STATE OF IDAHO)
County of KOOTENAI)ss
FILED 3/30/2020
AT 4:45 O'Clock P. M
CLERK, DISTRICT COURT
Deputy

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

CRAIG W. WIESENHUTTER, **Petitioner,** **STATE OF IDAHO, IDAHO TRANSPORTATION DEPARTMENT,** **Respondent.**	**Case No. CV28-19-5452** **MEMORANDUM DECISION AND ORDER ON JUDICIAL REVIEW AFFIRMING ADMINISTRATIVE DECISION OF STATE OF IDAHO TRANSPORTATION DEPARTMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

The matter before the Court is a petition for judicial review filed by petitioner Craig W. Wiesenhutter (Wiesenhutter), arising from the decision of the respondent Idaho Transportation Department (ITD) to issue a final order issuing Wiesenhutter an Administrative License Suspension (ALS). This Court affirms ITD's final order.

On June 3, 2019, Wiesenhutter was arrested for DUI and issued a "Suspension and Mandatory Ignition Interlock Advisory" (also called a Notice of Suspension). Wiesenhutter, through counsel, requested a hearing. That hearing was held June 27, 2019, and on July 12, 2019,the hearing officer for ITD issued a decision upholding the Administrative License Suspension.

On July 29, 2019, Wiesenhutter tiemly filed an Appeal or Petition for Judicial Review. On August 30, 2019, ITD filed a Notice of Lodging Agency Record. On September 19, 2019, ITD filed a Notice of Filing Agency Record (Exhibit C – CD). On

October 17, 2019, ITD filed a Notice of Filing Supplemental Agency Record. Petitioner's Brief on Review was filed on January 3, 2020. On January 30, 2020, ITD filed Respondent's Brief and Declaration of Lori Chapman. Wiesenhutter filed Petitioner's Reply on February 21, 2020. Oral argument was held before this Court on March 24, 2020. At the conclusion of that hearing, this Court took the matter under advisement.

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).

III. ANALYSIS

A. Wiesenhutter's claim that the advisement he received was misleading and inaccurate as to when he could apply for restricted noncommercial vehicle privileges.

Wiesenhutter's first issue with the advisement he received has to do with the part of the advisement that reads:

> Your driver's license will be suspended for ninety (90) days if this is your first failure of an evidentiary testing, but you may request restricted non-commercial driving privileges after the first thirty (30) days."

Petr's. Br. On Review 2, 4 (citing) Ex. 1. The advisement that was read to Wiesenhutter is functionally identical to the language of I.C. 18-8002A(2), which prescribes what must be contained in an advisement at the time of evidentiary testing. The relevant language of that statute reads:

> "[a]t the time of evidentiary testing for concentration of alcohol or for the presence of drugs or other intoxicating substances is requested ... the person shall be informed substantially as follows (but need not be informed verbatim): (I.C. 18-8002A(2)) ... **This suspension will be for ninety (90) days if this is your first failure of evidentiary testing, but you may request restricted noncommercial vehicle driving privileges after the first thirty (30) days.**

Idaho Code 18-8002A(2)(d) (bold added). Wiesenhutter concedes that the Advisory language and the language of I.C. § 18-8002A(2)(d) closely mirror each other. However, Wiesenhutter argues that even an advisement containing a mirror image of the language required in I.C. § 18-8002A(2)(d) is insufficient because I.C. § 18-8002A(2)(d) itself misstates the law regarding "*when* a person may request restricted noncommercial vehicle driving privileges." Petr's. Br. On Review 9.

Wiesenhutter bases his appeal on I.C. § 18-8002A(7)(e) (Petr's. Br. 6.), which states that a hearing officer must vacate a suspension if:

> (e) The person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section[.]

Wiesenhutter argues, "that contradictory information provided by law enforcement concerning one's rights and responsibilities under I.C. §§ 18-8002 and 18-8002A renders an advisory incomplete, requiring reversal." Petr's. Br. 6 (citing *Cunningham v. State*, 150 Idaho 687 (2011); *Matter of Virgil*, 126 Idaho 946 (Ct. App. 1995). Thus, Wiesenhutter's issue with the advisement he received is that he believes that both the advisement and I.C. § 18-8002A(2) to be an incorrect statement of the law because they are contradicted by I.C. §18-8002A(9) in that they appear to indicate that **a person can only put in a request for restricted noncommercial vehicle driving privileges after the first 30 days of the suspension have run**, while I.C. §18-8002A(9) indicates that **a person can apply for restricted noncommercial vehicle driving privileges immediately after being served with a notice of suspension,** but that the privileges could only become effective after the completion of the 30-day absolute suspension period. *Id.* at 8-10. For this reason, Weissenhutter argues that the Administrative License Suspension must be vacated under I.C. § 18-8002A(7)(e). *Id.* at 10.

ITD argues that:

> Here, there is no dispute that in [sic] the audio recording played for Wiesenhutter contained all the information contained in Idaho Code Section 18-8002A(2). Therefore, the information required by the statute was read to Wiesenhutter prior to evidentiary testing.

Resp't. Br. 7. To this end, ITD argues that there are no additional advisory requirements, outside of the mandated advisory language found in 18-8002A(2), and "the audio advisory given to Wiesenhutter did comply with Idaho Code Section

18-8002A(2) and there is no allegation that the deputy gave Wiesenhutter inaccurate or erroneous information." *Id.* For these reasons, ITD argues that, "Wiesenhutter's argument invites this Court to add additional advisory requirements to the requirements already mandated by statute[,]" *Id*, at 11. "This Court should decline the invitation." *Id.*

The hearing officer made the following relevant findings:

> I.C. §18-8002A(9) provides further direction and guidance in applying to the Department for noncommercial vehicle driving privileges, when the driving privileges become effective, at what time the application may be made, and for what purpose the restricted permit may be issued for, but all of the foregoing need not be advised/informed to the driver prior to and at the time he is substantially informed of the consequence of refusing to or submitting to evidentiary testing.

Agency R. 50.

> Pursuant to I.C. §18-8002A(2), Wiesenhutter was substantially informed of the information and consequences of refusing to submit to or failing to complete evidentiary testing or of submitting to and failing evidentiary testing.

Id.

> All information statutorily mandated to be given to a person pursuant to Idaho Code §18-8002 (Refusal Statute) and Idaho Code §18-8002A (Administrative License Suspension statute) is substantially included in the Notice of Suspension advisory form, and was asserted to Wiesenhutter at the time of evidentiary testing.

Id.

> All notification provided Wiesenhutter by way of the audio advisory were accurate advisements, and Wiesenhutter by way of the audio advisory were accurate advisements, and Wiesenhutter was not provided with any misinformation nor was he provided with any information contrary to Idaho Code §§18-8002 and 18-8002A.

Id.

This Court sustains ITD's July 12, 2019, decision because ITD did not err in finding that Wiesenhutter was properly advised of the information required under Idaho law prior to evidentiary testing. This court agrees with the hearing officer's findings that

the advisory Wiesenhutter received met all the requirements of I.C. §18-8002A(2). The advisory Wiesenhutter received was in compliance with and did not run contrary to Idaho law. Specifically, it mirrors all that is required for advisement under Idaho law, and I.C. §18-8002A(9) only provides *additional* information pertaining to when a person with an ALS may put in a request for noncommercial vehicle driving privileges, but under Idaho law, this information need not be advised to a person at the time of evidentiary testing. I.C. §18-8002A(9) states:

> A person served with a notice of suspension for ninety (90) days pursuant to this section may apply to the department for restricted noncommercial vehicle driving privileges, to become effective after the thirty (30) day absolute suspension has been completed. The request may be made at any time after service of the notice of suspension.

Idaho Code §73-113 provides:

> **CONSTRUCTION OF WORDS AND PHRASES.** (1) The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. The literal words of a statute are the best guide to determining legislative intent.

Idaho case law is consistent with this statute. Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction. ((See) *In re Adoption of Doe*, 156 Idaho 345, 349, 326 P.3d 347, 351 (2014)), and "The interpretation of a statute must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." (See) *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d at 506 (internal quotation marks omitted).

When construing I.C. § 18-8002A as a whole, there is a separation between I.C. § 18-8002A(2), which states the requirement as to what a person must be informed of at the time of evidentiary testing, and the rest of I.C. § 18-8002A, which provides additional further detailed statutory language. However, it is not necessary to inform a

person of this additional further language at the time of evidentiary testing. This is evident by the plain language of I.C. § 18-9002A(2), which reads, "[a]t the time of evidentiary testing for concentration of alcohol or for the presence of drugs or other intoxicating substances is requested... the person shall be informed substantially as follows (but need not be informed verbatim)[.]" In this case, the Idaho legislature has decided that it is enough to inform a person that "you may request restricted noncommercial vehicle driving privileges after the first (30) days." I.C. § 18-9002A(2)(d). It is unambiguous that this is all that is required for a person to be informed under I.C. § 18-9002A. This Court need not perform statutory interpretation to determine why the legislature felt the advisory language of I.C. §18-8002A(2)(d) is satisfactory. Reading the entirety of I.C. §18-8002A(9) to a person at the time of evidentiary testing would certainly clear up the facts that while a person can only receive noncommercial vehicle driving privileges after the first thirty days has run, the request for the noncommercial vehicle driving privileges "may be made at any time after service of the notice of suspension." But when construing I.C. § 18-8002A as a whole, the legislature has clearly indicated that providing information that "you may request restricted noncommercial vehicle driving privileges after the first (30) days" is enough to satisfy the statute. In fact, even this statement, "need not be informed verbatim[,]" which indicates at least some level deviation from the wording of this statement is allowed under the statute, and would still result in a person being found substantially informed.

Much argument has been made by Wiesenhutter pertaining to the idea that the language of I.C. § 18-8002A(2)(d), is misleading in light of I.C. §18-8002A(9), and therefore the ALS must be overturned under I.C. § 18-8002A(7)(e). This is simply not true.

As stated above, a person must only be substantially informed of the language found in I.C. § 18-8002A(2). The advisory read to Wiesenhutter mirrors this language, and nowhere else in the statute does it state that any additional information must be informed to a person at the time of evidentiary testing. This point is made abundantly clear in I.C. § 18-8002A(7)(e), which states that a hearing officer must vacate a suspension if "[t]he person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section[,]" or "[t]he person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section[.]" The wording of I.C. § 18-8002A(7)(e) clearly reflects the statutory scheme that statutory information outside of I.C. § 18-8002A(2) need not be informed upon a person at the time of evidentiary testing.

Finally, Wiesenhutter cites case law in which an Administrative License Suspension was overturned because the advisory read to the defendant did not comport to the requirements of the implied consent statute, or the officer gave additional information misstating what was required under the implied consent statute. These cases do not apply to the case at hand because the advisory read to Wiesenhutter mirrored the language required under the implied consent statute. In both of the cases cited by Wiesenhutter, the pertinent sections of the implied consent statute pertaining to the cases reside in I.C. § 18-8002(3). In the present case, I.C. § 18-8002A(2) contains the sections applicable to the case, but the same principle applies that I.C. § 18-8002A(2) represents all the applicable information required to be read to Wiesenhutter, just as I.C. § 18-8002(3) represents all the applicable information required to be read to the defendants in the two cases cited by Wiesenhutter.

Wiesenhutter cites *Cunningham v. State*, 150 Idaho 687, 249 P.3d 880 (Ct. App. 2011) and *Matter of Virgil*, 126 Idaho 946, 895 P.2d 182 (Ct. App. 1995) as examples of cases where "contradictory information provided by law enforcement concerning one's rights and responsibilities under I.C. § § 18-8002 and 18-8002A renders an advisory incomplete, requiring reversal." Petr's. Br. on Review 6. In *Virgil*, the Idaho Court of Appeals held that, "Virgil was not properly advised pursuant to I.C. § 18–8002(3)[,]" because the advisory used by police "did not properly advise Virgil of his rights and duties under Idaho's implied consent statute, I.C. § 18–8002." 126 Idaho at 948, 895 P.2d at 184. In our case, Wiesenhutter concedes that the advisory he was read mirrored the language required under I.C. § 18-9002A(2)(d), the implied consent statute. As described above, this is the only information required to be read to a person at the time of evidentiary testing. For these reasons, *Virgil* does not apply to this case.

Similarly, in *Cunningham* the Idaho Court of Appeals found that, "information provided to *Cunningham* did not comport with that required by I.C. § 18–8002(3)" 150 Idaho at 693, 249 P.3d at 886. Additionally, that Court found that, "the officer's repeated assertions went beyond mild misstatements or passing inaccuracies, which may occur during an advisory involving a presumably intoxicated driver." *Id.* This case also does not apply to the present case for the same reasons that *Virgil* does not apply.

For the reasons stated above, ITD's final order issuing Wiesenhutter an Administrative License Suspension (ALS) is sustained.

B. Wiesenhutter's claim that paragraphs 3(c) and 4 of the advisory, when read together, provided incorrect advice as to the categories of use for restricted noncommercial vehicle driving privileges.

Wiesenhutter argues that:

> Under the statutory scheme in place at the time of Dr. Wisenhutter's test, there were basically two (2) types of "temporary

restricted permits," which for the purpose of this review, we will call "suspension exceptions." These suspension exceptions permit individuals whose licenses are otherwise suspended under I.C. §§ 18-8002 or 18-8002A to drive, for *limited purposes*, during their suspension. Each suspension exception has different qualifications for issuance, and each has a different set of permissible uses.

Petr's. Br. on Review 11. Wiesenhutter goes on to argue that:

> Under 18-8002A(9), the categories of activities are defined as work, school, and *to meet the medical needs of the person or his or her family*. However, the advisement used here incorrectly advised the [sic] that such restricted privileges could be used only to get to work, school, or to attend treatment. By omitting an entire category of uses, the advisory misstated the law, once again rendering the advisory incomplete.

Id. at 4.

> When read together, paragraphs 3(c) and 4 of the advisory lead to the logical, but mistaken conclusion, that the suspension exceptions referenced [in] both paragraphs are the same, and therefore carry the same limitations. Such is not the case. Restricted noncommercial vehicles driving privileges are not limited to getting to and from work, school, and an alcohol treatment programs. Rather, they may be used to meet the medical needs of the driver or a family member. This is not an insignificant distinction, especially to a doctor.
>
> By once again incorrectly advising Dr. Wiesenhutter as to his rights and duties under the implied consent statute, the advisory was rendered incomplete. The department's action must therefore be reversed.

Id. at 13-14. Below is the advisory that was read to Wiesenhutter and the relevant language that is required to be read prior to an evidentiary hearing under §18-8002A. The additional language of the advisory compared to I.C.§ §18-8002A(d), I.C. §18-8002A(e) is in bold for comparison purposes.

> If you complete evidentiary testing and fail to pass the testing and do not request a hearing before the department or do not prevail at the hearing, your driver's license or driving privileges will be suspended and you will be required to install, at your own expense, a state approved ignition interlock system on all motor vehicles you operate for a period to end one (1) year following the end of the suspension period. Your driver's license will be suspended for ninety (90) days if this is your first failure of an evidentiary testing, but you may request restricted non-commercial driving privileges after the first thirty (30) days. The suspension will be for one (1) year if this is your second or more failure of evidentiary testing within five (5) years. You will not be able to obtain a temporary restricted license during

this period. **(Unless you meet the provisions of paragraph 4 below.)**

Ex. 1, at 3.

> If you are admitted to a problem solving court program and have served at least forty-five (45) days of an absolute suspension of driving privileges, you may be eligible for a restricted permit **for non-commercial driving privileges** for the purpose of getting to and from work, school, or an alcohol treatment program, but only if a state approved ignition interlock system has been installed, at your expense, on all vehicles operated by you.

Id.

> If you complete evidentiary testing and fail the testing and do not request a hearing before the department or do not prevail at the hearing, your driver's license will be suspended and you will be required to install, at your expense, a state approved ignition interlock system on all motor vehicles you operate for a period to end one (1) year following the end of the suspension period. This suspension will be for ninety (90) days if this is your first failure of evidentiary testing, but you may request restricted noncommercial vehicle driving privileges after the first thirty (30) days. The suspension will be for one (1) year if this is your second failure of evidentiary testing within five (5) years. You will not be able to obtain a temporary restricted license during that period.

I.C. §18-8002A(2)(d),

> However, if you are admitted to a problem solving court program and have served at least forty-five (45) days of an absolute suspension of driving privileges, you may be eligible for a restricted permit for the purpose of getting to and from work, school or an alcohol treatment program, but only if you install, at your expense, a state approved ignition interlock system on all motor vehicles you operate[.]

I.C. §18-8002A(2)(e).

In response to Wiesenhutter's argument, ITD largely rests on the argument that the hearing officer's, "findings of fact are supported by substantial evidence and binding on this Court." Resp't. Br. 10. Additionally, "The legal conclusions of the hearing officer are supported by Idaho law." *Id.*

The hearing officer found that,

All information statutorily mandated to be given to a person pursuant to

> Idaho Code §18-8002 (Refusal Statute) and Idaho Code §18-8002A (Administrative License Suspension statute) is substantially included in the Notice of Suspension advisory form, and was asserted to Wiesenhutter at the time of evidentiary testing.

Agency Record 50.

> All notification provided Wiesenhutter by way of the audio advisory were accurate advisements, and Wiesenhutter by way of the audio advisory were accurate advisements, and Wiesenhutter was not provided with any misinformation nor was he provided with any information contrary to Idaho Code §§18-8002 and 18-8002A.

Id.

In this case, the advisory Wiesenhutter received met the requirement to substantially inform him of the activities allowed under the permitting schemes as required by §§18-8002A(2)(d) and 18-8002A(2)(e).

Wiesenhutter's argument does not come close to the deviations required to run afoul of the advisory requirements of I.C. § 18-8002A(2). The cases cited by Wiesenhutter (*Cunningham* and *Virgil*) involve incorrect or contradictory statements within an advisory read to or expounded upon by the officer. In the present case, the addition of the phrase "[u]nless you meet the provisions of paragraph 4 below" is not incorrect or contradictory. It is a true statement. The phrase illuminates the fact that there is a way to receive driving privileges if the requirements of the next paragraph are satisfied. The next paragraph in question mirrors the advisory requirements of I.C. §18-8002A(2)(e), with the exception of calling the permit, outlined in 18-8002A(2)(e), a "restricted permit **for non-commercial driving privileges**," instead of simply a restricted permit. Idaho Code 18-8002A requires that a person be "informed substantially" of the information found in I.C. §18-8002A(2)(e), but this information "need not be informed verbatim." Simply calling the permitting scheme found in I.C. §18-8002A(2)(e) by the same name as that found in I.C. §18-8002A(2)(d) is

inconsequential to the question of whether Wiesenhutter was substantially informed under the statute. Idaho Code 18-8002A(2)(e) lists activities allowed under its permitting scheme, and I.C. §18-8002A(2)(d) is silent on the activities allowed under its permitting scheme. The activities permitted under I.C. §18-8002A(2)(d) are found under I.C. §18-8002A(9), and the language of I.C. §18-8002A(9) is not required to be informed to a person at the time of evidentiary testing. Just because the advisory uses the same name for both permitting schemes does not mean that Wiesenhutter should conclude each permitting scheme has the same restrictions on activities. Regardless of what Wiesenhutter concluded at the time of evidentiary testing, the advisory clearly substantially informed Wiesenhutter of the language required under 18-8002A and therefore met the statutory requirements under the implied consent statute.

IV. CONCLUSION AND ORDER.

For the reasons stated above, the decision of respondent ITD issuing petitioner Craig W. Wiesenhutter an Administrative License Suspension is affirmed.

IT IS HEREBY ORDERED the decision of the respondent Idaho Transportation Department (ITD) issuing Wiesenhutter an Administrative License Suspension (ALS) is AFFIRMED.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 30th day of March, 2020, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

Dominic M. Bartoletta
~~Fax: (509) 325-3710~~ dbartolettae hotmail.com

Susan K. Servick
susan@servicklaw.com

Secretary