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COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 (720) 625-5150	
Larimer County District Court Honorable Judge Gregory Lammons, Division 5B Case Number 22CV30214	
MAGGIE JANSMA, **Plaintiff-Appellant,** vs. COLORADO DEPARTMENT OF REVENUE, MOTOR VEHICLE DIVISION, **Defendant-Appellee.**	▲ COURT USE ONLY ▲
Attorney for Appellant: Sarah Schielke, #42077 The Life & Liberty Law Office 1209 Cleveland Avenue Loveland, CO 80537 P: (970) 493-1980 F: (970) 797-4008 sarah@lifeandlibertylaw.com	Case Number: 2022CA761
REPLY BRIEF	

Plaintiff-Appellant Maggie Jansma (hereinafter "Appellant"), by and through her counsel, Sarah Schielke, of The Life & Liberty Law Office, hereby submits the following

Reply Brief:

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certify that this brief complies with all the requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with C.A.R. 28(g). Excluding the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block, it contains 1,621 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Sarah Schielke
Counsel for Appellant

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ARGUMENT

1. The Department's argument is a tautology. A legal determination of "refusal" cannot be made by the Department based solely on the fact that the police officer claims to have made a legal determination of "refusal."

Under § 42-2-126(5)(a), C.R.S., a law enforcement officer having probable cause to believe that a person is subject to license revocation for refusal to take a chemical test is required to forward to the Department a completed express consent affidavit form containing "information relevant to the legal issues and facts that shall be considered by the [D]epartment to determine whether the person's license should be revoked." Id.

In literally every refusal case decided by the Colorado Court of Appeals or Colorado Supreme Court since the express consent statutory framework was implemented over fifty years ago, the "legal issues and facts" to be determined by a hearing officer in a refusal case have been set forth, time and time again, as follows:

> In deciding whether a driver refused to submit to testing, "the trier of fact should consider the driver's words and other manifestations of willingness or unwillingness to take the test." *Gallion,* 171 P.3d at 220 (internal quotation marks omitted). An objective standard applies to determine whether a driver's statements or behavior constituted an outright refusal or a refusal by noncooperation. *Id.*

Haney v. Colorado Dep't of Revenue, Div. of Motor Vehicles, 361 P.3d 1093, 1096 (Colo. App. 2015). A hearing officer's finding on the refusal issue must be based on application of the proper objective legal standards and resolution of conflicting inferences from the evidence. *See Poe v. Dep't of Revenue,* 859 P.2d 906, 908 (Colo. App. 1993).

The Department contends in its Answer Brief that a police officer may make a legal determination of refusal in the field and that the Department can rely on that legal determination, and make the legal determination again, without hearing a single fact to support it. Their argument goes as follows: The police officer stamped a form "refusal." At the hearing, no facts were alleged or presented relating to a chemical test request or describing an alleged refusal to complete a chemical test; *but*, the officer *had* stamped a form "refusal." This fact of the stamping, the Department argues, was sufficient for it to simply double-stamp the original stamp. ("Our refusal determination is factually supported by evidence of a refusal determination," it essentially goes). Now, on appeal, the Department continues to concede the absence of actual factual record support for the first stamp, and instead is asking the Court to ignore all that and just triple stamp their double stamp.

This echo chamber of legal determinations made upon legal determinations with nary an injection of a single actual fact to evaluate the premise is improper circular reasoning. Circular reasoning (or circular logic) is a logical fallacy in which the reasoner begins with what they are trying to end with. (Here: "The refusal determination is supported by the fact of a refusal determination."). It is a pragmatic defect in an argument whereby the premises are just as much in need of proof or evidence as the conclusion. It is antithetical to all notions of fairness and due process.

The problem and fallacy of the Department's argument is well illustrated by examining how it would work in other contexts. For example, imagine a suppression hearing. A police officer takes the stand and states, "I initiated a traffic stop because I had reasonable suspicion the driver committed a crime." There is no further testimony. By the Department's argument here, **the trial court may rely on the "fact" of the officer testifying under oath that he had reasonable suspicion and conclude from this alone that reasonable suspicion existed for the stop**. The "fact" supporting a legal determination that reasonable suspicion existed would be that the police officer said that reasonable suspicion existed. Next imagine a probation revocation hearing. The probation officer takes the stand and says, "the defendant failed to comply with one of the terms of his probation." There is no further testimony. By the Department's argument here, the trial court may on that record alone render a legal determination that the defendant violated his probation. "The probation officer said he violated it, under oath," the trial court could say, and, according to the Department, that "fact" would be more than enough record support for the conclusion.

In deciding whether a driver refused to submit to testing, "the trier of fact should consider the driver's words and other manifestations of willingness or unwillingness to take the test." *Gallion v. Colo. Dep't of Revenue,* 171 P.3d 217, 220 (Colo. 2007) (internal quotation marks omitted). This objective standard, notably, does *not* suggest the trier of fact should merely "consider whether the police officer checked the box for

'refusal.'" There must be actual facts, articulated or insinuated *somewhere*, from which one may generate some basic factual premise upon which a "refusal" legal determination can rest. This is not a high bar. Indeed it is often satisfied just by the officer filling in a few words in the blank lines next to the "Refused" box on the Express Consent Affidavit "describing what [they] saw or heard" as the form directs. More typically it is satisfied with just a few sentences in the officer's written report, noting when they made the request for a chemical test and what the driver said or did in response. But the officer here wrote nothing on the form and said nothing in his report.[1] With no facts, there can be no finding. The officer's conclusion of refusal by checking a box simply cannot, entirely on its own, constitute "substantial evidence" supporting a conclusion of refusal. Permitting such circular analytical reasoning to suffice on appeal would serve to generally deter fact-finding by the Department in future hearings, and it would also operate to prospectively foreclose the entire notion of meaningful appellate review for future litigants.

[1] And the officers' reports here actually describe their entire encounter with Ms. Jansma in great detail. Despite all the fastidious narrative detail, still, neither report describes, mentions, or alludes to any facts, moments, or junctures where there may have been an exchange evidencing a chemical test request or refusal.

2. The officer's failure to contemporaneously serve Ms. Jansma with the Notice of Revocation as required by law is "substantial evidence" that a timely chemical test was never requested.

The Department did not address this argument in their Answer Brief, yet it's one of the most glaring concerns Ms. Jansma has raised in this case. From *Schulte v. Dep't of Revenue*, 488 P.3d 419, 422-23 (Colo. App. 2018):

> Section 42-2-126, which we shall call "the revocation statute," allows the Department of Revenue to revoke a person's driver's license for refusing to complete a test. § 42-2-126(3)(c). If a law enforcement officer determines that a person has refused to submit to a test, the officer "shall personally serve a notice of revocation on" him or her. § 42-2-126(5)(b)(I). After serving notice, the officer must "take possession of any driver's license ... that the person holds." § 42-2-126(5)(b)(II).

This bears repeating. By law, "[i]if a law enforcement officer determines that a person has refused to submit to a test, the officer *shall* personally serve a notice of revocation on" the driver and take their license. *Id.* Here, the officer did *not* personally serve a notice of revocation on the driver *or* take her license. Utilizing appropriate deductive reasoning (*not* inductive reasoning, like that discussed *supra*), this indicates one of two things: (1) that the officer did *not* determine that Ms. Jansma refused to submit to a test; or (2) that the officer violated the law and his obligations under it. Those are the only two logical options. Most impactful here has to be the fact that regardless which option the hearing officer went with, <u>both</u> necessarily weigh *against* a refusal determination factually. Option (1) means that the officer either never requested a test or did not determine Ms. Jansma refused a test. Option (2) means that the officer is willing to violate the law or at

least be fast-and-loose with his obligations under the law, which renders his many-weeks-belated checking of the "refused" box on the not-contemporaneously-served express consent affidavit form not a particularly compelling assertion. In a case where the record contains zero narrative facts describing any alleged chemical test request or chemical test refusal, the fact of the officer's failure to follow any of the procedures required by law where there is an alleged refusal to test does not help make the Department's case one bit. Quite to the contrary, it is an unusual and aberrant event which – especially in the context of 20+ pages of police report narratives from this encounter which *also* never mention a chemical test request or refusal – is "substantial evidence" that Ms. Jansma was never asked to complete a chemical test at all.

CONCLUSION

"A hearing officer's finding of fact is arbitrary and capricious if the record as a whole shows there is no substantial evidence to support the decision." *Fallon v. Colo. Dep't of Revenue*, 250 P.3d 691, 693 (Colo. App. 2010). The Department argues that it can survive this rather low bar of appellate review by arguing here that its finding of a refusal can be entirely factually supported by the police officer's finding of refusal, and nothing more. Respectfully, the Department is wrong. Due process, Colorado law, common sense, and basic notions of fairness all require a little bit more than "A is B because A is B." **The factual evidence supporting a legal conclusion cannot be entirely supplied by the fact that someone made the legal conclusion**. To permit

otherwise wouldn't just render Department hearings pointless; it would render all of appellate review pointless.

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CERTIFICATE OF SERVICE

This certifies that on September 21, 2022, a true and accurate copy of the foregoing **Reply Brief** was provided to the following parties via ICCES e-service:

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/s/ Sarah Schielke