SUMMARY
June 29, 2023

2023COA59

No. 22CA0761, *Jansma v. Colo. Dep't of Revenue, Motor Vehicle Division* — Vehicles and Traffic — Drivers' Licenses — Revocation of License Based on Administrative Determination — Actions of Law Enforcement Officer — Probable Cause to Believe Person Should be Subject to License Revocation for Excess BAC or Refusal

Addressing a novel issue, a division of the court of appeals considers whether a bare assertion by a law enforcement officer, made by checking boxes in a form affidavit, that a driver refused a chemical testing request provided sufficient evidence to support the Department of Revenue revoking a driver's license under section 42-2-126(3)(c), C.R.S. 2022. The division holds that section 42-2-126(5)(a) requires the Department of Revenue to present evidence sufficient to support a factual finding that the law enforcement officer had probable cause to believe the driver should be subject to driver's license revocation.

COLORADO COURT OF APPEALS **2023COA59**

Court of Appeals No. 22CA0761
Larimer County District Court No. 22CV30214
Honorable Gregory M. Lammons, Judge

Maggie Jansma,

Plaintiff-Appellant,

v.

Colorado Department of Revenue, Motor Vehicle Division,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE FURMAN
Tow and Johnson, JJ., concur

Announced June 29, 2023

The Life & Liberty Law Office, Sarah Schielke, Loveland, Colorado, for
Plaintiff-Appellant

Philip J. Weiser, Attorney General, Danny Rheiner, Assistant Attorney General,
Denver, Colorado, for Defendant-Appellee

¶ 1 Plaintiff, Maggie Jansma, appeals the district court's judgment affirming the revocation of her driver's license by defendant, the Department of Revenue, Motor Vehicle Division (Department). She contends that the evidence presented by the Department at her hearing was insufficient to support the hearing officer's factual findings, and therefore the hearing officer's order upholding the Department's revocation was unsupported by the evidence and arbitrary and capricious. We agree with Jansma. So we reverse the judgment and remand the case with directions to reverse the revocation.

I. The Car Accident

¶ 2 One night in January 2022, a witness spotted Jansma's SUV "speeding" at an estimated sixty miles per hour or more "in icy conditions." Shortly thereafter, her SUV "sp[u]n out" and struck another driver's car. The witness reported seeing Jansma unsuccessfully try to drive away from the scene of the accident. And when she tried to get out of her vehicle, the other driver and the witness noticed that Jansma seemed intoxicated. The police were called, and two officers responded to the accident.

¶ 3 The investigating officer arrived first and approached Jansma, speaking with her while she sat in the driver's seat of her SUV. In his written report, he noted various indicia of intoxication and Jansma's behavior during the investigation. He observed that (1) she "was confused"; (2) she "was slurring heavily and could not complete a sentence"; (3) he "could smell the odor of alcohol emitting from her breath"; and (4) "her eyes were bloodshot and watery." Based on his observations, his training and experience, and "his personal knowledge of Jansma" (a police report noted that the investigating officer knew Jansma "previously" due to her relationship with the officer and the officer's wife), he concluded that she was intoxicated. She admitted to drinking two margaritas, but she refused to perform roadside maneuvers. Although she was generally uncooperative with the investigating officer, she eventually agreed to get out of her SUV. And when she did, he noticed that "she was unsteady and had trouble maintaining [her] balance." So he placed Jansma under arrest for driving under the influence of alcohol (DUI).

¶ 4 The transporting officer arrived. In his own written report, he described her at-times-contentious behavior during the interaction and her post-arrest transport, along with his observations that led him to conclude based on his training and experience that she was "obviously intoxicated."

¶ 5 Neither officer filled out — or served Jansma with — an "express consent affidavit and notice of revocation" form during this encounter, nor did they confiscate her driver's license. And while both officers filed detailed reports on their interactions with Jansma, neither report mentioned either officer giving an express consent advisement to Jansma, one of them requesting that she undergo chemical testing, or her refusing to take such a test.

¶ 6 A few days after her DUI arrest, Jansma contacted the Department to inquire whether it was issuing an express consent revocation notice and to ask for a hearing if so. Almost two weeks from the day of the incident, the transporting officer filled out an express consent affidavit and delivered it to the Department. But the express consent affidavit was incomplete; the officer left the section of the form affidavit that asks "what did officer see or hear" in connection with a refusal to take a chemical test blank. The Department served Jansma with a notice of revocation, and she timely requested a hearing.

II. The Revocation Hearing

¶ 7 At the revocation hearing, only Jansma's counsel appeared. Without objection, the Department's Exhibit A was entered into evidence. Exhibit A consisted of the express consent affidavit and notice of revocation, a police report (including both officers' written reports), a custody report, an affidavit for warrantless arrest, two vehicle tow reports, and a witness statement. The total evidence documenting "refusal" was in the express consent affidavit, and it consisted of this:

You are hereby notified that on this date, you were asked to submit to a test or tests to determine the alcohol and/or drug concentration within your system. [§42-4-1301.1, C.R.S.]. The following constitute PROBABLE CAUSE to believe you were driving a motor vehicle while impaired by or under the influence of alcohol or drugs, or with a blood or breath alcohol content in excess of the limits imposed by law.

At 2:25 AM on 01/06/2022 (date) you were operating a motor vehicle at: (location) Approximately S. Taft Ave & 14th St SW, Loveland, Co 80537 You were contacted for: Motor vehicle Crash (reason for contact)	On contact you had the following: **BREATH** ☐ Normal ☒ Odor of alcoholic **EYES** ☐ normal ☒ bloodshot ☐ glassy ☒ watery ☐ other **SPEECH** ☐ normal ☒ slurred ☐ distinct ☐ other **BALANCE** ☐ normal ☒ unsteady ☐ falling ☐ other	Voluntary roadside maneuvers ☐ Yes ☒ No ☐ refused Satisfactorily completed as compared to a sober person ☐ Yes ☐ No Colorado Express Consent Law read or explained to respondent ☒ Yes ☐ No ☒ refused (what did officer see or hear)	Chemical test chosen ☐ blood ☐ breath Time of test/blood draw AM PM on Date of Stop **B.A.C.**

ORDER OF REVOCATION (§42-2-126 C.R.S.)

THIS IS YOUR OFFICIAL ORDER. Unless you make a written request for hearing, surrender your license, and receive a permit from the Department as explained below, this order takes effect on the eighth (8th) day following the Date of Notice*. This order remains in effect until you serve the period of revocation, comply with the provisions of **§42-2-132 C.R.S.**, and complete the reinstatement process. Following reinstatement, you may have to pass a written and drive test before receiving a new driver's license.

[X] **REFUSAL.** Because you refused to take or complete, or to cooperate with any testing or tests of your blood, breath, saliva, and/or urine, your driver's license and/or driving privilege is hereby revoked. (FIRST OFFENSE - one year, three years if hazardous material violation. SECOND OFFENSE - two years, life if commercial licensee. THIRD OR SUBSEQUENT OFFENSE - three years, life if commercial licensee.)

And the only evidence in Exhibit A documenting Jansma's interaction with law enforcement that night consisted of the officers' written reports and the substantially similar affidavit for warrantless arrest.

¶ 8 Jansma's counsel presented no evidence at the hearing but argued that Exhibit A was insufficient evidence to establish that an express consent advisement was given, that chemical testing was requested, or that what Jansma said or did in response to any advisement or request constituted a refusal.

¶ 9 Relying only on the contents of Exhibit A, the hearing officer found that Jansma had been advised on the express consent law and that she had refused chemical testing. The hearing officer also found that Jansma refused to take a chemical test of her blood or breath "by acting uncooperative and combative with law enforcement." And based on these findings, the hearing officer upheld the Department's one-year revocation of Jansma's driver's license under section 42-2-126(3)(c), C.R.S. 2022.

¶ 10 Jansma sought judicial review in the district court, arguing again that the evidence was insufficient to support the administrative action because it only included legal conclusions without factual details to support them. The district court affirmed the Department's revocation. She appeals, raising substantially the same arguments.

¶ 11 Her appeal poses this question: Does a police officer's statement that a legal standard was met, alone, sufficiently support a factual finding that the officer had probable cause to revoke a driver's license? In this case, we conclude that it does not.

III. Sufficiency of the Evidence

A. Express Consent Law

¶ 12 Anyone who drives a motor vehicle in Colorado is required to take a blood or breath test when requested by a law enforcement officer having probable cause to believe the driver is under the influence of alcohol. § 42-4-1301.1(2)(a)(I), C.R.S. 2022. As relevant here, if a driver refuses "to take or complete, or to cooperate in the completing of, a test of the" driver's blood or breath as required by statute, § 42-2-126(2)(h), that refusal shall result in the revocation of the driver's license for at least one year, § 42-2-126(3)(c)(I).

> If a law enforcement officer has probable cause to believe that a person should be subject to license revocation for excess BAC [blood or breath alcohol content] or refusal, the law enforcement officer shall forward to the department an affidavit containing information relevant to the legal issues and facts that shall be considered by the department to determine

> whether the person's license should be revoked as provided in subsection (3) of this section.

§ 42-2-126(5)(a).

> Upon receipt of an affidavit of a law enforcement officer and the relevant documents required by paragraph (a) of subsection (5) of this section, the department shall determine whether the person's license should be revoked under subsection (3) of this section. The determination shall be based upon the information contained in the affidavit and the relevant documents submitted to the department, and the determination shall be final unless a hearing is requested and held as provided in subsection (8) of this section.

§ 42-2-126(6)(a)

¶ 13 The motor vehicle code does not define the term affidavit. "When a term is not defined in a statute and the statute is unambiguous, we give effect to the statute's plain and ordinary meaning and look no further." *Dep't of Revenue v. Rowland*, 2018 CO 1, ¶ 7 (citing *Francen v. Colo. Dep't of Revenue*, 2014 CO 54, ¶ 8). Black's Law Dictionary defines affidavit as "[a] voluntary *declaration of facts* written down and sworn to by a declarant, usu[ally] before an officer authorized to administer oaths." Black's Law Dictionary 71 (11th ed. 2019) (emphasis added).

¶ 14 "Refusal" is defined in section 42-2-126(2)(h) as "refusing to take or complete, or to cooperate in the completing of, a test of the person's blood, breath, saliva, or urine as required by section 18-3-106(4) or 18-3-205(4), C.R.S. [2022], or section 42-4-1301.1(2)." "[A] finding of cooperation or non-cooperation requires that the court look to a driver's statements and behavior indicating willingness or unwillingness to submit to testing." *Gallion v. Colo. Dep't of Revenue*, 171 P.3d 217, 222 (Colo. 2007) (citing *Dolan v. Rust*, 195 Colo. 173, 175, 576 P.2d 560, 562 (1978)).

B. Standard of Review

¶ 15 Under section 42-2-126(9)(b), a reviewing court may reverse the Department's revocation action if, based on the administrative record, the court determines that the Department acted in an arbitrary and capricious manner, exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, made clearly erroneous factual findings, or made a determination that is unsupported by substantial evidence in the record. § 24-4-106(7)(a), (b), C.R.S. 2022; *see* § 42-2-126(11) (applying § 24-4-106 to review of driver's license revocation to the extent statutes are consistent). A hearing officer's decision is arbitrary and capricious if the record as a whole lacks substantial evidence to support the decision. *See Charnes v. Robinson*, 772 P.2d 62, 68 (Colo. 1989). "Substantial evidence is the quantum of probative evidence that a fact finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Black Diamond Fund, LLLP v. Joseph*, 211 P.3d 727, 730 (Colo. App. 2009).

¶ 16 "In general, . . . evidentiary facts are the detailed factual or historical findings upon which a legal determination rests." *State Bd. of Med. Exam'rs v. McCroskey*, 880 P.2d 1188, 1193 (Colo. 1994).

> In contrast, findings of ultimate fact involve a conclusion of law, or at least a mixed question of law and fact, and settle the rights and liabilities of the parties. Unlike evidentiary facts, ultimate conclusions of fact usually are phrased in the language of the controlling statute or legal standard.

Id. (citations omitted).

¶ 17 "A reviewing court may not disturb a hearing officer's factual findings unless they are 'clearly erroneous on the whole record.'" *Neppl v. Colo. Dep't of Revenue*, 2019 COA 29, ¶ 9 (quoting § 24-4-106(7)(b)(VII)).

¶ 18 In reviewing revocation proceedings, we stand in the same position as the district court. *Long v. Colo. Dep't of Revenue*, 2012 COA 130, ¶ 7. We review the hearing officer's determinations of law de novo. *Hanson v. Colo. Dep't of Revenue*, 2012 COA 143, ¶ 14, *aff'd*, 2014 CO 55.

C. Analysis

¶ 19 As noted, the only evidence entered at the hearing was Exhibit A. Exhibit A included the transporting officer's express consent affidavit, in which the officer swore, by checking boxes next to the corresponding preprinted fields, as follows:

> (1) The "Colorado Express Consent Law [was] read or explained to" Jansma and she "refused."
>
> (2) She "refused to take or complete, or to cooperate with any testing or tests of [her] blood, breath, saliva, and/or urine."

¶ 20 Exhibit A also included the officers' written reports on their encounter with Jansma, along with an affidavit for warrantless arrest that contained substantially the same information as the officers' reports. These documents provided a detailed account of Jansma's behavior and responses during the encounter, but, as noted, they do not reference an advisement of rights under the express consent law, a chemical testing request made by either officer, or the circumstances supporting refusal by Jansma.

¶ 21 The hearing officer made two pertinent findings based on the affidavits and officers' reports: (1) the transporting officer advised Jansma of Colorado's express consent statute and (2) Jansma "refused to take a chemical test of blood or breath by acting uncooperative and combative with law enforcement."

¶ 22 Jansma challenges these findings, arguing that because the express consent affidavit merely asserted legal conclusions without factual support and the officers' written reports and warrantless arrest affidavit did not describe a chemical testing refusal, the evidence was insufficient to meet the Department's burden of proof on, among other things, establishing that Jansma refused chemical testing.

¶ 23 Unsurprisingly, the Department disagrees and contends that the transporting officer's express consent affidavit satisfied the Department's burden of proof on showing a chemical testing refusal. And because no record evidence contradicted the affidavit, the Department was required to order the revocation, and the hearing officer could properly uphold it. We disagree with the Department.

¶ 24 A prerequisite to a law enforcement officer forwarding a revocation affidavit to the Department is that the officer has probable cause to believe that a driver should be subject to revocation. § 42-2-126(5)(a) ("If a law enforcement officer has probable cause to believe that a person should be subject to license revocation for excess BAC or refusal, the law enforcement officer shall forward to the department an affidavit . . . ."). And in a revocation proceeding, the Department has the burden of proof. *See Schocke v. State, Dep't of Revenue*, 719 P.2d 361, 363 (Colo. App. 1986). So to uphold a revocation, the Department must present at least sufficient evidence that a hearing officer could find a law enforcement officer had probable cause to believe that either the driver's BAC exceeded the limit or the driver refused a chemical testing request. *See* § 42-2-126(5)(a).

¶ 25 Of the documents making up Exhibit A, there are three that could contain information relevant to this revocation for refusing chemical testing: the express consent affidavit, the police reports, and the warrantless arrest affidavit.

¶ 26 The express consent affidavit is the only part of Exhibit A that references an advisement, a chemical testing request, or a corresponding refusal. The substance of this express consent affidavit form's "refusal" sections is composed of either language pulled directly from the controlling statute, *see* § 42-2-126(2)(h), or a bare assertion that the testing request was "refused," a legal standard in this context, *see Gallion*, 171 P.3d at 222-23 (discussing refusal determinations). And further, the "what did officer see or hear" portion of the form was left blank and did not include any of the transporting officer's relevant observations related to refusal of the chemical test. And an officer's observations of a driver's indicia of intoxication cannot substitute for facts detailing the circumstances of refusal. While a completed affidavit could have provided facts and circumstances sufficient to support a finding that the officer had probable cause to initiate a license revocation based on refusal, this affidavit provided no such facts or circumstances. *Cf. Baldwin v. Huber*, 223 P.3d 150, 153 (Colo. App. 2009) ("The police have probable cause to arrest a driver for committing an alcohol-related driving offense when the *facts and circumstances* known to the police are sufficient to warrant the belief by a reasonable and prudent person that the driver has committed such an offense.") (emphasis added).

¶ 27 Similarly, the officers' reports and the warrantless arrest affidavit indicate that Jansma had a poor attitude while interacting with the officers. But in the absence of additional testimony or documentary evidence connecting this poor attitude to an advisement and refusal, the officers' reports do not support the hearing officer's factual finding that Jansma "refused to take a chemical test of blood or breath by acting uncooperative and combative with law enforcement." *See Gallion*, 171 P.3d at 222.

¶ 28 So we conclude that (1) the express consent affidavit contains only bare assertions of ultimate fact on the issue of refusal and (2) the police report and warrantless arrest affidavit provide no factual support for the hearing officer's findings on refusal, and thus the hearing officer's finding that Jansma refused testing by being "uncooperative and combative" with law enforcement officers is unsupported by the record and clearly erroneous. *See Neppl*, ¶ 9; *McCroskey*, 880 P.2d at 1193. Because we conclude that the hearing officer's factual findings on refusal were clearly erroneous, we must also conclude that the Department failed to meet its evidentiary burden. *See* § 24-4-106(7)(b)(VI); *see also* § 42-2-126(5)(a); *Schocke*, 719 P.2d at 363.

¶ 29 Accordingly, the hearing officer's ultimate legal conclusion that Jansma "did not agree to cooperate in the taking and completing of said [chemical] test or refused to take said test" is unsupported by substantial evidence in the record, *see* § 24-4-106(7)(b)(VII), so the order upholding the driver's license revocation was arbitrary and capricious. *See Charnes*, 772 P.2d at 68; *Neppl*, ¶ 9; *see also* Black's Law Dictionary at 129 (An "arbitrary" judicial decision is one "founded on prejudice or preference rather than on reason or fact."); *id.* at 261 (A "capricious" decree is one that is "contrary to the evidence or established rules of law."). And therefore the district court's judgment affirming the hearing officer's order was also erroneous and must be reversed. § 42-2-126(9)(b).

¶ 30 The Department's reliance on *Baldwin v. Huber* to argue that the conclusory statements on refusal in the express consent affidavit satisfied its burden of proof in this revocation proceeding is misplaced. In *Baldwin*, the officer submitted two pertinent records to the Department: an affidavit form containing a general declaration that the driver was stopped for a "traffic violation" and a criminal summons that contained a second, more specific statement that the driver's traffic violation was weaving and accompanying relevant details such as the time and place where the officer observed the weaving and the direction that the vehicle was traveling. 223 P.3d at 151. But here the transporting officer provided no such description of a chemical testing request to Jansma and her refusal accompanied by relevant details, not even the brief description of what the officer saw or heard as requested by the form affidavit. Thus the division's holding in *Baldwin* does not control the outcome of this case.

¶ 31 We certainly would not support a probable cause finding based on a law enforcement officer's bare assertion, absent factual details, that the officer had probable cause to believe a driver's BAC exceeded the legal limit. *Cf. Franklin v. Colo. Dep't of Revenue*, 728 P.2d 391, 392-93 (Colo. App. 1986) (concluding the Department had sufficient information to revoke driver's license for excess BAC "[n]otwithstanding the fact that the form [affidavit] was incomplete" and did not specify the basis for revocation because the Department's revocation notice was accompanied by chemical blood test results and other documents). Likewise, in this case we cannot uphold revocation based only on the transporting officer's bare assertion that Jansma refused testing in the absence of factual details. To support a license revocation, the Department must — at a minimum — put forth factual evidence sufficient to show a law enforcement officer had probable cause to subject a driver to license revocation, and a presentation of the facts and circumstances known to the officer is necessary to make such a showing. *See* § 42-2-126(5)(a); *Schocke*, 719 P.2d at 363; *cf. Baldwin*, 223 P.3d at 153.

¶ 32 Because we agree with Jansma that the evidence was insufficient to establish that she refused a chemical testing request, we need not reach her remaining contentions of error related to the sufficiency of the evidence that an advisement was given or a testing request was timely.

IV. Conclusion

¶ 33 The judgment is reversed, and the case is remanded with directions that the Department's driver's license revocation order be reversed.

JUDGE TOW and JUDGE JOHNSON concur.