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**WASHINGTON STATE  
DEPARTMENT OF LICENSING**

HEARINGS & INTERVIEWS UNIT  
OLYMPIA OFFICE

**SCHEDULING MEMORANDUM**

**TO:** REGION 1  
**FROM:** DUANE GUERTIN  
**SUBJECT:** WATNE, JACK M JR  
**INCIDENT DATE:** 06/23/07  
**HEARING DATE:** 09/18/07  
**TIME OF HEARING:** 11:00 AM  
**INTERPRETER:** NO  
**NAME OF HRNG. O.:** J TOWNSEND  
**ATTORNEY:** CHRISTOPHER DUMM  
**PHONE NUMBER:** 360-907-2511  
**CDL HOLDER:** NO  
**ARRESTING AGENCY:** WSP #772

**Discovery/Evidence mailed to parties on: 7/13/07**

**TL 11/20/07**

**Additional documents to follow: yes/no**

**Findings:**

I have completed my administrative review and have taken official notice as indicated.  
This order will be officially sent by DOL, this is a courtesy copy only.

I have electronically transmitted it to DOL.

**STATE OF WASHINGTON  
DEPARTMENT OF LICENSING ADMINISTRATIVE HEARING**

JACK M. WATNE JR.  
(WATNEJM332CM)  
Petitioner,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF LICENSING  
Respondent.

**ORDER OF DISMISSAL**

An administrative hearing was convened on September 18, 2007 in the above captioned matter.

The Director of the Department of Licensing appointed Josephine C. Townsend to represent her as her authorized Hearing Officer. The arresting agency was the Washington State Patrol. Petitioner did not appear and was represented by attorney Christopher Dumm. The date of arrest was June 23, 2007.

Having considered the record, and being fully advised, I make the following determination:

One of the requirements that the State must satisfy in laying its foundation for the admission of the breath test is that a print-out of the breath test analysis performed on the defendant that is generated by the machine indicates that the simulator external standard result lies between .072 and .088 inclusive as required by RCW 46.61.506(a)(vii). This requirement can only be met when the simulator external standard is properly prepared.

Part of the simulator solution protocol, and thus a requirement for certifying a solution as fit to be used in the field; the total number of analysts who individually tested five aliquots, of the cocktail must enter their number into the equation. See: [http://www.breathtest.wsp.wa.gov/SupportDocs/Protocols/simulator/Simulator%20Solution%20Protocol\\_Approved\\_2007-03-26.pdf](http://www.breathtest.wsp.wa.gov/SupportDocs/Protocols/simulator/Simulator%20Solution%20Protocol_Approved_2007-03-26.pdf), which specifically states:

**G. Certification**

(3) A minimum of three analysts must certify the solution prior to its certification.

(4) The average of the results from all of the analysts is computed (rounded to four decimal places). The standard deviation and relative standard deviation (CV) on all results are computed. (Freedman et al., 1978).

Further, RCW § 46.61.506(3), states: Persons under influence of intoxicating liquor or drug -- Evidence -- Tests -- Information concerning tests

(3) Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose.

In using as evidence any of the various chemical tests to determine the alcoholic content of the blood, the state must present prima facie proof that both the test chemicals and the sample are free from adulteration which could conceivably introduce error into the results of the test. *State v. Erdman*, 64 Wn.2d 286, 391 P.2d 518 (1964).

Breath tests that did not meet the technical requirements of the statute and regulations were not admissible as per se evidence of intoxication or as any other competent evidence of intoxication; thus, the breath test evidence was properly excluded. *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 93 P.3d 141 (2004).

Rules governing breath testing protocols are promulgated to inform the public of the administrative aspects of the state's breath test program and to practice those principals accepted in the scientific community. *Walk v. State Dept of Licensing*, 95 Wn. App 653 (1999). The party seeking to admit the results of a breath test must first show compliance with all of the protocols and procedural safeguards established by the state toxicologist. *Dept. of Licensing v. Cannon*, 147 Wn. 2d 41. When the protocols approved by the state toxicologist and existing code provisions are followed, there is sufficient assurance of accuracy and reliability. *City of Seattle v. Allison*, 148 Wn. 2d 75 (2002).

Hearing Officers shall rule on the admissibility and weight to be accorded all evidence at a hearing conducted pursuant to RCW 46.20.308. The admissibility of evidence in an administrative hearing conducted pursuant to RCW 46.20.308 is controlled by RCW 46.20.308(8), which provides that any evidence accompanying a sworn report or report under a declaration authorized by RCW 9A.72.085 "shall be admissible without further evidentiary foundation." The admissibility of evidence shall be liberally construed to effect the intent and purpose of the hearings conducted pursuant to RCW 46.20.308. See WAC 308-103-120(1). My determination here is based on the weight I give the state's evidence.

I find that the information which has been both posted on the website and disseminated by the State Toxicology lab indicates that only the first twelve of sixteen analyst's data was computed by the software from sometime in 2005, until the software glitch was discovered in August of 2007. Additionally, there were other abnormalities present in the testing and signing of certifications by at least two employees. This sufficiently rebuts prima facie evidence that the technical requirements of the State Toxicologist protocols were followed. While it may be possible that the errors created

by humans and computers can be overcome by additional evidence, that evidence is not before me in this hearing.

As evidenced by the re-calculations in the announced Spokane cases, this error in the software did affect some of the breath test cases and resulted in new solutions being distributed for use in the field. Testimony by two of the analysts involved in the preparation of simulator solution indicated that they relied on the computer software to calculate the figures and that they in good faith, signed certificates that the solutions met the protocols established by the state toxicologist. Since the time of their signatures, it has come to light that while the state toxicologist protocols require all analysts to enter their data, the computer did not actually use their data as intended by the state toxicologist.

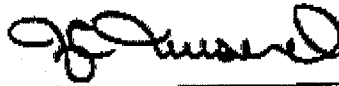
Therefore, from a technical aspect, it was impossible to comply with the state toxicologist protocol. An argument can be made that only three analysts are actually required to obtain an acceptable result, and in a more likely than not scenario, the simulator solutions may be reliable. If this were the only issue before me, I might find that this was the case and give more weight to the state's evidence.

But there is more at stake in these proceedings than just a computer error. There are the cumulative issues which have been brought to my attention; these issues affect what weight I will give the state's evidence. While I find that the breath test results are admissible, I give them little weight for the following reasons: The introduction of software in 2005 which was not sufficiently tested to ensure that accurate data was being computer; the lack of check and balances or quality assurance to find the error; the certification and testing of solutions by persons not authorized to do so; the credibility issues with regard to the work performed by the toxicology lab manager and the assistant manager; the re-issuance of new simulator solutions statewide to correct deficiencies which may have existed due to these errors and issues.

I find it reasonable to assume that if these errors did not affect the simulator solutions, then there would be no need to change out the solutions statewide since the discovery of the errors. I find that these issues erode my confidence in the quality of the scientific work performed and call into question the reliability of the breath test evidence presented before the problems were corrected. In recognition of the amount of state resources which would be required to rehabilitate the state's evidence, and the limited issues before me, combined with the fact that the State is not present at these hearings and has not sufficiently rebutted the defense arguments, I find that the Department has not met its burden in this case.

**IT IS HEREBY ORDERED** that the proposed action of the Department of Licensing to suspend or revoke the Petitioner's driving privilege pursuant to RCW 46.20.308 is dismissed.

DATED: September 18, 2007



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Josephine C. Townsend  
Hearing Officer  
Department of Licensing  
WSBA# 31965