

COA# 302211

Supreme Court  
Number 84825-4

**BEFORE THE SUPREME COURT OF THE STATE OF WASHINGTON**

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REBECCA E. DESMON, and the PUBLIC SCHOOL EMPLOYEES OF  
WASHINGTON, SEIU Local Union #1948, a Washington Non-Profit Corporation,  
*Plaintiffs/Appellants,*

v.

WASHINGTON STATE DEPARTMENT OF LICENSING,  
*Defendant/Respondent.*

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**APPELLANTS' REPLY BRIEF**

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## ARGUMENT

### *1. Evidence relevant to Barbara Shields is relevant to this case.*

Plaintiff Public School Employees of Washington, SEIU Local Union 1948 [hereinafter cited as PSE] brought this action as a declaratory judgment action. In order to establish standing to do so over DOL's initial objection, PSE was required to demonstrate that the substance of the action concerned matters falling within the scope of its organizational purpose – that is, the representation of the employment interests of school bus drivers. Defendant Department of Licensing [hereinafter cited as DOL] complains that PSE attempts to “add a party on appeal.” [Respondent's Brief at p.5]. That is not the case. Indeed, as DOL concedes, the trial judge in Superior Court has already noted that the outcome of this case with respect to the issue of enabling authority would control the outcome with respect to Ms. Shields' situation. [Respondent's Brief at p.5, n.6].

Information contained in the record below regarding Ms. Shields' experience with the DOL retest program is very relevant to the agency's contentions regarding its motivation to cancel the CDL's of audit subjects who allegedly failed a retest, as well as the validity of the retest process itself. DOL had the opportunity to have such information excluded from the record if it desired, but that was not done. *See*, CR 56(e).

**2. DOL is not required to retest CDL holders who were initially examined by third-party testers.**

DOL contends that it is “statutorily required” to retest CDL holders in order to audit the performance of its third-party testers. [*See, e.g.*, Respondent’s Brief at p.2]. That simply is not the case. The relevant portion of Title 49 CFR § 383.75 (a)(2), which is the “statute,” upon which DOL’s argument is based, provides as follows:

Require that, at least on an annual basis, State employees take the tests actually administered by the third party [tester] as if the State employee were a test applicant, or that States test a sample of drivers who were examined by the third party *to compare pass/fail results*. Title 49 CFR § 383.75 (a)(2)(iv) [emphasis added]. [The entire regulation is set forth at Respondent’s Brief, p.7].

The regulation is not ambiguous in the least. It clearly provides that States [DOL, in this case] *choose* one of two methods of auditing their third-party testers. DOL may either have its staff employees take a test themselves, with the third-party tester as examiner; *or* DOL may test a sample of licensees. There is no federal mandate that the audit program be conducted solely by retesting existing CDL holders. Doing so is solely a choice made by the agency.

**3. DOL reads too much into the audit regulation.**

Title 49 CFR § 383.75 (a)(2) is *the only* authority which has been cited by DOL as authority to conduct its CDL retest operations. The plain

language of that regulation, however, does not provide authority for DOL to cancel the otherwise-valid CDL's held by licensees who are subjected to a retest for audit purposes. The only statutory or regulatory authority for conducting an administrative retest is contained in the last clause of § iv of the regulation, and provides as follows:

... or that States test a sample of drivers who were examined by the third party *to compare pass/fail results*. Title 49 CFR § 383.75 (a)(2)(iv) [emphasis added].

This is the point that DOL just doesn't want to recognize, and which is central to the resolution of the dispute now before the court. DOL was only given the authority to conduct retests *in order to compare pass/fail results* – presumably among third-party testers, or with pass/fail results of CDL tests which were administered by state-employed examiners. The agency has simply presumed authority to go beyond the audit process, and, when pressed by PSE on the point, has developed a circular argument based upon general licensing statutes which have nothing to do with the situation presented by the retest scenario.

***4. DOL's contention that it possesses the statutory authority to cancel the CDL's of randomly-selected licensees who fail the pre-trip inspection portion of a retest is wrong.***

DOL contends that it does possess the statutory authority to cancel the CDL of a properly licensed school bus driver who fails a retest of the

pre-trip portion of the skills test a year after having successfully passed the same test. The agency's argument is based upon a circular reading of driver licensing statutes and regulations which simply do not provide support for such a contention.

The easiest way to unravel DOL's argument is to begin with the statute which provides its basic authority to *cancel* (as opposed to revoke or suspend) drivers licenses, including ordinary passenger car drivers licenses, RCW 46.20.207.

That statute provides as follows:

(1) The department is authorized to cancel any driver's license upon determining that the licensee was not entitled to the issuance of the license, or that the licensee failed to give the required or correct information in his or her application, or that the licensee is incompetent to drive a motor vehicle for any of the reasons under RCW 46.20.031 (4) and (7).

The provisions of this statute simply do not apply to the present situation. It gives DOL authority to cancel a drivers license in three very specific circumstances; none of which are present with respect to Ms. Desmon or Ms. Shields:

1) DOL can cancel a drivers license upon determining that the licensee was not entitled to the issuance of the license. These words mean that the licensee was not entitled to the issuance of the license *at the time it was issued*. DOL has never contended, nor could it reasonably establish, that

either Ms. Desmon or Ms. Shields were not entitled to the issuance of a CDL. The only contention advanced by DOL in this case is that they did not pass the pre-trip inspection portion of the skills test a year after having taken it the first time.<sup>1</sup> DOL has not asserted that their performance on the skills test which the women *initially* passed was irregular in any respect. If the legislature wanted DOL to be able to randomly re-examine drivers *and cancel their drivers licenses* as a result of that re-examination, it could certainly have changed one word in RCW 46.20.207. The legislature could have said that DOL had authority to cancel a drivers license upon learning that the licensee “*is not entitled to the issuance of a license.*” But, the legislature simply didn’t do that. That statute is obviously aimed at the *initial* licensing event.

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<sup>1</sup> And really, how critical could that pre-trip inspection portion of the skills test be if DOL is willing to leave school bus drivers on the road for months after they allegedly fail their initial retest? Plaintiff Rebecca Desmon failed the retest on July 21, 2009. Her CDL was not proposed for cancellation by DOL until September 17, 2009. [Agency Record, DOL p 26]. The proposed cancellation of Ms. Desmon’s CDL was delayed again after she appealed the agency’s cancellation decision, even though she had been informed by DOL that an appeal would not delay the cancellation. [ Declaration of Rebecca Desmon, ¶¶ 9-15, CP 26-28]. Ms. Desmon’s CDL was eventually cancelled on November 3, 2009. During the 105 days which elapsed between failing the retest and the actual cancellation of her CDL, Ms. Desmon legally drove a school bus as an employee of the Cheney School District. [Declaration of Rebecca Desmon, ¶ 14, CP 28]. DOL was also willing to waive the pre-trip inspection portion of a second retest if Ms. Desmon would voluntarily submit to an over-the-road driving test in settlement of this litigation. [CP 47-48]. *See, also,* Declaration of Barbara Shields, ¶ 14 (a Cheney School District bus driver who repeatedly failed pre-trip inspection re-test was eventually just required to back a school bus through a line of traffic cones in order to “pass” the re-test). [CP 41].

2) DOL can cancel the drivers license of an individual who did not provide accurate information on his or her application for the license.

That situation does not apply to the present case.

3) DOL can cancel a drivers license for the reasons specified in RCW 46.20.031 (4), (7). That statute provides as follows:

The department shall not issue a license to a person:

(4) Who has previously been adjudged to be mentally ill or insane, or to be incompetent due to a mental disability or disease. The department shall, however, issue a license to the person if he or she otherwise qualifies and:

(a) Has been restored to competency by the methods provided by law; or

(b) The superior court finds the person able to operate a motor vehicle with safety upon the highways during such incompetency;

(7) Who is unable to safely operate a motor vehicle upon the highways due to a physical or mental disability. The department's conclusion that a person is barred from licensing under this subsection must be reasonable and be based upon good and substantial evidence. This determination is subject to review by a court of competent jurisdiction.

There is no evidence in this case, nor does DOL assert, that either Ms.

Desmon or Ms. Shields is mentally ill, insane, or suffers from a mental or physical disability which renders them unsafe to operate a motor vehicle.

Thus, DOL does not have statutory authority to *cancel* the CDL of either Ms. Desmon or Ms. Shields, pursuant to RCW 46.20.207. The agency also asserts that RCW 46.20.031 (5) provides it with authority to

cancel their licenses.<sup>2</sup> That assertion is also without merit. RCW

46.20.031 (5) states:

The department shall not issue a license to a person:

(5) Who has not passed the driver's licensing examination required by RCW 46.20.120 and 46.20.305, if applicable.

However, both Ms. Desmon and Ms. Shields *did pass* the driver's licensing examination when they initially received their CDL's. They hold validly-issued licenses which must be cancelled or otherwise revoked if they are to be taken away. If the Legislature wanted DOL to be able to go back, without cause, and cancel a drivers license in the event that the licensee failed a retest, this section of RCW 46.20.031 would at least have been mentioned in the cancellation statute, RCW 46.20.207, *discussed supra*. After all, two other sections of RCW 46.20.031 *are* referenced in the cancellation statute. If the Legislature referenced two other sections of that statute, but did not include section (5), it must be presumed that the omission was purposeful.

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<sup>2</sup> DOL does not reference either RCW 46.20.207 or RCW 46.20.031 in Respondent's Brief. However, both of those statutes were cited by DOL as authority for its cancellation of Rebecca Desmon's CDL during the administrative proceedings below. [Agency record, DOL p.73]. Plaintiffs address the applicability, or lack thereof, of those statutes to this case for two reasons. First, because this Court reviews summary judgment decisions *de novo*, and secondly, in order to demonstrate that DOL is essentially making up its arguments to support cancellation as it goes along, and not because the agency was certain, in any respect, that it did have the authority to take the derogatory actions which it did take with respect to Ms. Desmon (and Ms. Shields).

A court is not permitted to add language to an unambiguous statute.

Our primary duty in interpreting any statute is to discern and implement the intent of the legislature. Our starting point must always be ‘the statute’s plain language and ordinary meaning.’ When the plain language is unambiguous – that is, when the statutory language admits of only one meaning – the legislative intent is apparent, and we will not construe the statute otherwise. Just as we ‘cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language,’ we may not delete language from an unambiguous statute.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) [citations omitted, emphasis added].

It is also a fundamental principle of administrative law that an agency may not exceed its statutory authority.

The power and authority of an administrative agency is limited to that which is expressly granted by statute or necessarily implied therein. *Department of Labor and Industries*, 94 Wn. App. 764, 779, 973 P.2d 30 (1999) citing *McGuire v. State*, 58 Wn. App. 195, 198, 791 P.2d 929 (1990). “Ultra vires acts are those done “wholly without legal authorization or in direct violation of existing statutes” . . . *Dept. of Labor and Industries, supra* citing *Metropolitan Park Dist. V. Department of Natural Resources*, 85 Wn.2d 821, 825, 539 P.2d 854 (1975).

What is missing in this case is any specific legislative authority which allows DOL to cancel the CDL’s of licensees who fail a retest. The actions of DOL with respect to the Cheney School District school bus drivers who are the focus of this litigation certainly imply that the agency itself believes that it is *not required* by statute to effect such cancellations. The substantial delays in cancellation which are present here should not

have occurred if DOL was required by law to cancel the CDL of an individual who failed the re-test. *See, discussion at note 2, supra. See also, Exhibit 3 to Declaration of Tandy Alexander, p.5, ¶ 4(i) (v) [CP 63]* (“For drivers that disqualify on any portion of their initial retest attempt successfully completed test phases (i.e., pre-trip, basic controls, etc.) will not be honored or ‘banked’ for the customer’s next test attempt(s). – Customer is required to begin from test phase 1.”). DOL isn’t even following its own internal procedures in dealing with the school bus drivers who are unlucky enough to be selected for a retest. (The provisions of RCW 46.20.031 are mandatory, and do not provide DOL with discretion whether to cancel a CDL if the requirements of the statute are met). Likewise, the agency could not have given the other Cheney driver mentioned by Ms. Shields a pass after several failures just by making him back up through a line of traffic cones.

DOL also asserts that the provisions of RCW 46.20.305 establish its authority to take the actions in which it has engaged here. That assertion is wrong as well. The section of the statute relied upon by the agency provides as follows:

- (1) The department, having good cause to believe that a licensed driver is incompetent or otherwise not qualified to be licensed may upon notice require him or her to submit to an examination.

The question presented is which came first, the chicken or the egg? A plain reading of this statute clearly indicates that it is applicable only to situations where a driver's actions *while driving* establish good cause to believe that the driver is incompetent. That is important here, because the agency's authority under this statute is limited to those "examinations" which are triggered by good cause. The remainder of the statute refers to fatal accidents, physicians' exams, and the like. Thus the question raised is whether "good cause" can be, as DOL contends, a driver's performance on a CDL pre-trip re-test, when the driver has otherwise no blemishes on her driving record.

RCW 46.20.305 was initially enacted in 1965, long before the concept of a federally-authorized commercial drivers license was conceived. 1965 ex. Sess. Washington Laws, ch 121, § 26. It was extensively amended in 1998, as a part of the Cooper Jones Act, 1998 Washington Laws, ch. 165 § 13. The purpose of the Cooper Jones act was to improve pedestrian and bicycle safety upon the highways.

Hundreds of bicyclists and pedestrians are seriously injured every year in accidents, and millions of dollars are spent on health care costs associated with these accidents. There is clear evidence that organized training in the rules and techniques of safe and effective cycling can significantly reduce the incidence of serious injury and accidents, increase cooperation among road users, and significantly increase the incidence of bicycle helmet use, particularly among minors. A reduction in accidents benefits the entire community. 1998 Washington Laws, § 2(2).

The Cooper Jones Act does not reference CDL's or the DOL retest program in any manner. The authority to cancel the CDL's of school bus drivers who fail a retest which is conducted solely for the purposes of auditing third-party testers cannot reasonably be implied from the provisions of RCW 46.20.305.

However, even assuming that the statute applies to Ms. Desmon and Ms. Shields under the circumstances presented in this case, DOL has not complied with its requirements. RCW 46.20.305 (4) provides as follows:

Upon the conclusion of an examination under this section *the department shall take driver improvement action as may be appropriate* and may suspend or revoke the license of such person or permit him or her to retain such license, or may issue a license subject to restrictions as permitted under RCW 46.20.041. The department may suspend or revoke the license of such person who refuses or neglects to submit to such examination. [emphasis added].

First, it is not clear from the statute what the term "examination" means. In the context of the other portions of the statute, an "examination" doesn't necessarily mean repeating a portion of a skills test which you initially passed. An examination could very well mean an eye exam, a physician's exam, or a mental examination.

More important, though, the statute doesn't say what action DOL must take after the examination. It only *requires* DOL to take "driver

improvement action as may be appropriate.” While that language clearly provides the agency with some leeway, it certainly doesn’t mean taking a test over and over again until you pass; or until the agency is tired of testing you, so it devises a different, easier, test. And, DOL is absolutely not *required*, as it suggests in this case, to cancel an individual’s driver’s license. It has permissive authority to *suspend or revoke* a license but the action taken here, an administrative cancellation, is not mentioned in the statute.

Under the statutory canon *expressio unius est exclusio alterius*, the express inclusion in a statute of the situations in which it applies implies that other situations are intentionally omitted. *In re Detention of Strand*, 167 Wn.2d 180, 190, 217 P.3d 1159 (2009), *citing State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003).

As DOL points out, the terms “cancellation,” “suspension,” and “revocation,” are each defined by statute in the code title which addresses DOL and its regulatory authority over drivers licenses. Respondent’s Brief at p. 11. The legislature certainly knows the difference, yet it did not provide authority to DOL to cancel a drivers license pursuant to RCW 46.20.305. Because, as DOL correctly asserts, suspension and revocation of a drivers license carry more severe consequences for the licensee, it is clear that the legislature 1) only intended that the statute apply to the most severe situations; and 2) that the legislature prefers that the agency follow its directive to engage in “driver improvement action.”

This would presumably include DOL involvement in remedial actions such as retraining the driver. The agency's administration of the retest program and its treatment of Ms. Desmon and Ms. Shields just cannot be reconciled with the requirements of RCW 46.20.305.

Like the other statutes cited by DOL, the provisions of RCW 46.20.305 simply do not fit the circumstances presented to this Court, and they can't be made to fit unless the Court fills in the obvious blanks, in contravention of well-established judicial precedent in our State.

Hoping not to unduly belabor the point, PSE submits that DOL has crossed the line here, and does not possess the legislative authority to cancel the CDL's of Ms. Desmon and Ms. Shields based upon the evidence in the record in this case.

***5. There is no rational basis for the selection of Rebecca Desmon to be retested.***

Plaintiffs agree with DOL that the standard by which the Court must compare the treatment of Rebecca Desmon by DOL to that accorded by DOL to other CDL holders is whether there was a rational basis for her differential treatment. Respondent's Brief at 14-15.

Although the level of scrutiny applied under the rational basis test that we all studied in law school is minimal, some scrutiny is merited.

That is particularly true with respect to the deprivation of Ms. Desmon's protected interest in maintaining an occupational license.

It is well established that, once issued, professional and motor vehicle licenses create interests requiring due process protection. *See, e.g., Barry v. Barchi*, 443 U.S. 55, 64 n.11, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979) (licenses issued to horse trainers were protected by due process and equal protection because "state law has engendered a clear expectation of continued enjoyment of a license absent proof of culpable conduct by the trainer"); *Bell*, 402 U.S. at 539 (procedural due process protection). Likewise, the United States Supreme Court has held that pursuit of an occupation or profession is a liberty interest protected by the due process clause. *Conn v. Gabbert*, 526 U.S. 286, 291-92, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999) (the "Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment"); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). *See also Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999), (the pursuit of profession or occupation is a protected liberty interest that extends across a broad range of lawful occupations), *cert. denied*, 530 U.S. 1261 (2000); *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1271 (S.D. Cal. 1997) ("[t]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts" of the federal constitution (quoting *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959).)). *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 219, 143 P.3d 571 (2006).

Recently, however, Washington courts have begun applying a somewhat more rigorous review to the facts underlying the revocation of a professional license. In *Nguyen v. Department of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001), the Court required that an administrative agency

apply a clear and convincing evidentiary standard to the review of a petition to revoke a medical doctor's license.

The interest of the medical practitioner in a professional disciplinary proceeding is obviously much greater than that which would be implicated by the mistaken rendition of a mere money judgment against him. It is much more than the loss of a specific job. It involves the professional's substantial interest to practice within his profession, his reputation, his livelihood, and his financial and emotional future. That the public has an interest in the competent provision of health care services lends even greater importance to the assurance against erroneous deprivation which a higher standard would promote, as ultimately the public is dependent upon the provision of such services, not their elimination. An inadequate standard of proof increases the risk of erroneous deprivation and, therefore, requires recognition, as so many other courts have, that the constitutional minimum standard of proof in a professional disciplinary proceeding for a medical doctor must be something more than a mere preponderance. *Nguyen*, 144 Wn.2d at 534.

The clear and convincing evidentiary standard was extended to the registration of a nursing assistant in *Ongom v. Department of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2007).

Although undoubtedly a medical license is much more difficult to obtain than a registration to practice as a nursing assistant, each constitutes a lawful entitlement to practice one's chosen profession. We cannot say Ms. Ongom's interest in earning a living as a nursing assistant is any less valuable to her than Dr. Nguyen's interest in pursuing his career as a medical doctor. *Ongom*, 159 Wn.2d 136.

What does this mean in the context of the present case? In the best of all possible worlds, of course, the Court would decide that Ms. Desmond's interest in earning a living as a school bus driver is just as

valuable to her as Ms. Ongom's and Dr. Nguyen's similar interests were to them, and find that she was denied due process of law when a lower evidentiary standard was applied to the facts adduced at the contested hearing in this matter.<sup>3</sup>

If the Court is not disposed to extend this branch of the constitutional tree again in the forest that is made up of professional license litigation, Plaintiffs do suggest that the Court recognize the general trend toward heightened judicial scrutiny of actions by the state to deprive an individual of their property interest in an occupational license, and apply such a heightened degree of scrutiny to the agency's actions here.

For example, DOL now contends that "[a]fter learning that Desmon's original test was administered by a suspect third party, the Department had good cause to believe she was not qualified to be licensed." Respondent's Brief at p.15. However, the DOL Hearing Examiner made the following finding of fact after hearing the testimony of DOL's Commercial Drivers License Compliance Manager, Gil Kingsley:

Ms. Desmon argues no remedial action was taken against the Third Party Tester. However, Mr. Kingsley testified the Department did conduct an evaluation of the Third Party Tester based upon the results of these re-tests (which the Third Party Tester successfully passed.). [Agency record, DOL p.132].

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<sup>3</sup> Contested facts in this case were apparently decided by the agency using the lowest possible standard of proof – substantial evidence. There is no indication in the agency's decision that even a preponderance of the evidence standard was utilized. *See*, agency record, DOL pp. 129-134.

There's a disconnect here somewhere. DOL initially contended that its audit of the third-party tester who tested the Cheney school bus drivers was completely random. In fact, the agency record reveals that it was PSE that raised the issue of why remedial action was not taken against the third-party tester if so many school bus drivers whom he had initially examined failed the retest. As this litigation unspooled, and DOL focused more and more on RCW 46.20.305 as a panacea, the agency realized that it needed something more to trigger the statute's "good cause" threshold, and so it concocted an after-the-fact story about DOL selecting this particular third-party tester's clients for retesting because it suspected that he was not applying the agency's testing criteria.<sup>4</sup> Sadly, that assertion absolutely conflicts earlier sworn testimony from a DOL manager who would be in the position to know.

Throwing out the argument that DOL knew in advance that the third-party tester who examined Ms. Desmon and Ms. Shields was not doing a thorough job, there is absolutely nothing else in the record in this case which would serve to separate them from the general pool of all CDL licensees who had taken their examinations from third-party testers,

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<sup>4</sup> The Court will please note that PSE does not accuse DOL's counsel of complicity here. The basis for counsel's statement in Respondent's Brief appears in a Sworn Declaration made by a DOL bureaucrat in conjunction with the summary judgment proceedings in Superior Court. [CP 70].

which, prior to 2008, was everyone who had acquired a CDL in Washington. Before 2008, DOL *only* used third-party testers. [CP 46].

There is no evidence in the record that would establish a rational basis for selecting Ms. Desmon and Ms. Shields for retesting. Why not retest drivers who had been licensed for more than a year? Or why not test drivers who had accidents or received traffic citations? Why not test every second, or every fourth, or every seventh driver on the list? Either there was a reason to test every third driver on the list, and another reason why the list only extended back one year, or there wasn't, and it was a purely *arbitrary* decision by DOL. If there were reasons underlying the specific decisions made by DOL which led to the classification of CDL licensees who were retested, those reasons should appear in the record of this case if a rational basis for the classification is to be established. There are no such reasons in the record here, and the classification, which ultimately led to the withdrawal of Ms. Desmon's professional license, violates her right to equal treatment under the law.

***6. Ms. Desmon and Ms. Shields did not voluntarily submit to the re-test procedure.***

DOL's contention that Ms. Desmon and Ms. Shields voluntarily submitted to the retest procedure is not accurate. [Respondent's Brief p.19]. As Ms. Shields states:

I have been told that when I applied for my CDL, some fine print on the application that I signed gave DOL the right to subject me to this re-test procedure if I took my initial skills test from a third-party tester. If that is the case, it was certainly not a voluntary agreement on my behalf. When I applied for the license, I didn't know the difference between a third-party tester and a regular DOL agency staff tester, and it was absolutely not explained to me at the time I signed the application form. I simply took my initial skills test from a tester to whom I was directed by the school district, and I signed whatever papers the DOL staff told me needed to be signed in order to acquire a CDL.

*Declaration of Barbara Shields, ¶ 19 [CP 43].*

Ms. Desmon testified in a similar manner during the administrative hearing that DOL conducted in her cancellation case. [Agency verbatim record, p.87]. Even if the matter had been fully explained at the time of their applications, the women could hardly have “chosen” to be tested by a DOL staff tester, as apparently most, if not all, of the CDL skills testing was being done by the contracted third party testers. “In 2007, Washington State was one of only seven states that relied solely on the use of third party testers (TPT) for conducting all CDL skills test examinations.” *Declaration of Tandy Alexander, p.2. [CP 46].* The declaration goes on to state that in 2007, the state legislature appropriated funds for the agency to hire staff CDL testers, and that currently (in 2010) there are staff testers in six geographical locations. [CP 46, n.1]. DOL does not provide information about how many staff testers were available in the Spokane area in the fall of 2008, when Ms. Desmon and Ms. Shields

took and passed their initial skills tests. However, it is unlikely that the agency could have been fully staffed with CDL testers so soon after they were authorized for the first time by the legislature.

Frankly, the CDL application process more closely resembles a contract of adhesion, than any meaningful choice on the part of Ms. Desmon or Ms. Shields to use a third-party tester and subject themselves to the retest process solely because of the fine print on the application form.

The factors considered in determining whether a contract is an adhesion contract are (1) whether the contract is a standard form printed contract, (2) whether it was "prepared by one party and submitted to the other on a 'take it or leave it' basis", and (3) whether there was "no true equality of bargaining power" between the parties. *Yakima County Fire Protection Dist. No. 12 (West Valley) v. City of Yakima*, 122 Wn.2d 371, 393, 858 P.2d 245 (1993).

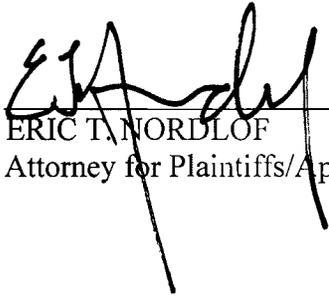
Ms. Desmon and Ms. Shields should not be held to have consented to the aggravation they have experienced through the retest procedure solely because they signed a DOL form that was shoved in front of them without explanation.

#### CONCLUSION

The trial court's order of June 24, 2010 should be vacated, and this matter remanded to the trial court with instructions to enter judgment in favor of Plaintiffs, and to discontinue cancelling the CDL's

of the holders of otherwise validly-issued licenses solely on the basis of their performance, sometime later, on a retest which is administered only as the means of auditing the performance of a third-party tester contracted by DOL to administer the skills test portion of a CDL examination.

Dated this 9 day of December, 2010.

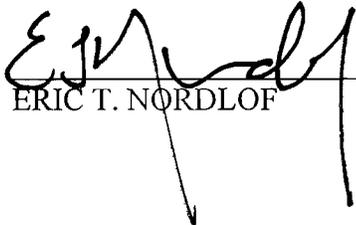
  
ERIC T. NORDLOF      WSBA # 13181  
Attorney for Plaintiffs/Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and accurate copy of the foregoing Appellants' Reply Brief to:

Toni Hood, Assistant Attorney General  
State of Washington  
PO Box 40110  
Olympia, Washington 98504-0110

on this 9 day of December, 2010, by ordinary first class mail, with postage prepaid thereon.

  
ERIC T. NORDLOF

APPENDIX A --  
WASHINGTON STATUTES

RCW 46.20.031  
Ineligibility.

The department shall not issue a driver's license to a person:

- (1) Who is under the age of sixteen years;
- (2) Whose driving privilege has been withheld unless and until the department may authorize the driving privilege under RCW 46.20.311;
- (3) Who has been classified as an alcoholic, drug addict, alcohol abuser, or drug abuser by a program approved by the department of social and health services. The department may, however, issue a license if the person:
  - (a) Has been granted a deferred prosecution under chapter 10.05 RCW; or
  - (b) Is satisfactorily participating in or has successfully completed an alcohol or drug abuse treatment program approved by the department of social and health services and has established control of his or her alcohol or drug abuse problem;
- (4) Who has previously been adjudged to be mentally ill or insane, or to be incompetent due to a mental disability or disease. The department shall, however, issue a license to the person if he or she otherwise qualifies and:
  - (a) Has been restored to competency by the methods provided by law; or
  - (b) The superior court finds the person able to operate a motor vehicle with safety upon the highways during such incompetency;
- (5) Who has not passed the driver's licensing examination required by RCW 46.20.120 and 46.20.305, if applicable;
- (6) Who is required under the laws of this state to deposit proof of financial responsibility and who has not deposited such proof;
- (7) Who is unable to safely operate a motor vehicle upon the highways due to a physical or mental disability. The department's conclusion that a person is barred from licensing under this subsection must be reasonable and be based upon good and substantial evidence. This determination is subject to review by a court of competent jurisdiction.

[2002 c 279 § 3; 1999 c 6 § 7; 1995 c 219 § 1; 1993 c 501 § 2; 1985 c 101 § 1; 1977 ex.s. c 162 § 1; 1965 ex.s. c 121 § 4.]

**Notes:**

**Intent – 1999 c 6:** See note following RCW 46.04.168.

Allowing unauthorized person to drive: RCW 46.16.011, 46.20.024.

Juvenile driving privileges, alcohol or drug violations: RCW 66.44.365, 69.50.420.

## RCW 46.20.041

## Persons with physical or mental disabilities or diseases.

(1) If the department has reason to believe that a person is suffering from a physical or mental disability or disease that may affect that person's ability to drive a motor vehicle, the department must evaluate whether the person is able to safely drive a motor vehicle. As part of the evaluation:

(a) The department shall permit the person to demonstrate personally that notwithstanding the disability or disease he or she is able to safely drive a motor vehicle.

(b) The department may require the person to obtain a statement signed by a licensed physician or other proper authority designated by the department certifying the person's condition.

(i) The statement is for the confidential use of the director and the chief of the Washington state patrol and for other public officials designated by law. It is exempt from public inspection and copying notwithstanding chapter 42.56 RCW.

(ii) The statement may not be offered as evidence in any court except when appeal is taken from the order of the director canceling or withholding a person's driving privilege. However, the department may make the statement available to the director of the department of retirement systems for use in determining eligibility for or continuance of disability benefits and it may be offered and admitted as evidence in any administrative proceeding or court action concerning the disability benefits.

(2) On the basis of the evaluation the department may:

(a) Issue or renew a driver's license to the person without restrictions;

(b) Cancel or withhold the driving privilege from the person; or

(c) Issue a restricted driver's license to the person. The restrictions must be suitable to the licensee's driving ability. The restrictions may include:

(i) Special mechanical control devices on the motor vehicle operated by the licensee;

(ii) Limitations on the type of motor vehicle that the licensee may operate; or

(iii) Other restrictions determined by the department to be appropriate to assure the licensee's safe operation of a motor vehicle.

(3) The department may either issue a special restricted license or may set forth the restrictions upon the usual license form.

(4) The department may suspend or revoke a restricted license upon receiving satisfactory evidence of any violation of the restrictions. In that event the licensee is entitled to a driver improvement interview and a hearing as provided by RCW 46.20.322 or 46.20.328.

(5) Operating a motor vehicle in violation of the restrictions imposed in a restricted license is a traffic infraction.

[2005 c 274 § 306; 1999 c 274 § 12; 1999 c 6 § 9; 1986 c 176 § 1; 1979 ex.s. c 136 § 54; 1979 c 61 § 2; 1965 ex.s. c 121 § 5.]

## Notes:

Part headings not law -- Effective date--2005 c 274: See RCW 42.56.901 and 42.56.902.

Intent -- 1999 c 6: See note following RCW 46.04.168.

Effective date -- Severability -- 1979 ex.s. c 136: See notes following RCW 46.63.010.

RCW 46.20.120  
Examinations — Waiver — Renewals — Fees.

An applicant for a new or renewed driver's license must successfully pass a driver licensing examination to qualify for a driver's license. The department shall give examinations at places and times reasonably available to the people of this state.

(1) Waiver. The department may waive:

(a) All or any part of the examination of any person applying for the renewal of a driver's license unless the department determines that the applicant is not qualified to hold a driver's license under this title; or

(b) All or any part of the examination involving operating a motor vehicle if the applicant:

(i) Surrenders a valid driver's license issued by the person's previous home state; or

(ii) Provides for verification a valid driver's license issued by a foreign driver licensing jurisdiction with which the department has an informal agreement under RCW 46.20.125; and

(iii) Is otherwise qualified to be licensed.

(2) Fee. Each applicant for a new license must pay an examination fee of twenty dollars.

(a) The examination fee is in addition to the fee charged for issuance of the license.

(b) "New license" means a license issued to a driver:

(i) Who has not been previously licensed in this state; or

(ii) Whose last previous Washington license has been expired for more than five years.

(3) An application for driver's license renewal may be submitted by means of:

(a) Personal appearance before the department; or

(b) Mail or electronic commerce, if permitted by rule of the department and if the applicant did not renew his or her license by mail or by electronic commerce when it last expired. However, the department may accept an application for renewal of a driver's license submitted by means of mail or electronic commerce only if specific authority and funding is provided for this purpose by June 30, 2004, in the omnibus transportation appropriations act.

(4) A person whose license expired or will expire while he or she is living outside the state, may:

(a) Apply to the department to extend the validity of his or her license for no more than twelve months. If the person establishes to the department's satisfaction that he or she is unable to return to Washington before the date his or her license expires, the department shall extend the person's license. The department may grant consecutive extensions, but in no event may the cumulative total of extensions exceed twelve months. An extension granted under this section does not change the expiration date of the license for purposes of RCW 46.20.181. The department shall charge a fee of five dollars for each license extension;

(b) Apply to the department to renew his or her license by mail or, if permitted by rule of the department, by electronic commerce even if subsection (3)(b) of this section would not otherwise allow renewal by that means. If the person establishes to the department's satisfaction that he or she is unable to return to Washington within twelve months of the date that his or her license expires, the department shall renew the person's license by mail or, if permitted by rule of the department, by electronic commerce.

(5) If a qualified person submits an application for renewal under subsection (3)(b) or (4)(b) of this section, he or she is not required to pass an examination nor provide an updated photograph. A license renewed by mail or by electronic commerce that does not include a photograph of the licensee must be labeled "not valid for identification purposes."

[2005 c 314 § 306; 2005 c 61 § 2; 2004 c 249 § 6; 2002 c 352 § 13. Prior: 1999 c 308 § 1; 1999 c 199 § 3; 1999 c 6 § 19; 1990 c 9 § 1; 1988 c 88 § 2; 1985 ex.s. c 1 § 4; 1979 c 61 § 6; 1975 1st ex.s. c 191 § 2; 1967 c 167 § 4; 1965 ex.s. c 121 § 9; 1961 c 12 § 46.20.120; prior: 1959 c 284 § 1; 1953 c 221 § 2; 1937 c 188 § 55, part; RRS § 6312-55, part.]

Notes:

Reviser's note: This section was amended by 2005 c 61 § 2 and by 2005 c 314 § 306, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.032(2). For rule of construction, see RCW 1.12.025(1).

**Effective date -- 2005 c 314 §§ 101-107, 109, 303-309, and 401:** See note following RCW 46.68.290.

**Part headings not law -- 2005 c 314:** See note following RCW 46.68.035.

**Intent -- 2005 c 61:** See note following RCW 46.20.125.

**Effective dates -- 2002 c 352:** See note following RCW 46.09.410.

**Effective date -- 1999 c 308:** "Sections 1 through 5 of this act take effect July 1, 2000." [1999 c 308 § 6.]

**Effective date -- 1999 c 199:** See note following RCW 46.20.027.

**Intent -- 1999 c 6:** See note following RCW 46.04.168.

**Effective date -- 1985 ex.s. c 1:** See note following RCW 46.20.070.

RCW 46.20.207  
Cancellation.

(1) The department is authorized to cancel any driver's license upon determining that the licensee was not entitled to the issuance of the license, or that the licensee failed to give the required or correct information in his or her application, or that the licensee is incompetent to drive a motor vehicle for any of the reasons under RCW 46.20.031 (4) and (7).

(2) Upon such cancellation, the licensee must surrender the license so canceled to the department.

[1993 c 501 § 3; 1991 c 293 § 4; 1965 ex.s. c 121 § 20.]

RCW 46.20.305

Incompetent, unqualified driver — Reexamination — Physician's certificate — Action by department.

(1) The department, having good cause to believe that a licensed driver is incompetent or otherwise not qualified to be licensed may upon notice require him or her to submit to an examination.

(2) The department shall require a driver reported under RCW 46.52.070 (2) and (3) to submit to an examination. The examination must be completed no later than one hundred twenty days after the accident report required under RCW 46.52.070(2) is received by the department unless the department, at the request of the operator, extends the time for examination.

(3) The department may in addition to an examination under this section require such person to obtain a certificate showing his or her condition signed by a licensed physician or other proper authority designated by the department.

(4) Upon the conclusion of an examination under this section the department shall take driver improvement action as may be appropriate and may suspend or revoke the license of such person or permit him or her to retain such license, or may issue a license subject to restrictions as permitted under RCW 46.20.041. The department may suspend or revoke the license of such person who refuses or neglects to submit to such examination.

(5) The department may require payment of a fee by a person subject to examination under this section. The department shall set the fee in an amount that is sufficient to cover the additional cost of administering examinations required by this section.

[1995 c 351 § 3; 1998 c 165 § 13; 1965 ex.s. c 121 § 26.]

Note:

**Effective date -- 1998 c 165 §§ 8-14:** See note following RCW 46.52.070.

**Short title -- 1998 c 165:** See note following RCW 43.59.010.

**APPENDIX B --  
AGENCY RECORD EXTRACTS**



STATE OF WASHINGTON  
 DEPARTMENT OF LICENSING  
 P. O. Box 9031, Olympia, WA 98507-9031

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
 IN AND FOR THE COUNTY OF SPOKANE

REBECCA E DESMON Petitioner, No. 09-2-05211-0

V )  
 ) CERTIFICATION OF  
 ) ADMINISTRATIVE RECORD  
 STATE OF WASHINGTON )  
 DEPARTMENT OF LICENSING, )  
 Respondent. )  
 \_\_\_\_\_ )

I, Kevin Ritzer, do hereby certify that I have been, and am now, an officer having by law custody of the records of the Department of Licensing, duly appointed by Liz Luce, the duly appointed director of the Department of Licensing.

I further certify that the attached is the administrative record relating to the Department's action against the driving privileges of REBECCA E DESMON, pursuant to RCWs 46.20.031, 46.20.207 and 46.20.305.

I further certify that such records are official, and are maintained as public records in the office of the Department of Licensing in the Highways-Licenses Building, Olympia, Washington.

Witness my hand and official seal of the Department of Licensing, at Olympia, in the county of Thurston, State of Washington, this 25th day of November, 2009.

Kevin Ritzer  
 Custodian of Records  
 Department of Licensing  
 State of Washington





STATE OF WASHINGTON  
DEPARTMENT OF LICENSING  
PO Box 9020, Olympia, WA 98507-9020

August 18, 2009

REBECCA E. DESMON  
27 N 5TH ST  
CHENEY, WA 99004

PIC: I **REDACTION**

NOTICE OF CANCELLATION

Dear Rebecca:

This letter is to notify you that we will cancel your Commercial Driver License (CDL) on September 17, 2009 because you failed the retest you took on July 21, 2009.

To appeal this action you may return the enclosed form or submit a written request postmarked within 15 days from the date of this notice to the Department of Licensing, Hearings and Interviews, PO Box 9031, Olympia WA 98507-9031, or you may fax your appeal request to 360-664-8492.

You will be required to complete the applicable tests and pay the required fees to reinstate your commercial driving privileges. Testing may include knowledge tests if your previous knowledge tests were passed more than one year ago. You will be required to successfully complete a CDL skills test for the type of CDL you wish to obtain. You must complete your skills test with DOL staff and not a Third Party Tester. Depending on commercial vehicle availability, you may be required to provide your own vehicle for completing this test.

If you have any questions regarding this notice, you may contact the CDL Compliance Program at (360) 902-3859, via email at [cdlre-testing@dol.wa.gov](mailto:cdlre-testing@dol.wa.gov), or you may write the Department of Licensing CDL Compliance Program PO Box 9030, Olympia WA 98507-9030.

Sincerely,

Gibb Kingsley, CDL Compliance Program Manager  
Planning and Performance, Driver Services Division

RCW 46.20.031  
46.20.207  
46.20.305

The Department of Licensing has a policy of providing equal access to its services.  
If you need special accommodation, please call (360) 902-3900 or TDD (360) 664-0116.



STATE OF WASHINGTON  
DEPARTMENT OF LICENSING  
PO Box 9020, Olympia, WA 98507-9020

Exhibit # 6

REBECCA DESMON  
27 N 5TH ST  
CHENEY, WA 99004

PIC: ~~REDACTION~~

**NOTICE OF CDL SKILLS TEST DISQUALIFICATION**

You did not qualify on the re-examination of your Commercial Driver License (CDL) skills test conducted on 7-21-09. Therefore, you are required to successfully complete another CDL skills test with the Department of Licensing (DOL).

There is a \$100 skills test fee required for your next CDL skills test. Please take this letter into your local Driver Licensing Office where you can pay the required test fee and get a Skills Test Results form. After paying the fee and getting the form, call one of the following numbers listed below, depending upon your access to a commercial motor vehicle.

- If you will be providing your own commercial motor vehicle, please call (360)902-3607 to schedule your retest.
- If you will be requesting to use one of our commercial vehicles, please call (360)902-3853 to schedule your retest.

If you have any questions regarding this notice, you may contact the CDL Compliance Program (360) 902-3853, via email [cdlre-testing@dol.wa.gov](mailto:cdlre-testing@dol.wa.gov), or you may write the Department of Licensing, CDL Compliance Program, P.O. Box 9030, Olympia WA 98507-9030.

Sincerely,

Gibb Kingsley, CDL Compliance Program Manager  
Planning and Performance, Driver Services Division

RCW 46.20.031, 46.20.207, 46.20.305

FOR THE LSR: Please collect the \$100 CDL skills test fee and give the customer a CDL Skills Test Results form that is checked "DOL Tester." The customer will schedule their test with CDL staff at HQTRs.

The Department of Licensing has a policy of providing equal access to its services.  
If you need special accommodation, please call (360) 902-3900 or TDD (360) 664-0116.

**DOL PG 73**

**DEPARTMENT OF LICENSING  
HEARINGS AND INTERVIEWS SECTION  
FORMAL HEARING  
[CDL Retest – CDL – RCW 46.25]**

HEARING DATE: October 28, 2009

LICENSEE: **REBECCA E DESMON**  
27 N 5<sup>th</sup> Street  
Cheney, WA 99004-2201

LICENSE#: **REDACTION**

ATTORNEYS: Mr. Eric Nordlof  
Attorney at Law  
Public School Employees of Washington  
PO Box 798  
Auburn, WA 98071-0798

Ms. Charnelle Bjelkengren  
Assistant Attorney General  
1116 West Riverside Avenue  
Spokane, WA 99201-1194

**PROCEDURAL HISTORY:**

The Department disqualified Ms. Desmon's CDL driving privileges for failure to pass a CDL Re-Test. Ms. Desmon timely appealed the Department's Action. A formal hearing was held on October 28, 2009. Ms. Desmon was represented by Mr. Eric Nordlof, Public School Employees of Washington. The Department was represented by Ms. Charnelle Bjelkengren, Assistant Attorney General.

This hearing record is joined at the request of the parties with a companion CDL Re-Test case (Driver Mr. Jeff Barlow), also heard October 28, 2009, due to substantial identity of issues, testimony, and arguments.

**TESTIMONY:**

Ms. Rebecca Desmon, Ms. Sandra Brantley, Mr. Rodney Barnes, and Mr. Gibb Kingsley testified at the administrative hearing. Their testimony is incorporated herein.

In summary, Ms. Desmon is the licensee and testified regarding her background, training, experience, her skills as a driver, her employment with the Cheney School District, the administration of the CDL re-test, her performance on the CDL re-test, and her follow up complaints regarding the CDL-retest process.

In summary, Ms. Brantley testified regarding her background, training, and experience, her current employment as a school bus driver, driver trainer, and dispatcher for Cheney School District, her knowledge regarding Ms. Desmon's driving skills, and her opinion regarding Ms. Desmon's driving ability.

In summary, Mr. Barnes testified he is the DOL Tester who conducted Ms. Desmon's CDL re-test. Mr. Barnes testified regarding the CDL Re-test Procedure in general, how he administered Ms. Desmon's CDL Re-Test, Ms. Desmon's performance on the CDL Re-test, and his response in regards to Ms. Desmon's complaints regarding the CDL Re-test.

In summary, Mr. Kingsley testified he is the Commercial Drivers License Compliance Manager for the Department of Licensing. In summary, Mr. Kingsley testified regarding the Department's use of Third Party Testers, the results of the Federal audit, the CDL Re-testing program, the CDL re-testing procedures, the CDL Re-Test Result Letters, the Department's response to findings from the CDL Re-Test Program, and his investigation regarding Ms. Desmon's complaints regarding her CDL re-test.

#### **EXHIBITS:**

Thirty-Eight Exhibits were admitted into evidence. See the attached exhibit list.

#### **FINDINGS & SUMMARY (CDL DISQUALIFICATION):**

Ms. Desmon first argues the Department does not have lawful authority to conduct CDL re-tests.

Washington State's Uniform Commercial Driver's License Act is set forth in RCW 46.25. The stated purpose of RCW 46.25 is to implement the federal Commercial Motor Vehicle Safety Act of 1986 (CMVSA), Title XII, P.L. 99 and to "to reduce or prevent commercial motor vehicle accidents, fatalities, and injuries" ...by ... "(c) strengthening licensing and testing standards." RCW 46.25.005.

CDL licensing and testing standards are set forth in 49 CFR Part 383, subparts G and H. RCW 46.25.060(1)(a), incorporated herein. The skills test is comprised of three segments: 1) a pre-trip inspection, 2) a basic controls test, and 3) a road test.<sup>1</sup> A person must successfully pass all portions of the skills test in order to be licensed as a CDL driver.<sup>2</sup>

The Federal Regulations permit States to use Third Party Testers under certain specified conditions.<sup>3</sup> Washington State authorizes use of Third Party Testers

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<sup>1</sup>49 CFR Part 383, subparts G and H, RCW 46.25.060.

<sup>2</sup>49 CFR Part 383, subparts G and H, RCW 46.25.060.

<sup>3</sup>49 CFR 383.75.

per RCW 46.25.060(1)(b). Third Party Testers must meet the same qualification and training standards as State examiners to the extent necessary to conduct skills tests in compliance with 49 CFR Part 383, subparts G and H.<sup>4</sup>

States which employ Third Party Testers such as Washington State are required by Federal Regulation to conduct annual examinations, inspections, and audits which may include, among other things, testing of "a sample of drivers who were examined by the third party to compare pass/fail results...."<sup>5</sup>

To the extent Ms. Desmon challenges the provisions of the CDL, Third Party Tester, and/or CDL re-test regulations and statutes, such arguments are beyond the limited scope of this hearing. An administrative body does not have the authority to determine the constitutionality of the law it enforces.<sup>6</sup>

There is substantial proof the Department had the requisite legal authority pursuant to these Federal Regulations and State statutes to conduct Ms. Desmon's CDL retest. The motion to dismiss this action for this reason is respectfully denied.

Next, Ms. Desmon argues the Department's re-test procedures are "improperly designed to raise revenue for the CDL compliance program."<sup>7</sup> RCW 46.25.060 permits the imposition of fees for CDL testing. However, it is noted Ms. Desmon was not charged a fee for the July 21, 2009 CDL re-test at issue here.<sup>8</sup> Ms. Desmon was offered a Department vehicle at no cost for the re-test.<sup>9</sup> Further, Ms. Desmon was offered several re-test dates (and a number to call if such arrangements were not workable) to arguably save her from incurring other collateral expenses such as loss of work.<sup>10</sup>

In contrast, the Department imposes a fee to *re-take the re-test*.<sup>11</sup> However, there is no evidence Ms. Desmon paid this fee. There is no evidence Ms. Desmon is indigent. Likewise, there is insufficient showing that (or how) a \$100 fee to re-do the CDL retest is improper. The motion to dismiss this action for this reason is respectfully denied.

Ms. Desmon argues the CDL re-test program is to "justify the maintenance of agency positions in the face of declining utilization of commercial driver's license testing services."<sup>12</sup> As stated above, the Federal Regulations permit States to use or not use Third Party Testers. The evidence shows Washington State has

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<sup>4</sup> 49 CFR 383.75(a)(2)(iii).

<sup>5</sup> 49 CFR 383.75(a)(2).

<sup>6</sup> See *Bare v. Gorton*, 84 Wn. 2d 380, 383 (1974), *Smoke v. Seattle*, 132 Wn.2d 214 (1997); *Yakima Cy. v. Glascom Builders*, 85 Wn.2d 255 (1975), et al.

<sup>7</sup> Licensee's Closing Argument.

<sup>8</sup> Department's certified pre-marked Exhibit 3.

<sup>9</sup> Department's certified pre-marked Exhibit 3.

<sup>10</sup> Department's certified pre-marked Exhibit 3.

<sup>11</sup> Department's certified pre-marked Exhibit 4, Department's Additional Exhibit 3, Ms. Desmon's Exhibit 6.

<sup>12</sup> Licensee's Closing Arguments.

re-assessed its use of Third Party Testers based upon findings of audits that showed significant problems with the Third Party Testing program including fraudulent activity and a high re-test fail rate.<sup>13</sup> If the Department chooses to reduce the number of Third Party Testers because of these demonstrated problems, such decision is clearly permitted by both Federal and State Law and in compliance with Washington's stated legislative intent in RCW 46.25.005 "...to reduce or prevent commercial motor vehicle accidents, fatalities, and injuries"... by ..." (c) *strengthening* licensing and testing standards." The motion to dismiss this action for this reason is respectfully denied.

Ms. Desmon argues no remedial action was taken against the Third Party Tester. However, Mr. Kingsley testified the Department did conduct an evaluation of the Third Party Tester based upon the results of these re-tests (which the Third Party Tester successfully passed). Mr. Kingsley further testified the Department's own testers are subject to unannounced random audits. There is substantial proof the Department takes remedial action based upon the findings of the CDL re-test program. The motion to dismiss this action for this reason is respectfully denied.

Ms. Desmon argues the re-test selection process itself is "not random." Specifically, Ms. Desmon argues that choosing one out of four persons to re-test is not a true "random" test. The Department's re-test selection process is set forth in the Department's Additional Exhibit 3. The random re-test selection is made from pre-defined criteria from the monthly test logs of newly licensed CDL drivers that have been tested by selected Third Party Testers and have been issued a Washington CDL within the last 3 to 14 months.<sup>14</sup> There is substantial showing the Department's process meets the Federal Requirements that the States "test a sample..." of drivers as provided in 49 CFR 383.75(a). The motion to dismiss this action for this reason is respectfully denied.

Ms. Desmon argues the CDL re-test procedure was unfair because she was marked down for not using exact terminology. The CDL Test must comply with 49 CFR Part 383, subparts G and H. RCW 46.25.060(1)(a). There is substantial evidence in the hearing record regarding the Department's standardized pre-inspection scoring criteria. While a driver is not required to exactly recite each term in the CDL Manual in order to pass the test, the driver's answer must be *within specified parameters* in order to be a correct response.<sup>15</sup> The Department employs standardized criterion for what constitutes a pass or fail response.<sup>16</sup> The drivers are told at the time of re-test scheduling where to obtain this standardized information (in the CDL Drivers Manual - Chapter 11).<sup>17</sup> Finally, the

<sup>13</sup> Department's additional exhibits 1, 2, Testimony of Mr. Kingsley.

<sup>14</sup> Department's Additional Exhibit 3.

<sup>15</sup> For example, as described by Ms. Desmon's DOL Tester Mr. Barnes, while a driver might not remember the name of the Pitman Arm, Drag Link, and Tie Rod nor be able to explain their function as part of the front axle, the driver needs to be able to point to or touch the particular system and identify what type(s) of damage they are looking for when inspecting the system. [Department's additional Desmon Exhibit 4, Testimony of Mr. Barnes, Testimony of Mr. Holloway.

<sup>16</sup> Testimony of Mr. Kingsley, Testimony of Department's Testers, Department's Additional Exhibits 1-3.

<sup>17</sup> Testimony of Department Testers. Testimony of Ms. Desmon.

Department uses a standardized test scoring test sheet which identifies the correct response for consistent application of the scoring criteria.<sup>18</sup> There is substantial proof the Department's scoring criteria is in compliance with 49 CFR 383. The motion to dismiss this action for this reason is respectfully denied.

Ms. Desmon argues this matter should be dismissed because she was given a pre-addressed "disqualification" letter immediately following the test. CDL re-tests are conducted at different geographical locations on a rotating basis throughout the State.<sup>19</sup> The CDL tester has two pre-addressed letters for each re-test: 1) a congratulatory pass letter; and 2) a disqualification fail letter. Immediately following the re-test, the DOL tester gives the driver the appropriate letter.<sup>20</sup> The reason for this procedure is to provide the driver with immediate written notification of the decision rather having the driver wait for the appropriate letter to be sent from Olympia.<sup>21</sup> Also, such prompt notification affords a driver, in a test fail situation, an opportunity to immediately re-schedule the re-test before the re-test unit moves to a different geographical location. There is substantial evidence Ms. Desmon would have been given the appropriate congratulatory letter if she had in fact passed the re-test. The motion to dismiss this action for this reason is respectfully denied.

Finally, Ms. Desmon argues the Department did not have the authority to disqualify her CDL even though she failed the CDL re-test. The Department of Licensing has statutory authority to cancel driving privileges for a host of reasons. For example, RCW 46.20.207 authorizes the Department of Licensing to cancel any driver's license upon a determination the licensee was not entitled to the issuance of a license. As stated above, to the extent Ms. Desmon challenges the constitutionality of these statutory provisions, such arguments are beyond the limited scope of this hearing. However, since the issue was raised, it is noted Ms. Desmon chose to use a Third Party Tester to determine whether she was entitled to a CDL License. Ms. Desmon was notified at the time of CDL application she was subject to random CDL Re-Testing because of her use of a Third Party Tester.<sup>22</sup> Ms. Desmon was further advised that if she failed to successfully complete the re-test, her CDL would be cancelled.<sup>23</sup> Ms. Desmon signed the acknowledgement she was given this information.<sup>24</sup>

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<sup>18</sup> For example "L, R, C, CR, BNT, BR" on the test score sheet means leaks, rubs, cuts, cracks, bent, broken. Department's pre-Marked Desmon Exhibit 5, Department's Added Desmon Exhibit 4, Testimony of Department Testers.

<sup>19</sup> Testimony of Mr. Kingsley, Department's Additional Exhibits 1-3.

<sup>20</sup> Testimony of Mr. Kingsley, Testimony of Department Testers. Department's Additional Exhibit 3.

<sup>21</sup> Testimony of Mr. Kingsley, Testimony of Department Testers.

<sup>22</sup> Department's pre-marked Exhibit 2. The notification states in pertinent part:

Under 48 CFR 383.75 and RCW 46.25.060(1)(b), the Department may randomly retest a sample of commercial drivers who were examined by a third party in order to compare pass/fail results. Refusal to participate if selected for retesting, or failure to successfully complete any test administered is grounds for the cancellation of a CDL. (Emphasis added).

<sup>23</sup> Department's pre-marked Exhibits 2.

<sup>24</sup> Department's pre-marked Exhibits 2. Of note, Ms. Desmon's signed acknowledgement meets the requisite elements of RCW 9A.72.085 to constitute a sworn statement.

The Department determined Ms. Desmon was not entitled to a CDL license when she failed to demonstrate at the CDL re-test the minimally required competencies of a CDL holder. The Department cancelled Ms. Desmon's CDL privileges based upon this determination. To do otherwise would be inconsistent with the stated legislative purpose, construction, application, and intent of Washington State's Uniform Commercial Driver's Act and its stated purpose of enforcing the Federal Uniform CDL Commercial Driver's Act. The motion to dismiss this action is respectfully denied.

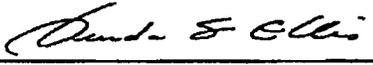
**CONCLUSIONS OF LAW:**

- 1) Ms. Desmon is the subject of this action.
- 2) Ms. Desmon was notified of the CDL Re-Testing Program.
- 3) Ms. Desmon was selected for CDL Re-Testing.
- 4) Ms. Desmon failed the CDL Re-Test.

**DECISION:**

**Against** Ms. Desmon. *Uphold* Order of Cancellation. However, once Ms. Desmon passes all portions of the CDL re-test, the Department of Licensing shall reinstate the appropriate CDL endorsement(s).

HEARING OFFICER

  
Brenda S. Ellis, WSBA 14160

Date: November 3, 2009.

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**STATE OF WASHINGTON  
SPOKANE COUNTY SUPERIOR COURT**

REBECCA E. DESMON, and the  
PUBLIC SCHOOL EMPLOYEES OF  
WASHINGTON, SEIU Local Union  
#1948, a Washington Non-Profit  
Corporation,

Plaintiffs/Appellants,

v.

WASHINGTON STATE  
DEPARTMENT OF LICENSING,

Defendant/Respondent.

NO. 09-2-05211-0

VERBATIM REPORT OF  
PROCEEDINGS

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MR. NORDLOF: No. Exhibit 5 is the score sheet.  
Exhibit 2 is the application.

THE WITNESS: Oh.

MR. NORDLOF: Oh, okay. Okay. You are showing  
this.

REDIRECT EXAMINATION

*— Examination of Rebecca Desmon —*

BY MR. NORDLOF:

Q Do you think if you had told the licensing agent or  
(inaudible) agree to this paragraph or if you crossed  
part of it out, they would have let you continue with  
the commercial driver's license --

A No.

Q -- procedure?

A No. It is definitely one of those things if you don't  
sign, you don't get the license.

Q All right.