987) is applicable to this fact situation and requires that some degree or modicum of competent legal evidence support the Respondent agency's findings.

3. In as much as there was not a residuum of competent legal evidence to support the agency's finding, this Court concludes that the determination of the Department of Public Safety Driver's License Division to suspend the driving privilege of the Plaintiff was arbitrary and capricious.

4. The requirement of a hearing and findings supported by a modicum of competent legal evidence is an appropriate and necessary safeguard to protect Petitioner and persons similarly situated from having their driving privilege taken from them without due process of law.

5. This court is not compelled to hold a trial de novo in all cases, otherwise the administrative process would be valueless and not subject to judicial review.

6. The objection raised by the Petitioner is not merely technical, non-prejudicial and procedural, and trial de novo would not be the proper remedy to cure such prejudicial error.

Dated this ____ day of May, 1992.

J. DENNIS FREDERICK
THIRD DISTRICT COURT JUDGE

APPROVED AS TO FORM:

THOM D. ROBERTS

ADDENDUM C

UTAH CODE ANN. SEC. 44-6-44.10 (Supp. 1992)

41-6-44.8. Municipal attorneys for specified offenses may prosecute for certain DUI offenses and driving while license suspended or revoked.

The following class A misdemeanors may be prosecuted by attorneys of cities and towns, as well as by prosecutors authorized elsewhere in this code to prosecute these alleged violations:

(1) alleged class A misdemeanor violations of Subsection 41-6-44(6)(a)(ii); and

(2) alleged violations of Section 41-2-136, which consist of the person operating a vehicle while his operator'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 or more of those sections or ordinances.

History: C. 1953, 41-6-44.8, enacted by L. 1983, ch. 102, § 1; 1987, ch. 138, § 40; 1990, ch. 299, § 2; 1991, ch. 147, § 2.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, added the introductory paragraph and Subsection (1); designated the former section as Subsection (2); and

made a related stylistic change in present Subsection (2).

The 1991 amendment, effective April 29, 1991, deleted "or a local ordinance similar to Subsection 41-6-44(6)(a)(ii) that complies with the requirements of Section 41-6-43" at the end of Subsection (1).

41-6-44.10. Implied consent to chemical tests for alcohol or drug — Number of tests — Refusal — Warning, report — Hearing, revocation of license — Appeal — Person incapable of refusal — Results of test available — Who may give test — Evidence.

(1) (a) A person operating a motor vehicle in this state is considered 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 operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section 41-6-44 or 41-6-44.4, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44, if the test is or tests are administered at the direction of a peace officer having grounds to believe that person to have been operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section 41-6-44 or 41-6-44.4, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44.

(b) The peace officer determines which of the tests are administered and how many of them are administered, except the officer shall request that either the blood or urine test be administered under Section 76-5-207. If an officer requests more than one test, refusal by a person to take one or more requested tests, even though he does submit to any other requested test or tests, is a refusal under this section.

(c) A person who has been requested under this section to submit to a chemical test or tests of his breath, blood, or urine, may not select the test or tests to be administered. The failure or inability of a peace officer to arrange for any specific chemical test is not a defense to taking a test requested by a peace officer, and it is not a defense in any criminal, civil, or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.

(2) (a) If the person has been placed under arrest, has then been requested by a peace officer to submit to any one or more of the chemical tests under Subsection (1), and refuses to submit to any chemical test requested, the person shall be warned by the peace officer requesting the test or tests that a refusal to submit to the test or tests can result in revocation of the person's license to operate a motor vehicle. Following this warning, unless the person immediately requests that the chemical test or tests as offered by a peace officer be administered, no test may be given.

(b) A peace officer shall serve on the person, on behalf of the division, immediate notice of the division's intention to revoke the person's privilege or license to operate a motor vehicle. When the officer serves the immediate notice on behalf of the division, he shall:

- (i) take the Utah license certificate or permit, if any, of the operator;
- (ii) issue a temporary license effective for only 30 days; and
- (iii) supply to the operator, on a form approved by the division, basic information regarding how to obtain a hearing before the division.

(c) A citation issued by a peace officer may, if approved as to form by the division, serve also as the temporary license.

(d) The peace officer shall submit a signed report, within five days after the date of the arrest, that he had grounds to believe the arrested person had been operating or was in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section 41-6-44 or 41-6-44.4 or while under the influence of alcohol or any drug or combination of alcohol and any drug under Section 41-6-44 and that the person had refused to submit to a chemical test or tests under Subsection (1).

(e) A person who has been notified of the division's intention to revoke his license under this section is entitled to a hearing. A request for the hearing shall be made in writing within ten days after the date of the arrest. Within 20 days after receiving a written request, the division shall notify the person of his opportunity to be heard as early as practicable. If the person does not make a timely written request for a hearing before the division, his privilege to operate a motor vehicle in Utah shall be revoked for a period of one year beginning on the 31st day after the date of arrest.

(f) If a hearing is requested by the person and conducted by the division, and the division determines that the person was requested to submit to a chemical test or tests and refused to submit to the test or tests, or if the person fails to appear before the division as required in the notice, the division shall revoke his license or permit to operate a motor vehicle in Utah for one year, beginning on the date the hearing is held. The division shall also assess against the person, in addition to any fee imposed under

Subsection 41-2-112(15), a fee under Section 41-2-103, which shall be paid before the person's driving privilege is reinstated, to cover administrative costs. The fee shall be cancelled if the person obtains an unappealed court decision following a proceeding allowed under this subsection that the revocation was improper.

(g) (i) Any person whose license has been revoked by the division under this section may seek judicial review.

(ii) Judicial review of an informal adjudicative proceeding is a trial. Venue is in the district court in the county in which the person resides.

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

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

(5) (a) Only a physician, registered nurse, practical nurse, or person authorized under Section 26-1-30, acting at the request of a peace officer, may withdraw blood to determine the alcoholic or drug content. This limitation does not apply to the taking of a urine or breath specimen.

(b) Any physician, registered nurse, practical nurse, or person authorized under Section 26-1-30 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 the sample is drawn, is immune from any civil or criminal liability arising from drawing the sample, if the test is administered according to standard medical practice.

(6) (a) The person to be tested may, at his own expense, have a physician of his own choice administer a chemical test in addition to the test or tests administered at the direction of a peace officer.

(b) The failure or inability to obtain the additional test does not affect admissibility of the results of the test or tests taken at the direction of a peace officer, or preclude or delay the test or tests to be taken at the direction of a peace officer.

(c) The additional test shall be subsequent to the test or tests administered at the direction of a peace officer.

(7) For the purpose of determining whether to submit to a chemical test or tests, the person to be tested does not have the right to consult an attorney or have an attorney, physician, or other person present as a condition for the taking of any test.

(8) If a person under arrest refuses to submit to a chemical test or tests or any additional test under this section, evidence of any refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was operating 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. 1988, ch. 148, § 1; 1990, ch. 30, § 21; 1992, 1981, ch. 123, § 43; L. 1983, ch. 99, § 16; ch. 73, § 3.
1987, ch. 129, § 3; 1987, ch. 133, § 41; 1987, Amendment Notes. — The 1990 amendment, effective April 23, 1990, substituted ch. 161, § 143; 1997 (1st S.S.), ch. 3, §§ 3, 4;

"specific chemical test" for "specific test" in the second sentence in Subsection (1)(c); deleted "or any one or all of the tests" after "chemical test" in the first sentence in Subsection (2)(a); designated the former third and fourth sentences in Subsection (2)(a) as present Subsection (2)(b); designated the first two sentences in former Subsection (2)(a)(iii) as present Subsections (2)(c) and (d) and redesignated former Subsections (2)(b) to (2)(d) as present Subsections (2)(e) to (2)(g); and made stylistic changes.

The 1992 amendment, effective April 27, 1992, inserted "under Section 41-6-44 or 41-6-44.4" in two places in Subsection (1)(a) and in Subsection (2)(d); substituted "Subsection 41-2-112(15)" for "Subsection 41-2-112(14)" in the second sentence in Subsection (2)(f); and substituted "Section 26-1-30" for "Subsection 26-1-30(19)" in Subsections (5)(a) and (5)(b).

NOTES TO DECISIONS

ANALYSIS

Administration of test.

Grounds for requesting test.

Independent test.

Prerequisites for admission into evidence.

Proceeding to revoke license for failure to submit to test.

—Appeal moot.

Refusal to submit to test.

Right to refuse test.

Cited.

Administration of test.

Defendant had no statutory or constitutional right to have the police provide her with a bottle in order to collect a urine sample, and the fact that a police officer attempted to facilitate her request as a courtesy did not render the police responsible for the manner in which she collected the sample or her failure to effectively pursue an analysis of that sample. *Provo City Corp. v. Werner*, 810 P.2d 469 (Utah Ct. App. 1991).

Grounds for requesting test.

This section does not require an arrest prior to taking a blood sample, and allows drawing blood from an unconscious person with or without an arrest. *State v. Wight*, 765 P.2d 12 (Utah Ct. App. 1988).

Independent test.

The right afforded by the implied consent law is the right to seek to obtain an independent test, not an absolute right to obtain a test. *Provo City Corp. v. Werner*, 810 P.2d 469 (Utah Ct. App. 1991).

Prerequisites for admission into evidence.

This section was inapplicable to a defendant

who had not been placed under arrest before his blood was drawn. *State v. Sterger*, 808 P.2d 122 (Utah Ct. App. 1991).

Proceeding to revoke license for failure to submit to test.

—Appeal moot.

Where the only issue on appeal was the status of the defendant's license revocations, which were no longer in effect, and no cognizable collateral consequences were legally imposed on the defendant because of the now-expired revocations, the expiration of the defendant's revocation periods mooted the appeals. *Phillips v. Schwendiman*, 802 P.2d 108 (Utah Ct. App. 1990).

Refusal to submit to test.

Driver's conduct was refusal when, although he verbally agreed to tests, he obstructed the process by sticking his tongue over and chewing on the mouthpiece and blowing out the sides of his mouth, thereby preventing officers from obtaining an adequate, viable breath sample. *Cowan v. Schwendiman*, 769 P.2d 280 (Utah Ct. App. 1989).

Right to refuse test.

Blood sample taken from a juvenile motorist who was not placed under arrest, who was not informed that he could refuse to submit to the test, and who did not consent thereto, was taken contrary to the provisions of this section, and the test results were therefore inadmissible. *In re I.*, 771 P.2d 1068 (Utah 1989), vacating 739 P.2d 1124 (Utah Ct. App. 1987) (noted in bound volume under this catchline).

Cited in *Burkett v. Schwendiman*, 773 P.2d 42 (Utah 1989).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Criminal Law, 1988 Utah L. Rev. 177.

A.L.R. — Sufficiency of showing of physical inability to take tests for driving while intoxicated to justify refusal, 68 A.L.R.4th 776.

ADDENDUM D

UTAH CODE ANN. SEC. 63-46B-17 (1989)

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or imposed by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

History: C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, substituted "As provided by statute; the Supreme Court or the Court of Appeals" for "The Supreme Court or other appellate court designated by statute" in Subsection (1); inserted "with the appropriate

appellate court" in Subsection (2)(a); and substituted "appellate rules of the appropriate appellate court" for "Utah Rules of Appellate Procedure" in Subsections (2)(a) and (2)(b).

Effective Date. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

NOTES TO DECISIONS

Function of district court.

Subsection (1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore, the dis-

trict court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to § 63-46b-15(1)(a). In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

3-46b-17. Judicial review — Type of relief.

(1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

(i) order agency action required by law;

(ii) order the agency to exercise its discretion as required by law;

(iii) set aside or modify agency action;

(iv) enjoin or stay the effective date of agency action; or

(v) remand the matter to the agency for further proceedings.

2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

History: C. 1953, 63-46b-17, enacted by L. 1987, ch. 161, § 273.

Effective Dates. — Laws 1987, ch. 161,

§ 315 makes the act effective on January 1, 1988.

ADDENDUM E

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. Sec. 63-46b-15 (Supp. 1992)

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b).

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.

History: C. 1983, 63-46b-14, enacted by L. 1987, ch. 161, § 270; 1988, ch. 72, § 24.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, divided former Subsection (1) into present Subsections (1) and (2) and redesignated former Subsection (2) as present Subsection (3); added "or is considered

to have been issued under Subsection 63-46b-13(3)(b)" in Subsection (3); and made minor stylistic changes.

Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

63-46b-15. Judicial review — Informal adjudicative proceedings.

(1) (a) The district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings.

(b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business.

(2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:

(i) the name and mailing address of the party seeking judicial review;

(ii) the name and mailing address of the respondent agency;

(iii) the title and date of the final agency action to be reviewed, together with a duplicate copy, summary, or brief description of the agency action;

(iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;

(v) a copy of the written agency order from the informal proceeding;

(vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;

(vii) a request for relief, specifying the type and extent of relief requested;

(viii) a statement of the reasons why the petitioner is entitled to relief.

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

History: C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, deleted "except that final agency action from informal adjudicative proceedings based on a record shall be reviewed by the district courts on the record

according to the standards of Subsection 63-46b-16(4)" at the end in Subsection (1)(a) and made minor stylistic changes.

Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

NOTES TO DECISIONS

Function of district court.

Section 63-46b-16(1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore,

the district court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to Subsection (1)(a) of this section. In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;