

ORIGINAL

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON
NO. 41718-9-II

STATE OF WASHINGTON/DEPARTMENT OF LICENSING,

Petitioner,

vs.

ROGER R. MARTIN,

Respondent.

RESPONDENT'S REPLY BRIEF ON CROSS-REVIEW

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STATE OF WASHINGTON
BY  DEPUTY

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DIVISION II

A. REPLY TO STATE'S RESPONSE ON CROSS-REVIEW

WAC 308-103-070(10) is not rationally related to any legitimate government purpose and violates the constitutional guarantees of due process and equal protection.

B. STATEMENT OF THE CASE

Cross-Appellant Mr. Martin hereby incorporates the statement of facts as set forth in his opening brief, with the following emphasis:

Contrary to the State's assertions in its Response Brief (at pages 8 and 11), there is absolutely no evidence anywhere in the record suggesting that Trooper Street's failure to appear for the administrative hearing, although properly subpoenaed and served one month prior, was the result of a conflict of schedule.

Indeed, it was the trooper's failure to respond in any manner to the subpoena, or to provide good cause for his inability to participate in the hearing, which prompted Mr. Martin's motion to suppress and dismiss, and the grant thereof. The Hearing Officer stated:

"And I'm going to grant that motion, I did issue that subpoena as you indicated and you submitted the, I did, I permitted the subpoena to be served by mail in this instance and you provided the proof of mailing and then there's the receipt, the signed receipt that it was served on November 23rd of 2009, which would be more than 10 days notice for the officer. I haven't received any messages or emails from him. I tried calling the number that's on the form and that was just the main number for the Kelso office of the State Patrol and Trooper Street was unavailable." CP at 122.

C. ARGUMENT AND AUTHORITIES

This Court should not permit the State to benefit from its officer's failure to respond to a duly served subpoena for appearance at an implied consent hearing simply because the driver happens to hold a Commercial Driver's License.

WAC 308-103-070(10) singles out CDL holders by requiring a second opportunity for the State to secure an officer's appearance in implied consent actions, despite the unexcused absence of that witness, while no such requirement exists for personal license holders; this is true even though all of the drivers facing sanctions under RCW 46.30.308 were arrested while driving in their personal vehicles.

The State's position that removing the procedural protections of commercial drivers enhances public safety is nothing but a red herring. Indeed, the same could be said for *any* due process guarantee; eliminating any given safeguard (an obstacle, according to the State), would increase the number of suspension actions, thereby presumably enhancing public safety. Indeed, following the State's argument to its natural conclusion would mean no contested administrative proceedings at all, since they inhibit imposition of driving sanctions.

Without justification and regard for equal treatment for similarly situated persons, the State relies on a WAC provision to circumvent its duty to procure subpoenaed witnesses and to timely prosecute administrative hearings. Instead, the State acts capriciously and arbitrarily by rescheduling administrative hearings when it is unprepared to proceed with its case, especially when there is no showing of good cause for a continuance. The State would have this Court believe that its actions are justified because the roadways will be safer when CDL holders are denied the same procedural protections bestowed upon all other drivers by statute and case law.

However, the underlying question in this case is whether a person arrested for suspicion of DUI while driving a personal vehicle should be subject to a more relaxed burden on the State solely by virtue of the fact that they happen to have a commercial driver's license, and the answer is clearly no. The State's approach is irrational and unjustified.

Indeed, what sanctions are incurred following a Departmental action that has been *upheld* as a violation of Washington's implied consent law, is simply not at issue here; the focus of Mr. Martin's challenge is the manner in which the State is permitted to conduct the administrative proceedings, and there is no rational basis for distinguishing between personal license holders and commercial license holders such that the

commercial license holder is afforded less protection from government officers' dereliction of duties.

Moreover, statutory authority governing the method by which disqualifications to commercial drivers are enforced contradicts the State's position. For example, driving suspensions resulting from arrests while operating a commercial vehicle are automatically stayed upon appeal and are afforded *de novo* review.¹ These provisions provide a higher level of procedural protection than personal license holders are entitled to under RCW 46.20.308. If we were to apply the State's version of the rational relation test, these provisions would certainly be invalid because they defer or inhibit an immediate disqualification.

It simply does not make sense that commercial drivers arrested for driving under the influence *while in their commercial vehicles* are provided greater procedural due process protections than drivers holding a CDL arrested while in a personal vehicle.

It likewise defies logic for the State to endorse *those* protections as a reasonable concern for the financial impact of commercial license disqualifications, yet oppose Mr. Martin's position here, where the risk to

¹ See RCW 46.25.120.

public safety is arguably greater in the first instance, and the potential cost to drivers is equal in both circumstances.

The State here confuses the legislature's broad mandate for enhancing *substantive* penalties for CDL holders where the administrative action is *sustained*, as a carte blanche for overriding the government's responsibility to provide appropriate *procedural* due process *prior* to such a deprivation.

While the State's interest in deterring commercial drivers from driving while intoxicated may be rationally related to legislation mandating enhanced terms of disqualification following administrative adjudication, it does not support a different standard of procedural process during that adjudication.

To the contrary, the more extensive the sanction, the more necessary are the protections against erroneous deprivations. *See E.g. Thompson vs. Department of Licensing*, 138 Wash.2d 783, 792, 982 P.2d 601 (1999) ("In the case of commercial driver's license disqualification, the stakes may often be higher for the licensee, because his or her livelihood is involved, whereas a noncommercial driver's license revocation may simply result in nothing more than inconvenience for the licensee.")

It does not follow that the seriousness of the sanction becomes a sliding scale for removing access to appropriate remedies when the State defaults.² Again, it is undisputed that the Hearing Officer here ruled that suppression and dismissal were the appropriate remedies given the trooper's non-compliance and the Department's inability to meet its burden of proof and persuasion. It was solely by virtue of the operation of WAC 308-103-070(10) that the Hearing Officer reversed herself. Had Mr. Martin not maintained a CDL enhancement, her dismissal would not have been disturbed.

Notably, the Hearing Officer did not, as the Department suggests, rely upon any other provision to support her decision. Indeed, doing so would have been improvident because the remaining portions of the WAC afford no support for her actions. For example, contrary to the State's assertions, a petitioner's limited waiver of his statutory right to a hearing within 60 days of arrest to a date certain for the purpose of securing the trooper's appearance does not result in an unlimited or permanent waiver of that right.

Pursuant to WAC 308-103-070(5), a hearing may not be scheduled outside of the sixty day window absent written consent of the driver or

² Likewise, in the context of criminal allegations, while the seriousness of the charge may support enhanced penalties upon conviction, an accused does not lose his due process protections during the adjudication.

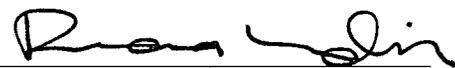
unless the driver requests an action that cannot be accommodated within that window. Neither provision applies to the Hearing Officer's unilateral decision to reconvene the proceeding here a month following the agreed hearing date. Moreover, the Hearing Officer's actions were not predicated by an "extreme emergency" as contemplated in WAC 308-103-070(9).

Ultimately, WAC 308-103-070(10) operates as a mechanism for the State to circumvent its due process obligations by requiring some drivers to afford the government an opportunity to cure a fatal procedural defect. The State has not articulated a legitimate or reasonable explanation for its disparate treatment of CDL holders in this regard; therefore this provision should be invalidated.

D. CONCLUSION

For all of the reasons detailed above, Respondent respectfully requests that the Court reverse the Department of Licensing suspension/disqualification action.

Dated this 1st day of June, 2012.



DIANA LUNDIN
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IN THE COURT OF APPEALS
DIVISION TWO, STATE OF WASHINGTON

ROGER R. MARTIN,

NO. 41718-9-II

Respondent/Cross-Appellant,

DECLARATION OF SERVICE

vs.

STATE OF WASHINGTON/DOL,

Petitioner/Cross-Respondent.

I, Diana Lundin, declare under penalty of perjury under the laws of the State of Washington that I served on the Assistant Attorney General, on June 1, 2012, by U.S. Mail: (1) Respondent's Reply Brief on Cross-Review, and (2) proof of service thereof, addressed as follows:

Mr. Eric Sonju
Assistant Attorney General
1125 Washington Street SE
P.O. Box 40110
Olympia, WA 98504-0110

Dated this 1st day of June, 2012.



DIANA LUNDIN
WSBA # 26394