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APPEALS

By Steven A. Tomeo

APPEALS FROM THE ADMINISTRATIVE HEARING

I. WHERE TO BEGIN

a. The Administrative Per Se Hearing

I know you have heard this before, but you begin your appeal when you start preparing for the per se hearing. Some attorneys do this consciously and others do it subconsciously. When you go into the per se hearing you have interviewed the client, your questions with regard to his case were answered, your questionnaire was completed along with your research, you went to the arrest site, taken pictures and retained the services of experts to assist you. So, when you go into the per se hearing it is safe to assume that you know the facts and the law that governs the issues in your case. If the decision is a suspension then you know where to begin.

b. Know your case

The better you know the details the better off you are. The devil is always in the details. You apply the facts to the law.

c. Objections to the A44 Report

We often do not object to the introduction of the A44 by the hearing officer. And when we do object the hearing officer overrules it claiming that the objection does not go to admissibility but to the weight of the evidence. I think it is best to object. When you do not object the following is the first paragraph in the State's Brief:

First, the principal evidence offered at the administrative hearing in support of the defendant's decision was the written A-44 police report which includes the police narrative supplemental report prepared by Police Officer (Name of Officer) in accordance with the provisions of Section 14-227b(c). However, the plaintiff did not object to the police report being admitted into evidence at the hearing. Record, September 16, 2004, transcript, pp. 4, 5.

No objection having been raised at the administrative hearing to the admission of the police report as to the field sobriety tests, probable cause and refusal, these issues that the plaintiff now seeks to litigate are simply not properly before the Court: "Where hearsay evidence is admitted without objection, the trier of facts may give such weight to it as he deems it is worth." Cutlip v. Connecticut Motor Vehicles Commissioner, 168 Conn. 94, 98, 357 A.2d 918 (1975). See also, Volck v. Muzio, 204 Conn. 507, 518, 529 A.2d 177 (1987).

The AG will then slam you with *Balch Pontiac-Buick, Inc. v. Commissioner of Motor Vehicles*, 165 Conn. 559, 570 and argue that it is too late to argue error after allowing the A44 into evidence without objection.

d. The Substantial Evidence Rule

You have to deal with this theory of the law every time you handle a per se case and especially when you handle an appeal.

You will have to deal with the case of **Murphy vs. Commissioner of Motor Vehicles, 254 Conn. 333**. I urge you to read it because it tells you what your facing in an appeal. There are other cases with regard to substantial evidence theories but this one gets cited all of the time. It is easy reading! This case tells me that in the vast majority of these DUI appeals, they win and we lose!

Here is a brief excerpt from the Supreme Court's decision:

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Our analysis begins with the appropriate standard of review. "[J]udicial review of the commissioner's action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes §§ 4-166 through 4-189], and the scope of that review is very restricted." (Internal quotation marks omitted.) Bancroft v. Commissioner of Motor Vehicles, 48 Conn. App. 391, 399, 710 A.2d 807 (1998). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citations omitted; internal quotation marks omitted.) Dolgner v. Alander, 237 Conn. 272, 280, 676 A.2d 865 (1996).

"The substantial evidence rule governs judicial review of administrative fact-finding under the UAPA. [See] General Statutes § 4-183 (j) (5) and (6). An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The substantial evidence rule imposes an important limitation on the power of the

courts to overturn a decision of an administrative agency" (Citations omitted; internal quotation marks omitted.) Id., 281.

*"It is fundamental that a plaintiff has the burden of proving that the **commissioner**, on the facts before him, acted contrary to law and in abuse of his discretion [in*

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*determining the issue of probable cause]. . . The law is also well established that if the decision of the **commissioner** is reasonably supported by the evidence it must be sustained." (Citation omitted.) **Demma v. Commissioner of Motor Vehicles**, 165 Conn. 15, 16-17, 327 A.2d 569 (1973).*

Well, what do you think? Perhaps it isn't that bad, but the Court does go onto say with regard to one of the issues that the Court will look at things on a "case by case basis." **Does this help?**

And if Murphy is not enough, they will come out with the case of Alvord v. Commissioner of Motor Vehicles, 84 Conn. App. 302 (2004), which indicates that in a case where the hearing officer ruled that the operator's tests results indicated a BAC of .07% or more, "substantial evidence existed to support the defendant's conclusion that the plaintiff operated a motor vehicle while he had an elevated blood alcohol content." Supra, p. 306. How do you overcome this when .07% is clearly below .08%.

e. To have testimony or not to have testimony

I often have testimony especially where you are challenging the credibility of the police officer on the issue of refusal. This is where your investigation of the facts is so important. I am doing this with regard to an appeal.

You may have a case where the client tells you that no one witnessed his refusal. If this is the case, then you may want the client to testify. If he testifies and just contradicts the officer's narrative statement the hearing officer could believe your client. However, in many cases the hearing officer will not say, "OK I believe you, license restored." The officer may subpoena the LEO (Law Enforcement Officer).

In some cases you may be pleasantly surprised as when the witnessing officer testifies that he did not witness the refusal. If that is the case you win and do not have to go any further. However, if the officer is present and you decide not to put him/her on the stand the hearing officer can and then it could hurt you and ruin your potential appeal. That is why most cases go forward without the testimony of LEO.

When you think about an appeal you have to understand that you often have to project out into the future. Think ahead—appeal!

f. Motions, Briefs and Memos of Law

Come prepared with motions and legal memos challenging probable cause, etc. I think that most of the hearing officers are interested in the law and this is a good tool to use. Your research of the various legal issues in your case should be put on the record. If you appeal, you then have a lot of your research completed.

You know what the issues are in your case. So, formulate your arguments and accordingly. Sometimes, you may object to certain hearsay matters in the Narrative Supplements to the A44. The hearing officer may sustain your objection in part by redacting a portion of it or if you really get luck he may sustain your objection in its entirety.

g. Your Client

May sure your client goes over the A44 and tells you what LEO did not put in the report. You may find out that the arresting LEO did not prepare the A44 or that no one was in the room when your client refused the breath test or that the attempted to blow into the breath machine but could not because he suffers from Asthma, etc. Remember, get the details. When you do, research the issue and you are likely to find a case that explains the law with regard to your issue.

h. Your argument

Be practical and stand on your opinion of the law. Don't be obnoxious with regard to the hearing process. Know when "you're licked!" Remember, you are not a magician and you are limited to the four (4) statutory issues at the hearing.

i. Your exhibits

I often introduce exhibits with regard to my case for help in the appeal, if necessary. You should always introduce medical reports and pictures as exhibits. Remember, "a picture is worth a thousand words." Pictures are often used to show a steep incline so as to depict that it was impossible to do the Standard Field Sobriety Tests (SFSTs). You know, too steep, etc. You are building your case for an appeal.

j. Remember this is Administrative (Civil) and Not Criminal.

This is important, because the hearing officer will always tell you this and the Courts will reaffirm this to let you know that we are not dealing with the criminal law here and that this is a civil matter.

k. Expert Witnesses

Doctors, nurses, physical therapists can all be used as experts in a variety of ways. You may use experts in law enforcement to show that the SFSTs were not given properly or to show that your client has HGN without having alcohol in his system.

II. THE ADMINISTRATIVE HEARING OFFICER'S DECISION

a. What it looks like

I attach a copy of a decision so that you know what it looks like because I always attach it to the Superior Court Appeal. **See Exhibit 1.**

b. What does it say and what should it say

It either says your client's license is restored or suspended. Sometimes, the hearing officer will give a statement as to subordinate findings. This is done to better explain and justify the decision no matter what the ruling is. It could be important because if the license is not restored his subordinate findings could impact your appeal. The subordinate findings better explain the decision.

c. What you hope it doesn't say

Often times you make the argument that the first breath test was not given within 2 hours of operation. However, you hope the hearing officer does not issue subordinate findings spelling out how he calculated that the breath test was given within 2 hours of operation. Things like that hurt you with regard to an appeal. Or, on a parking lot issue you hate to see a subordinate finding as to how the hearing officer concluded that the parking lot held 10 or more cars.

d. Who cares what it says as long as it says "License Restored"

You know, if you win, who cares what it says.

III. THE REQUEST FOR RECONSIDERATION

a. The Form

The following is a reprint of a Request For Reconsideration:

STATE OF CONNECTICUT
DEPARTMENT OF MOTOR VEHICLES
ADMINISTRATIVE PER SE UNIT
WETHERSFIELD, CONNECTIUCT

IN RE: (NAME OF RESPONDENT)

CASE NO. 03000000

DATE: (INSERT MONTH, DAY, YEAR)

REQUEST FOR RECONSIDERATION

1. On April 17, 2003, the Hearing Officer found nothing in the negative regarding the above-captioned matter
2. The Hearing Officer, without objection from the respondent, entered the A-44 as an Exhibit.
3. The A-44 Report indicates that the second breath test was not taken at least 30 minutes after the first test. In fact, the hearing officer's decision states that "there was substantial compliance with regulations by administering second test twenty minutes after completion of the first test."
4. CGS 14-227b(k) makes reference to CGS 14-227a (c)(5) regarding the second test, which is to be performed "at least thirty minutes after the initial test was performed..." Since Mr. RESPONDENT consented to the taking of the test it must be given in accordance with the statutes of regulations governing this area. Regulation 14-227b-2 gives further credence that the second test must be given at least 30 minutes after the first test. 14-227b-2 (a) states: "Any person who operates a motor vehicle in this state is deemed to have given his consent to a chemical analysis for determination of the alcohol or drug content, or both, of this blood." Mr. RESPONDENT complied with this. 14-227b-2 (c) states: "Chemical analysis for the purpose of determining the amount of alcohol in the blood of any person shall be performed in accordance with the applicable provision of Sections 14-227a-1 through 14-227a-10, inclusive of the Regulations of Connecticut State Agencies." There is no twenty (20) minute rule in these regulations.
5. The failure to perform the second test within the required period of time means that there is no evidence that the operator had an elevated blood alcohol content and therefore the hearing officer should not have made a finding of suspension.

WHEREFORE, the Respondent requests that this matter be reconsidered and that the license of the RESPONDENT be restored.

THE RESPONDENT,
MR. RESPONDENT

BY: _____
Steven A. Tomeo, Esq.
29 Kearney Road
Pomfret Center, CT 06259-0184
ATTORNEY FOR MR. RESPONDENT

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to the Administrative Per Se Unit, Department of Motor Vehicles, Administrative Per Se Unit, 60 State Street, P. O. Box 290661, Wethersfield, CT 06129-0861, on (INSERT DATE).

Steven A. Tomeo
Commissioner of Superior Court

b. The Statutes

§ 4-180

General Statutes

TITLE 4 Management of State Agencies

Chapter 54 Uniform Administrative Procedure Act

4-180 Contested cases

Sec. 4-180. Contested cases. Final decision. Application to court upon agency failure.

(a) Each agency shall proceed with reasonable dispatch to conclude any matter pending before it and, in all contested cases, shall render a final decision within ninety days following the close of evidence or the due date for the filing of briefs, whichever is later, in such proceedings.

(b) If any agency fails to comply with the provisions of subsection (a) of this section in any contested case, any party thereto may apply to the superior court for the judicial district of Hartford for an order requiring the agency to render a final decision forthwith. The court, after hearing, shall issue an appropriate order.

(c) A final decision in a contested case shall be in writing or orally stated on the record and, if adverse to a party, shall include the agency's findings of fact and conclusions of law necessary to its decision. Findings of fact shall be based exclusively on the evidence in the record and on matters noticed. The agency shall state in the final decision the name of each party and the most recent mailing address, provided to the agency, of the party or his authorized representative. The final decision shall be delivered promptly to each party or his authorized representative, personally or by United States mail, certified or registered, postage prepaid, return receipt requested. The final decision shall be effective when personally delivered or mailed or on a later date specified by the agency.

4-181a

Sec. 4-181a. Contested cases. Reconsideration. Modification.

(a) (1) Unless otherwise provided by law, a party in a contested case may, within fifteen days after the personal delivery or mailing of the final decision, file with the agency a petition for reconsideration of the decision on the ground that: (A) An error of fact or law should be corrected; (B) new evidence has been discovered which materially affects the merits of the case and which for good reasons was not presented in the agency proceeding; or (C) other good cause for reconsideration has been shown. Within twenty-five days of the filing of the petition, the agency shall decide whether to reconsider the final decision. The failure of the agency to make that determination within twenty-five days of such filing shall constitute a denial of the petition. (2) Within forty days of the personal delivery or mailing of the final decision, the agency, regardless of whether a petition for reconsideration has been filed, may decide to reconsider the final decision. (3) If the agency decides to reconsider a final decision, pursuant to subdivision (1) or (2) of this subsection, the agency shall proceed in a reasonable time to conduct such additional proceedings as may be necessary to render a decision modifying, affirming, or reversing the final decision.

(b) On a showing of changed conditions, the agency may reverse or modify the final decision, at any time, at the request of any person or on the agency's own motion. The procedure set forth in this chapter for contested cases shall be applicable to any proceeding in which such reversal or modification of any final decision is to be considered. The party or parties who were the subject of the original final decision, or their successors, if known, and intervenors in the original contested case, shall be notified of the proceeding and shall be given the opportunity to participate in the proceeding. Any decision to reverse or modify a final decision shall make provision for the rights or privileges of any person who has been shown to have relied on such final decision.

(c) The agency may, without further proceedings, modify a final decision to correct any clerical error. A person may appeal that modification under the provisions of section 4-183 or, if an appeal is pending when the modification is made, may amend the appeal.

(P.A. 88-317, S. 21, 107; P.A. 89-174, S. 4, 7.)

c. The Regulations

THERE ARE ALSO REGULATIONS THAT GUIDE THE HEARING OFFICER. THESE ARE THE REGULATIONS OF CONNECTICUT STATE AGENCIES SECTIONS 14-137-36 THROUGH 14-137-39, AND SECTIONS 14-227b-1 THROUGH 14-227b-29. THESE REGULATIONS ARE AS FOLLOWS:

Sec. 14-137-36. Procedure governed

These rules of practice set forth the nature and requirements of all formal and informal procedures available at the Department of Motor Vehicles in conformance with the Connecticut Uniform Administrative Procedure Act.

Sec. 14-137-37. Informal procedures

To the extent permitted by law the following informal procedures shall be available to any person or licensee affected by any order or licensing requirement of the department:

(a) **Informal conferences.** Informal conferences may be scheduled by the department to attempt to resolve any appropriate matter within its statutory jurisdiction. Informal conferences also may be scheduled at the request of licensees. Notification of such an

informal conference may be by telephone or by regular or certified mail, in the discretion of the commissioner or other authorized official or hearing officer of the department. The notice shall contain (1) a statement of the time, date, and place of the conference; (2) a reference to the statutory sections allegedly violated, or with respect to which any question of application exists; (3) a short statement of the facts surrounding the alleged violation or intended application of the statutory section(s) by the department; and (4) a statement that the respondent or person requesting the conference may be accompanied by counsel, if he or she so desires. Informal conferences need not be recorded and transcribed. Formal rules of procedure and evidence shall not be observed.

(b) **Opportunity to show compliance.** Unless otherwise required or authorized by statute, or by judicial order or decision, no revocation, suspension, annulment or withdrawal of a license is lawful unless prior to the institution of department proceedings, the department gave notice by mail to the holder thereof of facts or conduct which warrant the intended action, and the holder thereof was given the opportunity to show compliance with all lawful requirements for the retention of the license.

(1) Notification of such compliance conference shall be by certified mail. Said notice shall contain:

(A) A statement of the time, date and place of the compliance conference;

(B) A reference to the statute(s) or regulation(s) allegedly violated;

(C) A clear and concise factual statement sufficient to inform each respondent of the facts or practices alleged to be in violation of the law; and

(D) A statement that each respondent may be represented by counsel.

(2) Compliance conferences shall be recorded but need not be transcribed, and the rules of evidence are not applicable.

(3) The commissioner shall designate a hearing officer or other person to preside at such compliance conference. After said compliance conference, said designated presiding officer shall report in writing his recommendations to the commissioner.

(4) Any agreement reached as a result of a compliance meeting shall not preclude the department from further proceeding against the alleged violator.

Sec. 14-137-38. Hearing procedure

Hearings are conducted where required or authorized by statute or regulation under general authority of Connecticut General Statutes Section 14-4a. Pursuant to Section 14-4a, the commissioner may designate any person to act as a hearing officer for the motor vehicle department for the purpose of conducting hearings and rendering decisions. In any hearing where the hearing officer has been authorized by the commissioner to render a final decision, the fact of such authorization shall be noticed on the record. In any contested case in which the hearing officer assigned to conduct the hearing has not been

authorized to render a final decision in the matter, this fact shall be noticed on the record at the start of the hearing and the party(ies) of record shall be notified of the identity of the individual who will render the final decision.

(a) **Official address.** All correspondence relating to formal hearings should be addressed to: Adjudications Unit, Legal Services Division, Department of Motor Vehicles, 60 State Street, Wethersfield, Connecticut 06109-1896.

(b) **Waiver of rules.** Where good cause appears, the commissioner or his designee may permit deviation from these rules, except where precluded by statute or where the rights of any party would be prejudiced substantially.

(c) **Notice of hearings.**

(1) The department shall mail a notice of hearing to the last known address or the last address provided by the respondent, at least ten (10) days before the scheduled hearing, unless the respondent has received actual notice or waived the requirement of advance notice.

(2) The notice shall include:

(A) A statement of the time, place, and nature of the hearing;

(B) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(C) A reference to the particular sections of the statutes and regulations involved;

(D) A short and plain statement of the matters asserted. If the department or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

(d) **Location of hearings.** Hearings are held at 60 State Street, Wethersfield, Connecticut and at such other location or locations as the commissioner may designate.

(e) **Postponements and adjournments.**

(1) Only for good cause shown will a continuance be granted to any licensee upon a request made to the commissioner or his designee.

(2) A continuance will be granted when, due to an emergency, a police officer scheduled to appear at a hearing is required by his superiors to be on duty. Any hearing so continued will be rescheduled to the earliest possible time after the original hearing.

(3) No second continuance will be granted for the convenience of any party. An attorney for a respondent who has a conflicting court appearance may be granted a second continuance upon a request in writing, stating the name and location of the court, the date, time and case number of the conflicting court appearance. Such written request

shall be directed to the attention of the Adjudications Unit, Legal Services Division, Department of Motor Vehicles, 60 State Street, Wethersfield, CT 06109-1896.

(4) The requirements in subdivisions (1), (2) or (3) may be waived by the commissioner or his designee only for good cause shown. The commissioner or his designee may request written certification of the facts surrounding the request for a continuance.

(5) The commissioner or his designee may reschedule a hearing or adjourn a hearing in progress to another date and time.

(f) **Waiver of oral hearing and personal appearance.** The respondent may waive oral hearing and personal appearance and request that the matter be adjudicated on the basis of the available written and demonstrative evidence on file with the department including any evidence submitted by the respondent.

(g) **Adjudication in absence of a party.** Where the commissioner or his designee finds that the notice of hearing has been properly served by mail and the respondent or any witness has failed to appear, the commissioner or his designee may in his or her discretion hear the case and render a decision.

(h) Pre-hearing procedure in contested cases.

(1) At any time after the issuance of a complaint or order and before the scheduled hearing date, and where not otherwise precluded by law, the commissioner may order or a respondent may request an informal, pre-hearing conference. The granting or denial of a request for a pre-hearing conference is within the complete discretion of the commissioner or such hearing officer as has been designated by the commissioner.

(2) A pre-hearing conference may be held for any of the following purposes:

(A) To narrow the scope of the issues in dispute;

(B) To obtain stipulations as to matters of fact;

(C) To stipulate as to the authenticity of documents which are to be offered in evidence;

(D) To stipulate as to the qualifications of any expert witnesses who are to testify at the hearing; and

(E) To discuss the possibility of an informal disposition of a complaint.

(3) A pre-hearing conference need not be recorded, but a written record will be made of any stipulations as to matter of fact, as to the authenticity of documents, or as to the qualifications of expert witnesses. Any such written record will be signed by each of the individual respondents or his counsel and by the commissioner or his authorized representative.

(i) Informal disposition in contested cases.

(1) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default. A respondent may agree to enter an agreement containing a consent order in lieu of a hearing on the issue(s). Such agreement may be negotiated by the respondent and the counsel for a complainant or an authorized representative of the department. The acceptance of a consent agreement and order is within the complete discretion of the commissioner, or his designee, the chief of legal services for the department.

(2) A consent agreement and order shall contain:

(A) An admission of all jurisdiction facts;

(B) An express waiver of the right to seek judicial review or otherwise challenge or contest the validity of the order;

(C) An express waiver of the requirement that the decision contain findings of fact and conclusion of law;

(D) A provision that the complaint may be used in construing the terms of the order;

(E) A statement that the order contained therein shall have the same force and effect as an order entered after a full hearing and shall become final when issued;

(F) A statement that said order shall not be effective unless and until accepted and approved by the commissioner, or his designee, the chief of legal services for the department;

(G) The signature of each respondent or his attorney and the counsel for the complainant; and

(H) The signature of the commissioner or his said designee accepting and approving the consent agreement and order.

(j) **Motions.** Parties or their attorneys may file any appropriate motion in writing in advance of the hearing, at the hearing, or after the hearing. Any appropriate oral motion may be made at the hearing. The commissioner or his designee shall rule on pre-hearing and post hearing motions or refer them to the hearing officer hearing the case. The presiding hearing officer may rule on motions at the hearing, or may in his discretion incorporate a ruling on a motion in an intermediate or final decision.

(k) **Witnesses, subpoenas, and production of records.** All testimony shall be taken under oath or affirmation. The commissioner or his designee may subpoena witnesses and require the production of records, papers and documents. If any person disobeys such process or, having appeared in obedience thereto, refuses to answer any pertinent question put to him by or under the direction of the commissioner or his designee or to produce any records and papers pursuant thereto, the commissioner may apply to the superior court for the judicial district of Hartford-New Britain setting forth such disobedience to process or refusal to answer, as provided in Sections 4-177b and 14-110 of the Connecticut General Statutes.

(l) **Rules of evidence.** The following rules of evidence shall be followed in the admission of testimony and exhibits in all hearings:

(1) General. Any oral, documentary or physical evidence may be received. The commissioner or his designee shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence. The commissioner or his designee shall give effect to the rules of privilege recognized by law in Connecticut where appropriate to the conduct of the hearing.

(2) Documentary evidence. Documentary evidence may be received at the discretion of the commissioner or his designee in the form of copies or excerpts, if the original is not found readily available. Upon request by any party an opportunity shall be granted to compare the copy with the original which shall be subject to production by the person offering such copies, within the provisions of Section 52-180 of the Connecticut General Statutes.

(m) (1) **Limiting number of witnesses.** To avoid unnecessary cumulative evidence, the commissioner or his designee may limit the number of witnesses or the time for testimony upon a particular issue in the course of any hearing.

(2) The commissioner or his designee may permit any party to offer testimony in written form, if it will expedite the hearing. Such written testimony shall be received in evidence with the same force and effect as though it were stated orally by the witness who has given the evidence, provided that the interests of the parties will not be prejudiced substantially. Prior to its admission, such written testimony shall be subject to objections by parties.

(3) Cross-examination. A party may conduct cross-examinations required for a full and true disclosure of the facts.

(4) Facts noticed, scope and procedure. The department may take official notice of generally recognized technical or scientific facts within its specialized knowledge. Parties shall be afforded an opportunity to contest the material so noticed by being notified before or during the hearing, or by an appropriate reference in preliminary reports or otherwise of the material noticed. The department shall nevertheless employ its experience, technical competence, and specialized knowledge in evaluating the evidence presented at the hearing for the purpose of making its findings of facts and arriving at a final decision. Where an adjudication of violation or responsibility has been determined, the records and prior decisions of the department may be considered in determining an appropriate disposition.

(n) **Filing of added exhibits and testimony.** Upon order of the commissioner or his designee before, during or after the hearing, any party may be given an opportunity to submit additional pleadings and evidence unless the rights of any party would be substantially prejudiced. Such added exhibits and testimony shall be subject to such comment, reply and contest as due process may require.

(o) **Party and intervenor status in a contested case.**

(1) The commissioner or his designee shall grant a person status as a party in a contested case if:

(A) Such person has submitted a written petition to the department and mailed copies to all parties at least five days before the date of hearing; and

(B) The petition states facts that demonstrate that the person's legal rights, duties or privileges shall be specifically affected by the decision of the department in such contested case.

(2) The commissioner or his designee may grant any person status as an intervenor in a contested case if:

(A) Such person has submitted a written petition to the department and mailed copies to all parties at least five days before the date of hearing; and

(B) The petition states facts that demonstrate that the person's participation is in the interests of justice and will not impair the orderly conduct of the proceedings.

(3) The five-day requirement in subdivisions (1) and (2) of this subsection may be waived at any time before or after commencement of the hearing by the hearing officer on a showing of good cause.

(4) If a petition is granted pursuant to subdivision (2) of this subsection, the intervenor's participation may be limited to designated issues in accordance with the provisions of section 4-177a (d) of the General Statutes.

(p) Final decision in a contested case.

(1) A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A written decision shall be signed and dated by the hearing officer authorized to render the decision.

(2) In a contested case where the commissioner or his designee is to render the final decision or order, the commissioner or his designee shall give due consideration to the entire record before rendering such decision or order.

(3) Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the text of the final decision or order shall be sent by mail to each of the respondents and respondents' counsel, and to any other party of record.

(4) If no written request was filed for the preparation of a transcript, a final decision may be rendered at any time following the close of the hearing in compliance with the provisions of this subsection. If a transcript was requested in writing, the final decision may be rendered within a reasonable time following preparation and availability of the transcript in compliance with the provisions of this subsection.

(5) The Department shall proceed with reasonable dispatch to conclude any matter pending before it and shall render a final decision in all contested cases within ninety days following the close of evidence or the due date for the filing of briefs, whichever is

later, in accordance with the provisions of Section 4-180 of the Connecticut General Statutes.

(q) Record and transcripts:

(1) The record in a contested case shall include:

(A) All pleadings, motions and intermediate rulings;

(B) Evidence received or considered;

(C) Questions and offers of proof, objections and rulings thereon;

(D) Any decision, opinion or report by the commissioner or his designee.

(2) Oral proceedings or any part thereof shall be transcribed on request of any party. The requesting party shall pay the cost of such transcript or part thereof.

(r) Petition for reconsideration.

(1) Any petition for reconsideration of a contested case must be filed in writing within fifteen (15) days after the personal delivery or mailing of the notice of final decision. Within forty days of the personal delivery or mailing of the final decision, the department, regardless of whether a petition for reconsideration has been filed, may decide to reconsider the final decision.

(2) Petitions for reconsideration shall be addressed to: Legal Services Division, Department of Motor Vehicles, 60 State Street, Wethersfield, Connecticut 06109-1896.

(s) **Motion for stay pending appeal.** A motion for stay of suspension, fine or other order pending appeal, should ordinarily be presented to the superior court. Alternatively, the motion may be presented to the commissioner, or to both the superior court and the commissioner.

(t) **Judicial appeal.** Unless otherwise provided by statute or regulation, appeals from final decisions of the department are governed by applicable provisions of Chapter 54 of the Connecticut General Statutes (Uniform Administrative Procedure Act).

Sec. 14-137-39. Inconsistent regulations

Unless precluded by law, these regulations 14-137-36 through **14-137-39** shall take precedence over any other conflicting or inconsistent regulation pertaining to informal procedures available and to hearing procedures within the Department of Motor Vehicles.

Sec. 14-227b-1. Definitions

For the purpose of Sections **14-227b-1** through 14-227b-29a, inclusive, the following terms shall have the following meanings:

(1) "Chemical analysis" or "chemical test" means the quantitative analysis by means of direct or indirect measurement or physicochemical technique performed on a sample of blood, breath or urine of a person.

(2) "Commissioner" means the commissioner of motor vehicles or his designee as defined in subdivision (14) of subsection (a) of Section 14-1 of the General Statutes.

(3) "Department" means the department of motor vehicles.

(4) "Enumerated offense" means one or more of the following offenses:

(A) Operating a motor vehicle while under the influence of intoxicating liquor or any drug or both as provided in subsection (a) of Section 14-227a of the General Statutes; or

(B) Operating a motor vehicle while the ability to operate such motor vehicle is impaired by the consumption of intoxicating liquor as provided in subsection (b) of Section 14-227a of the General Statutes.

(5) "Failed" or "failure" of a chemical test means that the ratio of alcohol in a person's blood, as determined by chemical analysis, is ten-hundredths of one percent or more of alcohol, by weight.

(6) "Notice of arrest" means the initial receipt of notice by a person that he has been arrested, whether by being taken into custody by a police officer and informed of his arrest by the officer, or by receipt of a summons, or by receipt of a warrant served by a sheriff or other court officer.

(7) "Operator's license" means a valid license or permit to operate a motor vehicle issued by the Connecticut Department of Motor Vehicles.

(8) "Privilege" means the nonresident motor vehicle operating privilege granted to a licensed resident of another state, province or country under subsection (a) of Section 14-39 of the General Statutes.

(9) "Statutory period" means one of the following periods of time:

(A) Ninety days if a person submitted to a chemical test and the results of such chemical test indicate that the person failed the test; or

(B) Six months if a person refused to submit to a chemical test; or

(C) One year if a person either submitted to a chemical test and the results of such chemical test indicate that the person failed the test, or refused to submit to a chemical

test, and such person also has had his operator's license or privilege suspended previously in accordance with sections **14-227b-1** through 14-227b-29a, inclusive; or

(D) Two years if a person either submitted to a chemical test and the results of such chemical test indicate that the person failed the test, or refused to submit to a chemical test, and such person also has had his operator's license or privilege suspended two or more times previously in accordance with sections **14-227b-1** through 14-227b-29a, inclusive.

(10) "Suspension" means the temporary withdrawal of a person's motor vehicle operator's license or privilege to drive in this state for a specific period of time.

(11) "Temporary operators license" means a license form issued by a police officer after taking possession of a person's Connecticut operator's license or permit.

(12) "Temporary privilege" means a privilege form issued by a police officer to a nonresident giving the person the privilege of driving in this state.

(13) "Test" means a chemical analysis.

Sec. 14-227b-2. Consent to chemical analysis

(a) Any person who operates a motor vehicle in this state is deemed to have given his consent to a chemical analysis for determination of the alcohol or drug content, or both, of his blood.

(b) If the operator of a motor vehicle in this state is a minor, it shall be deemed that his parent(s) or guardian(s) has given consent to a chemical analysis for determination of the alcohol or drug content, or both, of the blood of such minor.

(c) Chemical analysis for the purpose of determining the amount of alcohol in the blood of any person shall be performed in accordance with the applicable provisions of Sections 14-227a-1 through 14-227a-10, inclusive, of the Regulations of Connecticut State Agencies.

(d) Chemical analysis for the purpose of determining the amount of a drug or drugs other than alcohol in the blood of any person shall be performed in accordance with procedures approved by the Department of Public Health Services.

Sec. 14-227b-3. Request that person submit to a chemical analysis

A police officer may request that a person operating a motor vehicle and having been arrested for an enumerated offense submit to a chemical analysis to determine the alcohol or drug content, or both, of his blood.

Sec. 14-227b-4. Selection of blood, breath or urine test

(a) The police officer has the option of selecting for the chemical analysis the blood, breath or urine test, except that if the person refuses or is unable to submit to a blood test, the police officer shall designate the breath or urine test for the chemical analysis.

(b) If a person refuses to take either the blood test or the test designated by the police officer in lieu thereof, no chemical analysis or test shall be given, and the person shall be deemed to have refused to submit to a chemical analysis.

Sec. 14-227b-5. Communication of assent to request to take test

A person shall be deemed to have refused to submit to a chemical analysis if he remains silent or does not otherwise communicate his assent after being requested to take a blood, breath or urine test under circumstances where a response may reasonably be expected.

Sec. 14-227b-6. Chemical analysis not required if medically inadvisable

Any person who claims that his physical condition is such that submission to a chemical analysis is medically inadvisable shall submit competent medical evidence at the hearing requested by such person sufficient to substantiate such claim. If the evidence presented at the hearing is insufficient, or if no hearing is requested by the person, the person shall be deemed to have refused to submit to such chemical analysis.

Sec. 14-227b-7. Refusal to take additional test

A person who refuses to submit to a second blood, breath or urine test of the same type after having taken a first test shall be deemed to have refused to submit to a chemical analysis.

Sec. 14-227b-8. Availability of chemical analysis results

The person who has submitted to a chemical analysis, or the person's attorney, will be afforded access to the test results by the department prior to a scheduled hearing.

Sec. 14-227b-9. Revocation of license and issuance of temporary license

(a) If the person arrested has a current valid motor vehicle operator's license, the arresting officer, after revoking and taking possession of the person's Connecticut operator's license, or, if the person is not a resident of this state, suspending the privilege of such person, shall issue to such person a temporary Connecticut operator's license, or if the person is not a resident of this state a temporary privilege, on a form as approved by

the commissioner. The temporary operator's license or privilege form shall contain the person's name, address, date of birth, licensing state, operator license number, the date and time of issuance, the effective date and time, the expiration date, and other information as required by the commissioner, and shall be signed by the person arrested and by the issuing police officer.

(b) If the person arrested does not have a current valid Connecticut or nonresident operator's license, or if the person's Connecticut or nonresident motor vehicle operator's license or privilege is under suspension, no temporary operator's license or privilege shall be issued.

(c) Any temporary operator's license or privilege issued by a police officer in error or to a person not entitled to receive such temporary license or privilege may be revoked by written notification to the person by the commissioner, and the immediate return of the temporary operator's license or privilege form from the person to whom it was issued shall be required.

(d) The temporary operator's license or privilege issued by a police officer shall be revoked automatically, and the commissioner may request immediate return of the temporary license or privilege form, if the person's operator's license or privilege is suspended under any provision of law by the commissioner or any court of law and the suspension becomes effective prior to the expiration of the temporary operator's license or privilege.

(e) The temporary operator's license or privilege shall be valid for a period beginning twenty-four hours after issuance and ending thirty (30) days after the date such person received notice of his arrest by the police officer. In computing the thirty (30) days, the day on which the person received notice of his arrest shall not be included.

Sec. 14-227b-10. Report to Department of Motor Vehicles

(a) The arresting police officer shall prepare a written report of the facts surrounding the person's arrest on a form approved by the commissioner. The report shall be subscribed and sworn to under penalty of false statement by the arresting officer. The written report shall adequately identify the person arrested.

(b) Additional statements or materials necessary to explain any item of information on the written report form may be attached to the report form. Such attachment(s) shall be considered a part of the report form having the approval of the commissioner, as provided in subsection (c) of section 14-227b of the General Statutes, if sworn to under penalty of false statement.

(c) If the person arrested refused to submit to a chemical test, the written report shall also be signed by a person other than the arresting officer who witnessed the refusal. The person signing the report as a witness is not prohibited from administering an oath or acting as the acknowledging officer in connection with the written report.

(d) The signed original of the written report shall be delivered or shall be forwarded to the Administrative Per Se Unit, Department of Motor Vehicles, Wethersfield, CT 06161-4010 by prepaid first class mail, and shall include the following:

- (1) A copy of the completed temporary license or privilege form, if any; and
- (2) Any Connecticut operator's license taken into possession; and
- (3) A copy of the results of any chemical test administered to the person.

Sec. 14-227b-11. Mailing address of person

If a person arrested for an enumerated offense provides to the arresting officer a mailing address different from the address of record of such person as recorded in the files of the department, all correspondence and notices required by sections 14-227b-1 through 14-227b-29a, inclusive, shall be mailed to both the address of record and to the mailing address provided to the arresting officer.

Sec. 14-227b-12. Suspension of operator's license or nonresident operating privilege. Notice of right to hearing

(a) Upon receipt of the written report required by Section 14-227b-10, the commissioner shall send to the person who was arrested, by bulk certified mail, a written suspension notice informing such person that his Connecticut operator's license or privilege is suspended, the length of the suspension and the effective date of the suspension.

(b) The suspension notice shall also notify such person that he is entitled to a hearing as a matter of right before a hearing officer prior to the effective date of the suspension, and that the person or his attorney may schedule such hearing by mail, in person or by telephoning the Administrative Per Se Unit, Department of Motor Vehicles, Wethersfield, CT 06161-4010, at (860) 566-8902 or as included in such suspension notice. The suspension notice shall also inform the person clearly and in a conspicuous manner that the hearing shall be requested by the person or his attorney and the hearing request received by the department within seven days of the date of mailing of the suspension notice, and if not so requested the person's Connecticut operator's license or privilege shall be suspended automatically on the effective date. The suspension notice shall clearly specify the reasons and statutory grounds for the suspension. The final date for requesting the hearing shall appear on the suspension notice in a conspicuous place and shall be so labeled.

(c) In computing the seven days, calendar days shall be used unless the seventh day falls on a day when the department is not open to the public, in which case the seventh day shall be the next following full business day of the department.

(d) It shall be presumed that the person received the suspension notice if it was mailed by bulk certified mail as provided in Section 14-227b-11.

Sec. 14-227b-13. Failure to request hearing. Affirming suspension

If the person to whom a suspension notice has been mailed in accordance with the provisions of Section 14-227b-12 does not request a hearing within seven days after the date of mailing of the suspension notice, the commissioner shall send to the person a notice by bulk certified mail that the suspension of which he was notified in the suspension notice is affirmed and that his Connecticut operator's license or privilege is suspended as of the effective date contained in the suspension notice.

Sec. 14-227b-14. Scheduling of hearing

(a) If the person or his attorney contacts the department after the person's arrest and prior to the expiration of seven days after the mailing of the suspension notice and requests a hearing, the department shall immediately assign a date, time and place for the hearing and shall communicate such information to the person or his attorney. Such request for a hearing shall be made by mail, in person or by telephone. The hearing shall be scheduled prior to the effective date of the suspension.

(b) The department upon receipt of a request for hearing shall forward a letter to the person or his attorney confirming the date, time and place for the hearing.

Sec. 14-227b-15. Granting a continuance of hearing

(a) Only for good cause shown will a continuance be granted to a person who has requested a hearing or to his attorney.

(b) Upon a showing of good cause the hearing officer may continue a hearing.

(c) A hearing may be continued only once, and any such continuance shall be for a period not to exceed fifteen (15) days.

(d) A request for a continuance may be made by the person or his attorney either in person, or by telephone, at the Administrative Per Se Unit, Department of Motor Vehicles, Wethersfield, CT 06161-4010, during normal hours of operation of the department.

(e) When a hearing is continued beyond thirty (30) days from the time the person received notice of his arrest, the department shall extend the effective date of the suspension and the expiration date of the temporary operator's license or privilege of the person who requested the hearing for a time not to exceed forty-five (45) days from the time the person received notice of his arrest.

(f) To obtain an extension of the expiration date of a temporary operator's license or privilege, the person or his designee shall present the original of the temporary license or privilege form at the Administrative Per Se Unit, Department of Motor Vehicles, Wethersfield, CT 06161-4010 to obtain the necessary endorsement.

Sec. 14-227b-16. Failure to appear at hearing

If a person for whom a hearing has been scheduled fails to appear at the hearing, the commissioner shall send to the person a notice that the suspension of which he was notified in the suspension notice is affirmed and that his Connecticut operator's license or privilege is suspended as of the effective date contained in the suspension notice.

Sec. 14-227b-17. Hearing

(a) The hearing shall be conducted by a hearing officer appointed by the commissioner pursuant to Section 14-4a of the General Statutes, and shall be limited to a determination of the issues stated in subsection (f) of Section 14-227b of the General Statutes.

(b) The findings required to be made at the hearing in accordance with subsection (f) of Section 14-227b of the General Statutes shall be based on substantial evidence when the record is considered as a whole.

Sec. 14-227b-18. Attendance of arresting officer at hearing

(a) At the hearing the commissioner shall not require the presence and testimony of the arresting officer, or any other person, but the hearing officer may make an appropriate order, as authorized by Section 14-110 of the General Statutes, to obtain the testimony of such arresting officer or other witness, if the same appears necessary to make a proper finding on one or more of the issues stated in subsection (f) of Section 14-227b of the General Statutes.

(b) A person arrested for an enumerated offense may at his own expense and by his own solicitation summon to the hearing the arresting officer and any other witness to give oral testimony. The failure to appear at the hearing of any witness summoned by the person arrested shall not be grounds for such person to request a continuance or dismissal of the hearing.

(c) If the person arrested for an enumerated offense wishes to summon to the hearing the arresting officer or any other witness, but such person is indigent, such person must file with the commissioner a sworn affidavit stating facts proving such indigency, at least seven days prior to the hearing. In such case the commissioner shall summon such arresting officer or witness to the hearing.

(d) The fees of any witness summoned to appear at the hearing shall be the same as provided by the General Statutes for witnesses in criminal cases

Sec. 14-227b-19. Admissibility of police report at hearing

(a) The written report filed by the arresting officer shall be admissible into evidence at the hearing if it conforms to the requirements of subsection (c) of Section 14-227b of the General Statutes.

(b) The chemical test results in the form of the tapes from a breath analyzer or other chemical testing device submitted contemporaneously with the written report shall be admissible into evidence at the hearing if they conform to the requirements of subsection (c) of Section 14-227b of the General Statutes.

Sec. 14-227b-20. Finding of facts

(a) The hearing officer shall make a determination of the facts at the hearing on the basis of all the relevant evidence presented at the hearing. A separate finding of fact shall be made by the hearing officer for each of the issues.

(b) The determination of the facts by the hearing officer shall be independent of the determination of the same or similar facts in the adjudication of criminal charges arising out of the person's arrest for the enumerated offense.

Sec. 14-227b-21.

Time of notice of decision

The decision of the hearing officer shall be in writing, and a copy of the decision shall be sent to the person who requested the hearing by bulk certified mail not later than thirty (30) days, or if a continuance is granted not later than forty-five (45) days, after the person received notice of his arrest.

Sec. 14-227b-22. Filing of appeal. Stay of suspension

The filing of an appeal of the decision of the hearing officer to a court having jurisdiction thereof, or the filing of a request for reconsideration by the commissioner shall not of itself stay enforcement of a suspension

Sec. 14-227b-23. Form of decision

The decision of the hearing officer, if adverse to the person, shall include the findings of fact and conclusions of law necessary to the decision and any appeal thereof.

Sec. 14-227b-24. Recording of hearing. Transcripts

The hearing shall be recorded in a form susceptible to transcription. A request for a transcript of the hearing shall be made in writing to the Administrative Hearing Section, Department of Motor Vehicles, Wethersfield, CT 06161-4010. A charge is made by the hearing reporter for each page of the transcript.

Sec. 14-227b-25. Return of operator's license

If the decision rendered by the hearing officer is that the person's Connecticut operator's license is to be reinstated, the operator's license that has been taken into possession shall be returned by mail to such person together with the notice of decision mailed in accordance with Section 14-227b-21 of these regulations.

Sec. 14-227b-26. Failure to render timely decision

(a) If the hearing officer fails to render a decision after a hearing within thirty (30) days from the date of the notice of arrest to such person or, if a continuance has been granted, within forty-five (45) days from the date of the notice of arrest to such person, the commissioner shall reinstate such person's Connecticut operator's license or privilege by mailing to the person by first class mail a reinstatement notice and, if such person's Connecticut operator's license has been taken, returning the person's license.

(b) Notwithstanding the reinstatement notice and return of any operator's license in accordance with subsection (a) of this section, the hearing officer may render a decision not later than thirty-two (32) days from the date of the notice to the person of his arrest, or if a continuance is granted, not later than forty-seven (47) days from the date of the notice to the person of his arrest, suspending the person's Connecticut operator's license or privilege. In such event the commissioner shall notify the person by first class mail of the decision and suspension, and request surrender of any Connecticut operator's license

previously returned to the person. The suspension notice shall indicate a date certain for the beginning of the suspension

Sec. 14-227b-27. Restoration fee. Removal of name from suspension files

(a) No restoration fee shall be required for the return of an operator's license in accordance with Sections 14-227b-25 or 14-227b-26.

(b) Any person whose operator's license is to be reinstated in accordance with Sections 14-227b-25 or 14-227b-26 shall have his name removed from the suspension files of the department.

Sec. 14-227b-28. Payment for blood test

(a) If a physician, at the request of any municipal or state police department, performs a chemical test by taking a blood sample from any person, the state shall pay reasonable charges to such physician.

(b) Any person who pays a physician for a blood sample in accordance with subsection (a) may request reimbursement by mailing a receipted copy of any payment and a statement of the surrounding facts to the commissioner. The commissioner may request details or proofs from such person.

Sec. 14-227b-29. Information

Information, requests for assistance, and answers to questions relating to sections 14-227b-1 through 14-227b-29a, inclusive, may be obtained from the Administrative Per Se Unit, Department of Motor Vehicles, Wethersfield, CT 06161-4010.

AFTER YOU HAVE REVIEWED THE ABOVE STATUTES AND REGULATIONS GOVERNING THIS AREA SOME OF THE MYSTERIES WILL BE DISPELLED WITH REGARD TO THE MECHANICS OF HANDLING ONE OF THESE CASES.

d. When to file it

(1) Any petition for reconsideration of a contested case must be filed in writing within fifteen (15) days after the personal delivery or mailing of the notice of final decision. Within forty days of the personal delivery or mailing of the final decision,

the department, regardless of whether a petition for reconsideration has been filed, may decide to reconsider the final decision.

(2) Petitions for reconsideration shall be addressed to: Legal Services Division, Department of Motor Vehicles, 60 State Street, Wethersfield, Connecticut 06109-1896.

e. What happens after you file it?

The Section Head at the DMV receives it and puts the entire case file together and a panel of hearing officers will review and reconsider the decision.

f. Where do you file it?

Petitions for reconsideration shall be addressed to: Legal Services Division, Department of Motor Vehicles, 60 State Street, Wethersfield, Connecticut 06109-1896

g. Can you fax it in?

I fax it and then mail a hard copy. The fax number is (860) 263-5569.

h. The address you mail it to

I generally mail it to: State of Connecticut, Legal Services Division, Department of Motor Vehicles, Administrative Per Se Unit, 60 State Street, P. O. Box 290861, Wethersfield, CT 06129-0861.

This differs from the address in the regulation with regard to the zip code.

I have never had a problem using either address.

You can telephone the unit at (860) 263-5204.

I. The fax number you fax it to

(860) 263-5569

j. When do you get a decision?

Within 30 days.

k. What the decision looks like

I have attached a copy of a decision. **See Exhibit 2.**

l. What's the point of all this?

The real reason is to obtain a decision restoring your client's license without the necessity of having to appeal to the Superior Court.

IV. APPEALING THE HEARING OFFICER'S *INCORRECT* DECISION TO THE SUPERIOR COURT.

A. The Statute

AFTER YOU FILE THE REQUEST FOR RECONSIDERATION YOU WILL RECEIVE A SHORT LETTER DECISION EITHER GRANTING OR DENYING YOUR REQUEST FOR RECONSIDERATION.

The Statute with regard to the Appeal to the Superior Court is as follows:

§ 4-183

General Statutes

TITLE 4 Management of State Agencies

Chapter 54 Uniform Administrative Procedure Act

4-183 Appeal to Superior Court

Sec. 4-183. Appeal to Superior Court.

(a) A person who has exhausted all **administrative** remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. The filing of a petition for reconsideration is not a prerequisite to the filing of such an appeal.

(b) A person may appeal a preliminary, procedural or intermediate agency action or ruling to the Superior Court if (1) it appears likely that the person will otherwise qualify under this chapter to appeal from the final agency action or ruling and (2) postponement of the appeal would result in an inadequate remedy.

(c) **Within forty-five days after mailing of the final decision under section 4-180 or, if there is no mailing, within forty-five days after personal delivery of the final decision under said section, a person appealing as provided in this section shall serve a copy of the appeal on the agency that rendered the final decision at its office or at the office of the Attorney General in Hartford and file the appeal with the clerk of the superior court for the judicial district of New Britain or for the judicial district wherein the person appealing resides or, if that person is not a resident of this state, with the clerk of the court for the judicial district of New Britain. Within that time, the person appealing shall also serve a copy of the appeal on each party listed in the final decision at the address shown in the decision, provided failure to make such service within forty-five days on parties other**

than the agency that rendered the final decision shall not deprive the court of jurisdiction over the appeal. Service of the appeal shall be made by (1) United States mail, certified or registered, postage prepaid, return receipt requested, without the use of a state marshal or other officer, or (2) personal service by a proper officer or indifferent person making service in the same manner as complaints are served in ordinary civil actions. If service of the appeal is made by mail, service shall be effective upon deposit of the appeal in the mail.

(d) The person appealing, not later than fifteen days after filing the appeal, shall file or cause to be filed with the clerk of the court an affidavit, or the state marshal's return, stating the date and manner in which a copy of the appeal was served on each party and on the agency that rendered the final decision, and, if service was not made on a party, the reason for failure to make service. If the failure to make service causes prejudice to any party to the appeal or to the agency, the court, after hearing, may dismiss the appeal.

(e) If service has not been made on a party, the court, on motion, shall make such orders of notice of the appeal as are reasonably calculated to notify each party not yet served.

(f) The filing of an appeal shall not, of itself, stay enforcement of an agency decision. An application for a stay may be made to the agency, to the court or to both. Filing of an application with the agency shall not preclude action by the court. A stay, if granted, shall be on appropriate terms.

(g) Within thirty days after the service of the appeal, or within such further time as may be allowed by the court, the agency shall transcribe any portion of the record that has not been transcribed and transmit to the reviewing court the original or a certified copy of the entire record of the proceeding appealed from, which shall include the agency's findings of fact and conclusions of law, separately stated. By stipulation of all parties to such appeal proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(h) If, before the date set for hearing on the merits of an appeal, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(i) The appeal shall be conducted by the court without a jury and shall be confined to the record. If alleged irregularities in procedure before the agency are not shown in the record or if facts necessary to establish aggrievement are not shown in the record, proof limited thereto may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(j) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the **administrative** findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment.

(k) If a particular agency action is required by law, the court, on sustaining the appeal, may render a judgment that modifies the agency decision, orders the particular agency action, or orders the agency to take such action as may be necessary to effect the particular action.

(l) In all **appeals** taken under this section, costs may be taxed in favor of the prevailing party in the same manner, and to the same extent, that costs are allowed in judgments rendered by the Superior Court. No costs shall be taxed against the state, except as provided in section 4-184a.

(m) In any case in which a person appealing claims that he cannot pay the costs of an appeal under this section, he shall, within the time permitted for filing the appeal, file with the clerk of the court to which the appeal is to be taken an application for waiver of payment of such fees, costs and necessary expenses, including the requirements of bond, if any. The application shall conform to the requirements prescribed by rule of the judges of the Superior Court. After such hearing as the court determines is necessary, the court shall render its judgment on the application, which judgment shall contain a statement of the facts the court has found, with its conclusions thereon. The filing of the application for the waiver shall toll the time limits for the filing of an appeal until such time as a judgment on such application is rendered.

B. The Regulations

I listed them in previous sections.

C. The Timeline

See the statute: 4-183 Appeal to Superior Court.

D. The Reconsideration Process doesn't toll the time

REMEMBER THAT FILING THE REQUEST FOR RECONSIDERATION DOES NOT TOLL THE TIME LIMIT TO APPEAL TO

THE SUPERIOR COURT. SO, ONCE THE DECISION IS RENDERED, THE CLOCK IS RUNNING.

E. What to file

1. An example of what to file

The following are the initial documents for filing an appeal to the Superior Court:

RETURN DATE: AUGUST 17, 2004 : SUPERIOR COURT
MR. S : JUDICIAL DISTRICT OF
VS : NEW BRITAIN
COMMISSIONER OF THE DEPARTMENT
OF MOTOR VEHICLES : JULY 13, 2004

SUMMONS AND CITATION

TO ANY PROPER OFFICER:

BY AUTHORITY OF THE STATE OF CONNECTICUT, you are hereby commanded to summon the STATE OF CONNECTICUT DEPARTMENT OF MOTOR VEHICLES, 60 State Street, Wethersfield, Connecticut, to appear before the Superior Court with and for the Judicial District of New Britain, Connecticut on the 17TH day of August, 2004, the appearance to be made by the STATE OF CONNECTICUT DEPARTMENT OF MOTOR VEHICLES or the OFFICE OF THE ATTORNEY GENERAL, by filing a written statement of appearance with the Clerk of the court on or before the second day following the return date, then and there to answer unto the foregoing Appeal of MR. S by leaving with, or at the office of, said Defendant STATE OF CONNECTICUT DEPARTMENT OF MOTOR VEHICLES at 60 Street, Wethersfield, Connecticut, and/or with the OFFICE OF THE ATTORNEY GENERAL for the State of Connecticut, 55 Elm Street, Hartford, Connecticut, a true and attested copy of said Appeal and of this Summons and Citation and Demand for Relief at least twelve (12) days before said return date.

Andrea M. Castano is recognized in the amount of \$250.00 to prosecute this appeal to effect and comply with the orders and decrees of this Court.

Hereof fail not, but of this Summons and Citation, Petition and Demand for Relief, due service and return make.

Dated at Pomfret, Connecticut this 13th day of July, 2004.

PETITIONER-APPELLANT

BY _____

Attorney Steven A. Tomeo
29 Kearney Road
P.O. Box 184
Pomfret Center, CT 06259
Tel No.: (860) 963-7441
Juris No.: 063913

RETURN DATE: AUGUST 17, 2004 : SUPERIOR COURT
MR. S : JUDICIAL DISTRICT OF
VS : NEW BRITAIN
COMMISSIONER OF THE DEPARTMENT
OF MOTOR VEHICLES : JULY 13, 2004

PETITION FOR APPEAL

1. The Petitioner-Appellant, MR. S, resides in Manchester, Connecticut and is the holder of a valid Connecticut motor vehicle operator's license.

2. On May 30, 2004, the Appellant was taken into custody for operating while under the influence in violation of Connecticut General Statutes §14-227a by a member of the East Lyme, Connecticut Police Department.

3. On May 30, 2004, the Appellant was asked and agreed to submit to two chemical alcohol breath tests.

4. On Wednesday, July 7, 2004 the State of Connecticut Department of Motor Vehicles held a hearing pursuant to General Statutes §14-227b(f) in respect to FAILING A CHEMICAL ALCOHOL TEST.

5. The purpose of said hearing was to determine whether the Appellant's motor vehicle operator's license should be suspended.

6. At said hearing, the State introduced **Exhibit A** consisting of a copy of a form A-44.

7. At the conclusion of the hearing, the Hearing Officer made "Findings of Fact and Conclusions of Law" indicating, inter alia, The police officer had probable cause to arrest the above-named operator for a violation specified in Section (g) of C.G.S. 14-227b; that the operator was placed under arrest; that the operator submitted to the test or analysis and the results indicated a BAC of .08% or more; that said person was operating the motor vehicle. And in Subordinate Findings stated: "The officer had probable cause to arrest the respondent after finding him asleep behind the wheel of his motor vehicle parked along side I 95 with the key on the ignition and the wiper and heater running. The respondent had

been drinking earlier and was very lost.” A copy of the July 7, 2004 Findings of Fact and Conclusions of Law is attached hereto as *Exhibit B.*

8. The July 7, 2004 decision of the Hearing Officer is a final decision by the STATE OF CONNECTICUT DEPARTMENT OF MOTOR VEHICLES that aggrieves the Appellant MR. S and leaves him no other available administrative remedies.

9. MR. S brings this appeal to this Court requesting that the final decision of the STATE OF CONNECTICUT DEPARTMENT of MOTOR VEHICLES be corrected because substantial rights of the Appellant have been prejudiced because of the administrative findings, inferences, conclusions or decision which are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and because the decision was arbitrary or capricious and characterized by abuse of discretion and clearly unwarranted exercise of discretion and violation of constitutional or statutory provisions.

10. Said decision was contrary to law and fact on the following grounds:

- a. There was no probable cause to arrest MR. S;
- b. MR. S was not operating the motor vehicle;
- c. That the breath test was not given within 2 hours of the time of operation;
- c. The Subordinate Findings are contrary to law and the facts in that the facts of being asleep behind the wheel of his motor vehicle parked along side I 95 with the key on the ignition and the wiper and heater running along with drinking earlier and the respondent being very lost do not give rise to probable cause to arrest but have more to do with whether or not the Respondent was operating the vehicle.

WHEREFORE, the Appellant claims:

1. A reversal of the findings of the STATE OF CONNECTICUT DEPARTMENT OF MOTOR VEHICLES that the Appellant was operating the motor vehicle; and, that the breath test analysis and the results indicated a BAC of .08% or more because the breath test was not given within two hours of operation;
2. the reinstatement of the Appellant’s operator’s license;

3. Such other relief as the Court may deem appropriate.

PLAINTIFF-APPELLANT

BY _____

Attorney Steven A. Tomeo
29 Kearney Road
P.O. Box 184
Pomfret Center, CT 06259
Tel No.: (860) 963-7441
Juris No.: 063913

RETURN DATE: AUGUST 17, 2004 : SUPERIOR COURT
MR. S : JUDICIAL DISTRICT OF
VS : NEW BRITAIN
COMMISSIONER OF THE DEPARTMENT
OF MOTOR VEHICLES : JULY 13, 2004

EX PARTE MOTION FOR STAY

The Petitioner-Appellant respectfully requests that the court grant his *Ex Parte* Motion to Stay the execution of the suspension of his license by the Respondent in respect to his alleged failure of a chemical alcohol test. Said stay is requested pending the outcome of this action. In support of this motion, the Petitioner-Appellant states:

1. That a suspension of his operator's license pursuant to Connecticut General Statutes §14-227b for a period of NINETY (90) DAYS would result in great personal and financial hardship;
2. That the Petitioner-Appellant's petition for appeal is meritorious;
3. That should this suspension not be stayed and the Petitioner-Appellant prevail in his appeal, a grave injustice would occur;
4. That this incident did not involve a motor vehicle accident nor personal injury to any person; and
5. That the Petitioner-Appellant was never the subject of a previous alcohol related suspension of his motor vehicles license or privileges to drive in this or any other state.

WHEREFORE, the Petitioner-Appellant requests that this court grant his *Ex Parte* Motion to Stay.

PETITIONER-APPELLANT

BY _____

Attorney Steven A. Tomeo
29 Kearney Road
P.O. Box 184
Pomfret Center, CT 06259
Tel No.: (860) 963-7441
Juris No.: 063913

ORDER

The foregoing Motion having been presented it is hereby ORDERED:

GRANTED/DENIED

BY THE COURT

Dated: _____

Clerk/Ass't Clerk/Judge

CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing was sent by regular U. S. Mail, postage prepaid on
JULY , 2004, to the following:

State of Connecticut Department of Motor Vehicles, 60 State Street, Wethersfield,

Attorney Priscilla J. Green, Assistant Attorney General, Juris No. 85143, 55 Elm Street
P. O. Box 120, Hartford, CT 06141-0120, Tel. (860) 808-5090.

Steven A. Tomeo
Commissioner of Superior Court

RETURN DATE: AUGUST 17, 2004 : SUPERIOR COURT
MR. S : JUDICIAL DISTRICT OF
VS : NEW BRITAIN
COMMISSIONER OF THE DEPARTMENT
OF MOTOR VEHICLES : JULY 13, 2004

MOTION FOR STAY
PENDING OUTCOME OF APPEAL

The Petitioner-Appellant respectfully requests that the court grant his Motion to Stay the execution of the suspension of his license by the Commissioner of Motor Vehicles in respect to his alleged operation of the motor vehicles and failure of a chemical alcohol test. Said stay is requested pending the outcome of this action. In support of this motion, the Petitioner-Appellant states:

1. That a suspension of his operator's license pursuant to Connecticut General Statutes §14-227b for a period of nine months would result in great personal and financial hardship;
2. That the Petitioner-Appellant's petition for appeal is meritorious;
3. That should this suspension not be stayed and the Petitioner-Appellant prevail in his appeal, a grave injustice would occur;
4. That this incident did not involve a motor vehicle accident nor personal injury to any person;
5. And that the Petitioner-Appellant has never had an alcohol related suspension of his motor vehicle license or privilege to drive in any state.

WHEREFORE, the Petitioner-Appellant requests that this court grant his Motion to Stay.

PETITIONER-APPELLANT

BY _____

Attorney Steven A. Tomeo
29 Kearney Road
P.O. Box 184
Pomfret Center, CT 06259
Tel No.: (860) 963-7441
Juris No.: 063913

ORDER

The foregoing Motion having been presented it is hereby ORDERED:

GRANTED/DENIED

BY THE COURT

Dated: _____

Clerk/Ass't Clerk/Judge

CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing was sent by regular U. S. Mail, postage prepaid on
JULY , 2004 to the following:

State of Connecticut
Department of Motor Vehicles
60 State Street
Wethersfield, Connecticut 06019

Attorney Priscilla J. Green
Assistant Attorney General
Juris No. 85143
55 Elm Street
P. O. Box 120
Hartford, CT 06141-0120
Tel. (860) 808-5090

Steven A. Tomeo
Commissioner of Superior Court

RETURN DATE: AUGUST 17, 2004 : SUPERIOR COURT
MR. S : JUDICIAL DISTRICT OF
VS : NEW BRITAIN
COMMISSIONER OF THE DEPARTMENT
OF MOTOR VEHICLES :

ORDER FOR HEARING ON MOTION FOR STAY

The attached Motion having been presented to the Court, it is hereby Ordered that a hearing be held on the 26th day of July, 2004 at 9:30 AM in courtroom 3F of the Superior Court, Judicial District of New Britain, 20 Franklin Square, New Britain, Connecticut.

It is further ordered that the Petitioner-Appellant give notice to the Respondent of the pendency of this Motion and of the time when it will be heard by causing a true and attested copy of the Motion and this Order to be served upon the Respondent by some proper officer on or before the 20th day of July, 2004 and that due return of service be made to this Court.

Dated at New Britain, Connecticut this 16th day of JULY , 2004.

BY THE COURT

Judge/Clerk

RETURN DATE: AUGUST 17, 2004 : SUPERIOR COURT
MR. S : JUDICIAL DISTRICT OF
VS : NEW BRITAIN
COMMISSIONER OF THE DEPARTMENT
OF MOTOR VEHICLES : JULY 13, 2004

AFFIDAVIT OF MR. S

1. I am over the age of eighteen years and understand and believe in the obligations of an oath.
2. I am a resident of Manchester, Connecticut and am the Petitioner in this matter.
3. I was arrested on May 30, 2004 by a member of the East Lyme, Connecticut Police Department and subsequently charged with violation of Connecticut General Statutes §14-227a.
4. That the suspension of my license will cause an undue hardship and financial burden upon me because I live in Manchester and work in Hartford, Connecticut and need my license for work because of my shift hours and drive time.
5. This incident did not involve personal injury to any person.
6. This incident did not involve a motor vehicle accident.
7. I do not have a prior 14-227b suspension and I have had no prior 14-227a suspensions in Connecticut or any other state.

Signed under the penalties of perjury this day 15 day of July, 2004 at Hartford, Connecticut.

MR. S

STATE OF CONNECTICUT)

) ss. Hartford, July 15 , 2004

COUNTY OF HARTFORD)

Personally appeared before me, MR. S, signer of the foregoing affidavit and acknowledged the same to be truthful and accurate and his free act and deed before me.

Steven A. Tomeo

Commissioner of Superior Court

F. Has your client ever had a prior alcohol related suspension?

1. Why this is important

If your client has no prior alcohol related suspension you may be able to prevail upon the Superior Court to stay the suspension of his driver's license.

G. The Office of the Attorney General

1. Their Attorney:

Attorney Priscilla J. Green
Assistant Attorney General
Juris No. 85143
55 Elm Street
P. O. Box 120
Hartford, CT 06141-0120
Tel. (860) 808-5090

(Most of my appeals have been with Priscilla Green.)

H. Service, the Marshal, Fees, the Court

I generally use Marshal Brian F. Zito, P. O. Box 290001, Wethersfield, CT 06109-0001, Telephone: (860) 520-0002. You have him serve the Commissioner of Motor Vehicles and the Attorney General. I listed AAG Green's address above.

Remember, this is a civil matter and your return is to: The Clerk, Superior Court, New Britain Judicial District, 20 Franklin Square, New Britain, CT 06051, Telephone: (860) 515-5180, Fax: (860) 515-5185.

The Court Filing Fee is \$225.00 made payable to Clerk, Superior Court.

- I. The Petition—See a copy of one listed above.
- J. Ex Parte Motion for Stay—See a copy of one listed above.
- K. Motion for Stay Pending Outcome of Appeal---See a copy of one listed above.
- L. Order for Hearing on Motion for Stay---See a copy of one listed above.
- M. Affidavit---See a copy of one listed above.

N. Scheduling Orders

When you have your papers prepared with regard to your appeal to the Superior Court, I recommend that you drive them to New Britain and go to the Third Floor, Room 310 of the Court House and present them to the Secretary for Administrative Hearings/Tax Appeals. She will review them. If they are in order, she will see that they are presented to Judge Levine. He will rule on your Motion To Stay and issue a date for a hearing with regard to the Motion For Stay. He may issue an ex parte order. At the hearing scheduling orders will be issued. My experience is that the matter will be over within 120 days of initiating the appeal.

Once the documents are reviewed and/or signed by the Judge, someone will take you to the JD Clerk's Office where you will be given a Case Number. You will pay the filing fee ASAP--\$225.00. The original documents will be given back to you so that you can issue service. Once the Marshal makes his return to you, you will return them to the Court.

The Telephone Number for this Administrative Appeal Office is (860) 515-5145.

- O. The Record/Transcript
 - 1. It is free!

I always order one of my own; however, you will be provided a transcript of the administrative proceedings.

P. Your Brief

The following is a brief in a case I handled:

DOCKET NO. CV 04-4000310-S : SUPERIOR COURT
MR. S : JUDICIAL DISTRICT OF
Plaintiff
VS : NEW BRITAIN at NEW BRITAIN
COMMISSIONER OF THE DEPARTMENT
OF MOTOR VEHICLES : SEPTEMBER 3, 2004
Defendant

MEMORANDUM IN SUPPORT OF APPEAL

I. FACTS

On May 30, 2004 at approximately 3:20 a.m., MR. S was taken into custody for operating while under the influence of alcohol in violation of Conn. Gen. Stat. §14-227a. (Form A-44, State's Exhibit A)

East Lyme Police Officer LEO was traveling southbound on Interstate-95 when he noticed a vehicle stopped in the rough shoulder between exits 72 and 73. The vehicle's left turn signal was flashing. The driver, MR. S, was reclined backwards in the driver's seat. Mr. S. did not respond to Officer LEO's spotlight. Officer LEO pulled in behind Mr. S.'s vehicle. Mr. S.'s windshield wipers were running, although it was not raining. Officer LEO heard the heater blower motor running and could see that the key was in the ignition and it was turned to the "on" position.

After knocking very hard on the driver's window, Officer LEO roused Mr. S. and arrested him for DUI after smelling alcohol on his breath and administering field sobriety tests. Mr. S. was transported to Troop E where he submitted to chemical breath testing commencing at 4:16 a.m.

After a July 7, 2004 hearing in front of Hearing Officer James Quinn, the Commissioner found that the police officer had probable cause to arrest Mr. S. for operating a motor vehicle while under the influence of alcohol; that Mr. S. was placed under arrest; that Mr. S. submitted to the test and the results indicated a BAC of .08% or more, and that Mr. S. was operating the motor vehicle. As a subordinate finding, the Commissioner determined "The officer had probable cause to arrest the respondent after finding him asleep behind the wheel of his motor vehicle parked along side I 95 with the key on the ignition and the wiper and heater running. The respondent had been drinking earlier and was very lost." Mr. S.'s license was suspended for ninety days. (Decision in Case No. 04004827 dated July 8, 2004). See Exhibit A.

Mr. S. has appealed from the decision of the Commissioner of Motor Vehicles and argues that there was no substantial evidence as to probable cause to arrest him, that he was not operating the motor vehicle, that the breath test was not given within two hours of the time of operation; and that the Subordinate Findings are contrary to law and the

facts in that the determination of being asleep behind the wheel of the motor vehicle parked alongside I-95 with the key on the ignition and the wiper and heater running along with drinking earlier and the respondent being very lost do not give rise to probable cause to arrest but have more to do with whether or not Mr. S. was operating the vehicle.

II. STANDARD FOR REVIEW OF ADMINISTRATIVE AGENCY

“In this type of an administrative appeal, the plaintiff bears the burden of proving that the commissioner’s decision to suspend a motor vehicle operator’s license was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.” Scott v. Salinas, 46 Conn. Sup. 337, 340, aff’d 57 Conn. App. 649 (2000). Administrative fact-finding is governed by the substantial evidence rule. “An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred.” Bancroft v. Comm. Of Motor Veh., 48 Conn. App. 391, 400 (1998). However, an administrative agency may not act unreasonably, arbitrarily or illegally or abuse its discretion. Id. at 401.

III. LEGAL ARGUMENT

A. *No Probable Cause Existed to Arrest Mr. S. Because There is No Evidence that He Operated a Motor Vehicle.*

There was no basis to arrest Mr. S. in that it was impossible for the police to determine whether Mr. S. was operating his motor vehicle at any time that he had an elevated blood alcohol content.

The Connecticut appellate courts have defined “operate” within the DUI statutes. The most recent case stated:

Our Supreme Court ... approved the following jury instruction in State v. Swift, 125 Conn. 399, 402-403, 6 A.2d 359 (1939): “[T]he statute [in question] refers to persons who shall operate a motor vehicle, and is not confined to persons who shall drive a motor vehicle. A person operates a motor vehicle within the meaning of this statute, *when in the vehicle he intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle.*”

State v. Ducatt, 22 Conn. App. 88, 90-91 (1990).

In Ducatt, the defendant was unconscious or sleeping in his parked, running vehicle with his arm wrapped around the steering wheel and his fingers curled around the gear shift lever.

[T]he controls of a car capable of immediate powered movement are under the control of an intoxicated motorist, which is precisely the evil the legislature sought to avoid through 14-227a (a). We conclude, therefore, that the statute does not require the state to prove that the defendant intended to move the vehicle in order to prove operation under 14-227a (a).

Id. at 93.

The court concluded:

An accused operates a motor vehicle within the meaning of General Statutes 14-227a (a) when, while under the influence of alcohol or any drug and while in the vehicle and in a position to control its movements, he manipulates, for any purpose, the machinery of the motor or any other machinery manipulable from the driver's position that affects or could affect the vehicle's movement, whether the accused moves the vehicle or not.

Id. See also State v. Marquis, 24 Conn. App. 467 (1991)(defendant sitting in parked vehicle with head on steering wheel and engine running was “operating” a motor vehicle).

Mr. S. was discovered by Officer LEO at about 3:20 in the very early morning. Mr. S. was in a very deep sleep. There is no evidence that Mr. S. manipulated any machinery that could affect his vehicle’s movement. Mr. S. was in a reclining position. The engine was not running. Mr. S. was not doing – or touching – anything that could engage any item of the car to cause it to operate, to move forward, to move. Mr. S. was not operating a motor vehicle at the time he was discovered by Officer LEO.

B. Chemical Breath Tests Flawed

The State must establish that Mr. S. was operating a motor vehicle while intoxicated or with an elevated blood alcohol content. "Elevated blood alcohol content" means a ratio of alcohol in the blood of such person that is eight-hundredths of one per cent or more of alcohol, by weight. Conn. Gen. Stat. § 14-227a.

At Troop E, Mr. S. submitted to an initial chemical breath test at 4:16 a.m. that showed a blood alcohol content of .168. A second chemical breath test at 4:54 a.m. showed a blood alcohol content of .144.

Conn. Gen. Stat. §14-227a (b) permits the introduction of chemical analysis of the defendant’s breath if all of the following requirements are met:

- (1) The defendant was afforded a reasonable opportunity to telephone an attorney prior to the performance of the test and consented to the taking of the test upon which such analysis is made;
- (2) a true copy of the report of the test result was mailed to or personally delivered to the defendant within twenty-four hours or by the end of the next regular business day, after such result was known, whichever is later;
- (3) the test was performed by or at the direction of a police officer according to methods and with equipment approved by the Department of Public Safety and was performed in accordance with the regulations adopted under subsection (d) of this section;
- (4) the device used for such test was checked for accuracy in accordance with the regulations adopted under subsection (d) of this section;
- (5) an additional chemical test of the same type was performed at least thirty minutes after the initial test was performed ...; and

(6) evidence is presented that the test was commenced within two hours of operation.

There is no evidence that the requirements of subsection (3), (4) or (6) were met.

1. Breath Test was Not in Accordance With Regulations

Regulations of Connecticut State Agencies Sec. 14-227a-10 (c) requires the following:

Any operator who conducts a breath analysis test shall utilize the following procedures:

(1) Sample collection

(A) The expired breath sample shall be air which is alveolar in composition. **The breath sample shall be collected only after the subject has been under continuous observation for at least fifteen (15) minutes prior to the collection of each sample. During this observation period the subject must not have ingested any alcoholic beverages or food, regurgitated, or smoked.**

There is nothing in the police report from which it can be inferred that Mr. S. was under continuous observation for fifteen minutes prior to his first test.

Furthermore, there is no indication that Officer LEO has been properly trained and certified to administer breathalyzer tests in accordance with the requirements of Conn. Gen. Stat. §14-227a (b).

2. Device was not checked for accuracy

Nothing in the police report indicates that the Intoxilyzer device was checked for accuracy.

In Cerrigione v. Commissioner of Motor Veh., 1995 Ct. Sup. 4648, Docket No. CV 94 070 54 06, J.D. of Hartford/New Britain at Hartford (May 3, 1995)(Maloney, J.), the court found that a breathalyzer test administered by an officer who did not execute the Form A-44 lacked sufficient indicia of reliability and should be disregarded. In reaching its decision, the court noted that although the intoximeter paper tapes showed that the machine was working correctly, “[t]he flaw here is that if the machine itself is not in good working order, its self-checking mechanism is presumably likewise suspect.” Also, there was no evidence that the testing officer was certified to perform the test. Those factors, in turn, brought into question the ultimate finding concerning the plaintiff’s blood alcohol level, since the determination was based on the results of the intoximeter tests.

The regulatory scheme governing the administration of the breath test is precise and detailed. [citations omitted] General Statutes § 14-227b(1) requires the commissioner to adopt appropriate regulations. Section 14-227b-2(c), promulgated by the defendant commissioner of motor vehicles, provides that the provisions of §§ 14-227a-1 through 14-227a-10 of the regulations, promulgated by the department of health and addiction services, apply to the administration of blood alcohol testing performed for purposes of General Statutes § 14-227b. Section 10 of those regulations requires that the operator of the testing device be certified as competent to do so by the department of health and addiction services; it requires that the machine be certified as accurate by the department; and it requires that the machine be checked for accuracy at the beginning and again at the end of each work day.

....

The obvious purpose of the requirements in the regulations is to ensure the integrity and accuracy of the breath testing procedure conducted by the police. In this case, the administrative hearing officer had no evidence that the police had complied with those regulations and there was some reasonable basis for inferring that they had not done so. There was, furthermore, no other evidence at the hearing to indicate that the testing procedure would produce reliable results. Under these circumstances, the court holds that the results of the breath test conducted by the police are not sufficiently reliable to support a finding by the hearing officer that the alcohol level in the subject's blood exceeded the legal level.

3. Chemical Test was Not Given Within Two Hours of Operation

There is no evidence that chemical breath testing commenced within two hours of operation, as required by subsection (6).

There is no evidence as to when Mr. S. pulled his vehicle over to rest, other than Mr. S.'s recollection that he had left New Britain around 9:00 or 10:00 p.m. Even Officer LEO acknowledges that "The accused was found parked on the shoulder **more than 5 hours after he headed for home.**" (emphasis added). Thus, giving a generous one hour to travel from New Britain to East Lyme, Mr. S. could have been napping for up to four hours at the time Officer LEO came upon him. The State of Connecticut presents no evidence from which it can be determined whether Mr. S. had been napping for four minutes or four hours.

In State v. DeCoster, 147 Conn. 502 (1960), a defendant was found slumped unconscious on a steering wheel in a car with the engine off. The court found that with no evidence showing when the defendant had last operated the car, a conclusion that he had operated the car while under the influence of liquor would "invade the realm of speculation and conjecture."

Without knowing how long Mr. S. had been stopped on the shoulder of Interstate-95, the State cannot establish that chemical breath testing commenced within two hours of operation.

C. Findings of the Hearing Officer are Clearly Erroneous as No Substantial Evidence of Operation or Elevated BAC

Because Mr. S. was not in a position to manipulate the vehicle controls, and was, in fact, reclined away from them, the State cannot prove operation. When the time of operation – the time at which Mr. S. pulled over onto the side of I-95 – cannot be determined, it cannot be concluded that chemical testing commenced within two hours of operation. In addition, the administration of the chemical breath tests were so outside the scope of the statutory and regulatory directives that they should not be relied upon.

IV. CONCLUSION

The Hearing Officer erred in finding that probable cause to arrest Mr. S. existed. Mr. S. was not operating a motor vehicle when the police came upon him. The Hearing Officer further erred in considering the chemical breath tests as evidence of intoxication when their administration was so flawed as to render them useless. The breath analysis tests were not commenced within two hours of operation and otherwise fail to meet statutory requirements. The State failed to demonstrate that Mr. S. operated a motor vehicle with an elevated blood alcohol content. For these reasons, this administrative appeal should be sustained.

PETITIONER-APPELLANT

BY _____

Attorney Steven A. Tomeo
29 Kearney Road
P.O. Box 184
Pomfret Center, CT 06259
Tel No.: (860) 963-7441
Juris No.063913

CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing was mailed postage prepaid on September 3, 2004 to:

Priscilla J. Green
Assistant Attorney General
State of Connecticut
Office of The Attorney General
55 Elm Street
Hartford, CT 06106

Steven A. Tomeo
Commissioner of Superior Court

Q. The Brief of the State of Connecticut

1. Standard Recitations to be aware of

See the attached Copy of the State's Brief. **See Exhibit 4.**

R. Reply Brief

I have never filed one. You can. So, in anticipation of filing one you should make that a part of your scheduling orders to give you time.

S. Oral Argument

My experience is that they are short. If you have a bad case Judge Levine will ask: "So, why are we hear today, Mr. Tomeo?"

T. The Decision

You generally know the Court's decision on the day you argue. You will get a notice in the mail, also.

APPEAL OF ADVERSE SUPERIOR COURT DECISION TO APPELLATE COURT

I. Is it over when you win the Administrative Appeal to the Superior Court?

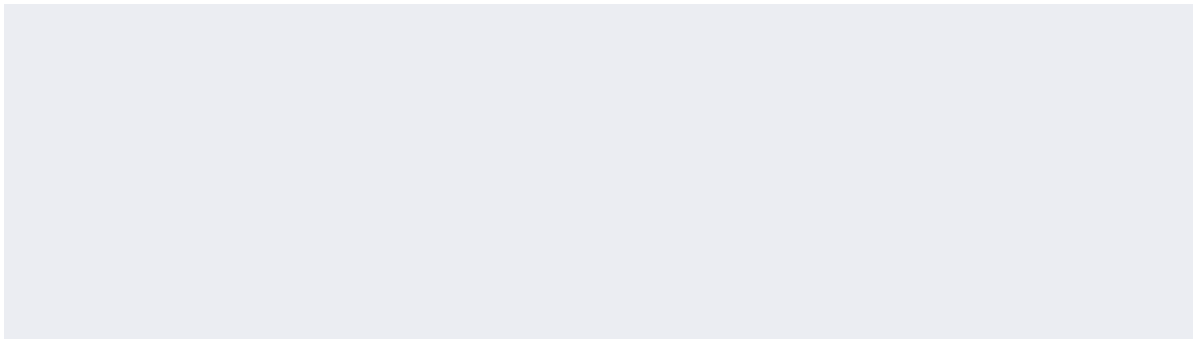
- A. Yes
- B. No
- C. Maybe for a while

II. If you lose the Administrative Appeal to the Superior Court.

- A. The Appellate Process
 - 1. The Statute

Sec. 4-184. Appeal from final judgment of Superior Court.

An aggrieved party may obtain a review of any final judgment of the Superior Court under this chapter. The appeal shall be taken in accordance with section 51-197b.



General Statutes

TITLE 51 Courts

Chapter 882 Superior Court

51-197b (Formerly Sec

Sec. 51-197b. (Formerly Sec. 52-7). Administrative appeals.

(a) Except as provided in section 31-301b, all appeals that may be taken from administrative decisions of officers, boards, commissions or agencies of the state or any political subdivision thereof shall be taken to the Superior Court.

(b) Except as provided in section 4-183, the Superior Court, after a hearing, may reverse or affirm, wholly or partly, or may modify or revise the decision appealed from.

(c) So much of any special act as is inconsistent with this section is repealed.

(d) Except as provided in sections 8-8, 8-9 and 22a-43, there shall be a right to further review to the Appellate Court under such rules as the judges of the Appellate Court shall adopt.

(e) The procedure on such appeal to the Appellate Court shall be in accordance with the procedure provided by rule or law for the appeal of judgments rendered by the Superior Court unless modified by rule of the judges of the Appellate Court. There shall be no right to further review except to the Supreme Court pursuant to the provisions of section 51-197f.

2. Practice Book

Sec. 63-1. Time to Appeal

(a) General provisions Unless a different time period is provided by statute, an appeal must be filed within twenty days of the date notice of the judgment or decision is given. The appeal period may be extended if permitted by Section 66-1(a). If circumstances give rise to a new appeal period as provided in subsection (c) of this rule, such new period may be similarly extended as long as no extension of the original appeal period was obtained. If a motion is filed within the appeal period that might give rise to a new appeal period as provided in subsection (c) of this rule, the appeal may be filed either in the original appeal period, which continues to run, or in the new appeal period. As used in this rule, "appeal period" includes any extension of such period obtained pursuant to Section 66-1(a).

(b) When appeal period begins If notice of the judgment or decision is given in open court, the appeal period shall begin on that day. If notice is given only by mail, the appeal period shall begin on the day that notice was mailed to counsel and pro se parties of record by the trial court clerk. The failure to give notice of judgment to a nonappearing party shall not affect the running of the appeal period. In criminal cases where the appeal is from a judgment of conviction, the appeal period shall begin when sentence is pronounced in open court. In civil jury cases, the appeal period shall begin when the verdict is accepted.

(c) New appeal period

(1) How new appeal period is created If a motion is filed within the appeal period that, if granted, would render the judgment, decision or acceptance of the verdict ineffective, a new twenty-day period for filing the appeal shall begin on the day that notice of the ruling is given on the last such outstanding motion, except as provided for additur or remittitur in the next paragraph. If a motion for additur or remittitur is filed within the appeal period and granted, a new twenty-day appeal period shall begin upon the earlier of (1) acceptance of the additur or remittitur or (2) expiration of the time set for the acceptance. If the motion is denied, the new appeal period shall begin on the day that notice of the ruling is given. Motions that, if granted, would render a judgment, decision or acceptance of the verdict ineffective include, but are not limited to, motions that seek: the opening or setting aside of the judgment; a new trial; the setting aside of the verdict; judgment notwithstanding the verdict; reargument of the judgment or decision; collateral source reduction; additur; remittitur; or any alteration of the terms of the judgment. Motions that do not give rise to a new appeal period include those that seek: clarification or articulation, as opposed to alteration, of the terms of the judgment or decision; a written or transcribed statement of the trial court's decision; or reargument of a motion listed in the previous paragraph. If, within the appeal period, any motion is filed, pursuant to Section 63-6 or 63-7, seeking waiver of fees, costs and security or appointment of counsel, a new twenty-day appeal period shall begin on the day that notice of the ruling is given on the last such outstanding motion. If a party files, pursuant to Section 66-6, a motion for review of any such motion, the new appeal period shall begin on the day that notice of the ruling is given on the motion for review.

(2) Who may appeal during new appeal period If a new appeal period arises due to the filing of a motion that, if granted, would render a judgment, decision or acceptance of the verdict ineffective, any party may take an appeal during the new appeal period regardless of who filed or prevailed upon such motion. If, however, a new appeal period arises due to the filing of a motion for waiver of fees, costs and security or a motion for appointment of counsel, only the party who filed such motion may take an appeal during the new appeal period.

(3) What may be appealed during new appeal period The new appeal period may be used for appealing the original judgment or decision and/or for appealing any order that gave rise to the new appeal period. Such period may also be used for amending an existing appeal pursuant to Section 61-9 to challenge the ruling that gave rise to the new appeal period. Rulings on motions for waiver of fees, costs and security or motions for appointment of counsel may not be appealed during the new appeal period, but may be challenged by motion for review in accordance with Section 66-6.

(d) When motion to stay briefing obligations may be filed If, after an appeal has been taken but before the appeal period has expired, any motion is filed that, if granted, would render the judgment, decision or acceptance of the verdict ineffective, any party may move to stay the briefing obligations of the parties in accordance with Section 67-12.

(e) Simultaneous filing of motions Any party filing more than one motion that, if granted, would render the judgment, decision or acceptance of the verdict ineffective, shall file such motions simultaneously insofar as simultaneous filing is possible.

CHAPTER 63 FILING THE APPEAL; WITHDRAWALS

[Sec. 63-1.](#) Time to Appeal

[Sec. 63-2.](#) Expiration of Time Limitations; Counting Days

[Sec. 63-3.](#) Filing Appeal in General; Number of Copies

[Sec. 63-4.](#) Additional Papers to Be Filed by Appellant and Appellee when Filing Appeal

[Sec. 63-5.](#) Fees

[Sec. 63-6.](#) Waiver of Fees, Costs and Security - Civil Cases

[Sec. 63-7.](#) Waiver of Fees, Costs and Security - Criminal Cases

[Sec. 63-8.](#) Ordering and Filing Transcript

[Sec. 63-8A.](#) Electronic Copies of Transcripts

[Sec. 63-9.](#) Filing Withdrawals of Appeals or Writs of Error

[Sec. 63-10.](#) Preargument Conferences

B. Timeline

See the above practice book regulations.

C. Notice of Appeal

See Attached copy. See Exhibit 5.

D. Brief of Appellant

See attached Appellant's Brief by the AG in the Alvord Case. See Exhibit 6.

E. Brief of Appellee

What follows is the Appellee's Brief in the Alvord Case. I lost the Per Se Hearing and Appealed to the Superior Court where the Judge agreed with my argument and restored my client's drivers' license. The AG appealed to the Appellate Court and won.

APPELLATE COURT
OF THE
STATE OF CONNECTICUT

A.C. 24443

JUSTIN M. ALVORD

v.

COMMISSIONER OF THE
DEPARTMENT OF MOTOR VEHICLES

BRIEF OF THE PLAINTIFF-APPELLEE

TO BE ARGUED BY:

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STATEMENT OF THE NATURE OF THE PROCEEDINGS
AND OF
THE FACTS OF THE CASE

I. NATURE OF THE PROCEEDINGS

The defendant Commissioner of the Department of Motor Vehicles is appealing from a judgment of the Superior Court. This matter arises from plaintiff Justin Alvord's arrest for driving under the influence. After a hearing at the Department of Motor Vehicles, the plaintiff's motor vehicle operator's license was suspended for a period of nine months in accordance with Conn. Gen. Stat. § 14-227b. The Hearing Officer had determined that the plaintiff had an elevated blood alcohol content in excess of .07%. Conn. Gen. Stat. § 14-227b, however, requires a finding that the elevated blood alcohol content be at least .08%. The plaintiff filed an appeal in Superior Court, Judicial District of New Britain and the Honorable George Levine sustained plaintiff Justin Alvord's appeal. The defendant appeals from that ruling.

II. STATEMENT OF THE FACTS

On January 5, 2003, the plaintiff Justin Alvord was taken into custody for operating while under the influence in violation of Conn. Gen. Stat. § 14-227a by Troop D Connecticut State Police Trooper Bavosi. The plaintiff submitted to two chemical alcohol breath tests taken with an Intoxilyzer Model 5000EN operated by Trooper Bavosi. Those test results indicated a BAC of .152 at 6:04 p.m. and .126 at 6:35 p.m. (Jan. 5, 2003 Form A-44 for Case Number DES030001053; hereafter "Form A-44" and set forth in Defendant-Appellant's Appendix as pp. 10a-15a)

On Friday, February 14, 2003 the State of Connecticut Department of Motor Vehicles held a hearing pursuant to Conn. Gen. Stat. § 14-227b (f) in respect to the alleged failure of a chemical alcohol test. (Feb. 14, 2003 Transcript of Hearing at State of Connecticut Department of Motor Vehicles In the Matter of Justin Alvord; hereafter "Hearing Transcript" and set forth in Defendant-Appellant's Appendix at pp. 5a-9a)

The hearing was to determine whether the plaintiff's motor vehicle operator's license should be suspended. At that hearing both Trooper Bovosi and the plaintiff testified. Trooper Bovosi testified that he stopped the plaintiff after he observed swerving within his lane "it looked a little tight and *deliberate*." (Hearing Transcript, p. 6)(emphasis added) The plaintiff testified that Trooper Bovosi was not in a good position to observe his driving and that he had not an alcoholic drink in a number of hours. (Hearing Transcript, p. 11)

Exhibit A, consisting of a copy of a form A-44 and photocopies of the two Intoxilyzer test tapes, were introduced as evidence at the Hearing. (Hearing Transcript)

At the conclusion of the hearing, the Hearing Officer made “Findings of Fact and Conclusions of Law” indicating, inter alia, “the operator submitted to the test or analysis and the results indicated a BAC of .07% or more” (emphasis added) and suspended the plaintiff’s driver’s license for nine months. (Case No. 03000001 Decision dated Feb. 14, 2003; hereafter “DMV Decision” and set forth in Defendant-Appellant’s Appendix at p. 17a)

Pursuant to Conn. Gen. Stat. § 4-183, the plaintiff filed an appeal in the Superior Court for the Judicial District of New Britain seeking judicial review of the suspension decision of the Commissioner.

On June 9, 2003, after receiving briefs and hearing argument of counsel, the trial court, the Honorable George Levine presiding, sustained the plaintiff’s appeal on the basis that the hearing officer made a finding of fact that the results indicated a “BAC of .07% or more.” (Superior Court Transcript of June 9, 2003 for Docket No. CV03-0520447S; hereafter “Court Transcript” and set forth in Defendant-Appellant’s Appendix at pp. 20a-27a)

The defendant Commissioner then filed this appeal in the Appellate Court, seeking a reversal of the trial court’s decision.

ARGUMENT

I. WHETHER SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTED THE COMMISSIONER OF MOTOR VEHICLES' FINDINGS OF FACT

A. Standard of Review

The Uniform Administrative Procedure Act ("UAPA") governs judicial review of the Commissioner of Motor Vehicles' action in suspending an operator's license under Conn. Gen. Stat. § 14-227b. The scope of judicial review is very restricted. Buckley v. Muzio, 200 Conn. 1, 3, (1986); O'Rourke v. Commissioner of Motor Vehicles, 33 Conn. App. 501, 506 (1994). Neither a trial court nor an appellate court is to retry the case or to substitute its judgment for that of the commissioner. Buckley v. Muzio, *supra.*; C & H Enterprises, Inc. v. Commissioner of Motor Vehicles, 176 Conn. 11, 12 (1978).

"The credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency, and, if there is evidence ... which reasonably supports the decision of the commissioner, ... [the court] cannot disturb the conclusion reached by him." DiBenedetto v. Commissioner of Motor Vehicles, 168 Conn. 587, 589 (1975).

The plaintiff who appeals under the UAPA must prove that his substantial rights were prejudiced because the administrative decision was, inter alia, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. See Conn. Gen. Stat. § 4-183 (j); Murphy v. Commissioner of Motor Vehicles, 254 Conn. 333, 343 (2000).

B. Substantial Evidence Supports the Hearing Officer's Finding of Blood Alcohol Content

The defendant appears to believe that because the Intoxilyzer indicated an elevated blood alcohol content, the Hearing Officer must rely upon those results. This is not true. Intoxilyzer machines may malfunction for any number of reasons, and the substantial decrease in BAC in just thirty minutes may have indicated to the Hearing Officer that the Intoxilyzer results were not reliable.

The testimony she heard from both the plaintiff and the State Trooper may have reinforced her feeling that the Intoxilyzer results were off, given that someone with the BAC indicated on the Intoxilyzer strips would have had great difficulty performing any field sobriety test correctly. The Form A-44

submitted as evidence indicated that the plaintiff correctly recited the alphabet, correctly performed the Walk-Turn test, and failed the One Leg Stand only because he put his foot down three times. He had no other conditions usually exhibited by intoxicated individuals who attempt the One Leg Stand.

If the Hearing Officer found the plaintiff's testimony credible, found the field sobriety test results credible, and found the Intoxilyzer test results un-credible, she could reasonably find that the plaintiff had an elevated blood alcohol content that did not reach the statutory prescribed minimum of .08%. Her Subordinate Findings emphasize that the State Trooper did have probable cause to arrest, but she did not validate the Intoxilyzer test results.

Thus, substantial evidence exists in the record to support a finding that the plaintiff had a "BAC of .07% or more" without requiring a finding that the results were .08% or more. The trial court correctly determined that substantial evidence in the record supported the Commissioner of Motor Vehicles' findings of fact.

II. WHETHER THE TRIAL COURT CORRECTLY DETERMINED THAT THE HEARING OFFICER'S FINDINGS OF FACT PROHIBITED SUSPENSION OF THE PLAINTIFF'S MOTOR VEHICLES' LICENSE.

Public Act 03-154, effective October 1, 2003, provides in relevant part that "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

The relevant portions of Conn. Gen. Stat. § 14-227b are clear:

- ...(g) ... The hearing shall be limited to a determination of the following issues;
- (1) did the police officer have probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or drug or both;
 - (2) was such person placed under arrest;
 - (3) ... did such person submit to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that such person had an elevated blood alcohol content; and
 - (4) was such person operating the motor vehicle. ...

(h) If, after such hearing, the commissioner finds on any one of the said issues in the negative, the commissioner shall reinstate such license or operating privilege.

Conn. Gen. Stat. § 14-227a (a) defines "elevated blood alcohol content" as being a rate "that is eight-hundredths of one per cent [.08%] or more of alcohol, by weight."

On appeal, the court was bound by the requirements of Conn. Gen. Stat. § 4-183 (j), which provides in relevant part:

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

If the court finds such prejudice, it shall sustain the appeal.

As discussed above, the court could not substitute its judgment for the Hearing Officer's conclusion, based on the evidence, that the plaintiff's BAC was in excess of .07%. Given that finding of fact, which is supported by substantial evidence in the record, the court had to find for the plaintiff because the decision to suspend the plaintiff's license was "in violation of constitutional or statutory provisions" that require a finding that the BAC be .08% or more. The substantial rights of the plaintiff were prejudiced by the decision that was in violation of the statutory provisions. Conn. Gen. Stat. § 4-183 (j) mandated that the court sustain the plaintiff's appeal. The court correctly determined that the Hearing Officer's findings of fact prohibited the suspension of the plaintiff's motor vehicles' license.

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

The procedure for suspending an individual's motor vehicles' operator license for driving under the influence is set forth in detail in Conn. Gen. Stat. § 14-227b. A court reviewing the decision of the Commissioner of Motor Vehicles is similarly bound by statutory authority set forth Conn. Gen. Stat. § 4-183 (j) that narrowly limits its review of determinations made pursuant to Conn. Gen. Stat. § 14-227b.

In following the requisite statutes, the trial court correctly determined that substantial evidence in the record supported the Hearing Officer's finding of fact that the plaintiff had a BAC of .07% or more. The trial court then correctly found that the specific finding of a BAC of .07 % or more rendered the Commissioner's decision to suspend the plaintiff's license invalid, because the governing statutes require a specific finding of .08% or more BAC.

For all the reasons set forth above, the decision of the trial court should be sustained.

PLAINTIFF-APPELLEE,

JUSTIN ALVORD

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CERTIFICATION

I hereby certify that the Plaintiff-Appellee's Brief and Appendix complies with all the provisions of Connecticut Practice Book § 67-2. A copy of the brief and appendix was mailed to the following on November , 2003.

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APPELLATE COURT
OF THE
STATE OF CONNECTICUT

A.C. 24443

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Conn. Gen. Stat. § 4-183. Appeal to Superior Court.

(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section.

The filing of a petition for reconsideration is not a prerequisite to the filing of such an appeal.

(b) A person may appeal a preliminary, procedural or intermediate agency action or ruling to the Superior Court if (1) it appears likely that the person will otherwise qualify under this chapter to appeal from the final agency action or ruling and (2) postponement of the appeal would result in an inadequate remedy.

(c) Within forty-five days after mailing of the final decision under section 4-180 or, if there is no mailing, within forty-five days after personal delivery of the final decision under said section, a person appealing as provided in this section shall serve a copy of the appeal on the agency that rendered the final decision at its office or at the office of the Attorney General in Hartford and file the appeal with the clerk of the superior court for the judicial district of New Britain or for the judicial district wherein the person appealing resides or, if that person is not a resident of this state, with the clerk of the court for the judicial district of New Britain. Within that time, the person appealing shall also serve a copy of the appeal on each party listed in the final decision at the address shown in the decision, provided failure to make such service within forty-five days on parties other than the agency that rendered the final decision shall not deprive the court of jurisdiction over the appeal. Service of the appeal shall be made by (1) United States mail, certified or registered, postage prepaid, return receipt requested, without the use of a state marshal or other officer, or (2) personal service by a proper officer or indifferent person making service in the same manner as complaints are served in ordinary civil actions. If service of the appeal is made by mail, service shall be effective upon deposit of the appeal in the mail.

(d) The person appealing, not later than fifteen days after filing the appeal, shall file or cause to be filed with the clerk of the court an affidavit, or the state marshal's return, stating the date and manner in which a copy of the appeal was served on each party and on the agency that rendered the final decision, and, if service was not made on a party, the reason for failure to make service. If the failure to make service causes prejudice to any party to the appeal or to the agency, the court, after hearing, may dismiss the appeal.

(e) If service has not been made on a party, the court, on motion, shall make such orders of notice of the appeal as are reasonably calculated to notify each party not yet served.

(f) The filing of an appeal shall not, of itself, stay enforcement of an agency decision. An application for a stay may be made to the agency, to the court or to both. Filing of an application with the agency shall not preclude action by the court. A stay, if granted, shall be on appropriate terms.

(g) Within thirty days after the service of the appeal, or within such further time as may be allowed by the court, the agency shall transcribe any portion of the record that has not been transcribed and transmit to the reviewing court the original or a certified copy of the entire record of the proceeding appealed from, which shall include the agency's findings of fact and conclusions of law, separately stated. By stipulation of all parties to such appeal proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(h) If, before the date set for hearing on the merits of an appeal, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(i) The appeal shall be conducted by the court without a jury and shall be confined to the record. If alleged irregularities in procedure before the agency are not shown in the record or if facts necessary to establish aggrievement are not shown in the record, proof limited thereto may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(j) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment.

(k) If a particular agency action is required by law, the court, on sustaining the appeal, may render a judgment that modifies the agency decision, orders the particular agency action, or orders the agency to take such action as may be necessary to effect the particular action.

(l) In all appeals taken under this section, costs may be taxed in favor of the prevailing party in the same manner, and to the same extent, that costs are allowed in judgments rendered by the Superior Court. No costs shall be taxed against the state, except as provided in section 4-184a.

(m) In any case in which a person appealing claims that he cannot pay the costs of an appeal under this section, he shall, within the time permitted for filing the appeal, file with the clerk of the court to which the appeal is to be taken an application for waiver of payment of such fees, costs and necessary expenses, including the requirements of bond, if any. The application shall conform to the requirements prescribed by rule of the judges of the Superior Court. After such hearing as the court determines is necessary, the court shall render its judgment on the application, which judgment shall contain a statement of the facts the court has found, with its conclusions thereon. The filing of the application for the waiver shall toll the time limits for the filing of an appeal until such time as a judgment on such application is rendered.

Conn. Gen. Stat. § 14-227a. Operation while under the influence of liquor or drug or while having an elevated blood alcohol content. As amended by P.A. 03-265, P.A. 03-278.

(a) Operation while under the influence or while having an elevated blood alcohol content. No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both. A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if such person operates a motor vehicle on a public highway of this state or on any road of a district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or on any private road on which a speed limit has been established in accordance with the provisions of section 14-218a, or in any parking area for ten or more cars or on any school property (1) while under the influence of intoxicating liquor or any drug or both, or (2) while such person has an elevated blood alcohol content. For the purposes of this section, "elevated blood alcohol content" means a ratio of alcohol in the blood of such person that is eight-hundredths of one per cent or more of alcohol, by weight.

(b) Admissibility of chemical analysis. Except as provided in subsection (c) of this section, in any criminal prosecution for violation of subsection (a) of this section, evidence respecting the amount of alcohol or drug in the defendant's blood or urine at the time of the alleged offense, as shown by a chemical analysis of the defendant's breath, blood or urine shall be admissible and competent provided: (1) The defendant was afforded a reasonable opportunity to telephone an attorney prior to the performance of the test and consented to the taking of the test upon which such analysis is made; (2) a true copy of the report of the test result was mailed to or personally delivered to the defendant within twenty-four hours or by the end of the next regular business day, after such result was known, whichever is later; (3) the test was performed by or at the direction of a police officer according to methods and with equipment approved by the Department of Public Safety and was performed in accordance with the regulations adopted under subsection (d) of this section; (4) the device used for such test was checked for accuracy in accordance with the regulations adopted under subsection (d) of this section; (5) an additional chemical test of the same type was performed at least thirty minutes after the initial test was performed or, if requested by the police officer for reasonable cause, an additional chemical test of a different type was performed to detect the presence of a drug or drugs other than or in addition to alcohol, provided the results of the initial test shall not be inadmissible under this subsection if reasonable efforts were made to have such additional test performed in accordance with the conditions set forth in this subsection and such additional test was not performed or was not performed within a reasonable time, or the results of such additional test are not admissible for failure to meet a condition set forth in this subsection; and (6) evidence is presented that the test was commenced within two hours of operation. In any prosecution under this section it shall be a rebuttable presumption that the results of such chemical analysis establish the ratio of alcohol in the blood of the defendant at the time of the alleged offense, except that if the results of the additional test indicate that the ratio of alcohol in the blood of such defendant is twelve-hundredths of one per cent or less of alcohol, by weight, and is higher than the results of the first test, evidence shall be presented that demonstrates that the test results and the analysis thereof accurately indicate the blood alcohol content at the time of the alleged offense.

(c) Evidence of blood alcohol content. In any prosecution for a violation of subdivision (1) of subsection (a) of this section, reliable evidence respecting the amount of alcohol in the defendant's blood or urine at the time of the alleged offense, as shown by a chemical analysis of the defendant's blood, breath or urine, otherwise admissible under subsection (b) of this section, shall be admissible only at the request of the defendant.

(d) Testing and analysis of blood, breath and urine. The Commissioner of Public Safety shall ascertain the reliability of each method and type of device offered for chemical testing and analysis purposes of blood, of breath and of urine and certify those methods and types which said commissioner finds suitable for use in testing and analysis of blood, breath and urine, respectively, in this state. The Commissioner of Public Safety shall adopt regulations, in accordance with chapter 54, governing the conduct of chemical tests, the operation and use of chemical test devices, the training and certification of operators of such devices and the drawing or obtaining of blood, breath or urine samples as said commissioner finds necessary to protect the health and safety of persons who submit to chemical tests and to insure reasonable accuracy in testing results. Such regulations shall not require recertification of a police officer solely because such officer terminates such officer's employment with the law enforcement agency for which certification was originally issued and commences employment with another such agency.

(e) Evidence of refusal to submit to test. In any criminal prosecution for a violation of subsection (a) of this section, evidence that the defendant refused to submit to a blood, breath or urine test requested in accordance with section 14-227b shall be admissible provided the requirements of subsection (b) of said section have been satisfied. If a case

involving a violation of subsection (a) of this section is tried to a jury, the court shall instruct the jury as to any inference that may or may not be drawn from the defendant's refusal to submit to a blood, breath or urine test.

(f) Reduction, nolle or dismissal prohibited. If a person is charged with a violation of the provisions of subsection (a) of this section, the charge may not be reduced, nolle or dismissed unless the prosecuting authority states in open court such prosecutor's reasons for the reduction, nolle or dismissal.

(g) Any person who violates any provision of subsection (a) of this section shall: (1) For conviction of a first violation, (A) be fined not less than five hundred dollars [nor] or more than one thousand dollars, and (B) be (i) imprisoned not more than six months, forty-eight consecutive hours of which may not be suspended or reduced in any manner, or (ii) imprisoned not more than six months, with the execution of such sentence of imprisonment suspended entirely and a period of probation imposed requiring as a condition of such probation that such person perform one hundred hours of community service, as defined in section 14-227e, and (C) have such person's motor vehicle operator's license or nonresident operating privilege suspended for one year; (2) for conviction of a second violation within ten years after a prior conviction for the same offense, (A) be fined not less than one thousand dollars [nor] or more than four thousand dollars, (B) be imprisoned not more than two years, one hundred twenty consecutive days of which may not be suspended or reduced in any manner, and sentenced to a period of probation requiring as a condition of such probation that such person perform one hundred hours of community service, as defined in section 14-227e, and (C) have such person's motor vehicle operator's license or nonresident operating privilege suspended for three years or until the date of such person's twenty-first birthday, whichever is longer; and (3) for conviction of a third and subsequent violation within ten years after a prior conviction for the same offense, (A) be fined not less than two thousand dollars [nor] or more than eight thousand dollars, (B) be imprisoned not more than three years, one year of which may not be suspended or reduced in any manner, and sentenced to a period of probation requiring as a condition of such probation that such person perform one hundred hours of community service, as defined in section 14-227e, and (C) have such person's motor vehicle operator's license or nonresident operating privilege permanently revoked upon such third offense. For purposes of the imposition of penalties for a second or third and subsequent offense pursuant to this subsection, a conviction under the provisions of subsection (a) of this section in effect on October 1, 1981, or as amended thereafter, a conviction under the provisions of either subdivision (1) or (2) of subsection (a) of this section, a conviction under the provisions of section 53a-56b or 53a-60d or a conviction in any other state of any offense the essential elements of which are determined by the court to be substantially the same as subdivision (1) or (2) of subsection (a) of this section or section 53a-56b or 53a-60d, shall constitute a prior conviction for the same offense.

(h) Suspension of operator's license or nonresident operating privilege. (1) Each court shall report each conviction under subsection (a) of this section to the Commissioner of Motor Vehicles, in accordance with the provisions of section 14-141. The commissioner shall suspend the motor vehicle operator's license or nonresident operating privilege of the person reported as convicted for the period of time required by subsection (g) of this section. The commissioner shall determine the period of time required by said subsection (g) based on the number of convictions such person has had within the specified time period according to such person's driving history record, notwithstanding the sentence imposed by the court for such conviction. (2) The motor vehicle operator's license or nonresident operating privilege of a person found guilty under subsection (a) of this section who is under eighteen years of age shall be suspended by the commissioner for the period of time set forth in subsection (g) of this section, or until such person attains the age of eighteen years, whichever period is longer. (3) The motor vehicle operator's license or nonresident operating privilege of a person found guilty under subsection (a) of this section who, at the time of the offense, was operating a motor vehicle in accordance with a special operator's permit issued pursuant to section 14-37a shall be suspended by the commissioner for twice the period of time set forth in subsection (g) of this section. (4) If an appeal of any conviction under subsection (a) of this section is taken, the suspension of the motor vehicle operator's license or nonresident operating privilege by the commissioner, in accordance with this subsection, shall be stayed during the pendency of such appeal.

(i) Participation in alcohol education and treatment program. In addition to any fine or sentence imposed pursuant to the provisions of subsection (g) of this section, the court may order such person to participate in an alcohol education and treatment program.

(j) Seizure and admissibility of medical records of injured operator. Notwithstanding the provisions of subsection (b) of this section, evidence respecting the amount of alcohol or drug in the blood or urine of an operator of a motor vehicle involved in an accident who has suffered or allegedly suffered physical injury in such accident, which evidence is derived from a chemical analysis of a blood sample taken from or a urine sample provided by such person after such

accident at the scene of the accident, while en route to a hospital or at a hospital, shall be competent evidence to establish probable cause for the arrest by warrant of such person for a violation of subsection (a) of this section and shall be admissible and competent in any subsequent prosecution thereof if: (1) The blood sample was taken or the urine sample was provided for the diagnosis and treatment of such injury; (2) if a blood sample was taken, the blood sample was taken in accordance with the regulations adopted under subsection (d) of this section; (3) a police officer has demonstrated to the satisfaction of a judge of the Superior Court that such officer has reason to believe that such person was operating a motor vehicle while under the influence of intoxicating liquor or drug or both and that the chemical analysis of such blood or urine sample constitutes evidence of the commission of the offense of operating a motor vehicle while under the influence of intoxicating liquor or drug or both in violation of subsection (a) of this section; and (4) such judge has issued a search warrant in accordance with section 54-33a authorizing the seizure of the chemical analysis of such blood or urine sample. Such search warrant may also authorize the seizure of the medical records prepared by the hospital in connection with the diagnosis or treatment of such injury.

(k) Participation in victim impact panel program. If the court sentences a person convicted of a violation of subsection (a) of this section to a period of probation, the court may require as a condition of such probation that such person participate in a victim impact panel program approved by the Court Support Services Division of the Judicial Department. Such victim impact panel program shall provide a nonconfrontational forum for the victims of alcohol-related or drug-related offenses and offenders to share experiences on the impact of alcohol-related or drug-related incidents in their lives. Such victim impact panel program shall be conducted by a nonprofit organization that advocates on behalf of victims of accidents caused by persons who operated a motor vehicle while under the influence of intoxicating liquor or any drug, or both. Such organization may assess a participation fee of not more than twenty-five dollars on any person required by the court to participate in such program.

Conn. Gen. Stat. § 14-227b. Implied consent to test operator's blood, breath or urine. Testing procedures. License suspension. Hearing. As amended by P.A. 03-278.

(a) Any person who operates a motor vehicle in this state shall be deemed to have given such person's consent to a chemical analysis of such person's blood, breath or urine and, if such person is a minor, such person's parent or parents or guardian shall also be deemed to have given their consent.

(b) If any such person, having been placed under arrest for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both, and thereafter, after being apprised of such person's constitutional rights, having been requested to submit to a blood, breath or urine test at the option of the police officer, having been afforded a reasonable opportunity to telephone an attorney prior to the performance of such test and having been informed that such person's license or nonresident operating privilege may be suspended in accordance with the provisions of this section if such person refuses to submit to such test or if such person submits to such test and the results of such test indicate that such person has an elevated blood alcohol content, and that evidence of any such refusal shall be admissible in accordance with subsection (e) of section 14-227a and may be used against such person in any criminal prosecution, refuses to submit to the designated test, the test shall not be given; provided, if the person refuses or is unable to submit to a blood test, the police officer shall designate the breath or urine test as the test to be taken. The police officer shall make a notation upon the records of the police department that such officer informed the person that such person's license or nonresident operating privilege may be suspended if such person refused to submit to such test or if such person submitted to such test and the results of such test indicated that such person had an elevated blood alcohol content.

(c) If the person arrested refuses to submit to such test or analysis or submits to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicate that such person has an elevated blood alcohol content, the police officer, acting on behalf of the Commissioner of Motor Vehicles, shall immediately revoke and take possession of the motor vehicle operator's license or, if such person is a nonresident, suspend the nonresident operating privilege of such person, for a twenty-four-hour period. The police officer shall prepare a written report of the incident and shall mail the report and a copy of the results of any chemical test or analysis to the Department of Motor Vehicles within three business days. The report shall be made on a form approved by the Commissioner of Motor Vehicles and shall be subscribed and sworn to under penalty of false statement as provided in section 53a-157b by the arresting officer. If the person arrested refused to submit to such test or analysis, the report shall be endorsed by a third person who witnessed such refusal. The report shall set forth the grounds for the officer's belief that there was probable cause to arrest such person for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both and shall state that such person had refused to submit to such test or analysis when requested by such police officer to do so or that such person submitted to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that such person had an elevated blood alcohol content.

(d) If the person arrested submits to a blood or urine test at the request of the police officer, and the specimen requires laboratory analysis in order to obtain the test results, the police officer shall not take possession of the motor vehicle operator's license of such person or, except as provided in this subsection, follow the procedures subsequent to taking possession of the operator's license as set forth in subsection (c) of this section. If the test results indicate that such person has an elevated blood alcohol content, the police officer, immediately upon receipt of the test results, shall notify the Commissioner of Motor Vehicles and submit to the commissioner the written report required pursuant to subsection (c) of this section.

(e) Upon receipt of such report, the Commissioner of Motor Vehicles may suspend any license or nonresident operating privilege of such person effective as of a date certain, which date shall be not later than thirty days after the date such person received notice of such person's arrest by the police officer. Any person whose license or operating privilege has been suspended in accordance with this subsection shall automatically be entitled to a hearing before the commissioner to be held prior to the effective date of the suspension. The commissioner shall send a suspension notice to such person informing such person that such person's operator's license or nonresident operating privilege is suspended as of a date certain and that such person is entitled to a hearing prior to the effective date of the suspension and may schedule such hearing by contacting the Department of Motor Vehicles not later than seven days after the date of mailing of such suspension notice.

(f) If such person does not contact the department to schedule a hearing, the commissioner shall affirm the suspension contained in the suspension notice for the appropriate period specified in subsection (i) of this section.

(g) If such person contacts the department to schedule a hearing, the department shall assign a date, time and place for the hearing, which date shall be prior to the effective date of the suspension. At the request of such person or the hearing officer and upon a showing of good cause, the commissioner may grant one continuance for a period not to exceed fifteen days. [If a continuance is granted, the commissioner shall extend the validity of the temporary operator's license or nonresident operating privilege issued pursuant to subsection (c) of this section for a period not to exceed the period of such continuance.] The hearing shall be limited to a determination of the following issues: (1) Did the police officer have probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both; (2) was such person placed under arrest; (3) did such person refuse to submit to such test or analysis or did such person submit to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that such person had an elevated blood alcohol content; and (4) was such person operating the motor vehicle. In the hearing, the results of the test or analysis shall be sufficient to indicate the ratio of alcohol in the blood of such person at the time of operation, except that if the results of the additional test indicate that the ratio of alcohol in the blood of such person is twelve-hundredths of one per cent or less of alcohol, by weight, and is higher than the results of the first test, evidence shall be presented that demonstrates that the test results and analysis thereof accurately indicate the blood alcohol content at the time of operation. The fees of any witness summoned to appear at the hearing shall be the same as provided by the general statutes for witnesses in criminal cases.

(h) If, after such hearing, the commissioner finds on any one of the said issues in the negative, the commissioner shall reinstate such license or operating privilege. If, after such hearing, the commissioner does not find on any one of the said issues in the negative or if such person fails to appear at such hearing, the commissioner shall affirm the suspension contained in the suspension notice for the appropriate period specified in subsection (i) of this section. The commissioner shall render a decision at the conclusion of such hearing or send a notice of the decision by bulk certified mail to such person not later than thirty days or, if a continuance is granted, not later than forty-five days from the date such person received notice of such person's arrest by the police officer. The notice of such decision sent by certified mail to the address of such person as shown by the records of the commissioner shall be sufficient notice to such person that such person's operator's license or nonresident operating privilege is reinstated or suspended, as the case may be. Unless a continuance of the hearing is granted pursuant to subsection (g) of this section, if the commissioner fails to render a decision within thirty days from the date such person received notice of such person's arrest by the police officer, the commissioner shall reinstate such person's operator's license or nonresident operating privilege, provided notwithstanding such reinstatement the commissioner may render a decision not later than two days thereafter suspending such operator's license or nonresident operating privilege.

(i) The commissioner shall suspend the operator's license or nonresident operating privilege [, and revoke the temporary operator's license or nonresident operating privilege issued pursuant to subsection (c) of this section,] of a person who did not contact the department to schedule a hearing, who failed to appear at a hearing or against whom, after a hearing, the commissioner held pursuant to subsection (h) of this section, as of the effective date contained in the suspension notice or the date the commissioner renders a decision, whichever is later, for a period of: (1)(A) Except as provided in subparagraph (B) of this subdivision, ninety days, if such person submitted to a test or analysis and the results of such test or analysis indicated that such person had an elevated blood alcohol content, (B) one hundred twenty days, if such person submitted to a test or analysis and the results of such test or analysis indicated that the ratio of alcohol in the blood of such person was sixteen-hundredths of one per cent or more of alcohol, by weight, or (C) six months if such person refused to submit to such test or analysis, (2) if such person has previously had such person's operator's license or nonresident operating privilege suspended under this section, (A) except as provided in subparagraph (B) of this subdivision, nine months if such person submitted to a test or analysis and the results of such test or analysis indicated that such person had an elevated blood alcohol content, (B) ten months if such person submitted to a test or analysis and the results of such test or analysis indicated that the ratio of alcohol in the blood of such person was sixteen-hundredths of one per cent or more of alcohol, by weight, and (C) one year if such person refused to submit to such test or analysis, and (3) if such person has two or more times previously had such person's operator's license or nonresident operating privilege suspended under this section, (A) except as provided in subparagraph (B) of this subdivision, two years if such person submitted to a test or analysis and the results of such test or analysis indicated that such person had an elevated blood alcohol content, (B) two and one-half years if such person submitted to a test or analysis and the results of such test or analysis indicated that the ratio of alcohol in the blood of such person was sixteen-hundredths of one per cent or more of alcohol, by weight, and (C) three years if such person refused to submit to such test or analysis.

(j) Notwithstanding the provisions of subsections (b) to (i), inclusive, of this section, any police officer who obtains the results of a chemical analysis of a blood sample taken from an operator of a motor vehicle involved in an accident who suffered or allegedly suffered physical injury in such accident shall notify the Commissioner of Motor Vehicles and submit to the commissioner a written report if such results indicate that such person had an elevated blood alcohol content, and if such person was arrested for violation of section 14-227a in connection with such accident. The report shall be made on a form approved by the commissioner containing such information as the commissioner prescribes, and shall be subscribed and sworn to under penalty of false statement, as provided in section 53a-157b, by the police officer. The commissioner may, after notice and an opportunity for hearing, which shall be conducted in accordance with chapter 54, suspend the motor vehicle operator's license or nonresident operating privilege of such person for a period of up to ninety days, or, if such person has previously had such person's operator's license or nonresident operating privilege suspended under this section for a period of up to one year. Each hearing conducted under this subsection shall be limited to a determination of the following issues: (1) Whether the police officer had probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or drug or both; (2) whether such person was placed under arrest; (3) whether such person was operating the motor vehicle; (4) whether the results of the analysis of the blood of such person indicate that such person had an elevated blood alcohol content; and (5) whether the blood sample was obtained in accordance with conditions for admissibility and competence as evidence as set forth in subsection (j) of section 14-227a. If, after such hearing, the commissioner finds on any one of the said issues in the negative, the commissioner shall not impose a suspension. The fees of any witness summoned to appear at the hearing shall be the same as provided by the general statutes for witnesses in criminal cases, as provided in section 52-260.

(k) The provisions of this section shall apply with the same effect to the refusal by any person to submit to an additional chemical test as provided in subdivision (5) of subsection (b) of section 14-227a.

(l) The provisions of this section shall not apply to any person whose physical condition is such that, according to competent medical advice, such test would be inadvisable.

(m) The state shall pay the reasonable charges of any physician who, at the request of a municipal police department, takes a blood sample for purposes of a test under the provisions of this section.

(n) For the purposes of this section, "elevated blood alcohol content" means (1) a ratio of alcohol in the blood of such person that is eight-hundredths of one per cent or more of alcohol, by weight, or (2) if such person is under twenty-one years of age, a ratio of alcohol in the blood of such person that is two-hundredths of one per cent or more of alcohol, by weight.

(o) The Commissioner of Motor Vehicles shall adopt regulations in accordance with chapter 54 to implement the provisions of this section.

Public Act No. 03-154

Substitute House Bill No. 5033

AN ACT CONCERNING STATUTORY INTERPRETATION.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) (Effective October 1, 2003) The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

Approved June 26, 2003.

E. Should you appeal?