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CLERK OF THE SUPREME COURT
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COA# 302211

Supreme Court
Number 84825-4

BEFORE THE SUPREME COURT OF THE STATE OF WASHINGTON

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.

APPELLANTS' OPENING BRIEF

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I. Introduction

This case involves a challenge to the authority of Defendant/Respondent Washington State Department of Licensing [DOL] to its practice of cancelling the Commercial Drivers License [CDL] of the holder of an otherwise-validly issued license who fails a re-test of the skills portion of the CDL exam which has been administered solely for the purpose of auditing the performance of the original tester.

II. Assignments of Error

1. The Trial Court erred in granting summary judgment in favor of Defendant DOL on June 24, 2010 [CP 83-85].
2. The Trial Court erred in failing to grant summary judgment in favor of Plaintiffs.

Issues Pertaining to Assignments of Error

1. Does Plaintiff Public School Employees of Washington [SEIU Local Union # 1948] [hereinafter cited as PSE] have standing to pursue a declaratory judgment in its own name and stead regarding the actions of Defendant DOL herein?
2. Does the Defendant DOL possess the statutory authority to cancel an otherwise validly-issued Commercial Drivers License [CDL] when a randomly-selected licensee fails a “retest” which is conducted

solely to audit the performance of a testing agent working for DOL as an independent contractor?

3. If the DOL does possess the authority referenced in Issue # 1, may it exercise that authority without promulgating supporting substantive and procedural regulations?

4. Does the DOL's practice of randomly selecting some, but not all, CDL licensees for retesting constitute a denial of the equal protection of the laws to those licensees who are selected?

5. Were the DOL's actions in selecting Rebecca Desmon and Barbara Shields for a retest arbitrary?

III. Statement of the Case

Plaintiff Rebecca Desmon is a school bus driver. [CP 25]. In order to practice her profession, she is required to hold both a commercial drivers license [CDL] and a school bus driver's certification. [CP 25]. A CDL is issued in Washington by the Defendant Washington State Department of Licensing [hereinafter cited as DOL], pursuant to standards established by a federal agency, the Federal Motor Carrier Safety Administration. RCW 46.25.005. School bus driver certificates in Washington are issued by the Office of the Washington State Superintendent of Public Instruction [hereinafter cited as OSPI]. RCW 28A.160.210; WAC Title 392, Chapter 144. Ms. Desmon earned a CDL in

2008, after completing a school bus driver training program administered by the Cheney School District and several written and practical tests administered by the Defendant DOL. [CP 25]. She completed the licensing process on or about November 17, 2008. [CP 25]. Ms. Desmon was also issued the appropriate school bus driver certificate by OSPI, although that licensure is not at issue in this case.

Upon acquiring the proper licenses, Ms. Desmon was employed, in January, 2009, as a school bus driver by the Cheney School District [hereinafter cited as the school district]. She worked for the school district without incident in that capacity until the 2008-09 instructional year concluded in June, 2009. [CP 25]. In particular, Ms. Desmon did not have an accident and she did not receive a traffic citation while driving a school bus for the school district (or in any other driving capacity). [CP 33]. Her work was not criticized by her superiors, and she was notified in May, 2009, that she would once again be offered employment as a school bus driver when school resumed in the fall of 2009. [CP 25].

On June 26, 2009, Ms. Desmon was notified by DOL that she had been “randomly” selected to take the practical “skills” portion of the CDL test examination over again. [CP 25]. This “retest,” as the agency called it, was not based upon any action or omission on Ms. Desmon’s behalf. It was not based upon any known or suspected irregularity in her initial

licensing process; it was not based upon any fraudulent conduct of Ms. Desmon in securing her initial CDL; nor, was it based upon any known or suspected lack of driving skills, intellectual knowledge, or physical or mental disability attributable to Ms. Desmon. [CP 25]. In short, DOL's requirement that Ms. Desmon take a second skills test some nine months after successfully completing the examination process, and at a point in time when her initial CDL was completely valid, was arbitrary, period. [CP 26]. Ms. Desmon did take the skills test again, on July 21, 2009. [CP 26].

Obviously, Ms. Desmon did not pass the skills re-test. [CP 26]. Ms. Desmon's CDL was eventually "cancelled" by DOL as a result of the retest. [CP 27]. The circumstances surrounding her retest were highly suspect. [CP 27]. Plaintiffs assert, for the reasons described *infra*, that DOL exceeded its statutory authority when it cancelled Ms. Desmon's otherwise valid CDL as a result of the retest process she was arbitrarily forced to undergo.

Barbara Shields is also a school bus driver employed by Cheney School District. [CP 38]. Her circumstances are similar to those of Ms. Desmon. Ms. Shields underwent the retest procedure in October, 2009. [CP 38]. As she states in her Declaration, Ms. Shields is convinced that she properly answered questions that are marked as incorrect answers on

the DOL tester's score sheet. [CP 42]. Ms. Shields' account of the events which took place during her retest leave little doubt that the primary goal of the DOL tester was to fail Ms. Shields on the pre-trip inspection portion of the skills test. [CP 40]. A second unavoidable conclusion is that the DOL, or at least the staff assigned to the retesting program, is utilizing the program as a means of generating revenue for the agency. [CP 40-41].

Remarkably, after allegedly failing the retest, Ms. Shields heard nothing from DOL for nearly four months. [CP 41]. During that period, and presently, Ms. Shields continued to hold a valid CDL, and continued to work as a school bus driver for the Cheney School District. [CP 41]. Eventually, she was notified that her CDL would be cancelled in March, 2010. [CP 41]. She contacted her union, and an administrative appeal of the agency's proposed action was properly initiated. Although Ms. Shields is not a named party to this case, her legal interests fall within the scope of the legal interests of Plaintiff PSE.

PSE is a labor organization representing approximately 27, 000 classified school employees in the State of Washington. [CP 31]. Approximately 3,600 of PSE's members are school bus drivers. [CP 31]. Among those school bus drivers are school bus drivers employed by the Cheney School District. Rebecca Desmon and Barbara Shields are among

those bus drivers, and are represented for collective bargaining purposes by PSE. [CP 31].

IV. Argument

1. This case is appropriate for declaratory judgment, and Plaintiff PSE has standing to bring the action in its own name and stead.

This case involves a cause of action brought pursuant to the Uniform Declaratory Judgments Act [UDJA] to declare the legal rights of certain CDL holders who are represented for collective bargaining by PSE.

RCW 7.24.010 provides as follows:

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Organizations, including unions, have standing to bring suits on behalf of their membership pursuant to the Uniform Declaratory Judgments Act when their members would have individual standing to do so.

An organization has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual

members in the lawsuit. *American Legion Post No. 149 v. Department of Health*, 164 Wn.2d 570, 595, 192 P.3d 306 (2008), citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).

In this case, Plaintiff PSE represents two individuals who would have standing to contest the authority of DOL to cancel their otherwise validly-issued CDL's because they failed a retest which was applied to them solely as an internal agency audit mechanism to gauge the performance of its cadre of third-party testers. The UDJA grants standing to individuals whose rights are affected by a statute. *Federal Way School District No. 10 v. State*, 167 Wn2d 514, 528, 219 P.3d 941 (2009). Here, Ms. Desmon and Ms. Shields' rights are affected by DOL's contention that it possesses the legal authority to cancel their CDL's as a result of the retest process.

Further, this case presents a justiciable controversy. That is, Ms. Desmon has already lost her CDL, and Ms. Shields is in danger of losing hers. "To be justiciable under the Uniform Declaratory Judgments Act, a controversy must be an actual, present and existing dispute, not possible, dormant, or hypothetical. *Federal Way School District, supra*, at p.529. Because PSE represents both Ms. Desmon and Ms. Shields for collective bargaining, PSE thus has standing to seek a declaration of their rights pursuant to DOL's enabling legislation.

2. Defendant DOL acted in excess of its enabling authority in this case.

At the core of the dispute in this case lies the question of whether DOL was vested with the authority to cancel an otherwise validly-issued CDL solely because its holder failed the pre-trip inspection portion of a so-called retest that was administered solely to audit the performance of a DOL contract tester.

An administrative agency may act only within the scope of its legislative (enabling) authority.

Our analysis of the Growth Management Hearings Board's authority to impose or fashion a remedy in any given case begins with the principle that administrative agencies are creatures of the Legislature, without inherent or common-law powers and, as such, may exercise only those powers conferred by statute, either expressly or by necessary implication. *Kaiser Aluminum & Chem. Corp. v. Department of Labor & Indus.*, 121 Wn.2d 776, 780, 854 P.2d 611 (1993); *Human Rights Comm'n v. Cheney Sch. Dist.* 30, 97 Wn.2d 118, 125, 641 P.2d 163 (1982). The power of an administrative tribunal to fashion a remedy is strictly limited by statute. *Skagit Surveyors and Engineers v. Friends of Skagit County*, 135 Wn2d 542, 558, 958 P.2d 962 (1998).

A close examination of the statutes and administrative regulations relied upon by DOL as a basis for its actions reveals that the agency does not have the authority to cancel a CDL which was otherwise validly-issued *solely* because the licensee failed a re-examination of her skills for which she was randomly selected as a means of auditing agency testing contractors.

DOL's basic authority to regulate CDLs is granted by the Washington State Legislature, and is contained in RCW Chapter 46.25.

RCW 46.25.005 provides as follows:

(1) The purpose of this chapter is to implement the federal Commercial Motor Vehicle Safety Act of 1986 (CMVSA), Title XII, P.L. 99-570, and reduce or prevent commercial motor vehicle accidents, fatalities, and injuries by:

- (a) Permitting commercial drivers to hold only one license;
- (b) Disqualifying commercial drivers who have committed certain serious traffic violations, or other specified offenses;
- (c) Strengthening licensing and testing standards.

(2) This chapter is a remedial law and shall be liberally construed to promote the public health, safety, and welfare. To the extent that this chapter conflicts with general driver licensing provisions, this chapter prevails. Where this chapter is silent, the general driver licensing provisions apply.

DOL is authorized, by statute, to delegate its CDL testing authority to other entities, including private contractors [third-party testers]. RCW 46.25.060(1)(b) provides as follows:

(b) The department may authorize a person, including an agency of this or another state, an employer, a private driver training facility, or other private institution, or a department, agency, or instrumentality of local government, to administer the skills test specified by this section under the following conditions:

- (i) The test is the same which would otherwise be administered by the state;
- (ii) The third party has entered into an agreement with the state that complies with the requirements of 49 C.F.R. part 383.75; and
- (iii) ***The director has adopted rules as to the third party testing program and the development and justification for fees charged by any third party.*** [emphasis added].

DOL has adopted rules as to the third party testing program. These are found in WAC 308-100-150. One of the requirements to be a third-party tester is to “[s]ubmit to announced or unannounced audits.” WAC 308-100-150 (7). DOL has not promulgated any rule which clarifies what constitutes an “audit,” but the plain language of the regulation would seem to mean that the audit process involves the tester, as opposed to individuals whom he or she has tested. The agency has also adopted its own internal procedures for administering a retest program for CDL holders, apparently as a means of auditing the third-party testers. [CP 59-67]. However, these internal procedures have not been promulgated as agency rules pursuant to the requirements of the APA, and may not, therefore, be relied upon by the agency as the basis for denying Ms. Desmon and Ms. Shields a public benefit.

The controlling federal authority which is incorporated by reference into DOL’s enabling statute is Title 49 CFR § 383.75. That regulation provides as follows:

Sec. 383.75 Third party testing.

(a) Third party tests. A State may authorize a person (including another State, an employer, a private driver training facility or other private institution, or a department, agency or instrumentality of a local government) to administer the skills tests as specified in

subparts G and H of this part, if the following conditions are met:

(1) The tests given by the third party are the same as those which would otherwise be given by the State; and

(2) The third party as an agreement with the State containing, at a minimum, provisions that:

(i) Allow the FMCSA, or its representative, and the State to conduct random examinations, inspections and audits without prior notice;

(ii) Require the State to conduct on-site inspections at least annually;

(iii) Require that all third party examiners meet the same qualification and training standards as State examiners, to the extent necessary to conduct skills tests in compliance with subparts G and H;

(iv) Require that, at least on an annual basis, State employees take the tests actually administered by the third party 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*; and

(v) Reserve unto the State the right to take prompt and appropriate remedial action against the third-party testers in the event that the third-party fails to comply with State or Federal standards for the CDL testing program, or with any other terms of the third-party contract.

(b) Proof of testing by a third party. A driver applicant who takes and passes driving tests administered by an authorized third party shall

provide evidence to the State licensing agency that he/she has successfully passed the driving tests administered by the third party.

[emphasis added]

Although the web of licensing regulations and statutes is a little confusing on first reading, it is fair to say that the applicable authority can be summarized as follows:

- The Washington legislature granted DOL the authority to utilize third-party testers to administer the skills portion of the CDL test. [RCW 46.25.060(1)(b)].
- However, DOL must adhere to the requirements of Title 49 CFR § 383.75, which include a requirement that the proficiency of the third-party testers be audited by 1) having them administer the test to a state employee (presumably a state CDL tester) *or* 2) testing a sample of drivers who were tested by the third-party tester in order to compare pass/fail results.
- DOL must also promulgate rules for administering the third-party tester audit program. Those rules, as adopted by the agency, *do not provide for the cancellation of the CDL of an individual who is retested as part of the audit of the performance of a third-party tester*. The clear purpose of the retest is to measure the performance of the third-party tester, *not* the ability, a lengthy period after having passed their initial test, of drivers who were tested by the audit subject.

What is missing here is any statute or state or federal regulation which says what DOL is allowed to do with respect to a holder of an otherwise validly-issued CDL who does not pass the audit retest. The “CDL Retest Procedures” adopted by DOL cannot vest the agency with authority which it has not been delegated to it by the state legislature.

DOL relies upon the provisions of three general drivers licensing statutes in support of its contention that it has the authority to cancel the CDL of someone who fails a re-test. None of those statutes is even close to applicable to the situation presented here.

RCW 46.20.031 specifies individuals who are ineligible to hold a driver's license; no provision of that statute applies to the current situation.

RCW 46.20.207 authorizes the agency to cancel the driver's license of an individual upon a determination that the licensee was not entitled to the issuance of the license. The performance of a CDL licensee on a re-test nearly a year after passing the initial skills test is too remote to be probative, without specific facts linking the two events. No such facts are present in this case.

RCW 46.20.030 is not applicable to random re-tests, as it only grants the agency authority to require a driver to submit to an examination if good cause exists *prior* to the re-examination.

RCW 46.25.060 requires holders of a CDL to “[pass] a knowledge and skills test for driving a commercial motor vehicle.” Plaintiff Desmon, and Ms. Shields did indeed pass such a test – a year prior to being required to take a second test in order to serve as an audit “guinea pig” for the agency's third-party testing program. Nothing in this statute requires a

licensee to pass the test more than once during the term of an otherwise validly-issued CDL.

Plaintiffs in this case are not the only individuals who have expressed concern regarding DOL's claim that it has statutory authority to engage in the retest/cancellation process which is the subject of this matter. Alan Jones is the Director of Pupil Transportation at OSPI. In that capacity, he exercises supervisory authority over the program which regulates the issuance of school bus driver certifications. [*See*, RCW 28A.160.210; WAC Title 392, Chapter 144]. In September, 2009, Mr. Jones wrote to Plaintiff Desmon expressing his own frustration over DOL's failure to provide him information as to its enabling authority for the retest/cancellation program. Mr. Jones stated to Ms. Desmon that he had engaged in many discussions with DOL staff regarding the retesting process, and that he had never received a satisfactory answer to his inquiries regarding the agency's authority for conducting the retest program. [CP 27].

Clearly, DOL has fabricated from whole cloth the notion that it has authority to cancel a CDL which was otherwise validly-issued in the past if the licensee fails the skills portion of a retest which is given solely in order to audit the performance of a third-party tester. It is a fundamental premise of administrative law that an agency may only act within the

scope of its enabling authority. *See*, RCW 34.05.570(3)(b). In this case, the agency has extrapolated authority from several collateral sources, but has not received any *actual* authority to cancel CDL's in the manner in which it cancelled Plaintiff Desmon's license, or proposes to cancel Barbara Shields' license. Without any legitimate factual showing that a CDL licensee who fails a retest wouldn't have passed the test a year earlier, or wouldn't have passed the test if it were initially taken from a DOL staff examiner, the agency's actions here cannot be supported by its enabling legislation.

3. *DOL interprets the law in an unconstitutional manner.*

Rebecca Desmon and Barbara Shields have been denied the equal protection of the laws of the State of Washington, in violation of Amendment XIV, UNITED STATES CONSTITUTION.

The first step in conducting any equal protection analysis is determining the standard of review to be applied to the situation. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 225, 5 P.3d 691 (2000). As this is a case involving the resources of the State, the courts would apply a rational basis test. *Caughey v. Employment Security Department*, 81 Wn.2d 597, 599, 503 P.2d 460 (1972).

The rational basis test inquires whether 1) all members of the class created by the statute are treated alike; 2) reasonable grounds exist to

justify the exclusion of parties who are not within the class; and 3) the classification created by the statute bears a rational relationship to the legitimate purpose of the statute. *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998).

A. All members of the class are not treated alike.

Technically, a statute creates only one relevant class, whereby differential treatment creates different subgroups within the same class. *Willoughby v. Department of Labor and Industries*, 147 Wn.2d 725, 739, 57 P.3d 611 (2002). Here, the class under consideration is all holders of validly-issued CDL's. From that class, DOL has arbitrarily selected certain individuals to take the licensing tests over again, at the risk of losing their occupational license if they do not pass the exam a second time.

B. There is no rational relationship between the classification and a legitimate purpose of the statute.

DOL has not articulated a single fact which would tend to prove that there is any relationship, rational or otherwise, between a school bus driver's performance on a retest and her performance on the original skills test at the time she received her CDL. Further, DOL concedes that its selection of *some*, but not all, holders of validly-issued CDL's to take a retest, and thus put their occupational license at risk, was completely

arbitrary. The school bus drivers who were selected to take a retest were selected at random from the pool of CDL holders who had been examined by third-party testers. If failing the retest carried no derogatory consequence for Plaintiff Desmon and Ms. Shields, and the agency was testing them solely to develop information regarding the performance and methodology of the third-party tester who initially administered their skills tests, the agency's arbitrary identification of them as retest subjects might have been acceptable. But a government-issued occupational license should not be put at risk based upon a game of chance. What would happen, for example, if Washington lawyers were selected at random to re-take the state bar examination after passing it the first time, just so the Bar Association could determine whether bar graders were doing a good job? The outcry would be heard from the Pacific Ocean to the Idaho border!

Because there is no rational basis for discriminating among the holders of validly-issued CDL's, school bus drivers who are forced to retest (at the risk of losing their CDL's) are being denied the equal protection of the laws. Rebecca Desmon and Barbara Shields fall into that group, and they have been denied a public benefit in violation of their federally-protected rights.

4. DOL's actions are arbitrary.

An administrative agency cannot act arbitrarily. An arbitrary action is one which depends “upon individual discretion (as of a judge) and not fixed by law.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (Merriam-Webster, Inc., 1988) at p. 99. The agency has already admitted that both Ms. Desmon and Ms. Shields were selected to be retested *randomly*, out of the entire pool of holders of validly-issued CDL’s. Neither of them had demonstrated the slightest deficiency in the appropriate skill or knowledge required of the holder of a CDL. Even if the selection had been made at random from the lesser pool of individuals who had taken their initial skills test from a third-party tester; or from a lesser pool of individuals who had received their initial CDL within a specified time period; the action would have been arbitrary if it had not been undertaken based upon some discernable indicia, *which had been previously established by law or lawful regulation*. The Washington Supreme Court has reiterated this basic premise of administrative law time and again. Most recently, in *Ames v. Dep’t of Health, Med. Quality Assurance Comm’n*, 166 Wn.2d 255, 260; 208 P.3d 549 (2010), US Supreme Court *certiorari denied* by *Ames v. Wa Health Dep’t*, 2010 U.S. LEXIS 1225 (U.S., Feb. 22, 2010):

We apply the standards of the Washington Administrative Procedure Act (WAPA), chapter 34.05 RCW, directly to the agency record in reviewing agency adjudicative proceedings.

William Dickson Co. v. Puget Sound Air Pollution Control Agency, 81 Wn. App. 403, 407, 914 P.2d 750 (1996) (citing *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402-03, 858 P.2d 494 (1993)). Under the WAPA, a reviewing court may reverse an administrative order (1) if it is based on an error of law, (2) if it is unsupported by substantial evidence, (3) ***if it is arbitrary or capricious***, (4) if it violates the constitution, (5) if it is beyond statutory authority, or (6) when the agency employs improper procedure. RCW 34.05.570(3)(d), (e), (i), (a), (b), (c); *Tapper*, 122 Wn.2d at 402; *Olmstead v. Dep't of Health, Med. Section*, 61 Wn. App. 888, 891-92, 812 P.2d 527 (1991). [emphasis added].

Without belaboring the point, it is worth repeating that there is simply no connection in this case between the selection of Plaintiff Desmon and Barbara Shields to take a retest of the skills portion of their CDL examination many months after properly taking and passing the initial skills test and their actual performance as drivers.

There is not a shred of evidence in the record which would suggest that Plaintiff Desmon is an unsafe driver. She has never had a traffic accident; never had a violation; and she was a valued employee of the Cheney School District while she held a valid CDL. She lost her employment as a school bus driver when her CDL was illegally cancelled by DOL, and Plaintiff is not able to obtain similar employment as long as the status of her CDL is in question.

The same is true for Barbara Shields. She is also a safe, competent and conscientious school bus driver. Her driving record is also without a blemish. Ms. Shields stands to lose her job because she failed a retest for

which she was randomly selected. DOL has not produced any evidence that failing a retest of the pre-trip component of the skills test a year after initially passing it means anything. The second result is certainly not probative on the issue of whether the licensee was administered a proper skills test a year prior.

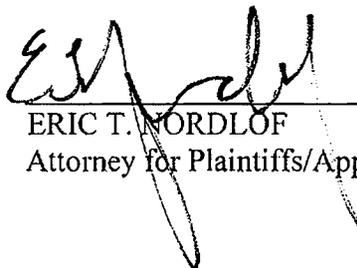
Finally, it is worth mentioning that all of the school bus drivers of whom PSE is aware who failed the retest did not fail on the driving portion of the retest, but on the pre-trip inspection portion of the retest. The circumstances under which the retest took place with respect to Ms. Desmon and Ms. Shields raise substantial questions with respect to whether DOL's true motivation in conducting the retest program was actually to generate revenue for the agency, rather than ensure the safety of the public highways and byways, as the agency is certain to claim before this Court.

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

solely 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 10th day of September, 2010.

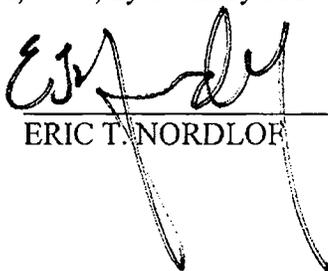

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CERTIFICATE OF MAILING

I hereby certify that I mailed true and accurate copies of the foregoing Appellants' Opening Brief to:

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on this 10th day of September, 2010, by ordinary first class mail, with postage prepaid thereon.


ERIC T. NORDLOF