

ORIGINAL

NO. 247201 and 247210

80149-5

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING,

Petitioner

v.

BRYAN LINDLEY DELONG, and
PAUL DOUGLAS INGRAM,

Respondents.

APPELLANT'S RELY BRIEF

ROBERT M. MCKENNA
Attorney General

CHARNELLE BJELKENGREN
Assistant Attorney General
Attorneys for Appellant
Office of Attorney General
Licensing and Administrative Law Division
1116 West Riverside Avenue
Spokane, WA 99201-1194
(509) 456-3123

I. INTRODUCTION

The Department of Licensing (Department) submits this brief in accordance with RAP 10.2(d).¹ The brief of respondents Ingram and DeLong contains a pervasive error. Respondents appear to argue that the State Toxicologist, Dr. Barry Logan's, declaration is only admissible if a foundation is laid sufficient to meet the standards for independently admitting the declaration under the rules of evidence. However, the rules of evidence do not apply strictly in administrative hearings. Instead, the laws and rules discussed below apply to the admissibility of evidence in license revocation hearings.

Dr. Logan's declaration concerns his approval of the thermometers used to measure the temperature of the simulator solution in the Datamaster machine. The temperature of the simulator solution is part of the evidentiary foundation for admitting the result of the breathalyzer test.

As shown below and in the Department's opening brief, the hearing officer did not err in admitting Dr. Logan's declaration. The superior court should be reversed and the Department revocation orders affirmed.

¹ "A reply brief of an appellant or petitioner should be filed with the appellate court within 30 days after service of the brief of respondent unless the court orders otherwise." RAP 10.2(d).

II. ARGUMENT

A. The Department's Evidence Establishing That An Approved Thermometer Was Utilized In The Datamaster Is Admissible

The relevance of Dr. Logan's declaration (also referred to as "Exhibit 2"), is reflected in RCW 46.61.506(4)(a)(iv), which requires that only approved thermometers be used in Datamaster machines. To meet this requirement, Dr. Logan prepared a declaration explaining that only approved thermometers are used in the Datamaster machines. To avoid admission of the breath test results, respondents contend the Department has not established sufficient foundation for admissibility of Dr. Logan's declaration concerning the approved thermometers.

Respondents' argument fails to overcome any of the three separate reasons why Dr. Logan's declaration should be admitted to demonstrate the temperature of the simulator solution was measured by an approved thermometer. First, Department rules govern the admissibility of evidence in license revocation proceedings and call for a relaxed application of the rules of evidence. Dr. Logan's declaration is admissible under this liberal standard of admissibility pertinent to license revocation proceedings. Second, the criminal rules for courts of limited jurisdiction (CrRLJ) provide for admissibility of Dr. Logan's declaration in lieu of his testimony. CrRLJ 6.13(c). Third, the declaration is admissible under

Department rules and RCW 46.20.332 as a Department record. Finally, in some related cases (not respondents' Ingram and DeLong), the declaration is admissible as accompanying the officer's sworn report.

1. License Revocation Proceedings Provide For Liberal Admission Of Evidence As Opposed To A Strict Application Of The Rules Of Evidence

As argued in the Department's opening brief, the rules of evidence do not strictly apply in license revocation proceedings. Appellant's Br. at 19-20. Instead, they are simply viewed as guidelines in administrative proceedings. WAC 308-103-150 addresses the "conduct of hearings" by which the hearing officer should abide. Additional direction is provided in WAC 308-103-120, which provides,

The hearing officer shall rule on the admissibility and weight to be accorded to all evidence submitted at the hearing. . . . The admissibility of evidence shall be liberally construed to effect the intent and purpose of the hearings covered by these rules.

Finally, RCW 46.61.506(4)(b) explains that the Department's evidence should be viewed in a light most favorable to the Department. When viewing all of these provisions together, the hearing officers did not err in admitting and considering Dr. Logan's declaration.

Respondents contend that Dr. Logan's declaration is not "automatically admissible." Respondents' Br. at 23. The Department is not suggesting that the declaration would be automatically admissible.

Rather, the hearing officers, only after proper application of the law, ruled that the declaration was admitted. CP at 42-43, 149-151. Hearing Officer Corey properly reasoned:

Exhibit 2 is offered for entry into the hearing record by the Department of Licensing. A copy of the document was furnished to Mr. DeLong in advance of the hearing. The document is in proper declaration form, bears the signature of Dr. Barry Logan, Washington State Toxicologist, signed under authority of RCW 9A.72.085. It is a public record, easily attained from the Washington State Patrol website at breathtests.wsp.wa.gov and relates directly to issues being considered at this hearing. Although the Department does not create the document, the document is placed in Mr. DeLong's file for purposes of this administrative hearing. Therefore, the document is a Department record and is properly admissible.

CP at 42-43. In addition, Hearing Officer Mullenix provided a number of bases for admitting the declaration. CP at 149-151. In a footnote he specifically acknowledged:

Admissibility of Exhibit Number 2 is consistent with RCW 46.20.308(8) and RCW 46.20.332 and supported by WAC's 308-103-100(4), 308-103-120, 308-103-150(8)(9).

Mullenix concluded, "For the aforementioned reasons, the Hearing Officer admitted Exhibit number 2 into the hearing record and assigned it appropriate weight." CP at 151. It is clear, based on the hearing officers' reasoning, the declaration was not viewed as "automatically admissible."

Rather, both hearing officers found it admissible only after proper application of relevant laws and rules.

2. Dr. Logan's Declaration Is Admissible Under The Criminal Rules for Courts of Limited Jurisdiction

As argued in the Department's opening brief, Dr. Logan's declaration is admissible under CrRLJ 6.13(c) as a certificate in substantially the same form as other certificates listed in the rule. Appellant's Br. at 13-16. There is no requirement in the rule that the declaration exactly match the declarations listed in the rule.

Respondents contend that the criminal rule does not specifically address license revocation proceedings. Respondent's Br. at 14. However, RCW 46.20.308(8) specifically makes the criminal rules for courts of limited jurisdiction applicable in license revocation proceedings. This is in accordance with the purpose and intent of license revocation proceedings, which is to "ensure swift and certain consequences for those who drink and drive." RCW 46.20.308, Notes, Finding – Intent – 2004 c 68.

Respondents further argue that the hearing officers did not rely on the criminal rules in their decision admitting Dr. Logan's declaration. Therefore, respondents suggest this argument might not be allowed on appeal. Respondents' Br. at 13. This is not fatal because the Court may

uphold the hearing officers' decision on different grounds. *Ertman v. Olympia*, 95 Wn.2d 105, 108, 621 P.2d 724 (1980). In *Ertman*, our Supreme Court explained “[w]e have held many times that where a judgment or order is correct, it will not be reversed merely because the trial court gave the wrong reason for its rendition.” *Id.*; *See also, Pannell v. Thompson*, 91 Wn.2d 591, 603, 589 P.2d 1235 (1979). There was no obligation for the hearing officers to recite all possible reasons for admitting the declaration.

Respondents argue that Dr. Logan's declaration is not admitted in accordance with the purpose of CrRLJ 6.13(c), which is to determine, “whether a person was operating or in actual physical control of a motor vehicle while under the influence of intoxicating liquors.” *See* Respondents' Br. at 14. To the contrary, that is the purpose for which Dr. Logan's declaration is admitted. Dr. Logan's declaration addresses the thermometers that are approved for use in Datamaster machines which measure a person's breath alcohol content. This is directly related to whether a person is driving under the influence of alcohol. Moreover, the other certificates identified in the rule address whether a person was driving under the influence of intoxicating liquors in the same way that Dr. Logan's declaration addresses the issue.

Respondents further take issue with the fact that certification relating to the simulator thermometer in CrRLJ 6.13(c), identifies a technician employed by the Washington State Patrol as the declarant. However, this does not prohibit the State Toxicologist from preparing the certification. The technicians are certifying compliance with standards developed by the State Toxicologist, Dr. Logan. Moreover, Dr. Logan's declaration does not purport to be the same certification listed in CrRLJ 6.13(c). Instead, it is a certificate substantially in the form of the identified certificates.

**3. Dr. Logan's Declaration Is Admissible Under
WAC 308-103-150 And RCW 46.20.332**

The Department established in its opening brief that the hearing officer had the authority to request Dr. Logan's declaration as an additional exhibit pursuant to WAC 308-103-150(8). Appellant's Br. at 17. Respondents argue that because the hearing officer did not request Dr. Logan's declaration in order to complete the record pursuant to WAC 308-103-150(8), it is inadmissible. However, whether the record was obtained by Department personnel on their own initiative or pursuant to the hearing officer's request seems to be a distinction without a difference. In other words, if the Department personnel had not obtained the declaration from

the Washington State Patrol website,² the hearing officer had authority to request this information from Department personnel in order to complete the record. Respondents point to no evidence showing how they were prejudiced by the declaration being produced prior to the hearing as opposed to being requested by the hearing officer after commencement of the hearing.³ Rather, by being produced prior to the hearing, respondents had the opportunity to address the declaration and present evidence in rebuttal.

Respondents further argue that RCW 46.20.332 does not apply to license revocation hearings, which are record reviews under RCW 46.20.308. Respondent's Br. at 20-21. Respondents' contention is not supported by the law. In fact, RCW 46.20.308(8) specifically states, "[e]xcept as otherwise provided in this section, the hearing is subject to and shall be scheduled and conducted in accordance with RCW 46.20.329

² Respondents dispute the availability of Dr. Logan's declaration on the Washington State Patrol's website. *See* Respondent's Br. at 11-12. Respondents also argue that because Exhibit 2 is not listed in WAC 448-16-140 it was improperly admitted. However, neither the hearing officers' conclusions, nor the law support his argument. Whether or not Exhibit 2 is specifically listed in WAC 448-16-140 as a document available on the website is less important than the fact that it is available and accessible on the website. The hearing officers correctly found that Exhibit 2 is available and maintained on the website. Also, because it is readily accessible on the website, there is no evidence that respondents would be subject to a fee to obtain the document.

³ If the hearing officer had requested the declaration during the hearing, the hearing would have likely been continued to give respondent an opportunity to present evidence in rebuttal. The obvious result would have been a prolonged process. If the hearing officer had requested the declaration during the hearing and failed to give respondent the opportunity to rebut the evidence, the Superior Court would have likely remanded the case back to the Department to allow respondent to present evidence in rebuttal.

and 46.20.332.” See also *Dep’t of Licensing v. Cannon*, 147 Wn.2d 41, 51, n. 34, 50 P.3d 627 (2002).

RCW 46.20.332 states, in part, “[a]t a formal hearing the department shall consider its records . . .” See also WAC 308-103-150(9). Therefore, RCW 46.20.332 directs the hearing officer to consider Dr. Logan’s declaration, which was undisputedly included in respondents’ Department file. Accordingly, the hearing officers did not err in admitting and considering the declaration.

B. Dr. Logan’s Declaration Accompanied The Law Enforcement Officer’s Sworn Report In Some Cases That Are Stayed Pending The Resolution Of Respondents’ Ingram and DeLong’s Case

Respondents argue that Dr. Logan’s declaration is not admissible as “accompanying” the officer’s sworn report under RCW 46.20.308(8). The Department agrees that in Respondents’ Ingram and DeLong’s cases as well as cases stayed pending the decision in Respondents’ cases, identified as “Group A”,⁴ the declaration did not accompany the officer’s sworn report. Accordingly, the Department has abandoned this argument on appeal. However, there are a group of cases identified as “Group B”, which have also been stayed pending the decision in respondents’ cases in

⁴ See Appendix for a list of “Group A” and “Group B” cases stayed pending the resolution in Respondents Ingram and DeLong’s case. See also the notice of discretionary review in *Jackson v. Dep’t of Licensing*, COA III, No. 258289 for further explanation.

which the officer did submit the declaration together with his sworn report. In those cases, Dr. Logan's declaration accompanied the officer's sworn report and was properly admitted under RCW 46.20.308(8) ("The sworn report . . . of the law enforcement officer and any other evidence accompanying the report shall be admissible without further evidentiary foundation . . ."). In sum, for purposes of respondents' cases, and all "Group A" cases, the Department does not suggest that Dr. Logan's declaration accompanied the officer's sworn report.

III. CONCLUSION

The Department respectfully asks the Court to reverse the decision of Kittitas County Superior Court and reinstate the revocation of respondents' driving privileges.

RESPECTFULLY SUBMITTED this 9th day of May, 2007.

ROBERT M. McKENNA
Attorney General


CHARNELLE BJELKENGREN
WSBA No. 30917
Assistant Attorney General
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on the 9th day of May, 2007, I served all parties, or their counsel of record, true and correct copies of Appellant's Reply Brief by the method(s) indicated below at the following address(es):

Mr. Kenneth D. Beckley
701 North Pine Street
Ellensburg, WA 98926-2939

US Mail, Postage Prepaid
 Overnight Mail (Fed-Ex)

DATED this 9th day of May, 2007, at Spokane, WA.


MARY KATE MILLER
Legal Assistant

Appendix

GROUP A

Baker v. Dep't of Licensing, COA III No. 251195
Beedle v. Dep't of Licensing, COA III No. 254020
Benke v. Dep't of Licensing, COA III No. 249638
Dahl v Dep't of Licensing, COA III No. 252400
DaSilva v. Dep't of Licensing, COA III No. 251209
Duran v. Dep't of Licensing, COA III No. 249921
Garcia v. Dep't of Licensing, COA III No. 252710
Gardiner v. Dep't of Licensing, COA III No. 256278
Harding v. Dep't of Licensing, COA III No. 255905
Hernandez v. Dep't of Licensing, COA III No. 248747
Johnson v. Dep't of Licensing, COA III No. 252701
Kastelitz v. Dep't of Licensing, COA III No. 249204
Linder v. Dep't of Licensing, COA III No. 251128
Lowe v. Dep't of Licensing, COA III No. 249905
McGuffen v. Dep't of Licensing, COA III No. 249310
McNutt v. Dep't of Licensing, COA III No. 248739
Miller v. Dep't of Licensing, COA III No. 251136
Myers v. Dep't of Licensing, COA III No. 249891
Pritchard v. Dep't of Licensing, COA III No. 249620
Rose v. Dep't of Licensing, COA III No. 251110
Salzman v. Dep't of Licensing, COA III No. 249913
Seal v. Dep't of Licensing, COA III No. 249191
Siltman v. Dep't of Licensing, COA III No. 252698
Standaert-Askins v. Dep't of Licensing, COA III No. 252205
Strom v. Dep't of Licensing, COA III No. 252671
Vache v. Dep't of Licensing, COA III No. 252388
Wait v. Dep't of Licensing, COA III No. 252396
Willette v. Dep't of Licensing, COA III No. 252680

GROUP B

Baumann v. Dep't of Licensing, COA III No. 257461
Beutler v. Dep't of Licensing, COA III No. 255760
Brandt v. Dep't of Licensing, COA III No. 254941
Bruzas v. Dep't of Licensing, COA III No. 254011
Chacon v. Dep't of Licensing, COA III No. 257452
Cruz v. Dep't of Licensing, COA III No. 255891
Del Gesso v. Dep't of Licensing, COA III No. 255875
De Los Santos v. Dep't of Licensing, COA III No. 258050
Dittman v. Dep't of Licensing, COA III No. 256570
Fields v. Dep't of Licensing, COA III No. 254879
Galvan-Zepeda v. Dep't of Licensing, COA III No. 254003
Harris v. Dep't of Licensing, COA III No. 253945
Houston v. Dep't of Licensing, COA III No. 260551
Hutchinson v. Dep't of Licensing, COA III No. 260526
Jackson v. Dep't of Licensing, COA III No. 258289
Kempf v. Dep't of Licensing, COA III No. 260577
Kuchin v. Dep't of Licensing, COA III No. 258297
Magnuson v. Dep't of Licensing, COA III No. 260585
McFadden v. Dep't of Licensing, COA III No. 256553
Mosier v. Dep't of Licensing, COA III No. 260569
Nafziger v. Dep't of Licensing, COA III No. 260267
Nelson v. Dep't of Licensing, COA III No. 256111
O'Meara v. Dep't of Licensing, COA III No. 253937
Robbins v. Dep't of Licensing, COA III No. 256561
Shea v. Dep't of Licensing, COA III No. 257444
Smith v. Dep't of Licensing, COA III No. 259633
Vanderverter v. Dep't of Licensing, COA III No. 260275
Wood v. Dep't of Licensing, COA III No. 255883