STATE OF IDAHO)
County of KOOTENAI)ss
FILED 1/28/19
AT 11:55 O'Clock A. M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

LISA AUCH-McCOLLOUGH, *Petitioner/Appellant,* vs. **STATE OF IDAHO TRANSPORTATION DEPARTMENT,** *Respondent.*	Case No. **CV28-18-4054** **MEMORANDUM DECISION AND ORDER AFFIRMING ADMINISTRATIVE DECISION ON JUDICIAL REVIEW**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This is a petition for judicial review from an April 30, 2018, administrative decision where the hearing officer upheld the one year license suspension of the petitioner/appellant, Lisa Auch-McCollough. Ag. Rec., 32–40. Petitioner timely filed her petition for review of that decision on May 18, 2018. On August 20, 2018, Petitioner filed her Brief in Support of Petition for Judicial Review. In that brief, Petitioner identifies the following issues:

> A. Whether the Hearing Examiner's decision was arbitrary and capricious and a violation of the Appellant Driver's constitutional due process rights.
> B. Whether the Hearing Examiner's authority (legal or judicial) to determine Appellant's Subpoena Duces Tecum request is/was denied based on relevancy, necessity, insufficient information and/or being unduly repetitions based on the existing record including, but not limited to:
>
> 1. The denial of the Hearing Examiner's Subpoena Duces Tecum for the bottles and lot number for storage and use:
>
> a. Calibration records are required to have the lot number so Appellant can determine the validity thereof (request for Subpoena Duces Tecum denied by Hearing Examiner).
> b. The calibration temperature check Subpoena was denied

by the Hearing Examiner. The machine manufacturer has specifications for the calibration temperature.

2. The Hearing Examiner's denial of a Subpoena Duces Tecum for the work schedule of Police Officer Alexander S. Mauri (arresting officer) including, but not limited to the following:

a. The Hearing Examiner's failure to vacate suspension due to the fact that Police Officers Shane Avriett and Alexander S. Mauri's work schedules and times prove they were not working at the same time:

i. Police Officer Avriett could not have personally notarized Police Officer Mauri's signature pursuant to the Idaho handbook/mandate sworn before him.

ii. Officer Mauri was not working or on duty on the date and at the time of the alleged Driving Under the Influence charge of Ms.Auch-McCollough.

C. The unconstitutional transfer of judicial power/legal determination to a lay person without legal training to determine relevancy, necessity, insufficient information and/or being unduly repetitions based on the existing record.

D. The Hearing Examiner's failure to vacate suspension due to the police officer not being certified — denoted as "pending".

E. The allowance of driving privileges to an individual who was DENIED access to the DUII Court program due to overcrowding, which is beyond her control, but the unfairness of granting DUII participants with a limited (work, treatment, testing) license.

Br. in Supp. of Pet. for Judicial Review, 2–4. On September 19, 2018, the respondent, State of Idaho, filed Respondent's Brief. Oral argument was held on December 5, 2018. At the conclusion of oral argument, the matter was taken under advisement by this Court.

II. STANDARD OF REVIEW.

Review of decisions to deny, cancel, suspend, disqualify, revoke, or restrict driver's licenses is governed by the Idaho Administrative Procedures Act (IDAPA). *See* I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270. Reviewing Courts review the agency record on appeal independently. *Marshall v. Idaho Dep't of Transp.*, 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct.App. 2002). But reviewing courts do not substitute their judgment for that of

the agency as to weight of the evidence presented. I.C. § 67-5279(1); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. An agency's findings of fact are deferred to unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial, competent evidence in the record. *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3d 1091, 1094 (2005).

Courts may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67—5279(3), and that a substantial right of that party has been prejudiced. *Price v. Payette County Bd. Of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998); *Bennett v. State Dept. of Transp.*, 147 Idaho 141, 142-43, 206 P.3d 505, 506-07 (Ct. App. 2009); *State of Idaho v. Kalani-Keegan*, 155 Idaho 297, 301, 311 P.3d 309, 313 (Ct. App. 2013).

III. ANALYSIS

A. Introduction.

Idaho Code Section 18-8002A, the administrative license suspension statute, requires the Idaho Transportation Department (ITD) to suspend the license of a driver who has failed a blood alcohol concentration (BAC) test. I.C. § 18–8002A(4). A driver may request a hearing before a hearing officer designated by the ITD to contest such a

suspension. I.C. § 18–8002A(7). At this hearing, the burden of proof rests on the driver to prove any of the grounds sufficient to vacate suspension. I.C. § 18–8002A(7); *Kane v. State, Dep't of Transportation*, 130 Idaho 596, 590, 83 P.3d 130 134 (Ct. App. 2003). The hearing officer must uphold the decision to suspend a license unless the driver has shown one of the several grounds set forth in Idaho Code Section 18–8002A(7): (a) the peace officer did not have legal cause to stop the person; (b) the officer did not have legal cause to believe the person was driving or in actual physical control of the vehicle while under the influence; (c) the test results do not show an alcohol concentration or presence of substances in violation of the statute; (d) the tests for alcohol concentration, drugs or other substances administered were not conducted in conformance with statutory requirements; or (e) the person was not informed of the consequences of submitting to evidentiary testing as required. I.C. § 18–8002A(7); *Archer v. State Department of Transportation*, 145 Idaho 617, 610, 181 P.3d 543, 546 (Ct. App. 2008).

B. Discovery in an Administrative License Proceeding.

Two of the five primary issues listed by petitioner on appeal are issues regarding discovery, specifically the denial by the hearing officer to issue subpoenas. Much of Petitioner's oral argument on December 5, 2018, was focused on these issues. Counsel for petitioner argued, "How does the hearing officer know what I need and don't need," and "How can I make my burden when I'm being denied subpoenas." Idaho Code Section 18–8002A(10) authorizes the ITD to adopt rules to implement the provisions of the ALS statute. I.C. § 18–8002A(10). Under IDAPA 39.02.72.300.01, the hearing officer assigned to the matter may, upon written request, issue subpoenas requiring the

attendance of witnesses or the production of documentary or tangible evidence at a hearing. Also, petitioners can seek documents through a request or motion for production of documents through a request or motion for production of documents through IDAPA 39.02.72.400.01. While that method of discovery was not utilized by Petitioner, that rule reads:

> 400. DOCUMENT DISCOVERY.
> 01. Obtaining Photocopies.
> To obtain a photocopy of a document which is public record, relates to the petitioner hearing, and is in the possession of the Department, petitioners shall make a written request to the Department. The Department shall attempt to provide the requested copies prior to the hearing date, but failure to do so shall not be grounds for staying or rescinding a suspension. (10-1-94)
> 02. Further Document Discovery.
> Further discovery shall only be conducted in accordance with IDAPA 04.11.01.521, "Idaho Rules of Administrative Procedure of the Attorney General."

In turn, IDAPA 04.11.01.521 reads:

> Parties may agree between or among themselves to provide for discovery without reference to an agency's statutes, rules of procedure, or orders. Otherwise no party before the agency is entitled to engage in discovery unless discovery is authorized before the agency, the party moves to compel discovery, and the agency issues an order directing that the discovery be answered. The presiding officer shall provide a schedule for discovery in the order compelling discovery, but the order compelling and scheduling discovery need not conform to the timetables of the Idaho Rules of Civil Procedure. The agency or agency staff may conduct statutory inspection, examination, investigation, etc., at any time without filing a motion to compel discovery.

"Under these rules, the hearing officer has broad discretion in the extent of discovery that the hearing officer orders." *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 945, 155 P.3d 1176, 1184 (Ct. App. 2006). This Court must review discretionary decisions of the hearing officer under an abuse of discretion standard. This Court agrees with Respondent's argument, made after citing *Bell v. ITD*, 151 Idaho 659, 666-69, 262

P.3d 1030, 1037-40 (2011):

> Here, the hearing officer recognized that she had the discretion to grant or deny the requests from the Petitioner. In fact, some of the requests were granted. *See Ag. Rec., p. 37.* Significantly, the Petitioner presented no affirmative evidence that the breath testing equipment operated improperly. In denying the requests for items including COBRA data, calibration bottles and lots, certification numbers, the hearing officer found the requested items were not relevant. In this case, the record contained affirmative evidence that the breath testing equipment was properly calibrated and operating properly. The affirmative evidence included the Instrument Log Sheet (Ag. Rec., p.12) and the information available on the ISP website (Ag. Rec., p. 3). Therefore, the hearing officer was within her discretion to deny the subpoenas due to the absence of any evidence in the record or from the Petitioner that might suggest the existence of contrary information.

Resp't Br., 12. The Idaho Court of Appeals in *Gibbar*, 143 Idaho 937, 945–48, 155 P.3d 1176, 1184–86, engaged in a lengthy discussion concluding that a denial by the hearing officer of certain discovery requests for documents (which requests were similar to those requested via subpoena in the present case) were not an abuse of discretion by that hearing officer. The Idaho Supreme Court in *Bell* engaged in a similar lengthy discussion and concluded that a denial by the hearing officer of certain subpoena deuces tecum requests (again, similar to the requests in the instant case) were not an abuse of discretion by that hearing officer and did not violate the petitioner's due process rights. 151 Idaho at 666–70, 262 P.3d at 1037–49.

Regarding the requests for subpoenas in the present case, the hearing officer in the present case held:

> 1. Council [sp] for Auch-McCullough argued that the denial to issue subpoenas for the Lifeloc F020 certification information and the lot and solution numbers for the performance verification checks that were conducted denied Auch-McCullough her rights and ability to properly defend herself because without such information, she could not verify if Standard Operating Procedures and Rules were followed for testing and calibrations.

2. IDAPA Rule 39.02.72.300.01 provides that a Hearing Officer may issue subpoenas for tangible evidence.
3. The Hearing Officer has sole authority for determining whether discovery requests are relevant.
4. The Hearing Officer in this case denied Auch-McCullough's, request for certain subpoenas based upon the fact that much of the information was already in the record, some of it was available on-line and other information was deemed irrelevant to the hearing at hand.
5. Officer and instrument certifications as well as Certificates of Analysis/Approval are available via the Idaho State Police website without the need for issuance of a subpoena. This fact was disclosed to council via the Administrative License Suspension Discovery Information Sheet that was provided to her.
6. The Instrument Operations Log, Exhibit 3, shows that the calibration/performance verification checks were done with an EasyCal. The EasyCal unit is a device utilized specifically for the purpose of conducting performance verification checks on a Lifeloc FCZO breath—testing instrument using a dry gas solution; replacing the use of a wet bath simulator solution.
7. The Instrument Operations Log m the record provided the solution numbers for the dry gas standards used to conduct the various performance verification checks hence; there was no need to issue a subpoena for the information.
8. As disclosed by the Administrative License Suspension Discovery Information Sheet, inquiries for certificates of origin and creation for the dry gas simulator solutions were to be made through the respective law enforcement agency and/or manufacturer.
9. ISP's Standard Operating Procedure (SOP) 4.2.I.3 sets forth that a performance verification of the FC20 instrument using a 0.08 or 0.20 performance verification standard must be, performed within 24 hours, before or after, an evidentiary test to be approved for evidentiary testing.
10. SOP sections 4.2.1.3.1 and 4.2.1.4, provide that neither the 0.08 or the 0.20 dry gas performance verification standards need to be changed monthly or approximately every 25 verifications in order for the instrument to be approved for evidentiary breath alcohol testing; only that they must not be used beyond their expiration date.
11. The Instrument Operations Log shows: that a 0 08 solution standard with number 737672 was used to conduct a performance verification check within 24 hours of Auch—McCullough's test as required by SOP. The log also shows that the solution standard had an expiration date of 03/2020 thus, confirming that the standard was not used beyond its expiration date.
12. Auch-McCullough has not sufficiently shown by a preponderance of evidence that she was unable to properly defend herself as to whether Standard Operating Procedures and Rules were followed for testing and calibrations.
13. Auch-McCullough has not shown that her due process rights were

violated by the denial of requested subpoenas.
14. Additionally, Auch—McCullough's argument disregards the plain language of Idaho Code §18-8002A, which enumerates five grounds upon which ; a hearing officer may vacate a license suspension; none of which concern the issuance of subpoenas.
15. In the mater of *Kane v. ITD,* I39 Idaho at 590 (Ct App. 2003), the court held that the hearing officer is not authoried to vacate the license suspension unless one of the five enumerated grounds have been satisfied-
16. It is Auch-McCullough's burden to present evidence affirmatively showing one or more of the grounds for relief enumerated in Idaho code § 18-8002A(7).
17. Auch-McCullough did not present the requisite affirmative evidence to prove that her rights were violated nor to vacate the suspension based upon any of the grounds mandated by statue.

Ag. Rec., 66–68. Holding number three shows the hearing officer appreciated this was (a) a matter committed to her discretion. Some of Petitioner's requests were granted. Ag. Rec., 37. Holdings four through thirteen demonstrate adequate reasoning by the hearing officer as to why the subpoenas were not allowed. Those holdings convince this Court, on review of the administrative agency's decision, that the hearing officer acted (b) within the bounds of her discretion consistent within the legal standards applicable, and (c) reached her decision by an exercise of reason. The three tiered abuse of discretion standard of review set forth in *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991), made applicable to administrative license suspensions by *Gibbar*, 143 Idaho at 945, 155 P.3d at 1184, has been met in the present case. The hearing officer found the requests for COBRA data, calibration bottles and lots, and certification numbers, were not relevant. The record contained affirmative evidence (Instrument Log Sheet, Ag. Rec., 12; information available on the ISP website, Ag. Rec., 3) that the breath testing equipment was properly calibrated and operating properly.

Additionally, there is no indication that Petitioner filed a written request for

discovery documents, as allowed under IDAPA 39.02.72.400.01, nor is there any indication that Petitioner filed a motion to compel with the hearing officer, as is allowed under IDAPA 04.11.01.521. Had a motion to compel been raised before the hearing officer, the hearing officer could have responded to any documents not produced. In any event, the hearing officer did not abuse her discretion in denying the subpoenas requested by petitioner.

C. Review of Administrative License Suspension.

1. Hearing officer correctly found that Officer Mauri was properly certified to operate the LIFELOC FC20 breathalyzer instrument.

Petitioner argues that because Officer Mauri's Peace Officer Standards and Training (POST) certification was listed as "pending," the license suspension should be vacated. Br. in Supp. of Pet. for Judicial Review, 18. Respondent argues that although the hearing officer was presented with evidence showing that Officer Mauri's POST certification was pending, as well as evidence showing that Officer Mauri was trained and certified to operate all breathalyzer equipment, the Court must defer to the findings of the hearing officer if supported by substantial and competent evidence. Resp't Br., 14–15. Respondent asserts that the hearing officer found Officer Mauri was properly certified to operate the breathalyzer instrument on the day of the DUI investigation, and that her finding was indeed supported by substantial, competent evidence. *Id.* at 15.

Petitioner's brief speaks generally of "certification," as if POST certification and specialty certifications are one in the same. *See generally* Br. in Supp. of Pet. for Judicial Review, 18. However, the Idaho State Police website, which was provided to Petitioner, clearly shows that they are not. The website shows that an officer can obtain a breath testing operator certification for a qualifying instrument, such as the LIFELOC FC20, upon

satisfactory completion of the Idaho breath and alcohol training program. Therefore, POST certification and breathalyzer instrument certification are two very separate and distinct certifications.

Additionally, Petitioner focuses her entire argument on the Idaho Breath Alcohol Standard Operating Procedures, without once mentioning POST certification, indicating that the issue is not about Officer Mauri's pending POST certification, but instead whether Officer Mauri was certified to operate the breathalyzer instrument. It is worth noting that the record is devoid of any argument asserting that a police officer must first become officially POST-certified before he or she can operate a breathalyzer instrument out in the field. The issue before the Court today is whether the hearing officer correctly found that Officer Mauri was properly certified to operate the LIFELOC FC20 during the DUI investigation on March 13, 2018, and that finding is supported by substantial and competent evidence.

On March 30, 2018, the hearing officer was provided with an updated list of Coeur d'Alene police officers and their POST certifications. Ag. Rec., Ex. F, G. Although the list indicated that Officer Mauri's POST certification was pending, the list also showed that Officer Mauri was currently trained and certified to operate all breathalyzer instruments.[1] Resp't Br., 14; Ag. Rec., Ex. J. Additional supporting evidence provided to the hearing officer, contained in Officer Mauri's probable cause declaration, shows that Officer Mauri's certification, which allows him to operate the LIFELOC FC20 breathalyzer instrument, is set to expire on August 7, 2019. Ag. Rec., Ex. 4; Br. In Supp. of Pet. for Judicial Review,

[1] Officer Mauri had one year from his hiring date to become POST certified. *See* I.C. § 19–5109; *see also* IDAPA 11.11.01.097.01; *State v. Wengren*, 126 Idaho 662, 666, 889 P.2d 96, 100 (Ct. App. 1995). Officer Mauri was hired on June 1, 2017, and pursuant to Idaho Code Section 19–5109, he had until approximately

18. Petitioner, in citing to the Idaho Breath Alcohol Standard Operating Procedures, correctly stated that this breath testing operator certification is for two calendar years. Br. In Supp. of Pet. for Judicial Review, 18. Therefore, because Officer Mauri's certification expires in August of 2019, he received the initial certification in August of 2017 – approximately seven months before the DUI investigation at issue in this case.[2]

The hearing officer's finding that Officer Mauri was properly certified to operate the LIFELOC FC20 at the time of the DUI investigation is supported by, a) the letter showing that Officer Mauri was trained and certified to operate the LIFELOC FC20 on the date in question, 2) Officer Mauri's probable cause declaration, and 3) the relevant statutes and rules cited by both Petitioner and Respondent The Court concludes that the hearing officer's finding was based on substantial and competent evidence. The findings of the hearing officer are upheld.

2. Officer Mauri's probable cause declaration was properly considered by the hearing officer.

Petitioner argues that the hearing officer "failed to follow the rules" by considering as evidence Officer Mauri's probable cause declaration, arguing that because it is not a sworn statement by the officer, it should not have been considered. Br. in Supp. of Pet. for Judicial Review, 19. In support of her argument, Petitioner cites to IDAPA 39.02.72.200.01.b, which requires that a sworn statement of the officer be forwarded to the Idaho Transportation Department. *Id.* Respondent asserts that the argument put

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May 31, 2018, to obtain POST certification.

[2] Additionally, each of Officer Mauri's certificates showing that he is certified to operate multiple breathalyzer instruments (including the LIFELOC FC20) is easily accessible on the Idaho State Police website. This website address was provided to Petitioner, and was referenced numerous times by the hearing officer throughout the administrative hearing. The certificate pertaining to the LIFELOC FC20 breathalyzer instrument states that Officer Mauri became certified to operate it on August 7, 2017, and the certification expires on August 7, 2019.

forth by Petitioner on this particular issue is not one of the five enumerated reasons upon which a hearing officer may vacate a license suspension. Resp't Br., 16. Respondent further argues that even if Officer Mauri's probable cause declaration did not fully comply with the relevant IDAPA rule and Idaho Code section, such a minor failing is not enough to warrant the vacating of Petitioner's license suspension. *Id.* at 18.

Respondent is correct in stating that a hearing officer considering the unsworn declaration of a police officer is not one of the five grounds upon which a hearing officer may vacate a license suspension. *See* I.C. § 1 –8002A(7); *see also Wheeler v. Idaho Transp. Dep't*, 148 Idaho 378, 382, 223 P.3d 761, 765 (Ct. App. 2009); *Kane v. State, Dep't of Transp.*, 139 Idaho 586, 589, 83 P.3d 130, 133 (Ct. App. 2003). Though Petitioner's argument on this particular issue is not permitted, as it does not fall within one of the enumerated grounds provided by Idaho Code Section 18–8002A(7), the Court will still address it on the merits.

The pertinent version of Idaho Code Section 9–1406 reads:

> Whenever...any matter is required...to be supported, evidenced, established or proved by the sworn statement, declaration...or affidavit, in writing, of the person making the same, ...such matter may with like force and effect be supported, evidenced, established or proven by the unsworn certification or declaration, in writing, which is subscribed by such person and is in substantially the following form:
> "I certify (or declare) under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct."

I.C. § 9–1406(1) (emphasis added). The plain language of the statute indicates that if any matter requires a written sworn statement by a person, a written and unsworn declaration by that person will be considered in lieu of the sworn statement, so long as the certifying statement ("I certify under penalty of perjury...") is present in the declaration.

Here, as mentioned by Petitioner, IDAPA 39.02.72.200.01.b required a sworn statement by Officer Mauri to be forwarded to ITD (Idaho Code Section 18–8002A(5) also required a sworn statement from Officer Mauri). Officer Mauri forwarded ITD a written, unsworn declaration that included: "I certify and declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing declarations and any attached reports and/or documents are true and correct." Ag. Rec., Ex. 4. This was followed by the date and Officer Mauri's signature. *Id.* Pursuant to Idaho Code Section 9–1406, Officer Mauri's probable cause declaration sufficed to satisfy the "sworn statement" requirement of both IDAPA 39.02.72.200.01.b and Idaho Code Section 18–8002A(5). Therefore, the probable cause declaration was properly considered by the hearing officer.

Respondent provides case law that supports the assertion made above – that even if Officer Mauri's probable cause declaration did not fully comply with the rules, such a minor and technical issue is not enough to warrant the vacating of Petitioner's license suspension. *See Kane v. State, Dep't of Transp.*, 139 Idaho 586, 590, 83 P.3d 130, 134 (Ct. App. 2003); *State Transp. Dep't v. Kalani-Keegan*, 155 Idaho 297, 306, 311 P.3d 309, 318 (Ct. App. 2013). However, because Officer Mauri's probable cause declaration did comply with the relevant laws, and was properly considered in lieu of a sworn statement, the Court need not address Respondent's argument further.

The hearing officer found that Officer Mauri's probable cause declaration was a valid sworn statement, as it met the requirements of Idaho Code Section 9-406. Ag. Rec., Ex. J. While the Court agrees that Officer Mauri's probable cause declaration satisfied the requirements presented in Idaho Code Section 9–1406, the Court notes that an unsworn declaration is not a sworn statement. Under Section 9–1406, an unsworn

declaration that meets the express requirements of the section has the same "like force and effect" of a sworn statement. Therefore, the unsworn declaration satisfied the "sworn statement" requirement. With that particular detail noted, the Court upholds the finding of the hearing officer on this issue, as it was supported by substantial and competent evidence.

D. New Issue Presented Before This Court.

Petitioner argues that she was denied equal protection of the law because she was denied the opportunity to enter DUI Court where she might have had driving privileges as a basis for vacating her administrative license suspension. This is an argument which was not raised before the hearing officer. Br. in Supp. of Pet. for Judicial Review, 4, 20. Petitioner states the Notice of Suspension reads: "If you are admitted to a problem solving court program and have served at least forty-five (45) days of an absolute suspicion (suspension) of driving privileges, you may be eligible for a restricted permit..." *Id.* at 20; Ag. Rec., Ex. 1. There are a variety of problems with this argument by petitioner.

First, this issue was not raised before the hearing officer. Issues not raised before the tribunal below will not be considered on appeal. *Cowan v. Board of Com'rs of Fremont County*, 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006) (citing *Butters v. Hauser*, 125 Idaho 79, 82, 867 P.2d 953, 956 (1993)); *see also Balser v. Kootenai Cty. Bd. Of Com'rs*, 110 Idaho 37, 40, 714 P.2d 6, 9 (1986). *Balser* concerned application of IDAPA, and found that a judge who rules on issues not raised before the agency, engages in a prohibited *de novo* factual determination. 110 Idaho at 40, 714 P.2d at 9.

Second, the information given in the Notice of Suspension comes from Idaho

Code Section 18-8002A(2)(e). That subsection of the statute does not provide for complete relief from the 90-day absolute suspension set forth in Idaho Code Section 18-8002A(2)(e), but only a reduction to 45 days with a restricted privileges. Thus, there is no defense to an administrative license suspension provided by this statute. All that statute provides is a shortened suspension if a person were to be entered into a DUI court during a time when less than all the suspension period was served and the presiding DUI court judge approved such shortened period. None of those prerequisites exist in this case.

Third, there is no "evidence" before this Court that petitioner was denied access to DUI court. Counsel for petitioner simply makes the bald assertion that, "[d]ue to overcrowding the Appellant was not eligible for DUII [sic] Court." Br. in Supp. of Pet. for Judicial Review, 20.

Fourth, while counsel for petitioner claims that because petitioner was not allowed into DUI Court, "she was denied equal protection of the law, as she was not able to participate due to overcrowding" (*id.*), no legal basis was given for that legal claim. No case law, nothing. The equal protection clause is violated only if the classification is based solely on reasons totally unrelated to the pursuit of the State's goals or only if no grounds can be justified to justify the State's goals. *Idaho Schools for Equal Educational Opportunity v. Evans*, 123 Idaho 573, 580, 850 P.2d 724, 731 (1993). Petitioner has not even articulated what the "classification" might be. Petitioner has set forth no case law indicating that admission into a problem solving court is a fundamental right. No Idaho appellate court case was found by this Court, but the State of Washington Supreme Court in an *en banc* decision held there is no fundamental right to drug court, and that the absence of a drug court in counties where the defendants were charged did not violate a

defendant's right to equal protection. *State v. Hamer*, 153 Wash.2d 228, 235–37, 103 P.3d 738, 742–43 (Wash. 2004).

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED the decision of the hearing officer (Findings of Fact and Conclusions of Law and Order dated April 30, 2018) is **AFFIRMED**.

IT IS FURTHER ORDERED the stay of the driver's license suspension entered by this Court on May 23, 2018, is **VACATED**.

Entered this 28th day of January, 2019.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 28th day of January, 2019, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Suzanna L. Graham 208 665-7079; Susan K. Servick 208 667-1825
office@slgattorney.com; susan@servicklaw.com
State of Idaho Transportation Department
Court.suspensions@itd.idaho.gov.

Jeanne Clausen, Deputy Clerk