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 RESPONSE BRIEF
AND
OPENING BRIEF ON CROSS-REVIEW

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Cowlitz County Superior Court properly reversed the Department of Licensing's order of suspension where it determined that the implied consent warnings provided to Mr. Martin did not afford him the opportunity to make a knowing and intelligent decision regarding whether or not to invoke his statutory right to refuse the breath test.

2. Mr. Martin cross-appealed on the application of WAC 308-103-1070(10), and assigns error to the Hearing Officer reversing her order if dismissal and re-opening the proceedings pursuant to its mandate.

WAC 308-103-070(10) unconstitutionally impinges on drivers' due process rights and violates equal protection by treating commercial driver license holders disparately without a legitimate or rational basis.

B. STATEMENT OF THE CASE

Roger Martin was driving his personal vehicle when he was stopped and arrested for suspicion of driving under the influence. After arrest he was given the warnings as they appear in the Washington State DUI Arrest Report packet (*See* Petitioner's Motion at pages 4-5 and Appendix A). Mr. Martin has a Commercial Driver's License (CDL), which was known to the trooper at the time. Relying on the language in the DUI arrest report, Mr. Martin submitted to the breath test. CP at 42, 48.

Upon receipt of the sworn report of breath test results from the arresting officer, the Department of Licensing sought to suspend his personal driving privileges for ninety days, but also notified him (for the first time) of its intended one year disqualification of his CDL for one year. CP at 89, 100.

Mr. Martin requested an administrative hearing to challenge the Department's proposed suspension action. The Hearing Officer issued a subpoena for the telephonic appearance of the arresting officer, Trooper Street, which was served as directed by the Washington Administrative Code. CP at 69-71. On December 28, 2009, the administrative hearing was convened, however Trooper Street failed to appear or provide any good cause for his absence. CP at 120-122. As a result, the Hearing Officer, relying specifically on Lytle vs. Department of Licensing, *infra*, granted Mr. Martin's motions to suppress the trooper's sworn report and dismiss the suspension action. Id. The hearing was then terminated.

Sometime thereafter, the Hearing Officer *sua sponte* initiated a second hearing, at which she reversed her previous decision based exclusively on WAC 308-103-070(10).[1] CP at 123-125. Over Mr. Martin's objection, the hearing was rescheduled and a second subpoena

[1] WAC 308-103-070(10) provides, in part: "The Hearing Officer must continue a hearing in the event a law enforcement officer who has been subpoenaed as a witness fails to appear and the petitioner is a holder of a commercial driver's license or was operating a commercial motor vehicle at the time of the driver's arrest."

issued for the trooper. Again over Mr. Martin's objection, a third hearing was convened on January 25, 2010, at which Trooper Street telephonically appeared and offered testimony. CP at 127. The Hearing Officer subsequently sustained the proposed action. CP at 54-58.

Mr. Martin appealed to the Cowlitz County Superior Court where Judge Stephen Warning, finding he was likely to prevail, granted him a stay of suspension pending a final determination on the merits of his appeal. The Superior Court subsequently held Mr. Martin was not accurately advised of his implied consent warnings, and therefore reversed the Department of Licensing's suspension and disqualification orders. CP at 163-164. The Court did not endorse Mr. Martin's position *vis-à-vis* the application of WAC 308-103-070(10).

C. ARGUMENT AND AUTHORITIES

I. The Implied Consent Warnings Provided To Mr. Martin Misled Him Because They Implied A Lesser Sanction To His Commercial Driving Privileges Than Is Mandated By Law.

The warnings provided to Mr. Martin did not afford him the opportunity to make a knowing and intelligent decision regarding whether or not to submit to a breath test because they did not contain accurate admonishments as to the consequences to his CDL.

Where the legislature has endowed drivers with statutory implied consent rights, due process and fundamental fairness mandate that those drivers be properly advised of their rights and obligations under the statute. Indeed, as the Washington Supreme Court so aptly stated in 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. Thus, a proper implied consent warning may be more imperative in commercial license cases.

In determining whether a subject is provided an opportunity to make a knowing and intelligent decision, "the warnings must permit someone of normal intelligence to understand the consequences of his or her actions." State vs. Whitman County Dist. Court, 105 Wash.2d 278, 286, 714 P.2d 1183 (1986). Jury vs. State, Dept. of Licensing, 114 Wash. App. 726, 731, 60 P.3d 615, 617 (2002).

Further, where an officer attempts to clarify a warning or adds additional information that is not accurate, the officer may invalidate warnings that are otherwise correct. State vs. Koch, 126 Wash. App. 589, 595, 103 P.3d 1280, 1283 (2005). Warnings that are fundamentally unfair

violate a driver's constitutional right to due process. State vs. Bostrom, 127 Wash. 2d 580, 590 (1995). Warnings given to a driver that are ***implicitly misleading*** are fundamentally unfair. Id. (emphasis added)

The warnings read to Mr. Martin include the language found in RCW 46.20.308 as it relates to individuals with standard drivers licenses, however the sanctions to individuals' commercial driving privileges are not accurately detailed. RCW 46.25.090, which pertains to the disqualification of an individual's commercial driver's license (CDL), now mandates penalties against commercial driving privileges even for arrests occurring while driving a personal vehicle.

RCW 46.25.090 imposes no less than a **one-year** CDL disqualification for any administrative action pursuant to RCW 46.20.308, regardless of whether the individual submitted a breath test over the legal limit or refused to provide a breath sample. The Washington State DUI Arrest Packet does not reflect these consequences. The result is that CDL holders such as Mr. Martin are not advised of the actual ramifications of their decision under the implied consent laws.

"If the information conveyed confuses the driver about his rights under the statute, the driver may claim that he had no reasonable opportunity to refuse." Ghaffari vs. Department of Licensing, 62 Wash. App. 870, 877, 816 P.2d 66 (1991), *review denied,* 118 Wash.2d 1019,

827 P.2d 1012 (1992); Keefe vs. Department of Licensing, 46 Wash. App. 627, 632, 731 P.2d 1161 (1987) ("The underlying purpose of the implied consent statute is to provide the driver the opportunity to make an intelligent decision as to whether to exercise the statutory right of refusal"). Mairs vs. Department of Licensing, 70 Wash. App. 541, 546, 854 P.2d 665,668 (1993). "...[T]he significant inquiry is whether the police supplied the arrestee with information that was not inaccurate or misleading." City of Clyde Hill vs. Rodriguez, 65 Wash. App. at 785, 831 P.2d 149. Moffitt vs. City of Bellevue, 87 Wash. App. 144, 148, 940 P.2d 695, 697 (1997).

Mr. Martin was misled because the 90 day language infers that any suspension could be as little as that, when in reality his CDL would be disqualified for a minimum of one year.[2] Notably, the warnings use the terms "license, permit or privilege to drive," without qualification, which to any reasonable person of normal intelligence would include *all* driving privileges.

The only explicit reference to commercial driving is found in the extraneous language, which does nothing to clarify the length of disqualification:

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[2] Mr. Martin does not allege that he expressed confusion regarding the import of the warnings which was not adequately clarified – to the contrary, he relied on the warnings as written, which misled him as to what the consequences of his decision would be.

> **FOR THOSE NOT DRIVING A COMMERCIAL MOTOR VEHICLE AT THE TIME OF ARREST:** IF YOUR DRIVER'S LICENSE IS SUSPENDED OR REVOKED, YOUR COMMERCIAL DRIVER'S LICENSE, IF ANY, WILL BE DISQUALIFIED.

Indeed, continuing to use the terms "suspended" and "revoked" reinforces the distinction between the two as described in the language of the 46.20.308 warnings. Moreover, under RCW 46.25.090, a disqualification can be for as little as sixty days, or last as long as a lifetime. Thus, using the term itself does not denote any specific period of time.

In Cooper vs. Department of Licensing, 61 Wash. App. 525, 810 P.2d 1385 (1991), the Court of Appeals found it improper for an officer to inform a driver that upon refusal his license would be revoked for "probably" at least one year. That statement was deemed misleading as it **implicitly suggested** the possibility that the revocation could be for less than one year, when in fact it would be a legal certainty that his license would be revoked for a minimum of one year.

Here, Mr. Martin was led to believe that **any** loss of privilege could be as little as ninety days, when it fact it was a legal certainty that his CDL would be disqualified for a minimum of one year. Like Mr. Cooper, Mr. Martin thus never had the opportunity to make a knowing and intelligent choice. Where the warnings inaccurately state the potential length of

suspension, the driver cannot possibly understand the consequences of his decision.

As the Supreme Court noted in State vs. Bartels, 112 Wn.2d 882, 774 P.2d 1183 (1989), the inclusion of specific language, here the length of potential suspension, can result in warnings that are less accurate than had they less detail. While the State is not required to advise drivers of a particular length of the suspension, in choosing to do so the State also assumes the responsibility for providing accurate information. The inclusion of specific potential suspension periods actually makes the warnings less accurate than they would have been without the inclusion of such language. *See* State vs. Bartels, 112 Wash.2d 882 (1989).

Furthermore, while the purpose of the implied consent law may be threefold,[3] the purpose of the implied consent warnings is to provide drivers with accurate information about the potential consequences to their privileges to drive when they either produce a breath sample over the legal limit or refuse to submit to the test. Excluding a warning discussing a mandatory minimum one year deprivation of what is in effect a vocational license makes the intended purpose of the warnings obsolete.

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[3] Generally, the implied consent law is intended to 1) discourage drivers from operating a motor vehicle while under the influence of alcohol, 2) remove the driving privileges from those disposed to do so and, 3) gather reliable evidence of intoxication. Nowell vs. DOL, 83 Wn.2d 121, 124 (1973).

Had the State simply added the words "for not less than one year" to the end of the extraneous section, the warnings would clearly communicate the appropriate legal sanction. Also, doing so would not mean "tailoring" the warnings to every driver; it would provide the same amount of information to commercial driving as to personal driving, which is necessary since both are affected by a subject's decision in this context.

Moreover, Mr. Martin was prejudiced by the inaccuracies of the implied consent warnings because the nature of the error related to a relevant consideration for a CDL holder. *See* Graham vs. Department of Licensing, 56 Wash. App. 677 (1990). Prejudice is dictated not by whether the sanction is the same, but whether a driver's opportunity to make a knowing and intelligent decision is compromised by the misadvisement.

Even though the sanctions to Mr. Martin's CDL would have been at least one year whether he produced a breath test result over .08 or refused the breath test, the failure of the warnings to so state impacted his opportunity to make an intelligent decision about the breath test.[4] Had Mr. Martin been accurately advised that he would face an identical sanction to

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[4] *See* Thompson vs. Department of Licensing *infra.*

his CDL, he would have been in the position intended by the legislature to make a knowing and intelligent decision. Because the warnings deceived him as to the consequences of his choice, he was denied that opportunity and thus actually prejudiced.

Surprisingly, the Department continues to assert a proposition has been rejected by Washington courts - that in order to establish prejudice a driver must establish that he specifically relied on the erroneous language in his decision, and would have otherwise acted differently. As the Court of Appeals reasoned in Gahagan vs. Department of Licensing, 59 Wash. App. 703, 708 (1990):

> "In its opening brief, the Department argues that in order to prove actual prejudice the driver must actually be indigent **and** must show that he refused the test because he 1) distrusted the test given, 2) wanted an additional test and 3) believed he would ultimately have to pay for the test...The court in Graham and Gonzalez found that indigency [by itself] demonstrated actual prejudice. *See* Gonzalez, 112 Wash.2d at 899-902, 774 P.2d 1187; Graham 56 Wash. App. at 680-681, 784 P.2d 1295. **In short, the Department's argument for a higher standard is not supported by precedent."** (emphasis added).

Additionally, this argument, in a nearly identical factual scenario, was taken up in Thompson vs. Department of Licensing, 138 Wn.2d 783, at 800 FN 8 where the Court held:

> "The Court of Appeals also held there was no prejudice because Thompson's commercial license would have been disqualified for one year no matter what course he took.

> That is, refusal would have resulted in a one-year disqualification under the statute, and taking the test resulted in a one-year disqualification because his reading was above .04. This analysis is too facile. It depends on the fortuity that a driver's BAC result will be above .04 and provides no disincentive to law enforcement officials to give improper implied consent warnings."

Thus, prejudice is not determined by whether the warning affected a specific driver's decision to take a breath test. There need not be a showing as to what a driver's decision would have been regarding the taking of a breath test if correctly advised. Graham at 681; *See*, Cooper vs. Department of Licensing, 61 Wash. App. 525, 810 P.2d 1385 (1991). Notably, the Attorney General's Officer, *legal counsel for the Department itself*, agreed in its legal memoranda to the King County Superior Court:

> "Admittedly, the warning that states a .08 or higher BAC level will result in a suspension of 'at least 90 days' could lead a CDL holder of normal intelligence to believe that their CDL may only be suspended for 'at least 90 days' as well. If that person actually submitted to the breath test under that impression, then there is a possibility of prejudice in that situation." (Hantke vs. State/Department of Licensing, 08-2-32514-8 SEA)

Finally, State vs. Bostrom, 127 Wn.2d 580 (1995), does not stand for the proposition that as long as the warnings given mirror the statutory requirements, they are *de facto* legally sufficient. First, when Bostrom was decided, individuals only faced probationary license status and not complete deprivation of driving privileges. Second, the legislature, in

recognizing the devastating consequences to CDL holders, has made clear that special procedural protections are mandated where the potential deprivation of a CDL is involved.[5] Merseal vs. Department of Licensing, 99 Wash. App. 414, 994, P.2d 262 (2000). Third, the Bostrom court clearly indicated that warnings that are **fundamentally unfair** violate an individual's due process rights. Here, the warnings are fundamentally unfair because they provide inadequate notification and misleading information about the consequences to an individual's CDL.

Most importantly, whereas in Bostrom the court addressed criminal consequences and concluded that the legislature did not intend that drivers be so advised, here the legislature *did* intend to advise drivers of the administrative consequences to their driving privileges; the chosen language is simply deficient.

Thus, the Superior Court correctly ruled that Mr. Martin was not given the necessary opportunity to make a knowing and intelligent decision, and its ruling is consistent with statutory and constitutional mandates.

II. WAC 308-103-070(10) Violates The Constitutional Guarantees Of Due Process and Equal Protection Because It Unfairly Burdens Drivers Who Hold Commercial Driving Endorsements.

[5] *See* RCW 46.25.120 and RCW 46.20.334.

A. Due Process Is Contravened By A WAC Provision Precluding A Hearing Officer From Dismissing A Departmental Action Where A Subpoenaed Witness Fails To Appear Without Good Cause.

It is well settled law that the "[r]evocation of a driver's license for a statutorily defined cause implicates a protectable property interest that must comply with due process." Lytle vs. Department of Licensing, 94 Wash. App. 357, 361, 971 P.2d 969 (1999) *citing* Bell vs. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); Gibson vs. Department of Licensing, 54 Wash. App. 188, 194, 773 P.2d 110, review denied, 113 Wn.2d 1020 (1989).

Further, "[t]he State has the burden of proving the revocation of a person's license complied with due process." Lytle vs. Department of Licensing, 94 Wash. App. 357, 361, 971 P.2d 969 (1999) *citing* State vs. Storhoff, 133 Wn.2d 523, 527, 946 P.2d 783 (1997).

This right to due process includes the right to confront witnesses. As reiterated in Lytle, "[i]n Flory vs. Department of Motor Vehicles, 84 Wn.2d 568, 571, 527 P.2d 1318 (1974), our Supreme Court held that a license to drive may not be revoked without a hearing that satisfies the requirements of due process, including the right to confront witnesses." Lytle vs. Department of Licensing, at 361. *See also* State vs. Whitney

78 Wash. App. 506, 510, 897 P.2d 374, review denied, 128 Wn.2d 1003 (1995).

In Lytle, the driver requested subpoenas for three officers who had offered sworn reports, however only two of them responded, and only one appeared at the administrative hearing. The Court of Appeals held that this inability to cross-examine the witnesses denied Mr. Lytle due process and it reversed and dismissed the action.

The Lytle Court presumed prejudice because his ability to rebut the totality of the State's prima facie evidence was improperly restricted due to the limitations on his right to cross examine the witnesses. Notably, the Court did *not* remand Mr. Lytle's case with a directive to reconvene and obtain what testimony was available, or fault Mr. Lytle for not questioning the officer who appeared at the administrative hearing.

Moreover, the fact that the proposed suspension was held in abeyance during the pendency of the administrative process did not obviate the prejudice to him. In other words, Mr. Lytle was not required to demonstrate actual harm to him by virtue of delaying the proceedings.

Similarly, in King County vs. Mansour, 131 Wash. App. 255, 128 P.3d 1241 (2006), Division One confirmed the right to cross-examine witnesses in an administrative proceeding, denial of which is a due process violation requiring dismissal of the action. There, Mr.

Mansour was precluded from subpoenaing witnesses and records relevant to the County's attempt to remove his pet during an administrative proceeding.

The Mansour Court reiterated: "procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth of Fourteenth Amendment." Id.

Moreover, an unexcused absence at the time of trial is not good cause. State ex rel. Nugent v. Lewis, 93 Wash.2d 80, 605 P.2d 1265 (1980). There, the arresting officer did not appear on the day of trial and the State had no explanation for his absence. The Washington Supreme Court held that the trial judge erred in granting a continuance in such circumstances, and the defendant was entitled to dismissal of the charge (without regard to the nature of the charge or the status of the defendant).

Here Trooper Street did not appear as required by the subpoena served *almost an entire month* prior. As in Lytle, the date and time of this administrative hearing were memorialized in the subpoena, and appearance by Trooper Street was mandatory. At Mr. Martin's hearing, Trooper Street was not available, had not contacted the Department in advance as directed by the subpoena, and had not provided any excuse for his non-appearance.

Indeed, these circumstances sufficiently curtailed Mr. Martin's ability to be meaningfully heard in a timely manner such that the Hearing Officer initially *granted* Mr. Martin's motion to suppress and dismiss. The Department appears to exhaust much of its response on arguing, contrary to its own representative's ruling, the extent of Lytle's application; however Mr. Martin did not challenge the Hearing Officer's decision in that regard, and it is not at issue here.

Ultimately, no authority supports the State's position that the Department can mandate a continuance, rather than dismissal, due solely to the failure to appear of a duly subpoenaed officer. Indeed, while WAC 308-103-070(4) allows the Hearing Officer to "continue, adjourn or reschedule" a hearing *for good cause*, subsection (5) also requires the hearing to be reset within 60 days from the driver's arrest, as required by RCW 46.20.308, unless a written waiver from the driver is given, or unless the requirement is waived.

Subsection (6) states "a petitioner is deemed to have waived the statutory requirement that the hearing be held within sixty days if petitioner requests an action that cannot be accommodated within the sixty-day period," which was not the case here.

A driver should not be forced to waive his right to a timely hearing and a speedy determination on the issues where he has exercised his right

to confrontation and the State fails to comply with due process. To the extent that WAC 448-103-070 undercuts these rights, it unconstitutionally violates fundamental fairness, especially where disparate standards would result.

For example, if Mr. Martin had failed to timely request a hearing, he would have forfeited his opportunity, even if he presented good cause. RCW 46.20.308(8). Likewise, according to WAC 308-103-160 a petitioner is required to appear within twenty minutes of the scheduled time or else the petitioner is deemed to have defaulted and withdrawn his request for a hearing.

The State should not be entitled to skirt procedural due process by mandating a continuance of a duly scheduled implied consent proceeding solely because its witness was absent without explanation. WAC 308-103-070(10) does just that, and is therefore unconstitutional.

B. WAC 308-103-070(10) Is An Unconstitutional Violation Of Mr. Martin's Right To Equal Protection.

The Hearing Officer's reliance on WAC 308-103-070(10), resulted in an erroneous license suspension because the WAC itself is contrary to law and therefore void.

"[A] court shall grant relief from an agency order if [it] determine[s] that "[t]he order, or the statute or rule on which the order is

based, is in violation of constitutional provisions on its face or as applied." Devine vs. Department of Licensing, 126 Wash. App. 941, 110 P.3d 237 (2005).

There, the Court of Appeals invalidated a Department of Licensing created WAC because it was contrary to legislative enactment. The Court there stated: "a rule that conflicts with a statute is beyond an agency's authority. Invalidation of the rule is the proper remedy."

Likewise, the Department cannot amend, change or nullify the constitutional guarantees of due process and equal protection under the law. WAC 308-103-070 is illegal for two reasons. First, as discussed above, it impermissibly impinges on the right of a driver to confront witnesses against him. Second, it violates the equal protection clause of the Constitution because it treats similarly situated drivers disparately without a rational relation to any legitimate governmental interest.

The equal protection clause of the Fourteenth Amendment and article I, section 12 are substantially identical and subject to the same analysis. State vs. Shawn P., 122 Wash.2d 553, 559-60, 859 P.2d 1220 (1993); State vs. Osman, 157 Wash.2d 474, 139 P.3d 334 (2006). When evaluating an equal protection claim, the initial inquiry is whether the individual claiming the violation is similarly situated with other persons. State vs. Handley, 115 Wash.2d 275, 289, 796 P.2d 1266 (1990).

"A defendant must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination. Id. at 290, 796 P.2d 1266. Although equal protection does not require that the State treat all persons identically, any classification must be relevant to the purpose for the disparate treatment. In re Det. Of Thorell, *citing* Baxstrom vs. Herold, 383 U.S. 107, 111, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966)."[6]

Here, the Department unilaterally removed a critical due process protection from Mr. Martin, and all other CDL holders, simply by virtue of their classification as such. Moreover, such disparate treatment is not rationally related to any legitimate government interest. In fact, the best the State can offer is to suggest that the government has a legitimate reason to prevent drivers from escaping sanction due to an officer's "schedule conflict." Appellant's Brief at 27. Yet, that would be true for all drivers, and is not rationally related to CDL status. Further, there is no evidence in this record that Trooper Street failed to appear because of a scheduling conflict.

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[6] "Rational basis" is the appropriate standard of scrutiny on an equal protection claim of this nature. Merseal vs. Department of Licensing, 99 Wash. App. 414, 994, P.2d 262 (2000).

While there is certainly a recognized societal interest in removing intoxicated drivers from the roadway,[7] removing *procedural* due process protections for CDL holders does not advance that goal; to the contrary, in Merseal vs. Department of Licensing, 99 Wash. App. 414, 421, 994 P.2d 262 (2000), the Court of Appeals reaffirmed that CDL holders are entitled to "*enhanced* ***procedural*** *due process*." (emphasis added)

Due process protections are designed to *prevent* erroneous license deprivations. The legislative goals of the implied consent law are furthered by their stringent application, and frustrated by their abandonment. The Department has articulated no rational basis for disparately applying constitutional due process protections, such as the right to confrontation, *against* a driver simply because he holds a CDL. Indeed, both the Revised Code of Washington and the courts of this state have articulated the necessity of *increased* procedural protections where CDL's are threatened.

For example, RCW 46.25.120(5) provides that any disqualification is stayed pending appeal to the superior court (*compare* RCW 46.20.308, limiting stays in personal driver license appeals to showings of likelihood of prevailing plus irreparable harm).

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[7] Nowell vs. DOL, 83 Wn.2d 121, 124 (1973)

Likewise RCW 46.20.334 provides for *de novo* review on disqualification appeals, whereas personal license suspension appeals receive only substantial evidence review. Finally, as previously mentioned, the Court of Appeals recognized the necessity of procedural due process where commercial driving privileges are at stake. Merseal vs. Department of Licensing *supra.*

While the State may have legitimate reasons for imposing greater substantive sanctions to the driving privileges of CDL holders, it does not follow that the distinction between the two classes supports disparate treatment procedurally. Therefore, the Code section is unconstitutional and void.

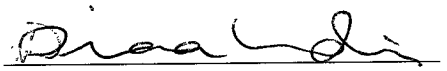
Trooper Street's failure to timely respond to a duly served subpoena forfeited the Department's ability to proceed against Mr. Martin, especially since no good cause was offered, and there is no rational basis for treating Mr. Martin differently than any other driver under RCW 46.20.308.

D. CONCLUSION

For all of the reasons detailed above, Respondent respectfully requests that the Court affirm the Superior Court in concluding that Mr. Martin was not given adequate implied consent warnings, and also hold

WAC 308-103-070(10) to be an unconstitutional violation of due process and equal protection.

Dated this 4th day of April, 2012.



DIANA LUNDIN
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EXHIBIT A

WASHINGTON STATE
DUI ARREST REPORT

CASE / CITATION NUMBER: 9461212513

IMPLIED CONSENT WARNING FOR BREATH

WARNING! YOU ARE UNDER ARREST FOR:
(check appropriate box[es])

- [X] RCW 46.61.502 OR RCW 46.61.504: Driving or being in actual physical control of a motor vehicle while under the influence of intoxicating liquor and/or drugs.
- [ ] RCW 46.61.503: Being under 21 years of age and driving or being in actual physical control of a motor vehicle after consuming alcohol.
- [ ] RCW 46.25.110: Driving a commercial motor vehicle while having alcohol in your system.

FURTHER, YOU ARE NOW BEING ASKED TO SUBMIT TO A TEST OF YOUR BREATH WHICH CONSISTS OF TWO SEPARATE SAMPLES OF YOUR BREATH, TAKEN INDEPENDENTLY, TO DETERMINE ALCOHOL CONCENTRATION.

1. YOU ARE NOW ADVISED THAT YOU HAVE THE RIGHT TO REFUSE THIS BREATH TEST; AND THAT IF YOU REFUSE:
   (A) YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE WILL BE REVOKED OR DENIED BY THE DEPARTMENT OF LICENSING FOR AT LEAST ONE YEAR; AND
   (B) YOUR REFUSAL TO SUBMIT TO THIS TEST MAY BE USED IN A CRIMINAL TRIAL.
2. YOU ARE FURTHER ADVISED THAT IF YOU SUBMIT TO THIS BREATH TEST, AND THE TEST IS ADMINISTERED, YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE WILL BE SUSPENDED, REVOKED, OR DENIED BY THE DEPARTMENT OF LICENSING FOR AT LEAST NINETY DAYS IF YOU ARE:
   (A) AGE TWENTY-ONE OR OVER AND THE TEST INDICATES THE ALCOHOL CONCENTRATION OF YOUR BREATH IS 0.08 OR MORE, OR YOU ARE IN VIOLATION OF RCW 46.61.502, DRIVING UNDER THE INFLUENCE, OR RCW 46.61.504, PHYSICAL CONTROL OF A VEHICLE UNDER THE INFLUENCE; OR
   (B) UNDER AGE TWENTY-ONE AND THE TEST INDICATES THE ALCOHOL CONCENTRATION OF YOUR BREATH IS 0.02 OR MORE, OR YOU ARE IN VIOLATION OF RCW 46.61.502, DRIVING UNDER THE INFLUENCE, OR RCW 46.61.504, PHYSICAL CONTROL OF A VEHICLE UNDER THE INFLUENCE.
3. IF YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE IS SUSPENDED, REVOKED, OR DENIED, YOU MAY BE ELIGIBLE TO IMMEDIATELY APPLY FOR AN IGNITION INTERLOCK DRIVER'S LICENSE.
4. YOU HAVE THE RIGHT TO ADDITIONAL TESTS ADMINISTERED BY ANY QUALIFIED PERSON OF YOUR OWN CHOOSING.

FOR THOSE NOT DRIVING A COMMERCIAL MOTOR VEHICLE AT THE TIME OF ARREST: IF YOUR DRIVER'S LICENSE IS SUSPENDED OR REVOKED, YOUR COMMERCIAL DRIVER'S LICENSE, IF ANY, WILL BE DISQUALIFIED.

FOR THOSE DRIVING A COMMERCIAL MOTOR VEHICLE AT THE TIME OF ARREST: IF YOU EITHER (A) REFUSE THIS TEST OR (B) SUBMIT TO THIS TEST AND THE TEST INDICATES AN ALCOHOL CONCENTRATION OF 0.04 OR MORE, YOU WILL BE DISQUALIFIED BY THE DEPARTMENT OF LICENSING FROM DRIVING A COMMERCIAL MOTOR VEHICLE.

I HAVE READ THE ABOVE STATEMENT TO THE SUBJECT — OFFICER'S SIGNATURE

I HAVE READ OR HAVE HAD READ TO ME THE ABOVE STATEMENT(S). — SUBJECT'S SIGNATURE

DATE / TIME: 9-27-09 / 1853 — LOCATION: Cowlitz Jail

WILL YOU NOW SUBMIT TO A BREATH TEST? [X] YES [ ] NO

Did subject express any confusion regarding the implied consent warnings? If yes, explain below. [ ] YES [X] NO

[X] At the time of this test(s), I was certified to operate the BAC DATAMASTER, the BAC DATAMASTER CDM, and PBT and possessed a valid permit issued by the State Toxicologist.

DO YOU HAVE ANY FOREIGN SUBSTANCE IN YOUR MOUTH?	MOUTH CHECKED? TIME? 1845	2ND MOUTH CHECK? (If Necessary) TIME? 1910	ANY FOREIGN SUBSTANCES FOUND? EXPLAIN:
[ ] YES [X] NO	[X] YES [ ] NO	[X] YES [ ] NO	[ ] YES [X] NO REMOVED [ ] YES [ ] NO

[X] I observed the subject from the time of the mouth check through the completion of the breath test.
[X] The subject did not vomit, eat, drink, smoke, or place any foreign substance in his/her mouth during the observation time.

[X] I performed the PBT test in accordance with the State Toxicologist's protocols. (Chapter 448-15 WAC)	PBT READING .102	PBT TIME 1823

[X] BOOKED [ ] PR'D — RELEASED TO:

Exhibit 1-Page 3

IN THE COURT OF APPEALS
DIVISION TWO, STATE OF WASHINGTON

ROGER R. MARTIN, Respondent/Cross-Appellant, vs. STATE OF WASHINGTON/DOL, Petitioner/Cross-Respondent.	NO. 41718-9-II DECLARATION OF SERVICE

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 April 5, 2012, by U.S. Mail: (1) Respondent's Brief, 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 5th day of April, 2012.

DIANA LUNDIN
WSBA # 26394

PHILLIPSON & LUNDIN PLLC
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