

FILED
NOV 19 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

COA# 302211

NO. 84825-4

10/19/10 11:01:32
7711
CLERK

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.

RESPONDENT'S BRIEF

ROBERT M. MCKENNA
Attorney General

TONI M. HOOD
Assistant Attorney General
WSBA #26473
PO Box 40110
Olympia, WA 98504-0110
(360) 586-2644

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE ISSUES.....1

III. STATEMENT OF THE CASE2

IV. ARGUMENT5

 A. PSE Cannot Add A Party On Appeal.5

 B. The Department Had Authority To Require Desmon To
 Take A Retest.....5

 C. RCW 46.20.305(4) Permits The Department To Revoke
 Or Suspend A License If The Driver Refuses The Retest
 Option.8

 D. The Department Was Not Required To Promulgate Rules
 Before Exercising Its Statutory Authority to Cancel
 Desmon’s License.....10

 E. Application Of The CDL Retest Program To Desmon
 Properly Observed Her Right To Equal Protection Of The
 Laws.13

 F. The Department’s Actions In Selecting Desmon Were
 Not Arbitrary.....16

V. CONCLUSION20

TABLE OF AUTHORITIES

Cases

<i>Ames v. Dep't of Health, Med. Quality Assurance Comm'n</i> 166 Wn.2d 255, 208 P.3d 549 (2009).....	18
<i>Budget Rent A Car Corp. v. Dep't of Licensing</i> 100 Wn. App. 381, 997 P.2d 420 (2000).....	12
<i>Campbell v. State of WA, Dep't of Social and Health Services</i> 83 P.3d 88 (2004).....	15
<i>Heller v. Doe</i> 509 U.S. 312, 113 S. Ct. 2637 (1993).....	15
<i>Lenca v. Empl. Sec. Dep't</i> 148 Wn. App. 565, 200 P.3d 281 (2009).....	17, 18
<i>Merseal v. Dep't of Licensing</i> 99 Wn. App. 414, 994 P.2d 262 (2000).....	14, 15
<i>State v. Shawn P.</i> 122 Wn.2d 553, 859 P.2d 1220 (1993).....	14

Statutes

RCW 34.05.030	18
RCW 34.05.030(2)(b)	18
RCW 34.05.410	18
RCW 34.05.570	18
RCW 34.05.598	18
RCW 46.01.011	10
RCW 46.04.090	11

RCW 46.04.480	11
RCW 46.04.580	11
RCW 46.20.265	11
RCW 46.20.285	11
RCW 46.20.305	8, 9, 11, 12
RCW 46.20.305(1).....	9
RCW 46.20.305(1).....	2, 8, 10, 15
RCW 46.20.305(4).....	8, 10
RCW 46.20.311	11
RCW 46.25.005	6
RCW 46.25.060	passim
RCW 46.25.060(1)(a)	6
RCW 46.25.060(1)(b)	passim
RCW 46.25.060(1)(b)(i)-(iii)	7
RCW 46.32	11
RCW 46.61.5055	11
RCW 46.65	11

Regulations

49 C.F.R. 383.75	2, 6, 13
49 C.F.R. 383.75(a)(2).....	7
49 C.F.R. 383.75(a)(2)(i)	9

49 C.F.R. 383.75(a)(2)(i)-(v).....	1, 7, 9, 16
49 C.F.R. part 383, subparts G and H.....	6
WAC 308-100-160.....	13

I. INTRODUCTION

Before being issued a commercial driver's license (CDL) a driver must pass a driving skills tests. RCW 46.25.060. The Department of Licensing contracts with third party testers to administer some of the driving skills tests. Federal law allows the Department to contract out these services as long as certain checks and balances are in place. As required by the federal code, the Department required some drivers to submit to a retest of their driving skills test. 49 C.F.R. 383.75(a)(2)(i)-(v). School bus driver Rebecca Desmon failed her retest and the Department cancelled her CDL. Desmon agrees that the Department has the authority to ask her to take the retest but argues that the Department cannot cancel her license if she fails to pass the test. To the contrary, the Department clearly acted within its statutory authority in asking Desmon to take the retest and cancelling her license when she failed to demonstrate that she can safely drive a school bus.

II. STATEMENT OF THE ISSUES

1. Did the superior court properly hold that the Department did not act in excess of its authority or arbitrarily when it cancelled Desmon's commercial driver's license after she failed to pass the skills retest?

2. Did the Department act within its authority when it cancelled the CDLs of drivers who failed statutorily required skills retests without first promulgating new rules?

3. RCW 46.20.305(1) permits the Department to require a retest any time it has good cause to believe a commercial driver is incompetent or unqualified. Did the Department's retesting program, which retested a randomly selected sample of drivers as part of its routine audit process, properly observe Desmon's right to equal protection of laws?

4. Did the Department act appropriately when selecting Desmon to retake the CDL skills test?

III. STATEMENT OF THE CASE

Desmon applied for and received her commercial driver's license in November 2008. DOL at 14.¹ In order to receive the CDL she had to pass a driving skills test. Desmon chose to take her original skills test from a third party tester who contracted with the Department to conduct CDL driving tests rather than from a Department tester. On Desmon's original CDL application she was informed "Under 49 C.F.R. 383.75 and RCW 46.25.060(1)(b), the Department may randomly retest a sample of

¹ "DOL" represents the specific page number as identified in the Department of Licensing certified hearing record. The certified record was designated in the Department's Supplemental Designation of Clerk's Papers.

commercial drivers who were examined by third party testers 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 cancellation of a CDL.” DOL at 14.

Between 2005 and 2007, the Department’s CDL compliance and quality assurance program discovered approximately 40 third party testers with potential testing improprieties resulting in high pass rates and possible fraudulent activities. CP at 45-47. Because of this discovery and because of ongoing federal investigations in Washington regarding contractors who were essentially selling passing test results, the Department’s CDL program began the CDL retesting program. CP at 46.

The program was set up to retest 10% of the drivers who were originally tested by third party testers. CP at 46. The retests were conducted by a Department tester. The Department used four criteria when deciding which third party testers to include in the retest program: 1) poor performance, i.e. based on observation during an unannounced audit, 2) complaints from customers or employers, i.e. a prospective employer calls to complain about someone who has a CDL but cannot pass the employer’s pre-employment drive test, 3) extremely high passing rates, and 4) a control group is chosen and a small percent of their drivers are also retested. CP at 70. After determining which testers raised concerns

for the Department, the Department would randomly select drivers from that group to retest with a Department tester. CP at 46.

In June 2009 Desmon was selected to participate in the retest process.² DOL at 156. Desmon was selected based on suspected irregularity on the part of the third party tester, Tom Griffey, who originally tested her. CP at 70. Mr. Griffey was selected two years in row based on the four criteria noted above. In January of 2010, Mr. Griffey was asked to resign based on the Department's belief that he was not following the required testing practices and that he was testing beyond the scope of his authority. CP at 72.³

Desmon failed the pre-trip inspection portion of the skills retest. DOL at 154. She missed 29 points. VRP at 28.⁴ The maximum points she was allowed to miss on the pre-trip inspection portion was 9. VRP at 28. She was provided the opportunity to retest and/or request an administrative hearing. DOL at 152-54. Desmon chose not to retake the test and proceeded with her request for an administrative hearing.⁵ DOL at 1. The administrative hearing officer ruled in favor of the Department

² In 2008, 685 drivers were retested and 46% of those drivers passed the retest. In 2009, 419 drivers were retested and 45% of those drivers passed the retest.

³ In 2008, 100% of the drivers who were originally tested by Mr. Griffey failed the retest and in 2009, 67% of the drivers failed.

⁴ The Department filed a Second Supplemental Designation of Clerks Papers designating the Verbatim Report of Proceedings of the administrative hearing.

⁵ Only three school bus drivers requested administrative hearings and one of those drivers chose not to appeal to superior court. The administrative hearing for Shields, the third driver, was held on November 4, 2010.

finding that Desmon's CDL was properly cancelled. DOL at 2-7. Desmon appealed that decision to Spokane County Superior Court by filing a Notice of Appeal and Complaint for Declaratory Judgment. CP at 1-17. Both parties filed motions for summary judgment which were argued together. The court granted the Department's motion for summary judgment, finding that it did not act in excess of its authority and its actions were not arbitrary. CP at 83-85. Desmon has asked the Supreme Court to accept direct review of the superior court decision.

IV. ARGUMENT

A. PSE Cannot Add A Party On Appeal.

PSE refers to its representation of "two individuals who have standing to contest the authority of DOL". Appellant's Opening Br. at 7. The two individuals PSE is referring to are Desmon and Barbara Shields. PSE's standing to bring this action as the representative of Desmon is not disputed. However, Shields has not been joined in this matter by order of any court nor exhausted her administrative remedies.⁶

B. The Department Had Authority To Require Desmon To Take A Retest.

⁶ The superior court noted that it was unnecessary to join Shields because the "Court's ultimate decision regarding the Defendant's statutory enabling authority would control the proposed cancellation of Ms. Shields' commercial driver's license in any event." CP at 87.

Washington's Uniform Commercial Driver's License Act was enacted to implement the federal Commercial Motor Vehicle Safety Act and reduce or prevent commercial motor vehicle accidents, fatalities and injuries. RCW 46.25.005. "The chapter is remedial law and shall be construed to promote the public health, safety, and welfare." *Id.*

Under RCW 46.25.060, before a driver may be issued a CDL, they must first pass a skills test for driving a commercial motor vehicle. The skills test must comply "with minimum federal standards established by federal regulation enumerated in 49 C.F.R. part 383, subparts G and H". RCW 46.25.060(1)(a). The skills test includes: a pre-trip inspection, a basic controls test (backing exercise), and a road test.

A third party tester may conduct the skills test under certain conditions. RCW 46.25.060(1)(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 CFR 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.

RCW 46.25.060(1)(b)(i)-(iii).

49 C.F.R. 383.75(a)(2) directs the state to have an agreement with third party testers that includes, at a minimum, the following restrictions:

(i) Allow the FMCSA⁷, 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 rights 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.

49 C.F.R. 383.75(a)(2)(i)-(v) (emphasis added) Appendix A. To compare pass/fail results, as required by 49 C.F.R. 383.75(a)(2), the Department

⁷ Federal Motor Carrier Safety Administration

developed CDL procedures for retesting a sample of drivers who tested with third party testers. CP at 45-53.

C. RCW 46.20.305(4) Permits The Department To Revoke Or Suspend A License If The Driver Refuses The Retest Option.

In addition to the directive contained in the federal law, the Department has independent authority under RCW 46.20.305 to require a driver to submit to a driving examination if the Department has good cause to believe the individual is incompetent or otherwise not qualified to be licensed. “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.” RCW 46.20.305(1). When a driver fails the retest, the Department allows the driver to retake the test to avoid license cancellation. Accordingly, after Desmon failed the retest, the Department had additional good cause to require her to retake the driving test before she was allowed to drive a school bus under RCW 46.20.305(1).

During oral argument at the superior court, Desmon twice conceded that the Department has authority to require her to take the retest.

THE COURT: All right. So this is what I’m trying to narrow in on. So Mr. Nordlof is asking the court to declare void ad initio a statute that was enacted in 1989 and

make this relief retroactive to everyone who ever has taken the retest and failed.

MR. NORDLOF: Well, not necessarily, because this statute only provides authority to give the retest. We concede they have authority to do a retest. We say – our position is they don't have the authority to cancel the holder of an otherwise valid license on the basis of the retest.

Appendix B at 18.⁸

THE COURT: And what did they do that was outside the scope? Is the retest, the way they handled the retest?

MR. NORDLOF: No. They have authority to do the retest.

Appendix B at 28.

Desmon argues that RCW 46.20.305 does not apply because the Department must have “good cause” prior to requiring Desmon to take the first retest. Appellant’s Opening Br. at 13. However that is contrary to the plain language of 49 C.F.R. 383.75(a)(2)(i)-(v), RCW 46.25.060(1)(b), RCW 46.20.305 (1) and Desmon’s statements at oral argument.

RCW 46.25.060 allows the Department to hire third party testers as long as it complies with 49 C.F.R. 383.75(a)(2)(i)-(v). 49 C.F.R. 383.75(a)(2)(i) requires the Department to audit third party testers and allows the retesting of CDL holders as one way to so. If the CDL holder

⁸ Appendix B is a copy of the relevant portion of the verbatim report of proceedings of the argument on summary judgment.

fails the retest the Department has authority under RCW 46.20.305(1) to require the driver to submit to an additional retest. Finally, the Department may suspend or revoke the driver's license of "such person who refuses or neglects to submit to such examination." RCW 46.20.305(4). Desmon refused the opportunity to retake the test after she failed the first retest. Therefore, the Department has authority to take action against her license.

If the Department did not either require her to retake the test or cancel her license, it would have allowed an incompetent school bus driver to continue to transport children. Such a result would place the public in significant danger, in direct conflict with the legislative directive that the licensing laws be administered to protect the residents of the state. RCW 46.01.011.

Evaluations from her employer do not negate Desmon's failure to pass the skills test. Given her refusal to retake the CDL skills test and display her fitness, the Department properly cancelled her license, pursuant to RCW 46.20.305(4).

D. The Department Was Not Required To Promulgate Rules Before Exercising Its Statutory Authority to Cancel Desmon's License.

Desmon acknowledges that the Department has the authority to delegate to third party testers the job of conducting commercial driver's

license skills tests. Appendix B at 28. Desmon agrees that the Department has the authority to retest CDL holders. *Id.* Desmon's only argument is that the Department cannot *cancel* a CDL after a driver fails the retest because RCW 46.20.305 refers to *suspending* or *revoking* a license if a driver refuses to take an examination.

Cancel, suspend and revoke are all defined in statute.

RCW 46.04.090 Cancel.

"Cancel," in all its forms, means invalidation indefinitely.

RCW 46.04.580 Suspend

"Suspend," in all its forms and unless a different period is specified, means invalidation for any period less than one calendar year and thereafter until reinstatement.

RCW 46.04.480 Revoke.

"Revoke," in all its forms, means the invalidation for a period of one calendar year and thereafter until reissue. However, under the provisions of RCW 46.20.285, 46.20.311, 46.20.265, or 46.61.5055, and chapters 46.32 and 46.65 RCW, the invalidation may last for a period other than one calendar year.

It was to Desmon's benefit that the Department cancelled her CDL rather than revoke or suspend it. Suspension or revocation must be done for a set period of time. RCW 46.04.480, RCW 46.04.580. In contrast, the period for cancellation is indefinite. RCW 46.04.090. Because Desmon could immediately take a retest and have the CDL reinstated, it was appropriate for the Department to use the term "cancel" instead of "suspend" or "revoke." By using the term "cancellation," the Department

used the least restrictive alternative in administering the CDL retest program because this allowed the drivers to retest immediately and get reinstated if they passed. If the Department cannot cancel the CDL, then the alternative is suspension or revocation for a set period of time.

Desmon argues the Department should be required to repeat its clear statutory authority in a rule before acting. Appellant's Opening Br. at 10. The Department is not required by statute or case law to adopt rules before taking actions pursuant to its statutory authority. The Administrative Procedure Act does not require rule making in this instance. "Under the Washington APA, unless a statute specifically requires adoption of a rule, agencies may develop policy either by rule making or adjudications." *Budget Rent A Car Corp. v. Dep't of Licensing*, 100 Wn. App. 381, 386, 997 P.2d 420 (2000). Here the statute, RCW 46.20.305, does not require rule making. The statute is clear and needs no explication. Under *Budget*, the Department may simply follow the law.

Desmon also argues that the Department is required to promulgate rules regarding administration of the retest. Appellant's Opening Brief at 10. RCW 46.25.060(1)(b)⁹ provides authority for the Department to

⁹ (1)(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

authorize third parties to conduct the skills test and to adopt rules regarding the third party testing program. RCW 46.25.060(1)(b) does not require the Department to adopt rules regarding the retest program specifically but rather directs the Department to adopt rules about third party testers. The Department promulgated WAC 308-100-160 to address third party testing.

Any test conducted by a third party tester shall conform to the testing requirements established by the department. If the test includes additional requirements, the performance of an applicant for a commercial driver's license on the additional portions shall not be considered for commercial driver license skill testing purposes. Any applicant aggrieved by the outcome of a test conducted by a third party tester may petition the department for review of the scoring procedure used by the third party tester.

WAC 308-100-160. The Department is thus in compliance with RCW 46.25.060 in this regard, and as discussed above otherwise complied with statute in cancelling Desmon's license.

E. Application Of The CDL Retest Program To Desmon Properly Observed Her Right To Equal Protection Of The Laws.

The Department's CDL retest program properly observes commercial drivers' rights to equal protection of the laws because it gives

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.

the same treatment to similarly situated license holders. There is no discriminatory application of the law in this instance. Accordingly, the Court should hold that the CDL retest program is constitutionally permissible.

The right to equal protection of laws is guaranteed by the Fourteenth Amendment of the United States Constitution and by the privileges and immunities clause of article I, section 12 of the Washington Constitution. Both require that persons similarly situated be similarly treated for any legitimate purpose of the law. *State v. Shawn P.*, 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993). The Court begins with a presumption in favor of the constitutionality of a statute or statutory scheme. *Merseal v. Dep't of Licensing*, 99 Wn. App. 414, 420, 994 P.2d 262 (2000). Next the Court must determine the appropriate level of scrutiny.

In *Merseal*, the Court concluded that “operating a commercial vehicle on public highways is a privilege; it is not a right.” *Id.* This is true even if a driver earns his or her livelihood by driving a vehicle that requires a CDL. *Id.* Therefore, a court must employ only minimum scrutiny and apply the rational basis test, when considering suspension of a CDL. *Id.* Since Desmon’s cancellation did not rise to the level of a

suspension for a set period of time, and was therefore of less impact than the suspension addressed in *Merseal*, minimal scrutiny is appropriate.

Under the rational basis test, the statute in question is presumed constitutional. *Id.* Desmon must show that the classification applies unequally to those within the class, that no real basis exists for distinguishing between classes, or that the classification bears no rational relation to the statute's purpose. *Id.* at 421. "Under minimum scrutiny, a classification must be upheld if there is any conceivable set of facts that could provide a rational basis for the classification. *Campbell v. State of WA, Dep't of Social and Health Services*, 83 P.3d 88 (2004) (citing *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637 (1993)).

RCW 46.20.305(1) applies equally to every holder of a commercial license. All such licensees are subject to retest if the Department has good cause to believe the individual is incompetent or otherwise not qualified to be licensed. After 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. Her failure of the test confirmed the existence of good cause. If Desmon ever regains her license, she will continue to be subject to suspension or revocation under RCW 46.20.305(1) if there is good cause to believe she is

incompetent or not qualified. There is no exemption from the statute for any subgroup or individual holding a CDL.

There is a rational relationship between the retesting requirement and the State's purpose. Requiring an individual that took the CDL test from a suspect test provider to retake the test serves the strong public safety interest in ensuring that only qualified individuals are permitted to hold a CDL and drive a school bus. The statute does not exceed beyond this public safety purpose. It does not impose a penalty or prevent Desmon from establishing her competence and regaining her license. Rather, if there is good cause to believe the driver is incompetent or unqualified, the driver is given an opportunity to show competence.

There is a clear, rational relationship between retesting and the statute's purpose. The retesting is done to comply with the federal auditing requirement for states which choose to use third party testers. 49 C.F.R. 383.75(a)(2)(i)-(v). The Department developed the retest program to assess the testers' compliance with state and federal requirements. CP at 50-52.

F. The Department's Actions In Selecting Desmon Were Not Arbitrary.

The Department's selection of Desmon was not done in an arbitrary or capricious manner. The Department developed a detailed

protocol for determining which third party testers should be included in the retest program. CP at 70. Once the Department determined which third party testers should be included, it then selected the drivers from monthly test logs by using a pre-determined selection process. CP at 59. The pre-determined selection process was to select every third driver from the log to take the retest. CP at 47. There is a rational relationship between the classification of the drivers and purpose behind RCW 46.25.060.

If the Department were required to retest *all* CDL drivers who were originally tested by third party testers, it would clearly defeat the purpose of using third party testers rather than Department employees in the first place. Retesting only a portion of the CDL holders who were originally tested by third party testers furthers the goal of public safety, making sure that the testers are properly testing the drivers in accordance with state and federal laws. It is no different than the state randomly auditing business records for tax purposes or randomly inspecting other licensees to ensure compliance with other health and safety requirements.

An agency action is arbitrary and capricious “if its actions are willful, unreasoning, and in disregard of facts and circumstances.” *Lenca v. Empl. Sec. Dep’t*, 148 Wn. App. 565, 575, 200 P.3d 281 (2009). For example, an agency official acts arbitrarily and capriciously by

disregarding pivotal facts and refusing to admit proof of them into evidence. *Id.* at 576. Here, the decision to test only every third was reasonable in that it balanced achieving the goals of public safety and third party tester auditing against the Department's limited resources and taxpayer funds. The court should decline to strike down the Department's actions here as arbitrary.

Desmon argues that the Department's actions in selecting her were arbitrary, citing to *Ames v. Dep't of Health, Med. Quality Assurance Comm'n*, 166 Wn.2d 255, 260, 208 P.3d 549 (2009), and the Washington Administrative Procedures Act. Appellant's Opening Br. at 18. In contrast to health licensing cases, this case is not subject to the Washington Administrative Procedures Act (WAPA). Under RCW 34.05.030 the provisions of RCW 34.05.410 through 34.05.598 do not apply to "the denial, suspension, or revocation of a driver's license by the department of licensing". RCW 34.05.030(2)(b). *Ames v. Dep't of Health* cites to WAPA, 34.05.570, when listing arbitrary and capricious as a factor when reviewing an agency action. *Ames v. Dep't of Health, Med. Quality Assurance Comm'n*, 166 Wn.2d at 260. Even if the WAPA did apply to the Department's retesting program, the Department's selection of Desmon was not done in an arbitrary or capricious manner.

Desmon argues that the Department has already admitted that she was selected “randomly, out of the entire pool of holders of validly issued CDL’s.” Appellant’s Opening Br. at 18. First, Desmon cites to no authority for the position that a random selection is automatically arbitrary and capricious. Second, her statement about the entire pool of CDL holders is incorrect. As explained above there was a detailed protocol for selecting which third party testers would be included in the retest program and there was a system of selecting every third driver from the monthly test logs. CP at 47, 59. The “entire pool” of CDL holders was not subject to the retest program but rather only those drivers who took their original test from a third party tester. If Desmon had chosen to take her initial driving skills tests from a Department examiner she would not have been subject to the retest program. Desmon was notified of the retest program and the possibility that she would be required to retest on her original CDL application. DOL at 14. She nevertheless elected to use a third party tester.

Desmon claims that she has not demonstrated “the slightest deficiency in the appropriate skill or knowledge required of the holder of a CDL.” This assertion is not supported by evidence in the record. There is nothing in the record regarding how she performed on her original skills test administered by the third party tester. What is in the record is the fact

that she failed the retest administered by the Department examiner, missing 29 points on the pre-trip inspection portion of the test. DOL at 73, DOL at 57-61, VRP at 28.

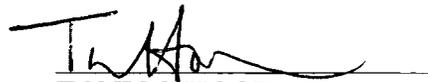
The Department's retest program is authorized by statute and the Department had detailed policies and procedures outlining the administration of the CDL retest program. The Department's actions were well reasoned and rationally related to the statutes.

V. CONCLUSION

The Department's cancellation of Desmon's CDL after she failed to demonstrate competence as a school bus driver was authorized by statute. The Department respectfully requests that this Court affirm the superior court's order granting the Department's motion for summary judgment.

RESPECTFULLY SUBMITTED this 10th day of November, 2010.

ROBERT M. MCKENNA
Attorney General


TONI M. HOOD
Assistant Attorney General
WSBA #26473
PO Box 40110
Olympia, WA 98504-0110
(360) 586-2644

APPENDIX A

C

Effective:[See Text Amendments]

Code of Federal Regulations Currentness

Title 49. Transportation

Subtitle B. Other Regulations Relating to Transportation

Chapter III. Federal Motor Carrier Safety Administration, Department of Transportation (Refs & Annos)

Subchapter B. Federal Motor Carrier Safety Regulations

▣ Part 383. Commercial Driver's License Standards; Requirements and Penalties (Refs & Annos)

▣ Subpart E. Testing and Licensing Procedures (Refs & Annos)

→ § 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.

[66 FR 49872, Oct. 1, 2001]

SOURCE: 52 FR 20587, June 1, 1987; 53 FR 27649, July 21, 1988; 57 FR 31457, July 16, 1992; 59 FR 26028, May 18, 1994; 59 FR 60323, Nov. 23, 1994; 61 FR 9564, March 8, 1996; 61 FR 14679, April 3, 1996; 62 FR 1296, Jan. 9, 1997; 64 FR 48110, Sept. 2, 1999; 66 FR 49872, Oct. 1, 2001; 67 FR 49755, July 31, 2002; 67 FR 61821, Oct. 2, 2002; 68 FR 23849, May 5, 2003; 70 FR

49 C.F.R. § 383.75

Page 2

56593, Sept. 28, 2005; 70 FR 66489, Nov. 2, 2005; 71 FR 2898, Jan. 18, 2006; 73 FR 73123, Dec. 1, 2008, unless otherwise noted.

AUTHORITY: 49 U.S.C. 521, 31136, 31301 et seq., and 31502; secs. 214 and 215 of Pub.L. 106-159, 113 Stat. 1766, 1767; sec. 1012(b) of Pub.L. 107-56; 115 Stat. 397; sec. 4140 of Pub.L. 109-59, 119 Stat. 1144, 1726; and 49 CFR 1.73.

49 C. F. R. § 383.75, 49 CFR § 383.75

Current through November 4, 2010; 75 FR 67918

© 2010 Thomson Reuters
END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

APPENDIX B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

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

Plaintiff/Appellants,)

vs.)

WASHINGTON STATE DEPARTMENT OF)
LICENSING,)

Defendant/Respondent.)

No. 09-2-05211-0

VERBATIM REPORT OF PROCEEDINGS

BEFORE: Honorable Tari S. Eitzen

DATE: May 5, 2010

A P P E A R A N C E S
FOR THE PLAINTIFF:

Mr. Eric Nordlof
Attorney at Law
410 N. Neel St., Ste. B
Kennewick, Washington 99336

FOR THE DEFENDANT:

MS. TONI M. HOOD
Assistant Attorney General
P.O. Box 40110
Olympia, Washington 98504-0110

REBECCA J. WEEKS CSR #2597
Official Court Reporter
1116 W. Broadway Dept. #3
Spokane, Washington 99260

1 the retest given by the Department of Licensing.

2 MR. NORDLOF: Right. They don't have it now. They
3 never had it, unless they can show the law changed somehow.

4 THE COURT: I'm not asking for the argument right
5 now.

6 MR. NORDLOF: I'm sorry.

7 THE COURT: I'm trying to define the issues, which I
8 always find is a nice starting point. Okay. Thank you,
9 sir.

10 MS. HOOD, go ahead.

11 MS. HOOD: And we are arguing that to go
12 retroactive, that they don't have standing to go
13 retroactive because what they're trying to include is this
14 group of unnamed people who we argue are we don't know who
15 the people are. We can't evaluate their injury or lack
16 there of. We can't evaluate whether there is a present
17 existing controversy and so that's why we are arguing
18 against the broad retroactive relief that they are
19 requesting.

20 THE COURT: Okay. Let's stop here for a second.
21 When was -- was this a -- what's the statutory or rule of
22 authority for the retesting? Where does that come from?

23 MS. HOOD: It comes from 46.25.060, which references
24 40 CFR, 838.75.

25 THE COURT: 838.75. All right. And when was that

REBECCA J. WEEKS CSR #2597
Official Court Reporter
1116 W. Broadway Dept. #3
Spokane, Washington 99260

1 promulgated?

2 MS. HOOD: It looks like it was originally in effect
3 in 1989 originally.

4 THE COURT: And then is that the statute or the CFR?

5 MS. HOOD: That's the statute.

6 THE COURT: All right. So this is what I'm trying
7 to narrow in on. So Mr. Nordlof is asking the court to
8 declare void ad initio a statute that was enacted in 1989
9 and make this relief retroactive to everyone who ever has
10 taken the retest and failed.

11 MR. NORDLOF: Well, not necessarily, because this
12 statute only provides authority to give the retest. We
13 concede they have authority to do a retest. We say -- our
14 position is they don't have the authority to cancel the
15 holder of an otherwise valid license on the basis of the
16 retest.

17 THE COURT: So you're asking the court to grant a
18 declaratory request that the statute in so much as it gives
19 DOL the authority to cancel commercial driver's licenses
20 based on retest, that the declaration, that it's void ad
21 initio would go back to 1989 and cover everyone who has had
22 their CDL cancelled based on the retest given.

23 MR. NORDLOF: No.

24 MS. HOOD: The program hasn't been in effect that
25 long.

1 relevant is that there are people that are affected by the
2 way they implemented the law.

3 THE COURT: All right. So you both agree that for
4 purposes of the declaratory action all I'm asked to look at
5 is the statute, the CFR, and whether or not as a matter of
6 law. And how do you articulate as a matter of law what's
7 wrong with the statute?

8 MR. NORDLOF: There is nothing wrong with the
9 statute. There is something wrong with the agency's
10 actions. The agency doesn't have enabling authority to
11 cancel the commercial driver's license of someone who fails
12 the retest if the license was otherwise validly issued.

13 THE COURT: So you're saying there is nothing wrong
14 with the CFR. There is nothing wrong with the RCW, but
15 it's how the Department of Licensing is acting in
16 effectuating the statute or how they are interpreting the
17 statute, what authority they get from the statute that's
18 wrong; they're acting outside the statute.

19 MR. NORDLOF: Right. Our whole argument is really a
20 first year law school administrative law final exam:
21 what's the scope of the agency?

22 THE COURT: You're going to make me have flashbacks
23 if you talk like that.

24 MR. NORDLOF: I probably went to law school long
25 before anybody here.

1 THE COURT: I don't think so. Your bar number is
2 significantly higher.

3 MR. NORDLOF: I practiced in Idaho for a number of
4 years before I came over here.

5 THE COURT: I grant you you probably know a lot more
6 about administrative law.

7 MR. NORDLOF: I don't. I'm a union lawyer, but I
8 know this: the agency can only act within the scope of its
9 statutory authority.

10 THE COURT: And what did they do that was outside
11 the scope? Is the retest, the way they handled the retest?

12 MR. NORDLOF: No. They have authority to do the
13 retest.

14 THE COURT: Is the way they delegate to the
15 third-party testers outside the scope?

16 MR. NORDLOF: No. They have authority to do that.

17 THE COURT: Okay. So what is it that they are
18 doing?

19 MR. NORDLOF: Their action to cancel the license of
20 someone who fails the retest because the purpose, the clear
21 purpose of the retest that they have authority to
22 administer is to audit the performance of their third-party
23 tester. In other words, they decide if they, if they test
24 a bunch of bus drivers who took the test from a certain
25 third-party tester and they all fail or they all do the

1 wrong thing, then the agency can go to that third-party
2 tester and either retrain them or fire them.

3 THE COURT: what do they do, the person that fails
4 the retest, then?

5 MR. NORDLOF: Nothing. I mean, the statute doesn't
6 give them authority to do anything. Their license just
7 runs for its original term.

8 THE COURT: So take me through this. Somebody takes
9 the test. who do they take the original test from?

10 MR. NORDLOF: Well, in this case, it would be the
11 third-party tester.

12 THE COURT: Okay. So the State contracts with the
13 third-party testers to do the testing, the testing for the
14 CDL.

15 MR. NORDLOF: Correct.

16 THE COURT: So the Department of Licensing goes out
17 and hires, you know, outsourcing.

18 MR. NORDLOF: Right.

19 THE COURT: They are outsourcing like everybody else
20 and they go hire whoever to test people for their
21 commercial driver's license. Okay.

22 MR. NORDLOF: Correct.

23 THE COURT: So they go out and they test Mr. Jones,
24 or making up somebody. So Mr. Jones passes the test.

25 MR. NORDLOF: Correct.