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

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**Consolidated**

**BRYAN LINDLEY DELONG - NO. 247210  
PAUL DOUGLAS INGRAM - NO. 247201**

**Respondents,**

**vs.**

**STATE OF WASHINGTON,  
DEPARTMENT OF LICENSING**

*Petitioner*

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**BRIEF OF RESPONDENTS DELONG AND INGRAM**

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR ..... 1

III. STATEMENT OF CASE ..... 1

    A. Bryan Lindley Delong .....1

    B. Paul Douglas Ingram ..... 4

IV. STANDARD OF REVIEW..... 5

V. ARGUMENT ..... 6

    A. Breath Test Results are Admissible When, *Inter Alia*,  
    the DataMaster Contains a Thermometer Approved  
    by the State Toxicologist .....8

    B. Dr. Logan’s Declaration is a Certification Authorized  
    by the Criminal Rules for Courts of Limited Jurisdiction  
    and, thus, is Admissible Without Further Evidentiary  
    Foundation .....13

    C. Applicable Washington Statutes and Department Rules  
    Support the Hearing Officer’s Admission and  
    Consideration of Exhibit 2.....17

    D. Exhibit 2 is Admissible as a Public Document.....24

    E. Exhibit 2 Should Not be Admitted on the Basis That is  
    was an “Accompanying” Document to the Certified  
    Report of Breath/Blood Test pursuant to RCW 46.20.308(8)....29

VI. CONCLUSION.....33

## TABLE OF AUTHORITIES

### Cases

<i>Alforde v. Department of Licensing</i> , 115 Wn.App. 576, 63 P.3 <sup>rd</sup> 170 (2003).....	33
<i>Bell v. Department of Licensing</i> , Kittitas County Superior Court Cause No. 05-2-00033-6.....	2-4, 8, 27, 30, 31, 33
<i>City of Seattle v. Clark – Munoz</i> , 152 Wn.2d 39, 93 P.3 <sup>rd</sup> 141 (2004).....	16
<i>Johnson v. Kittitas County</i> , 103 Wn.App. 213, 11 P.3 <sup>rd</sup> 862 (2000).....	34
<i>Letourneau v. Department of Licensing</i> , 131 Wn.App. 657, 128 P.3d 647 (2006) .....	12
<i>Lytle v. Department of Licensing</i> , 94 Wn.App. 357, 971 P.2d 969 (1999).....	32
<i>State v. Vasquez</i> , 148 Wn.2d 303 – 59P.3d (2002).....	6

### Statutes

RCW 9A.72.085 .....	10, 29, 31
RCW 46.20.308 .....	6, 8, 10, 25
RCW 46.20.308(2).....	7
RCW 46.20.308(8).....	13,14, 17, 18, 20, 24, 25, 29, 31-33
RCW 46.20.308(9).....	20, 22
RCW 46.20.328.....	22
RCW 46.20.329 .....	22
RCW 46.20.330.....	21

RCW 46.20.332.....	10, 20, 21, 27
RCW 46.20.334.....	7, 22
RCW 46.61.506(4)(a)(iv).....	9, 15

**Rules**

CrRLJ 6.1(c)(1).....	16
CrRLJ 6.13.....	14
CrRLJ 6.13(1).....	15

**Regulations**

WAC 308-103-100.....	26
WAC 308-103-100(1).....	25
WAC 308-103-100(4).....	25
WAC 308-103-101.....	25
WAC 308-103-120.....	23
WAC 308-120(1).....	25
WAC 308-150.....	17, 19
WAC 308-150(8).....	19, 20, 29
WAC 308-150(9).....	27
WAC 448-16-010.....	9
WAC 448-16-020.....	9
WAC 448-16-140.....	9-11, 12, 21, 26, 28

## **I. INTRODUCTION**

Respondent Bryan Lindley Delong and Respondent Paul Douglas Ingram are respondents joined in this appeal brought by the Appellant State of Washington, Department of Licensing, hereinafter "Department." As set forth hereinafter in this Brief of Respondents the Respondent DeLong and Respondent Ingram shall jointly be referred to as the single "Respondent" to the extent that the overwhelming number of the issues pertain to each of the respondents in this appeal. To the extent there is a particular reference that is particular to a particular respondent the identification will be Respondent Delong or Respondent Ingram.

Respondent does not object to the general statement as set forth in the Appellant Department Introduction section (p. 1-2) as well as footnote 1 and does not object to the copies of the Appendix A and Appendix B as attached to the Appellant Department brief.

## **II. ASSIGNMENTS OF ERROR**

Appellant Department adequately sets forth the Assignments of Error and the issue relating to Assignment of Error.

## **III. STATEMENT OF CASE**

### **A. Bryan Lindley Delong**

Respondent Delong questions the requirement of setting forth a factual determination as to the operation of the vehicle, basis for the stop,

how the breath test was administered and the level of the breath test except if it is solely for the purpose of establishing undue emphasis upon the conduct of the Respondent Delong other than focusing on the precise legal issue before this court with respect to the admissibility of Exhibit 2 as a condition precedent to establish that there should be an administrative suspension of the driving privilege of Respondent Delong for his conduct occurring on January 26, 2005.

Appellant Department on p. 3-6 sets forth the circumstances which the request was made for the administrative hearing, the content of the Dr. Logan Declaration (CP 49 and Appendix A to Brief of Appellant) and the procedure undertaken by Superior Court Judge Scott E. Sparks relative to reversing the suspension based upon the analysis as specifically set forth by Judge Sparks in Bell v. Department of Licensing entered on September 30, 2005 under Kittitas County Superior Court Cause No. 05-2-00033-6 which was referenced in his Memorandum Decision. CP 114. The record in Respondent Delong's case at the Superior Court level was somewhat unclear as to the consideration of the Bell v. Department of Licensing Memorandum Decision by Judge Sparks but has been clarified by a stipulation pertaining to argument as to admissibility of Exhibit 2 executed by attorney Kenneth D. Beckley and Charnelle Bjelkengren effective June 29, 2006 which has been filed with the court. That stipulation specifically

confirms that Superior Court Judge Scott E. Sparks considered his prior Bell Memorandum Decision and incorporated it by reference in the actual Memorandum Decision referenced in Delong at CP 114. Attached to the Respondent Delong brief on appeal as Exhibit A is a complete conformed copy of the Memorandum Decision entered September 30, 2005 which is also part of the record on appeal as part of Respondent Ingram's Position Statement on Appeal. CP 178, p.190-194.

Respondent Delong does object to the statement by Appellant Department on p. 3 that "included in the Department's records for each individual who requests a hearing is the declaration of Dr. Logan identified as Exhibit 2." That conclusion is contrary to the position of the Respondent Delong and will be argued hereafter.

Respondent Delong points out that the Exhibit 2 declaration utilized by Dr. Barry Logan and attached as Exhibit A is the October 27, 2004 format of that exhibit. In the Respondent Ingram appeal there is an updated March 25, 2005 declaration of Dr. Barry Logan attached as Exhibit "B." Much of the language is the same but there are some differences which will be discussed hereinafter by Respondent Delong and Respondent Ingram.

**B. Paul Douglas Ingram**

Respondent Ingram questions the requirement of setting forth a factual determination as to the operation of the vehicle, basis for the stop, how the breath test was administered and the level of the breath test except if it is solely for the purpose of establishing undue emphasis upon the conduct of the Respondent Ingram other than focusing on the precise legal issue before this court with respect to the admissibility of Exhibit 2 as a condition precedent to establish that there should be an administrative suspension of the driving privilege of Respondent Ingram for his conduct occurring on May 1, 2005.

Appellant Department on p. 7-9 sets forth the circumstances which the request was made for the administrative hearing, the content of the Dr. Logan Declaration (Appendix B to Brief of Appellant) and the procedure undertaken by Superior Court Judge Scott E. Sparks relative to reversing the suspension based upon the analysis as specifically set forth by Judge Sparks in Bell v. Department of Licensing entered on September 30, 2005 under Kittitas County Superior Court Cause No. 05-2-00033-6 which was referenced in his Memorandum Decision. CP 178. Attached to the Respondent Ingram's Brief on appeal as Exhibit A is a complete conformed copy of the Memorandum Decision entered September 30,

2005 which is also part of the record on appeal as part of Respondent Ingram's Position Statement on Appeal. CP 178, p.190-194.

Respondent Ingram's does object to the statement by Appellant Department on p. 7-8 that "included in the Department's records for each individual who requests a hearing is the declaration of Dr. Logan identified as Exhibit 2." That conclusion is contrary to the position of the Respondent Delong and will be argued hereafter.

Respondent Ingram points out that the Exhibit 2 declaration utilized by Dr. Barry Logan and attached as Exhibit A is the October 27, 2004 format of that exhibit. In the Respondent Ingram appeal there is an updated March 25, 2005 declaration of Dr. Barry Logan attached as Exhibit "B." Much of the language as to Exhibit A and B is the same but there are some differences which will be discussed hereinafter by Respondent Ingram and Respondent Ingram.

#### **IV. STANDARD OF REVIEW**

Neither Respondent objects to the general statement of law as set forth with respect to the current standard of review by licensee to the Appellant Department in order to challenge an administrative suspension or revocation of a driving privilege.

## V. ARGUMENT

Respondent agrees that the purpose of RCW 46.20.308 is to set forth an accelerated and abbreviated procedure purportedly under the guise of procedural and substantive due process, the net result of which is intended to carry forth the observations made in State v. Vasquez, 148 Wn.2d 303 – 59P.3d (2002) at p. 315-317 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; to ensure swift and certain punishment for those who drink and drive; and to have an administrative license suspension hearing to be adjudicated in a short period of time under relaxation of evidentiary rules. See RCW 46.20.308.

However, the issue then becomes what appropriate judicial interpretations/restraints should be placed upon this accelerated procedure addressed toward punishment by an administrative suspension or revocation in light of the determination by the Legislature over the past 15 years or so to modify the procedural and substantive due process protections that licensees should and must have available to them in filing an appeal with respect to the Department of Licensing action.

This court is well aware that the procedure with respect to Department of Licensing administrative action and Department of Licensing administrative hearings has been radically modified in order to ensure the least expensive, least time consuming, least intrusion upon the time and effort of law enforcement and upon the Department of Licensing to fulfill the purported procedural and evidentiary processes directed toward the Department of Licensing goal as summarized in Vasquez to

suspend or revoke the driving privilege of as many operators of vehicles as possible administratively for operating or being in physical control of a motor vehicle in the state of Washington while either being under the age or 21 and having a .02 BAC reading or being 21 and over and having a .08 BAC reading or being either being under 21 or over 21 and refusing to submit to a BAC Verifier DataMaster test. See RCW 46.20.308(2). In other words, the historical to current procedure:

(1) Required an administrative hearing before an administrative hearing officer with the licensee, the law enforcement officer and other witnesses personally present and for testimony to be taken in front a hearing officer who could then judge the credibility and substance of the testimony presented and, furthermore, which then allowed an appeal *de novo* to the Superior Court of the State of Washington. See former RCW 46.20.308 and 46.20.334, prior to September 1, 1995, was then converted into:

(2) Elimination of the in person testimony and elimination of the trial *de novo* based upon an appeal and the creation of the telephone administrative hearing process which however initially still resulted in or required that the officer or officers involved be available to testify by telephone, see RCW 46.20.308 effective September 1, 1995, and then was converted into:

(3) The current process which streamlines and makes more expeditious for the Appellant Department of Licensing to conduct hearings by eliminating the necessity of the arresting officer or officers to be present and allows their sworn report testimony to be introduced on a *prima facie* basis without any additional evidentiary foundation and, as argued by the Appellant Department of Licensing in this case, allows additional documentation, such as the separate Exhibit 2 utilized by Dr.

Barry Logan, likewise to be admitted under a variety of theories which Respondents rejects and which were rejected by Kittitas County Superior Court Judge Scott E. Sparks. See current RCW 46.20.308.

Respondent will address the theories advanced by the Appellant Department seeking admissibility of Exhibit 2 for consideration by the hearing officer and requesting that the decision of the hearing officer in each case be affirmed and that the determination of the Superior Court Judge Scott E. Sparks be reversed. However, the Respondent believes that for this court to adopt that approach there must be even a further relaxing, if not elimination, of an evidentiary foundation basis in order to allow for the consideration of Exhibit 2 in the format utilized by the Department of Licensing in each of these cases wherein:

(a) Exhibit 2 was submitted as a separate document and not

(b) As is currently being undertaken, at least in Department of Licensing hearings conducted in Kittitas County subsequent to Bell v. Department of Licensing, the Department submitted as part of the administrative record with the Exhibit 2 submitted not only as a separate document but also as a portion of Exhibit 1 claiming that it then “accompanies” the officer’s report which customarily can be admitted *prima facie* consistent with RCW 46.20.308. Counsel will now respond to the Appellant Department argument in support of Assignment of Error as set forth in ¶s A through D on p. 12-21 of Appellant’s Brief and add additional section E in support of Respondent position.

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

Appellant cites that authority on p. 12-13. The recitation to RCW 46.61.506(4)(a)(iv); WAC 448-16-010; and WAC 448-16-020 set forth the basic rules.

Appellant then cites WAC 448-16-140 for the principle that documents used by the State Toxicologist and personnel involved in breath testing are available on a website maintained by the Washington State Patrol. Presumptively, the argument is that per WAC 448-16-140 the Declaration of Dr. Barry Logan, either as to the 2004 version pertaining to Respondent Delong attached as Exhibit "A" or as to the Appellant Department of Licensing Brief or the 2005 version as to Respondent Ingram, attached as Exhibit "B" to the Appellant Department Brief is in and of itself sufficient to allow those documents to be utilized within the Department of Licensing administrative proceeding and to be admissible without further foundation because they are "public records" in that they are available through WAC 448-16-140. In that regard, Respondent argues:

(a) Findings of Fact 6, second full paragraph of Michael Corry, Department of Licensing Hearing Officer as to Delong v. Department of Licensing entered on March 25, 2005 wherein the following statement is made:

“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 obtained from the Washington State Patrol website at [breathtest@wsp.wa.gov](mailto:breathtest@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. (Footnote 4 which then references RCW 46.20.332, which will be discussed hereinafter under the public record discussion in the Brief of Respondent) (Emphasis added) CP 64, p.79

(b) Finding of Fact 7 entered by Hearing Officer Robert Mullenix pertaining to Respondent Ingram and as set forth in a portion of that Finding of Fact 7 the following is stated:

“WAC 448-16-140 indicates that documents used by the State Toxicologist and personnel involved in breath testing are available at <http://breathtest.wsp.wa.gov> . Exhibit 2 is a document that is available and maintained on the website in the section referenced “Public Records.

The hearing officer is familiar with Exhibit 2. By practice, employees of the department obtained Dr. Logan’s declaration from the website referenced in WAC 448-16-140. Departmental employees scan a copy of Dr. Logan’s declaration into the department’s records via optical scanning system.” (Emphasis added) CP 178, p. 187

Consequently, Appellant Department relies upon WAC 448-16-140 as the cure-all with respect to the admissibility of the Dr. Logan documents separately as part of a “public record” or other theory as to admissibility.

To the extent it is argued as a “public record” there will be further discussion in the Respondents Brief hereinafter. However, at this point, reference is made to the current form of WAC 448-16-140 which was in effect both as to the Respondent Delong and Respondent Ingram hearings.

It specifically provides:

**“WAC 448-16-140 information concerning technical aspects of the breath test program,** 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 documents for simulator solution, affidavit from analyst of simulator solution, database, quality assurance protocol, quality assurance procedure report, operator course outlined, operator refresher course outlined 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 website maintained by Washington State Patrol at <http://breathtest.wsp.wa.gov/welcome.htm>.” (Emphasis added)

A review of the aforementioned WAC which was in effect at the time of each of these hearings confirms:

- No mention is made with respect to the certification of Dr. Barry Logan, be it the 2004 or 2005 certification as a record available on request at the website and;
- There is a charge that would have to be paid by any person who wishes to obtain that record and the person should not be required

to pay a charge in order to exercise the Department of Licensing administrative appeal proceeding, particularly in light of the fact that there is a \$200 fee that has to be paid in order to invoke jurisdiction of the Department of Licensing and;

- The WAC specifically states that “copies of most of these records” are available and does not indicate that all of the records are available on the website. In other words, the reference by the hearing officers in their specific Findings of Fact that the information is readily available on the website is inaccurate and WAC 448-16-140 cannot be relied upon as the “catch all” and “save all” with respect to supporting the certification of Dr. Logan as an admissible “public record” or any other form of record available for the hearing officer to consider merely because reliance is placed upon WAC 448-16-140.

Consequently, Exhibit 2 was not properly admitted at the administrative hearing and does not amount to *prima facie* evidence that the thermometer approved by the State Toxicologist was used in obtaining Respondents breath test results as authorized and required by Letourneau v. Department 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, is Admissible Without Further Evidentiary Foundation.**

Respondent will address this argument set forth on p. 13-16 of Appellant Department's Brief.

Counsel for Respondent does not believe that either Hearing Officer Corry (as to Respondent Delong) or Hearing Office Mullenix (as to Respondent Ingram) relied upon this legal argument in order to support admissibility of the declaration of Dr. Barry Logan. However, counsel for Respondent is aware that on appeal additional legal theories or arguments in some instances are available for consideration by the Appellate Court with respect to supporting a conclusion of a hearing officer at an administrative hearing with respect to ruling upon an evidentiary or factual issue.

Assuming that this argument is allowed to be raised on appeal, the argument is not persuasive and should be rejected.

Counsel for Appellant Department correctly cites RCW 46.20.308(8) which states in pertinent part:

"...and the certifications authorized by the criminal rules for courts of limited jurisdiction shall be admissible without further evidentiary foundation."

However, recitation to CrRLJ 6.13 as a controlling court rule authorizing the admissibility under RCW 46.20.308(8) without further evidentiary foundation does not support Appellant Department.

Yes, there are similarities pertaining to the certification of Dr. Barry Logan and the requirements that are set forth in CrRLJ 6.13. Counsel for Respondent acknowledges the language within the rule that states:

“Certificates substantially in the following forms are admissible in lieu of a state expert witness...”

However, the rule is not controlling and should not be utilized as a basis for authorizing the admissibility of Exhibit 2 declaration of Dr. Barry Logan because:

(1) A reading of the rule under subsection (1) indicates that certificates substantially in the following forms are admissible in lieu of a state expert witness...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.

The court rules does not address the precise issue that is before this court pertaining to an appeal from an administrative hearing where the determination is whether or not to revoke or suspend a driving privilege. While an ancillary question may be that there would be a requirement that

a person be found to be either operating or in actual physical control of a motor vehicle while under the influence of intoxicating liquors the precise purpose of the Exhibit 2 as utilized in this case relates solely to the certification of Dr. Barry Logan with respect to compliance with RCW 46.60.506 (4)(a)(iv) as to thermometer certification.

(2) Also, within the context of CrRLJ 6.13(1) the particular items that are authorized pursuant to the admission of a certificate in the absence of a breathalyzer maintenance technician (and not to eliminate the absence of an expert pertaining to thermometer certification such as Dr. Barry Logan) are:

- (a) A BAC Verifier DataMaster infrared instrument technician.
- (b) 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..

In other words, the court rule is specifically and explicitly limited to those two specific purposes. It should be expanded to cover the certification of Dr. Logan pursuant to the Exhibit "A" and Exhibit "B" declarations/certifications as to thermometer requirements pursuant to RCW 46.61.406(4)(iv). If the Legislature or the State Supreme Court wished to amend the statute or amend the court rule that simply could be done in order to add the specific authorization that such a certification in the district courts as to criminal proceedings would also include any

certification pertaining to thermometer issues as required. However, that has not been done and the court rule should not be expanded to cover admissibility of the certification of Dr. Logan as to that particular issue even though there are general overall similarities between the form of the declaration of Dr. Barry Logan and the requirements of a declaration consistent with CrRLJ 6.1(c)(1).

(3) Finally, a review of the court rule indicates there is a specific designation of those expert witnesses that could be utilized by the prosecuting authority with respect to the court rule certification process.

They are restricted to:

- (a) Breathalyzer maintenance and chemical certification
- (b) BAC Verifier DataMaster certification
- (c) BAC Verifier DataMaster simulator solution certification
- (d) BAC DataMaster simulator thermometer certification

Insofar as the simulator thermometer certification is concerned. It relates solely to the employee trooper of the Washington State Patrol certified as a technician with authority to testify in court with respect to the history of the thermometer and the thermometer calibration and certification in light of the circumstances as set forth in City of Seattle v. Clark – Munoz, 152 Wn.2d 39, 93 P.3<sup>rd</sup> 141 (2004).

It does not relate to an expert such as Dr. Logan who is not an employee trooper of the Washington State Patrol. The above-referenced court rules do not specifically relate to the very specific area of the Barry Logan certification that can be utilized in order to eliminate the presence of that expert witness within a district court criminal proceeding which by

carryover to RCW 46.20.308(8) would allow that certification to be admitted without further evidentiary foundation at an administrative appeal hearing. The argument of the Appellant Department should be rejected.

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

Respondent will address Appellant Department argument as set forth in pages 16 – 19 of Appellant Department Brief.

Appellant Department relies upon RCW 46.20.308(8) and WAC 308-103-150 to support the admission and consideration of Exhibit 2. This argument should be rejected as a basis for admissibility of Exhibit 2 submitted as a separate document in an envelope to the hearing officer which according to Hearing Officer Mullenix and Hearing Officer Corry was extracted by an employee of the Department of Licensing and merely put in an envelope along with the officer's reports and submitted to the hearing officer for consideration at the Department of Licensing administrative hearing. See CP 64, p.79; CP 178, p.187; and foregoing p. 9 - 10 of this Brief.

The Appellant Department relies upon two arguments which are:

1. That RCW 46.20.308(8) provides that a hearing officer “may issue subpoenas for the attendance of witnesses and the production of documents...”

Yes, the statute so states that. However, in the circumstances now before this court as to both Respondent Delong and Respondent Ingram the hearing officer did not issue any subpoena for the production of Exhibit 2. It was delivered to the hearing officer as a separate document denominated as “Exhibit 2” in conjunction with other documents within that envelope which were with the officer’s certification which is the classic Exhibit 1 and the various attachments thereto comprising of the arresting or testing officer’s reports and other data pertaining to the administration of the BAC test and/or the refusal of that test.

Yes, the clause was intended to allow a hearing officer, after the hearing has been convened and after the hearing officer has the authority to review documents within the file, to thereafter issue as “subpoena” for the production of certain records or, alternatively, prior to the commencement of the hearing if a request is made by a *pro se* licensee or an attorney for the licensee who has filed a timely appeal to request the issuance of a “subpoena” for the production of certain records to assist in the entire hearing process.

Neither of those processes were undertaken in this case. Consequently, the statutory provision is irrelevant to the issues now on appeal.

2. Reliance is made upon WAC 308-103-150(8) entitled "Conduct of Hearings" which provides in pertinent part as follows:

"Hearings are open to public observation. To the extent that a hearing is conducted by telephone or other electronic means, the availability of public observation is satisfied by giving members of the public an opportunity to hear or inspect the agency's record. The hearing officer's authority includes, but not shall be limited to, the authority to:

(8) Call 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 contains fifteen (15) subsections relating to the conduct of hearings all of which upon review certainly extend common sense authority to a hearing officer just as similar authority would be granted to a judge in a judicial proceeding.

However, reference as to subsection (8) as authority for admitting Exhibit 2 by the Appellant Department in this appeal is not well founded. That is because subsection (8) allows the hearing officer, once the hearing has been commenced and the hearing officer determines that additional witnesses or discovery of documents is appropriate, to either, on the hearing officer's own authority, or, at the request of a licensee or an

attorney for the licensee, to call additional witnesses and request that the additional documents be produced. It is not intended as is argued by the Department in this appeal for Exhibit 2 to be part of the "record" automatically because it arrives in an envelope along with the officer's sworn report which is the jurisdictional basis for the initiation of the hearing. In other words, Exhibit 2 cannot be admitted merely because it is an "additional document" and the hearing officer would have authority to "subpoena" that document under RCW 46.20.308 or "request additional exhibits" pursuant to WAC 308.13.150(8).

The second argument of Appellant Department under this subsection of the brief is that 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. That argument likewise should be rejected as it was rejected by Kittitas County Superior Court Judge Scott E. Sparks. See footnote 4 on page 5 of Memorandum Decision dated September 29, 2005 and as part of record CP 178, p. 194 and p. 5 of Exhibit "A" attached.

Authority for the position of the Appellant Department appears to be:

- a. RCW 46.20.332 which provides:

“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 by Appellant Department of Licensing)

Appellant Department claims that Dr. Logan’s declaration is a record “made part of the driver’s file by the Department of Licensing” and then “forwarded to the assigned hearing officer.” Furthermore, that the document is “undisputedly found” on the Washington State Patrol website pursuant to WAC 448-16-140. Those arguments must be rejected because:

(1) RCW 46.20.332 was a statute enacted in 1972 based upon a 1965 enactment at the time the implied consent law of the State of Washington was first put into place legislatively. It has not been amended thereafter. That statute is part of the halcyon days when Department of Licensing administrative hearings were conducted by actual appearance and live testimony before a hearing officer and, thereafter, a *de novo* appeal to the Superior Court consistent with RCW 46.20.330 and RCW 46.20.334; and also p. 7 of Respondent’s Brief entitled “Appeal to Superior Court.” Those procedures have long since been legislatively overridden based upon the current process under RCW

46.20.308(8) with respect to the telephone administrative appeal process and appeal on the record and no automatic stay during the appeal.

(2) A review of RCW 46.20.322 through RCW 46.20.335 indicates those statutes are all grouped under a general definition of “driver improvement.” Consequently, RCW 46.20.332 is wholly inapplicable to authority now utilized by the Appellant Department to support introduction into evidence without further foundation any “record” of the Department. The thrust primarily of the aforementioned statutory procedure relates to driver improvement hearings as set forth in RCW 46.20.322 through 46.20.328. Thereafter, the provisions of RCW 46.20.329 through .334 also appear to relate to an appeal as a result of a driver improvement hearing. RCW 46.20.332 was enacted within the context of a subsequent *de novo* appeal to the Superior Court under RCW 46.20.334. There no longer is a right to a *de novo* appeal to the Superior Court pursuant to RCW 46.20.308(9) where the appeal is solely on the administrative record. The provisions of RCW 46.20.332 should not be utilized to support the admissibility of Exhibit 2.

The third basis asserted by the Appellant Department, is that the certification of Dr. Logan is consistent with WAC 308.103.120 which provides:

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

Respondent acknowledges the rule. However, even if the rule does allow for “liberally construed” as to the admissibility of evidence there still is required some initial proper foundation with respect to the receipt of the alleged document which must be established before ruled admissible and then admitted into the record. Merely because a document is received in some fashion, shape or form by a hearing officer pertaining to a Department of Licensing appeal does not mean that the document is just automatically admitted because the rule allows for “liberally construed” as to admissibility. The terminology as utilized as to “admissibility” does require that there be a foundational basis sufficient to justify the admissibility of any document.

There is a vast difference between a document or anything else being admissible compared to the judicial or quasi-judicial act of actually admitting the document after proper foundation. There is no question with respect to the authority to admit the classic Exhibit 1 (if in proper form)

which is the report of the officer and the attachment documents to that report since it so allowed by RCW 46.20.308(8). However, as to separate documents which are not part of the officer's report nor inherent with the knowledge of the officer, there must be a foundational basis for admissibility. Such is not the case with respect to the separate Exhibit 2 declaration of Dr. Barry Logan.

**D. Exhibit 2 is Admissible as a Public Document**

Appellant argues that admissibility as a public document pursuant to pages 19 through 21. Counsel for Respondent will now address that position.

The general statement of authority as to statute, case law and evidence rules as set forth in pages 19 through most of page 20, including footnotes, is a general statement of the law and no particular comment is applicable. However, the Appellant Department ultimate does concede that even though the rules of evidence do not strictly apply in administrative proceedings, there still is the applicable of evidentiary requirements pertaining to the presentation of testimony and, furthermore, the introduction of exhibits into the record at an administrative proceeding.

Respondent acknowledges that to supplement the statutory hearing as specified in RCW 46.28.308(8) there has been adopted Chapter 308-103 WAC entitled "Rules for procedure of hearings conducted under RCW 46.20.308. See specifically WAC 308-103-010. All rulings upon objections to the admissibility of evidence shall be made in accordance with the provisions of these rules, WAC 308.103.100(1), and evidence is admissible if received prior to, or during, the hearing. WAC 308.103.100(4).

Respondent believes that language specifically again distinguishes between the term "admissible" which could relate to any document or any evidence that is sought to be admitted and the next step which is the action of the administrative officer in ruling upon a request for admissibility and then making the quasi-judicial determination that testimony or a document should be admitted and, hence, is admitted into evidence as part of the record. Merely because a document is admissible does not automatically mean it is admitted as part of the record. There needs to be proper foundation with respect to its admissibility. See WAC 308-103-120(1) which provides:

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

Appellant then argues that the Exhibit 2 is a “public document” and/or “public record” and, in that regard, would automatically be admissible in that context. Citation of authority is set forth on p. 20 – 21 for WAC 448-16-140 which is the “website” argument. That argument should be rejected and the court’s attention is referred to counsel’s argument set forth on p. 10-12 of this Brief on appeal with respect to the inapplicability of WAC 448-16-140 to authorize the admissibility of the Exhibit 2 certification.

Argument by Appellant Department that WAC 308-103-100 which states that “evidence is admissible if received prior to, or during the hearing” should be rejected as to Exhibit 2 on this appeal. If that rule means what the Appellant Department asserts it means, the Department of Licensing hearing examiners would never need to rule on questions of admissibility, because if the evidence was received before the hearing was over, it would be automatically admissible and, therefore, no ruling would be necessary. That interpretation should be rejected in light of the authority outlined above which does require hearing officers to rule on issues of admissibility and not just automatically admit anything that may be submitted at any time before the hearing is over.

The Appellant Department suggests that WAC 308-103-150(9) may be the admissibility peg upon which this court should rule that Exhibit 2 under the circumstances of these of appeals should be admissible by the hearing officer because hearing officers can examine “the official records of the department.” See WAC 308-103-150(9). That argument should be rejected for two reasons:

(1) Attention is addressed to foregoing p. 7 and p. 20-22 of Respondents’ Brief on Appeal which that issue has been addressed within the context of RCW 46.20.332 and which likewise was rejected by Judge Scott E. Sparks in his Memorandum Decision in Bell v. Department of Licensing. See Exhibit “A” attached on page 5, footnote 4. Under the approach so argued, the position apparently of the Appellant Department would be that if a declaration from Dr. Logan appeared in a specific file relating to any respondent licensee then the hearing officer would be compelled to consider the document. That argument should fail because the placement of a document into an “official record” – as claimed by Appellant Department does not convert that particular document into an “official record.” Even if it could so be argued, that analysis simply allows the document to be examined as to admissibility and not admitted unless there was a proper foundational basis to support being admitted and considered as part of the record.

This court should reject the position Appellant Department with respect to Exhibit 2 being a “public record” merely because the Department of Licensing through its hearing officers chooses to call it a “public record” regardless of compliance with:

(a) Any of the minimal evidentiary requirements pertaining to the admissibility of a public record requiring certain authentication and identification and;

(b) Apparently taking a position that any piece of paper of any nature whatsoever that is placed upon a website pertaining to the Department of Licensing, the Washington State Patrol, or the State Toxicologist constitutes a “public record” because it is available to the “public” even though under WAC 448-16-140 there is a question as to whether the Exhibit 2 declaration of Dr. Barry Logan is on the website and, hence, available to the public. If the foregoing analysis is utilized, then any piece of paper anywhere under any set of circumstances which is available to the public as a “record” becomes a “public record” because the “public” has access to the “record.” Forget any evidentiary approach. Forget documentation as to authenticity and/or documentation as to certification of at least some person as a custodian of the record of some person providing some overview

to a hearing officer within a quasi-judicial administrative proceeding because it would not be needed. Under that approach, if the Department says it is a “record” open to the “public” it then somehow becomes a “public record” and is admissible. Such circular reasoning should be rejected.

**E. Exhibit 2 Should Not be Admitted on the Basis That it was an “Accompanying” Document to the Certified Report of Breath/Blood Test pursuant to RCW 46.20.308(8)**

Counsel for Respondents have carefully examined Appellant’ Brief with respect to argument regarding admissibility of Exhibit 2 as an “accompanying document” pursuant to the provisions of RCW 46.20.308(8) that provide as follows:

“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.” (Emphasis added)

The only possible reference to this argument appears to be in Section C, p. 16–19 of Appellant’s Brief discussing WAC 308-103-150(8). However, that argument was advanced by the Appellant Department at the Trial Court level before the Judge Scott E. Sparks as a basis to support the

affirmation of the hearing officer's decision in both Delong (see CP 87, p. 96) and Ingram (see CP 195, p. 200).

The argument of the Department of Licensing is that Exhibit 2 should be admissible as a "accompanying document" because it came in the same envelope to the hearing officer even though it is clear that all persons associated with the process understand that the Exhibit 2 document under the circumstances of Respondents Delong and Ingram were merely placed into the envelope by an employee of the Department who had extracted that from the "record" of the licensee. See CP 64, p. 79 and attached CP 178, p. 87 and foregoing p. 17- 18 of Respondent Brief.

The analysis of Judge Scott E. Sparks as set forth in Bell v. Department of Licensing, Kittitas County Superior Court No. 05-2-00033-6 (CP 178, p. 1 and attached Exhibit "A") supports the position advocated by attorney Kenneth D. Beckley on behalf of Respondent Bell in that case and supports the application of that rationale in rejecting any argument that the Exhibit 2 declaration of Dr. Barry Logan was an "accompanying" document.

As set forth by Judge Sparks in page 4 of his Memorandum Decision the following argument is reaffirmed by Respondent in this appeal to support a rejection by this court of any argument that Exhibit 2 separately included within an envelope submitted to the hearing officer via

an employee of the Department of Licensing constitutes an “accompanying” document within the context of RCW 46.20.308(8). As stated by Judge Sparks:

“The Department provides three separate rationales for why Exhibit 2 is admissible under the facts of this case. First, the Department argues RCW 46.20.308(8) admits, without further evidentiary foundation.

Under this reading, any item of mail delivered by the postman to the hearing examiner on the day the sworn report arrived in the mail would accompany the sworn report and thus be admissible at the DOL hearing. This cannot be what the legislature intended. A more reasonable interpretation of the statute is that the legislature intended that any evidence forwarded by the officer to the Department which accompanies the sworn report would be admissible; the officer’s evidence which accompanied the sworn report would be treated in the same fashion as to the sworn report.” (Emphasis added)

Counsel for Respondent supports that rationale since that was precisely the argument raised by Appellants Delong and Ingram at the Superior Court level incorporating the Bell decision and, thereafter, with respect to recitation of the same principles as set forth in argument on Delong and Ingram which incorporated the Bell rationale. Additional authority to support the determination made by Judge Scott E. Sparks is:

1. The sworn report of the officer pursuant to RCW 46.20.308 is a certification under RCW 9A.72.085. That officer can certainly certify that information being submitted is true, correct and accurate as to the best of his knowledge or opinion. However, he could not so certify as to the

accuracy of the Exhibit 2 declaration of Dr. Barry Logan as to being true, correct and accurate because the officer has no knowledge whatsoever pertaining to that technical process with respect to thermometer certifications. It is not within his expertise and, therefore, even if it were contained as a document within the sworn report of the officer as Exhibit 1 it should not be admissible. However, under the circumstances of the appeal in Respondents Delong and Ingram, the Exhibit 2 was not incorporated as part of the Exhibit 1 sworn report of the officer and was a separate document just inserted into the envelope for receipt on the same date as the sworn report.

2. In Lytle v. Department of Licensing, 94 Wn.App. 357, 971 P.2d 969 (1999) this court commented upon the purpose of RCW 46.20.308(8) at p. 362:

“RCW 46.20.308(8) specifically allows the DOL hearing officer to rely on the information contained in the sworn report and the police report as *prima facie* evidence that the statutory requirements of the implied consent law were properly followed.” (Emphasis added)

Respondent argues that the intent of the court in Lytle was to restrict the admissibility on a *prima facie* basis to that information which was restricted to the sworn report customarily introduced as Exhibit 1 and, thereafter, should any issue arise as to information contained within the sworn report which would not comply with the officers certifying under

penalty of perjury that he has knowledge as to the truth, correctness or accuracy of that information, for that issue to then be reserved for that particular set of circumstances. In other words, the sworn report should be related to the officer's report and the police reports only.

3. See also Alforde v. Department of Licensing, 115 Wn.App. 576, 63 P.3<sup>rd</sup> 170 (2003) where this court again had the opportunity to review RCW 46.20.308(8) and acknowledge Lytle and at p. 581 noted:

“Officer Hall sent Exhibit 1, a sworn report, to DOL. Mr. Alforde request a review hearing. The Ellensburg Police Department forwarded documents, including Exhibit 1, the traffic infraction, the incident report, the DUI incident report, Officer Hall’s complete police report with a signed declaration and Officer Turner’s complete police report with a signed declaration. The sworn report and the self-certified material is sufficient to establish a *prima facie* case...” (Emphasis added)

Any argument on this particular issue as to admissibility as “accompanying document” as argued at the Superior Court level or as may be inferred or argued at the Court of Appeals level on this appeal should be rejected as a basis for admissibility of Dr. Barry Logan Exhibit 2 declaration.

## VI. CONCLUSION

Superior Court Judge Scott E. Sparks did not commit error at law in ruling in Bell v. Department of Licensing, Kittitas County Superior Court Cause No. 05-2-00033-6 (which case was not appealed by the State

of Washington, Department of Licensing) and which formed the basis by reference as to the reversal/cancellation of any administrative suspension of the driving privilege or Respondents Delong and Ingram.

Superior Court Judge Scott E. Sparks correctly ruled that Exhibit 2 under the circumstances of these appeals did not constitute an accompanying document, and was not admissible as an “official record” or a “public document” nor was it admissible merely because it was part of a licensee’s “record” or was received and to be considered during the course of the administrative hearing. The order reversing administrative decision and granting Appellant’s relief on appeal should be affirmed in each appeal.

Respondents Delong and Ingram should be awarded statutory costs as prevailing party pursuant to the provisions of RAP 14.1 – 14.3 subject to the filing of a Cost Bill pursuant to RAP 14.4 as prevailing party. See also, Johnson v. Kittitas County, 103 Wn.App. 213, 11 P.3<sup>rd</sup> 862 (2000).

DATED this 20<sup>th</sup> day of April, 2007.

Respectfully submitted



Kenneth D. Beckley

Attorney for Respondents Bryan Lindley

Delong and Paul Douglas Ingram

WSBA#00469

EXHIBIT "A"

A-1 through A-5

**FILED**

SEP 30 2005

JOYCE L. JULSRUD, CLERK  
KITITAS COUNTY, WASHINGTON

**SUPERIOR COURT OF WASHINGTON FOR KITITAS COUNTY**

ERIC JAMES BELL,	)	
	)	
Appellant,	)	No. 05-2-00033-6
	)	
vs.	)	<b>MEMORANDUM DECISION</b>
	)	
STATE OF WASHINGTON,	)	
DEPARTMENT OF LICENSING,	)	
	)	
Respondent.	)	

**PROCEEDINGS**

Mr. Bell appeals the Department of Licensing hearings examiner's decision sustaining the Department of Licensing order suspending Mr. Bell's privilege to drive pursuant to RCW 46.20.308. Oral argument on the appeal was conducted on May 9, 2005. This court remanded the matter to the hearings examiner by order of May 27, 2005. Following proceedings consistent with the order on remand, oral argument was again conducted on September 26, 2005.

**DISCUSSION**

1. Assignment of Error. Mr. Bell's asserts the hearings examiner erred by entering Finding of Fact No. 6 (describing the administration of the BAC test) and Conclusion of Law No. 5 (concluding the BAC tests were properly administered). Simply put, Mr. Bell argues the Department failed to introduced sufficient evidence of compliance with the requirements of

MEMORANDUM DECISION - 1

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**EXHIBIT** A-1

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RCW 46.61.506(4)(a)(iv) and WAC 448-16-020.

2. Factual Background. On October 31, 2004 WSP Trooper Seim arrested Appellant for violation of RCW 46.61.503 (minor DUI) and transported him to the Kittitas County Jail for performance of the breath test. As the test results indicated a blood alcohol content above the legal limit, the Trooper notified Appellant of his hearing rights and Appellant requested a formal hearing. The initial Administrative Hearing occurred on December 22, 2004. At that hearing, Appellant discussed the propriety of the hearing examiner's use of Exhibit 2.<sup>1</sup> The hearing examiner admitted Exhibit 2 and sustained the Department's action towards Mr. Bell. Mr. Bell appealed to this court, and argued that the hearing examiner erred by admitting Exhibit 2. As the court could not tell on the record submitted whether the hearing examiner had understood the objection by Appellant to be one of admissibility or weight, this court remanded the matter for additional proceedings. Specifically, the court ordered the hearing examiner to make a "determination" of whether Exhibit 2 was challenged as to admissibility or as to weight, and if weight only, to describe the method by which Exhibit 2 was received for consideration by the hearing examiner and the theory of admissibility relied upon by the hearing examiner. In accord with the order on remand a second administrative hearing was held on July 5, 2005. The hearing examiner then issued an Amended Order wherein a determination was made that "petitioner challenged Exhibit 2 as to both admissibility and weight at the time of the original hearing..." The hearing examiner further explained the process by which he received Exhibit 2, the method by which he analyzed the information contained therein, and the weight he gave to that information.

4. Legal Issue Presented on Appeal. Did the hearing examiner err in concluding the BAC test results were properly obtained?

5. Standard of Review. RCW 46.20.308(9) governs this appeal and requires the court to review the action of the Department of Licensing in the same manner as an appeal from a decision of a court of limited jurisdiction. The standard of review is therefore set forth in RALJ

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<sup>1</sup> Described below.

9.1 and requires the court to determine whether the administrative hearing examiner committed errors of law. When reviewing the administrative law officer's decision for errors of law, this court must accept those factual determinations supported by substantial evidence in the record which were found by the administrative hearing examiner or which may reasonably be inferred from the judgment of the administrative hearing examiner. RALJ 9.1(b). The court cannot substitute its judgment for that of the administrative hearing examiner or weigh evidence or assess the credibility of witnesses. Davis v. Department of Labor & Industries; 94 Wn.2d 119, 124 (1980); Walk v. Department of Licensing, 95 Wn. App. 653, 656 (1999).

6. Analysis. A breath test shall be admissible at an administrative proceeding if the department produces prima facie evidence that the temperature of the simulator solution was within certain parameters as measured by a 'thermometer approved of by the state toxicologist.' RCW 46.61.506(4)(a)(iv). The thermometers approved of by the state toxicologist are described in WAC 448-16-020. Accordingly, if at the Administrative Hearing the Department established that the thermometers used during Appellant's breath test were approved by the state toxicologist, then the Department would have established compliance with RCW 46.61.506 and the Department's action towards Appellant's license would necessarily be sustained.

In an effort to establish that the thermometers used during Appellant's breath test met the approval of the state toxicologist, the hearings examiner informed Appellant that he would be considering Exhibit 2. Exhibit 2 is a declaration prepared by state toxicologist Dr. Barry K. Logan. Dr. Logan's declaration essentially states that every Washington state breath test instrument is in compliance with WAC 448-16-020. Although Appellant objected to the admissibility of Exhibit 2,<sup>2</sup> the hearings examiner admitted the document and considered the information contained in said declaration.

WAC 448-16-140 indicates that documents used by the state toxicologist are available on a web site maintained by the Washington state patrol at <http://breathtest.wsp.wa.gov/welcome.htm>. The hearings examiner, in the Amended Order, states that Exhibit 2 is a document that is available

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<sup>2</sup> Although Appellant could have been more clear as to exactly what he was objecting to, the purpose of remand was to determine whether that objection was coherent enough to preserve this issue for appeal. As the hearings officer has concluded that it was, and since sufficient evidence supports that decision, this court accepts the finding that

on this web site in the section referenced as "Public Records." The hearings examiner further stated:

"The Hearing Officer is familiar with Exhibit 2. By practice, employees of the department obtain Dr. Logan's declaration from the website referenced in WAC 448-16-140. Departmental 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, departmental 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... The Hearing Officer has personally viewed the department's records related to Mr. Bell's October 31, 2004 arrest and has observed Exhibit 2 within the department's records." Amended Order, page 4.

The Department provides three separate rationales for why Exhibit 2 is admissible under the facts of this case. First, the Department argues RCW 46.20.308(8) admits, without further evidentiary foundation, the "sworn report... of the law enforcement officer and any other evidence accompanying the report..." This argument asserts that since Exhibit 2 "accompanied" the officer's report when it was received by the hearings examiner, Exhibit 2 is admissible without further foundation. Under this reading, any item of mail delivered by the postman to the hearings examiner on the day the sworn report arrived in the mail would accompany the sworn report and thus be admissible at the DOL hearing. This cannot be what the legislature intended. A more reasonable interpretation of the statute is that the legislature intended that any evidence forwarded by the officer to the Department which accompanied the sworn report would be admissible: the officer's evidence which accompanied the sworn report would be treated in the same fashion as the sworn report.<sup>3</sup>

The Department next argues that WAC 308-103-100 states that "evidence is admissible if received prior to, or during, the hearing." If that rule means what the Department asserts it means, Department of Licensing hearing examiners would never need to rule on questions of admissibility, because if the evidence was received before the hearing was over, it would be automatically admissible and therefore no ruling would be necessary. The court rejects this interpretation.

Finally, the Department argues that since WAC 308-103-150(9) allows hearing examiners to examine the 'official records' of the department, and since Dr. Logan's declaration appeared in the

appellant objected to the admissibility of Exhibit 2.

<sup>3</sup> See also Alforde v. Dep't of Licensing, 115 Wn. App. 576 (2003), review denied, 150 Wn.2d 1004, at 582.

specific file relating to Appellant, the hearings examiner was compelled to consider the document. This argument fails because the placement of a document into an 'official record' does not convert that document into an official record.<sup>4</sup> Even if it did, this rule simply allows the document to be examined, not admitted.

All three of these theories of admissibility revolve around one simple theme: that any and all information that is, in any fashion, brought before the hearings examiner is deemed evidence and worthy of consideration. If the legislature had desired this result, it could have said so. Instead, RCW 46.20.308(8) contemplates formal hearings which including witness testimony. Since the only witness authorized to testify via sworn report or declaration is the officer, the state toxicologist's declaration, after objection, was inadmissible.<sup>5</sup>

### CONCLUSION

The hearing examiner erred by admitting Exhibit 2. The record thus contains no evidence that the breath test instrument used to collect Appellant's breath complied with RCW 46.61.506(4)(a)(iv) and WAC 448-16-020.<sup>6</sup> The decision of the hearing examiner sustaining the Department's action must be reversed.

DATED: September 29, 2005.

  
JUDGE

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<sup>4</sup> The same holds true regarding similar language in RCW 46.20.332.

<sup>5</sup> The fact that the hearings examiner has the authority to "call additional witnesses" (WAC 308-103-150) underscores the inherent dilemma faced by these hearing examiners: they must be neutral when ruling on objections to evidence which they themselves are proposing be introduced.

<sup>6</sup> In light of the debacle precipitated by the circumstances recognized by the Supreme Court in City of Seattle v. Clark-Munoz, 152 Wn.2d 39 (2004), the court is dumbfounded by the toxicologist's inability to include all of the necessary language within the rules under his authority.