

80149-5

NO. 247201

and

NO. 247210

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

BRYAN LINDLEY DELONG, and
PAUL DOUGLAS INGRAM,

Respondents.

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING,

Petitioner

APPELLANT'S BRIEF

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I. INTRODUCTION

The Department of Licensing (Department) appeals from orders entered by Kittitas County Superior Court Judge Sparks reversing the Department's suspension of Respondents' drivers' licenses under the Implied Consent Statute, RCW 46.20.308. The Department requests this Court to reverse Judge Sparks' decision and reinstate the suspension of Respondents' drivers' licenses.

This appeal involves the admissibility of evidence under the implied consent statute. The legislature intended to "insure swift and certain punishment for those who drink and drive." *State v. Vasquez*, 148 Wn.2d 303, 315, 59 P.3d 648 (2002). In accordance with this intent, "the admissibility of evidence shall be *liberally construed*". WAC 308-103-120.

At issue, is the admissibility of the declaration¹ of State Toxicologist Dr. Barry K. Logan, Ph.D., identified as "Exhibit 2," in the record at the administrative hearing. When a person submits to a breath test of his or her breath alcohol content (BAC), the breath test results are admissible if, *inter alia*, a thermometer approved by the state toxicologist is used in the Datamaster. RCW 46.61.506(4)(a).

¹ Dr. Logan's declaration in Mr. Delong's case is attached to this brief at Appendix A and the declaration in Mr. Ingram's case is attached at Appendix B.

In WAC 448-16-020(2), Dr. Logan has approved specific thermometers for use in the Datamaster. In Exhibit 2, Dr. Logan certifies that an approved thermometer is attached to every Datamaster. Thus, Dr. Logan's declaration is necessary for the sole purpose of showing that an approved thermometer was used in the Datamaster in Respondents' cases.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

(1) The superior court erred in finding that Dr. Logan's declaration, identified as "Exhibit 2", was not admissible and then excluding it from the administrative record.

(2) The superior court erred in reversing the revocation of Respondents' driving privileges and finding that the breath test results did not comply with RCW 46.61.506(4)(a)(iv) and WAC 448-16-020.

B. Issue related to Assignments of Error

Did the hearing officer properly admit Dr. Logan's declaration into the administrative record?

III. STATEMENT OF CASE

A. Bryan Lindley DeLong

On January 26, 2005, City of Ellensburg Police Officer Andrew Hall observed a vehicle drifting side to side in the lane of travel.

Clerk's Papers (CP) at 61. He observed the vehicle touch the fog line and centerline, and then, in the 1200 block of University Way, the vehicle drifted to the center and the left side tires crossed over the centerline. Id. Officer Hall initiated a traffic stop and contacted the driver, Bryan D. DeLong. Id. When Officer Hall contacted Mr. DeLong he could smell an odor of intoxicants on Mr. DeLong's breath. Id. He also observed that his eyes were red and watery, he had slurred speech, and poor coordination. Id. Mr. DeLong admitted that he had consumed four beers. Id.

Officer Hall arrested Mr. DeLong for driving under the influence of alcohol. CP at 62. Officer Hall informed him of his constitutional rights and implied consent warnings, and requested that he submit to a breath test. CP at 52-53, 62. Mr. DeLong submitted to the breath test, producing a result of 0.19, which is more than twice the legal limit. CP at 58. Officer Hall notified the Department of Licensing of the incident and the BAC results through submission of his sworn report. CP at 51. The Department notified Mr. DeLong that his license would be suspended and he had the right to request an administrative hearing. CP at 50.

Mr. DeLong requested an administrative hearing, which was held on March 24, 2004. CP at 40. Included in the Department's records for each individual who requests a hearing is the declaration of Dr. Logan, identified as Exhibit 2. CP at 49. Referring to Dr. Logan's declaration,

the Hearing Officer found, "Although the Department does not create the document, the document is placed in Mr. DeLong's file for purposes of this administrative hearing." CP at 43. At the hearing, Mr. DeLong objected to the Hearing Officer's admission and consideration of the declaration of Dr. Logan. CP at 40. The contents of the exhibit are as follows:

THERMOMETERS APPROVED TO MEASURE THE
TEMPERATURE OF SIMULATOR SOLUTIONS

I, Barry K. Logan, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am the State Toxicologist authorized under RCW 46.61.506 to approve methods for breath alcohol testing within the State of Washington.

The following instruments are approved for the quantitative measurement of alcohol in a person's breath:

- a) The Datamaster.
- b) The Datamaster CDM

These are the only two instruments utilized in the Washington State Patrol's breath testing program.

A simulator device is attached to every Datamaster instrument. Each of these simulator devices employs a mercury-in-glass thermometer with a scale graduated in tenths of a degree measuring a range between 33.5 to 34.5 degrees centigrade, as approved in WAC 448-16-020.

A Guth 2100 wet bath simulator is a component in every Datamaster CDM. Every Guth 2100 wet bath simulator employs a digital thermometer system as approved in WAC 448-16-020.

CP at 49; *See Appendix A.* Despite the objection, the Hearing Officer admitted and considered the exhibit. CP at 43.

At the hearing, Mr. DeLong also offered exhibits and testified regarding the circumstances surrounding the initial stop by Officer Hall. CP at 40. After considering the evidence presented, the Hearing Officer sustained the Department's suspension of Mr. DeLong's driving privileges. CP at 40-44.

The Hearing Officer concluded:

The requirements of RCW 46.61.506(3) and RCW 46.61.506(4), WAC 448-16-040, and WAC 448-16-050 were met. The state submitted prima facie evidence that all thermometers used in simulator devices attached to BAC DataMaster and BAC DataMaster CDM instruments in the State of Washington are approved in WAC 448-16-020. See Exhibit 2.

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

CP at 42-43. Mr. DeLong timely petitioned for review by the superior court, which resulted in Judge Sparks' decision reversing the suspension.

² See RCW 46.20.332.

CP at 112-114. Judge Sparks' analysis on the admission of Dr. Logan's declaration does not appear in his Memorandum Decision. CP at 112-115. Rather, his analysis relies on a previous decision by Judge Sparks, *Bell v. Dep't of Licensing*³, which is referenced in his Memorandum Decision. CP at 114, 191-94

B. Paul Douglas Ingram

On May 1, 2005, Kittitas County Sheriff's Deputy Mark R. McBride was sitting in his patrol car at the entrance to the public boat launch at the intersection of SR 970 and SR 10 when he observed three vehicles pass his location. CP at 165. As the third vehicle passed, the driver pulled over and yelled to Deputy McBride that the driver of the vehicle in front of her was drunk. *Id.* The vehicle that was traveling in front of her turned eastbound on SR 10. *Id.*

As Deputy McBride got behind the vehicle, he observed it cross completely over into the westbound lane of travel and then cross completely over onto the fog line. *Id.* The vehicle was traveling at approximately 70 mph in a location where the posted speed limit was 55 mph. *Id.* Deputy McBride initiated a traffic stop of the vehicle. *Id.*

Upon contact with the driver, Deputy McBride could smell a strong odor of intoxicants coming from within the vehicle. *Id.*

³ Kittitas County Superior Court Cause No. 05-2-00033-6.

The driver, who was identified as Paul D. Ingram appeared to be disoriented and had watery, bloodshot eyes. Id. Mr. Ingram had a difficult time locating his driver's license, passing over it twice in his wallet. CP at 165. He admitted that he had a few drinks in town. Id. Mr. Ingram agreed to submit to field sobriety tests. Id.

When Mr. Ingram exited the vehicle he had a difficult time maintaining his balance, and had to hold onto the driver's door to keep from falling. Id. While Mr. Ingram was holding onto the door, Deputy McBride observed that Mr. Ingram urinated in his pants. Id. Mr. Ingram performed poorly on the field sobriety tests. Id.

Deputy McBride arrested Mr. Ingram for driving under the influence of alcohol and placed him in the back of the patrol car. CP at 166. Deputy McBride advised him of his constitutional rights and implied consent warnings. CP at 160-161, 166. Mr. Ingram agreed to submit to a breath test and produced valid readings of .125 and .129. CP at 166, 169.

Deputy McBride submitted his sworn report to the Department of Licensing notifying the Department of the incident and the BAC results. CP at 159. The Department notified Mr. Ingram of his suspension and right to request an administrative hearing. CP at 158. Mr. Ingram requested an administrative hearing, which was held on July 12, 2005. CP at 147, 170. Included in the Department's records for each individual who

requests a hearing is the declaration of State Toxicologist

Dr. Barry K. Logan, Ph.D. CP at 140, 157.

By practice, employees of the department obtain Dr. Logan's declaration from the website referenced in WAC 448-16-140. Department employees scan a copy of Dr. Logan's declaration into the department's records via an optical scanning system.

The department maintains a separate and unique record for each person awaiting an administrative per se hearing and specific to each arrest. The department's record also contains any related arrest reports that have been directed to the department.

By practice, after a hearing has been scheduled, department employees access the electronic imaging system and print copies of the police reports (Exhibit 1) as well as Exhibit 2 from each person's unique file within the department's records. Along with notice of hearing, licensees are provided copies of Exhibits 1 and 2. Either support staff provide copies of Exhibits 1 and 2 to Hearing Officers or Hearing Officers, without immediate support staff, may access the department's records directly.

CP at 150.

At the administrative hearing, Mr. Ingram objected to the Hearing Officer's admission and consideration of Exhibit 2. CP at 171-172. Despite the objection, the Hearing Officer admitted and considered the exhibit. CP at 172. At the hearing, Mr. Ingram also offered exhibits and testified regarding the circumstances surrounding his breath test. CP at 171, 173-177. After considering the evidence presented, the Hearing Officer sustained the Department's suspension of Mr. Ingram's driving privileges. CP at 152.

Mr. Ingram timely petitioned for review by the superior court, which resulted in Judge Sparks' decision reversing the suspension. CP at 126, 209. Judge Sparks' analysis on the admission of Dr. Logan's declaration does not appear in the Order Reversing Administrative Decision. CP at 209. Rather, his analysis relies on a previous decision by Judge Sparks, *Bell v. Dep't of Licensing*⁴, which is referenced in the Order of Reversal. CP at 191-194, 213-214.

IV. STANDARD OF REVIEW

This appeal concerns the application of RCW 46.20.308. Under this "Implied Consent" statute, the Department of Licensing must suspend or revoke the driver's licenses of people who are arrested for driving under the influence, and who blow .08 or more on tests of their breath alcohol content. RCW 46.20.308(6). Under the Implied Consent law, if the person requests a hearing, it is limited to the following issues:

1. Whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in physical control of a motor vehicle while under the influence of intoxicating liquor;
2. Whether the person was placed under arrest;
3. Whether the person was advised of the implied consent warnings; and

⁴ Kittitas County Superior Court Cause No. 05-2-00033-6.

4. Whether the person submitted two valid breath samples with readings indicating a breath alcohol concentration equal to or exceeding .08.

RCW 46.20.308(8).

An aggrieved party has the right to appeal the Department's decision to superior court within thirty days. *See* RCW 46.20.308(9). The Court of Appeals reviews an administrative decision from the same position as the superior court. *In re Richie*, 127 Wn. App. 935, 113 P.3d 1045 (2005), *citing* *Clement v. Dep't of Licensing*, 109 Wn. App. 371, 373, 35 P.3d 1171 (2001). The superior court reviews an appeal under the implied consent statute in the same manner as an appeal from a decision of a court of limited jurisdiction. *Id.* *citing* RCW 46.20.308(9).

The review "must be limited to a determination of whether the Department has committed any errors of law." RCW 46.20.308(9). Also, the superior court shall accept findings of fact, expressly made or inferred from the final order, that are supported by substantial evidence in the record. RCW 46.20.308(9).

Findings of fact supported by substantial evidence are accepted as verities on appeal, and an appellate court will not substitute its judgment for that of the trial court even though it may have resolved the factual dispute differently. *Jane Doe v. Boeing Co.*, 121 Wn.2d 8, 19, 846 P.2d 531 (1993).

Substantial evidence is evidence sufficient to “persuade a fair-minded, rational person of the truth of the finding.” *State v. Vasquez*, 109 Wn. App. 310, 318, 34 P.3d 1255, 1260 (2001). Evidence may be substantial enough to support a finding of fact even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987).

V. ARGUMENT

The purpose of the license suspension proceeding under RCW 46.20.308 is to ensure “the *immediate* preservation of the public peace, health, or safety, to free Washington roads of drivers who take the wheel under the influence of alcohol or controlled substances.” *State v. Vasquez*, 148 Wn.2d at 315. Also, the legislature intended to “insure swift and certain punishment for those who drink and drive.” *Id.* at 315. For this purpose, the Legislature “intended the administrative license suspension hearing to be adjudicated in a short span of time.” *Id.* at 316. If a hearing “takes on characteristics of a completely litigated trial, it would defeat the legislative purpose of conducting swift and expeditious administrative hearings.” *Id.* at 317. Accordingly, the Washington State Supreme Court explained that the statute relaxes evidentiary rules. *Id.* at 316.

In fact, the “statute allows the arresting officer’s report to come in as prima facie evidence that the officer had reasonable grounds to believe the driver was under the influence.” *Id.*

A. Breath Test Results are Admissible When, *Inter Alia* the Datamaster Contains a Thermometer Approved by the State Toxicologist.

RCW 46.61.506(4)(a)(iv) directs the Department to produce prima facie evidence that, “prior to the start of the test, the temperature of the simulator solution as *measured by a thermometer approved of by the state toxicologist* was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade” (emphasis added). The Department promulgated rules, “intend[ing] to implement the direction of the statute by 1) approving instruments and associated equipment capable of performing a reliable breath alcohol test. . . .” WAC 448-16-010.

WAC 448-16-020 specifically identifies the instruments that are approved to measure alcohol in a person’s breath and the thermometers that are approved to measure the temperature of the simulator solution.

(1) Pursuant to RCW 46.61.506, the following instruments are approved for the quantitative measurement of alcohol in a person’s breath:

(a) The Datamaster

(b) The Datamaster CDM.

(2) Pursuant to RCW 46.61.506, the following thermometers are approved:

- (a) Mercury in glass thermometers with a scale graduated in tenths of a degree measuring a range between 33.5 and 34.5 degrees centigrade.
- (b) Digital thermometer system contained within the Guth 2100 wet bath simulator.

WAC 448-16-020. WAC 448-16-140 explains that documents used by the state toxicologist and personnel involved in breath testing are available on a website maintained by the Washington State Patrol at <http://breathtest.wsp.wa.gov>. Dr. Logan's declaration, which connects the approved thermometer to the Datamaster, is a document that is available and maintained on the website in the section referenced as 'Public Records.' CP at 42, 150. Exhibit 2 was properly admitted at the administrative hearing and amounts to prima facie evidence that a thermometer approved by the State Toxicologist was used in obtaining Respondents' breath test results. *See Letourneau v Dep't of Licensing*, 131 Wn. App. 657, 128 P.3d 647 (2006).

B. Dr. Logan's Declaration is a Certification Authorized by the Criminal Rules for Courts of Limited Jurisdiction and thus, Admissible Without Further Evidentiary Foundation.

The Implied Consent Statute addresses the admissibility of evidence in driver's license revocation proceedings. RCW 46.20.308(8).

The sworn report or report under a declaration authorized by RCW 9A.72.085 of the law enforcement officer and any other evidence accompanying the report shall be admissible without further evidentiary foundation *and the certifications authorized by the criminal rules for courts of*

limited jurisdiction shall be admissible without further evidentiary foundation.

RCW 46.20.308(8) (emphasis added). Clearly, the certifications authorized by the CrRLJ are admissible without further evidentiary foundation. The criminal rule provides,

(c) Breathalyzer Maintenance, Simulator Thermometer, BAC Verifier, and Simulator Solution Certificates.

(1) *Admission of Certificate.* In the absence of a request to produce a Breathalyzer maintenance technician, a BAC Verifier Data Master infrared instrument technician, or the person responsible for preparing or testing simulator solutions made at least 7 days prior to trial or such lesser time as the court deems proper, *certificates substantially in the following forms are admissible in lieu of a state expert witness* in any court proceeding held pursuant to RCW 46.61.506 for the purpose of determining whether a person was operating or in actual physical control of a motor vehicle while under the influence of intoxicating liquors:

CrRLJ 6.13 (emphasis added). The rule goes on to give examples of certificates referenced in (c)(1). Each example begins with an oath, “the undersigned certifies under penalty of perjury that” Following the oath is the applicable information, concluding with the signature and title. CrRLJ 6.13 does not limit certificates to only those referenced in (c)(1). Rather, the rule also states that “certificates substantially in the following form are admissible”

In this case, Dr. Logan's declaration entitled, "Thermometers Approved To Measure The Temperature Of Simulator Solutions," is substantially in the form of the certifications listed in the rule. First, the declaration starts with an oath: "I, Barry K. Logan, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct." *See Appendix A and B.* Next, like the certificates identified in CrRLJ 6.13, Dr. Logan's declaration addresses components of the breath test machine. Specifically, Dr. Logan's declaration addresses thermometers approved for use in the Datamaster. Finally, Dr. Logan signed the declaration and stated his title. *See Appendix A and B.* Thus, Dr. Logan's declaration is a certification in substantial compliance with CrRLJ 6.13.

Certifications in compliance with the rule are admissible in lieu of a state expert witness. This is in accordance with the Department's rule that provides, "The admissibility of evidence shall be *liberally construed* to effect the intent and purpose of the hearings covered by these rules." WAC 308-103-120 (emphasis added). Admissibility of Dr. Logan's certification also furthers the policy of the implied consent law, which is "to ensure swift and certain consequences" for drunk drivers. *See RCW 46.20.308, Finding – Intent – 2004.* "To meet this goal, [the legislature] adopted standards that govern the admissibility of breath test results in

order to “provide a degree of uniformity” and ‘reduce the delays caused by challenges to various breath test instrument components and maintenance procedures.’” *Letourneau*, at 664-65 (quoting Laws of 2004, ch. 68 sec. 1).

It would contradict the purpose of the statute if either the state toxicologist or breath test technicians were required to testify in each and every administrative hearing held by the Department almost every working day throughout the State of Washington. Requiring such, would undoubtedly result in delayed administrative hearings and consumption of limited state resources. These are the exact consequences our Supreme Court has intended to prevent. *Vasquez*, 148 Wn.2d at 317-18. Thus, Dr. Logan’s declaration was properly admitted by the hearing officer as a certification authorized by CrRLJ 6.13.

C. Applicable Washington Statutes and Department Rules Support the Hearing Officer’s Admission and Consideration of Exhibit 2.

First, the Hearing Officer’s Admission of Dr. Logan’s declaration is consistent with RCW 46.20.308 and WAC 308-103-150. The implied consent statute provides, in part, that “[a] hearing officer shall conduct the hearings, may issue subpoenas for the attendance of witnesses and *the production of documents*, and shall administer oaths to witnesses.” RCW 46.20.308(8) (emphasis added). The plain language of the statute

indicates that the legislature contemplated procedures for the production of documents in the administrative hearings beyond the sworn report. Clearly, this clause was not intended solely for the production of documents from drivers, but for the production of documents to complete the record and to resolve factual disputes even if the documents are in support of the Department's licensing action and are produced by the Department.

This is supported by the Department's rule that states, hearing officers have authority to "[c]all additional witnesses *and request additional exhibits* deemed necessary to complete the record and receive such evidence subject to full opportunity for cross-examination and rebuttal by the petitioner." WAC 308-103-150(8) (emphasis added). Dr. Logan's declaration is an exhibit necessary for completion of the record. Further, it was provided to Respondents' attorney in advance of the administrative hearing. Thus, Respondents had the opportunity to rebut the evidence. However, Respondents failed to produce any evidence in rebuttal of Dr. Logan's declaration. They merely objected to its admission contending that it did not accompany the sworn report, it was not a Department record, or a public document. The Hearing Officer's admission and consideration of Dr. Logan's declaration is consistent with the plain language of RCW 46.20.308 and WAC 308-103-150.

Second, Dr. Logan's declaration was admissible since it was offered at a formal hearing where "the department shall consider its records" pursuant to RCW 46.20.332. RCW 46.20.332 provides in pertinent part:

At a formal hearing the department *shall consider its records* and may receive sworn testimony and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers in the manner and subject to the conditions provided in chapter 5.56 RCW relating to the issuance of subpoenas.

(Emphasis added).

Dr. Logan's declaration is a record made part of the driver's file by the Department and then forwarded to the assigned Hearing Officer. Likewise, the declaration is undisputedly found on the Washington State Patrol website. WAC 448-16-140. The Hearing Officer could not ignore Dr. Logan's declaration included in the Respondents' DOL files without good reason and grounds for objection.

Third, admitting Dr. Logan's declaration is consistent with WAC 308-103-120, which expressly provides: "The hearing officer shall rule on the admissibility and weight to be accorded to all evidence submitted at the hearing. The admissibility of evidence shall be *liberally construed* to effect the intent and purpose of the hearings covered by these rules" (emphasis added). Each and every purpose behind the implied consent statute is served by admitting and considering Dr. Logan's

declaration.⁵ Thus, it should not be rejected absent a sound challenge to its authenticity or content. The admission and consideration of Dr. Logan's declaration is consistent with WAC 308-103-120 and with the underlying intent of the implied consent statute. The Hearing Officer properly admitted Dr. Logan's declaration just as he properly admitted Respondents' exhibits.

D. Exhibit 2 is Admissible as a Public Document.

Hearing Officers conducting implied consent hearings are not bound by the rules of evidence. The Supreme Court established the rules of evidence pursuant to RCW 2.04.190. The statute provides the authority of the Supreme Court to prescribe by rule the taking and obtaining of evidence and "the practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the Supreme Court, superior courts, and district courts of the state." RCW 2.04.190. However, the Court has no authority to prescribe rules affecting implied consent hearings or other administrative hearings. The Court recognized its limitation on the application of the rules of evidence when adopting Evidence Rule (ER) 101, which provides, "[t]hese rules govern proceedings in the *courts of the state* of Washington. . . ." (emphasis added).

⁵ See *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 47, 50 P.3d 627 (2002) (implied consent statute enacted to: (1) discourage persons from driving motor vehicles while under the influence of alcohol or drugs; (2) remove the driving privileges of those persons disposed to driving while intoxicated; and (3) provide an efficient means of gathering reliable evidence of intoxication or nonintoxication).

Additionally, it has long been held that evidentiary rules are relaxed in administrative proceedings.⁶ Although the rules of evidence do not strictly apply to administrative proceedings, state agencies that fall under the Administrative Procedure Act (APA) may follow the rules of evidence as “guidelines.” RCW 34.05.452(2). However, because implied consent hearings do not fall within the provisions of the APA, a hearing officer is not even bound to consider the rules of evidence as “guidelines.” RCW 34.05.030(2)(b); *See Dulmage v. City of Seattle*, 19 Wn. App. 932, 935, 578 P.2d 875 (1978). The agency’s duty with respect to evidentiary matters at an implied consent hearing is established by statute and by WAC 308-103-100 through WAC 308-103-140.⁷

Even though the rules of evidence do not strictly apply in administrative proceedings, it is worth noting that Dr. Logan’s declaration would still be admissible as a public record. It is captioned “Thermometers Approved to Measure the Temperature of Simulator Solutions.” It is certified under penalty of perjury by Dr. Barry K. Logan,

⁶ *See, Fetting v. Dep’t of Social & Health Services*, 49 Wn. App. 466, 473, 744 P.2d 349 (1987) (“The hearings judge functions under a more relaxed standard than that required by the rules of evidence.”) *See also*, ER 1101, Comment 1101 on Subsection (c)(3) (“[p]roceedings with respect to extradition, rendition, and detainers are essentially administrative matters, and the rules of evidence have traditionally not applied”).

⁷ Even if the rules of evidence were to apply to administrative proceedings, ER 1101 states that the rules of evidence do not apply to preliminary proceedings to determine the admissibility of evidence.

Ph.D., who is the State Toxicologist. It appears on the Washington State Patrol's website. WAC 448-16-140 expressly provides:

Documents used by the state toxicologist and personnel involved in breath testing for the state of Washington, which are available on request include: The simulator solution preparation protocol, alcohol analysis protocol, certification document for simulator solution, affidavit from analyst of simulator solution, data base, quality assurance protocol, quality assurance procedure report, operator course outline, operator refresher course outline, and operator training record. A fee may be charged to cover the cost of providing these copies. Copies of most of these records are available at no charge on a web site maintained by the Washington state patrol at <http://breathtest.wsp.wa.gov/welcome.htm>.

There is no claim, much less evidence to show, that (a) statutory authority is lacking to generate Dr. Logan's declaration, (b) it relates to facts other than those of a public nature, (c) it is not retained for the benefit of the public, (d) it reflects anything other than a statement made by a public official, or (e) it is not authentic. *See e.g.*, ER 803, 901, 902.

Accordingly, the Hearing Officer properly admitted and considered Dr. Logan's declaration.

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VI. CONCLUSION

The superior court erred in reversing the Hearing Officer's decision. The Department respectfully asks the Court to reverse the superior court decision and reinstate the hearing officer's decision suspending Respondents' drivers' licenses.

RESPECTFULLY SUBMITTED this 14th day of July, 2006.

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CERTIFICATE OF SERVICE

I certify that on the 14th day of July, 2006, I served all parties, or their counsel of record, a true and correct copy of this document by the method(s) indicated below at the following address(es):

Mr. Kenneth D. Beckley
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Ellensburg, WA 98926-2939

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

DATED this 14th day of July, 2006, at Spokane, WA.



JESSICA BUDD
Legal Assistant

ADDENDUM

The foregoing pages and appendix are submitted in place of those previously filed on July 14, 2006. The pages have citation corrections.

RESPECTFULLY SUBMITTED this 11th day of August, 2006.

ROB MCKENNA
Attorney General



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1116 West Riverside Avenue
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(509) 456-3123

CERTIFICATE OF SERVICE

I certify that on the 11th day of August, 2006, I served all parties, or their counsel of record, true and correct copies of the corrected pages of Appellant's Brief by the method(s) indicated below at the following address(es):

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

US Mail, Postage Prepaid
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DATED this 11th day of August, 2006, at Spokane, WA.



JESSICA BUDD
Legal Assistant

Appendix A

EXHIBIT 2

**THERMOMETERS APPROVED TO MEASURE THE TEMPERATURE OF
SIMULATOR SOLUTIONS**

I, Barry K. Logan, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am the State Toxicologist authorized under RCW 46.61.506 to approve methods for breath alcohol testing within the State of Washington.

The following instruments are approved for the quantitative measurement of alcohol in a person's breath:

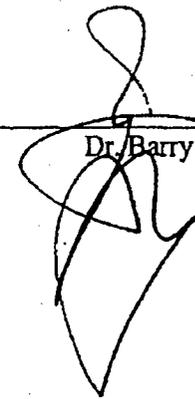
- a) The DataMaster.
- b) The DataMaster CDM

These are the only two instruments utilized in the Washington State Patrol's breath-testing program.

A simulator device is attached to every DataMaster instrument. Each of these simulator devices employs a mercury-in-glass thermometer with a scale graduated in tenths of a degree measuring a range between 33.5 to 34.5 degrees centigrade, as approved in WAC 448-16-020.

A Guth 2100 wet bath simulator is a component in every DataMaster CDM. Every Guth 2100 wet bath simulator employs a digital thermometer system as approved in WAC 448-16-020.

EXECUTED this 27th day of Oct, 2004, at Seattle, Washington



Dr. Barry K. Logan, State Toxicologist

Appendix B

Exhibit 2

**THERMOMETERS APPROVED TO MEASURE THE TEMPERATURE OF
SIMULATOR SOLUTIONS**

I, Barry K. Logan, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am the State Toxicologist authorized under RCW 46.61.506 to approve methods for breath alcohol testing within the State of Washington.

The following instruments are approved for the quantitative measurement of alcohol in a person's breath:

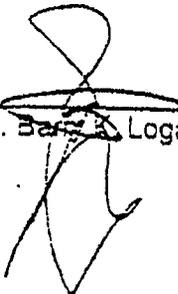
- A) The DataMaster
- B) The DataMaster CDM

These are the only two instruments utilized in the Washington State Patrol's breath-testing program.

A Guth Model 34C or Guth 2100 wet bath simulator device is attached to every DataMaster and DataMaster CDM. Each Guth Model 34 C simulator employs a mercury in glass thermometer with a scale graduated in tenths of a degree measuring a range between 33.5 and 34.5 degrees centigrade. Each Guth 2100 wet bath simulator employs a digital thermometer.

Persons who received their certification to conduct breath tests as described in WAC 448-16 have been trained and are certified to perform tests on the DataMaster, the DataMaster CDM, and portable breath test devices as described in WAC 448-15.

EXECUTED this 25th day of March, 2005, at Seattle, Washington



Dr. Barry K. Logan, State Toxicologist