PARTIES/ATTORNEYS

Plaintiff	Joseph James DeLeon	William Makler
Defendant	Steve Gordon, Director of Department of Motor Vehicles	Rob Bonta Gabrielle H. Brumbach Arang Chun

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RECOMMENDATION

For all the reasons discussed below, the court finds the DS 367, signed under penalty of perjury by Officer Zirate, to be admissible and sufficient to support the findings of the hearing officer. Accordingly, the petition for writ of administrative mandamus is denied. Respondent is directed to prepare the proposed judgment.

Factual and Procedural Background

1. The Arrest

On October 10, 2022, at approximately 11:40 PM, Officer M. Zirate and his partner Officer H. Hinojosa stopped Joseph James DeLeon's vehicle for expired tags while on patrol on eastbound SR-154, Santa Barbara, CA. (AR011, AR018.) Petitioner's vehicle came to an abrupt stop, nearly hitting a guardrail on the right-hand shoulder of the road. (AR011, AR018.) Officer Zirate observed DeLeon to have bloodshot/watery eyes, an unsteady gait, and slurred speech. He could smell both a strong odor of alcohol and marijuana emitting from the vehicle. (AR018.) Petitioner admitted to drinking alcohol and using marijuana. (AR016.) Subsequently, Petitioner poorly performed and failed to complete the field sobriety tests ("FST's"). (AR017.) Officer Zirate further advised Petitioner of the P.A.S. Admonition that requests, but does not require Petitioner to provide a breath, blood, or urine sample to assist him in determining whether Petitioner is intoxicated. (AR014, AR016, AR017.)

Petitioner refused. (AR009-10, AR016-17.) Officer Zirate formed the opinion that Petitioner was driving under the influence of alcohol and marijuana and placed Petitioner under arrest for driving under the influence of alcohol and drugs. (AR 009, AR013, AR019-20.) Officer Zirate obtained a warrant to draw Petitioner's blood for a sample. (AR019.) AMR Paramedic M. Yarbrough obtained the blood sample.

(AR019.) Subsequently, Petitioner was booked without incident. (AR019.) As a consequence, his license was suspended for failure to submit to a chemical test of the alcohol or drug content of his blood pursuant to Vehicle Code[1] section 13353.

2. DMV Upholds Suspension Following Administrative Hearing

At an administrative hearing before the Department of Motor Vehicles (DMV), DeLeon challenged the suspension of his license and claimed there was insufficient evidence that he had been admonished about the chemical test. He argued that (1) the "DUI probation" notation next to petitioner's testing refusal meant the officer asked petitioner whether he would submit to a PAS test after "possibly being told that he was required to so because he was on probation" where there was no evidence in the record that Petitioner was on probation and "very plausibly confused" Petitioner; 2) Officer Zirate placed his name and badge number in a section that asks the officer to list the name of the officer if a different officer read the admonition; 3) Officer Zirate may have been confused and read both the chemical test admonition and drug admonition to the Petitioner and possibly confused Petitioner; and 4) Officer Zirate initialed the narrative summary even though the instructions state Officer Zirate should provide an original signature. (AR030-032.) No witnesses were presented by either side.

On December 26, 2023, the DMV served its decision upholding the suspension. (AR003-5.) With regard to petitioner's evidentiary objections, Hearing Officer Haley considered, but rejected, petitioner's arguments for lack of evidence. (AR004.) Hearing Officer Haley determined: 1) the peace officer had reasonable cause to believe petitioner was driving a motor vehicle in violation of Vehicle Code section 23140,[2] 23152,[3] or 23153[4]; 2) petitioner was placed under lawful arrest; 3) petitioner was admonished about the consequences of refusing or failing to complete a chemical test; and 4) petitioner did refuse or fail to complete a chemical test. (AR003-5.) Hearing Officer Haley found that petitioner's driving privilege should therefore be suspended from January 9, 2024 through January 8, 2025. (AR001.)[5]

Petitioner timely challenges the decision in this court by writ of mandate. (§ 13559.) On March 21, 2024, this court stayed petitioner's suspension pending entry

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[1] All statutory references are to the Vehicle Code except where otherwise indicated.
[2] Declaring it unlawful for a person under the age of 21 who has 0.05 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.
[3] Declaring it unlawful to drive under the influence of drugs or alcohol.
[4] Driving under the influence and causing bodily injury to another person.
[5] Section 13353 subdivision (a)(1) provides: "If a person refuses the officer's request to submit to, or fails to complete, a chemical test or tests pursuant to Section 23612, upon receipt of the officer's sworn statement that the officer had reasonable cause to believe the person had been driving a motor vehicle in violation of Section 23140, 23152, or 23153, and that the person had refused to submit to, or did not complete, the test or tests after being requested by the officer, the department shall do one of the following: (1) Suspend the person's privilege to operate a motor vehicle for a period of one year."

of judgment on the petition. (Code Civ. Proc., § 1094.5, subd. (g).) The administrative record has been filed and the matter has been fully briefed.

Discussion

1. Relevant Legal Standards

In ruling on a petition for a writ of mandate seeking to set aside a driver's license suspension, the trial court uses its independent judgment to determine whether the weight of the evidence supports the administrative decision. (*Lake v. Reed* (1997) 16 Cal.4th 448, 456; *Murphey v. Shiomoto* (2017) 13 Cal.App.5th 1052, 1068–1069 (*Murphey*).) Under the independent judgment test, the trial court determines whether the administrative hearing officer abused his or her discretion because the findings are not supported by the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816–817.) "Even exercising its independent judgment, the trial court still 'must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." ' (*Manriquez v. Gourley* (2003) 105 Cal. App. 4th 1227, 1223.)

2. Implied Consent Law

If a person is lawfully arrested for driving under the influence of alcohol, he or she is deemed to have given his or her consent to chemical testing of his or her blood or breath to determine blood alcohol content. (§ 23612, subd. (a)(1)(A); *Garcia v. Department of Motor Vehicles* (2010) 185 Cal.App.4th 73, 81.) A driver lawfully arrested for driving under the influence of alcohol has the choice of a breath or blood test, and the arresting officer shall inform the driver of that choice. (§ 23612, subd. (a)(2)(A).) "If the person arrested either is incapable, or states that he or she is incapable of completing the chosen test, the person shall submit to the remaining test." (*Ibid.*) A person who refuses to submit to, or fails to complete, a chemical test under section 23612 is subject to suspension of his or her driving privileges, among other sanctions. (§ 13353.) The officer shall tell the arrestee that his or her failure to submit to, or failure to complete, the required chemical testing will result in a fine and suspension or revocation of driving privileges. (§ 23612, subd. (a)(1)(D).) If the lawfully arrested motorist refuses to submit to a chemical test as requested by a peace officer, the DMV is required to suspend his or her driving privilege. (§ 13353; *Garcia, supra,* 185 Cal.App.4th at p. 81.)

3. Likewise, a person who is on DUI probation shall be told that his or her failure to submit to, or the failure to complete, a preliminary alcohol screening test or other chemical test as requested will result in the suspension or revocation of the person's privilege to operate a motor

> vehicle for a period of one year to three years. (§ 23154, subd. (c)(3).) A PAS device is a breath-testing instrument used to determine either the presence or concentration of alcohol in a person's blood. Such device may be used by police, but is not required, in order to make a preliminary determination of sobriety prior to arrest. (§ 23157, subd. (h).) A PAS test is differentiated from mandated chemical testing of a suspect's blood alcohol level (BAL) after a lawful arrest under the implied consent law. (§ 23157, subd. (a)(1); *People v. Bury* (1996) 41 Cal.App.4th 1194, 1198.)Relevant evidentiary rules
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> a. Evidentiary rules applicable in administrative per se hearings

In *Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1216-1217, the court outlined the rules governing the admissibility of evidence in administrative per se proceedings:

> "The rules governing the evidence available for use in [Department] administrative per se hearings 'are set forth in ... the Vehicle Code, commencing with section 14100. (§ 14100, subd. (a).) Two provisions are especially relevant. First, ... section 14104.7 states in pertinent part: "At any hearing, the department shall consider its official records and may receive sworn testimony." ... Second, for all matters not specifically covered by ... the Vehicle Code ... section 14112 incorporates the provisions of the Administrative Procedures Act governing administrative hearings generally. (Gov. Code, § 11500 et seq. ...)' [Citation.]
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> "Government Code section 11513 addresses the admissibility of evidence generally in administrative hearings. [Citation.] It provides in relevant part: '(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. [¶] (d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but ... shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.' (Gov. Code, § 11513, subds. (c), (d).)" (Italics omitted.)

Section 13380, subdivision (a) mandates that "[i]f a peace officer ... arrests any person for a violation of Section ... 23152 ... the peace officer shall immediately forward to the department a sworn report of all information relevant to the enforcement action, including information that adequately identifies the person, a statement of the officer's grounds for belief that the person violated Section ... 23152

..., [and] a report of the results of any chemical tests that were conducted on the person." Section 13380, subdivision (b) provides, "The peace officer's sworn report shall be made on forms furnished or approved by the department." Form DS 367 is a form furnished and approved by the DMV for collecting a peace officer's sworn report of all the information set forth above (Officer's Statement or Form DS 367). (See *Petricka v. Department of Motor Vehicles* (2001) 89 Cal.App.4th 1341, 1350.)

Where an officer files a sworn statement with the Department, the officer's unsworn arrest report is admissible at the administrative per se hearing to supplement the sworn report. "[I]t is consistent with the relaxed evidentiary standards of an administrative per se hearing that technical omissions of proof can be corrected by an unsworn report filed by the arresting officer." (*MacDonald v. Gutierrez* (2004) 32 Cal.4th 150, 159.)

b. The public employee record exception to the hearsay rule

Evidence Code section 1280 provides:

> "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: (a) The writing was made by and within the scope of duty of a public employee. (b) The writing was made at or near the time of the act, condition, or event. (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

"Assuming satisfaction of the exception's other requirements, '[t]he trustworthiness requirement ... is established by a showing that [a police officer's] written report is based upon the observations of public employees who have a duty to observe the facts and report and record them correctly.' " (*Gananian v. Zolin* (1995) 33 Cal.App.4th 634, 640, fn. omitted [stating that a police officer's sworn report qualifies as an admissible public record under Evidence Code section 1280 in an administrative per se proceeding even to the extent that it reports a second officer's observations because the second officer "was acting pursuant to his duty as a police officer to observe the facts and report them correctly" (*Gananian, supra*, at p. 641].)

c. The presumption in favor of the performance of an official duty

Evidence Code section 664 provides:

"It is presumed that official duty has been regularly performed."

In an administrative per se proceeding, "An officer's statement relating firsthand observations meets [the criteria outlined in Evidence Code section 1280] and ' "the statutory presumption of duty regularly performed (Evid. Code, § 664) shifts the foundational, method-of-preparation burden in this situation," ' requiring the licensee to show that the officer failed in his or her duty to observe and correctly report the events described in the statement." (*Santos v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 537, 547; accord *Morgenstern v. Department of Motor Vehicles* (2003) 111 Cal.App.4th 366, 373 ["Where it is applicable, the presumption [in Evidence Code section 664] shifts the burden of proof to the party against whom it operates to establish the nonexistence of the presumed fact"].)

4. Application

Petitioner concedes that Evidence Code section 1280 applies. There is no dispute that the Officer's Statement was "made by and within the scope of duty of a public employee" (Evid. Code, § 1280, subd. (a)), and was "made at or near the time of the act, condition, or event" (Evid. Code, § 1280, subd. (b)). Petitioner argues that Officer Zirate's execution of the Officer's Statement was so careless as to render is unreliable (and, therefore, inadmissible) under Evidence Code section 1280. Once the Officer's Statement is excluded, petitioner contends, the Department may not rely on the unsworn arrest report to supplement it.

In support, petitioner identifies the following errors: Officer Zirate checked the box on the form that indicates that DeLeon was asked to submit to a Preliminary Alcohol Screening (PAS) because he was on "DUI Probation" even though there was no evidence in DeLeon's driving record that he was on DUI probation[6] (AR010); Officer Zirate entered his own name to indicate that he read both the Chemical Test Admonition and the Drug Admonition even though the form instructed him to enter a name only if *another* officer gave the admonition (AR010); and Officer Zirate initialed the Narrative portion of the Officer's Statement on Page 2 even though the form instructed him to use an original signature. (AR011.) Petitioner argues that, taken together or separately, this evidence shows that Officer Zirate was either confused, not paying very close attention, or otherwise not following the instructions set forth in the Officer's Statement when he completed it, undermining its reliability. Petitioner further argues that these same errors undermine the presumption that the duty was regularly performed under Evidence Code section 664.

[6] The preliminary alcohol screening (PAS) is only required for alcohol probationers driving under the influence. (See § 23154.) "The person shall be told that his or her failure to submit to, or the failure to complete, a preliminary alcohol screening test or other chemical test as requested will result in the suspension or revocation of the person's privilege to operate a motor vehicle for a period of one year to three years." (§ 23154, subd. (c)(3).)

The court disagrees. To put the decision in context, the construction of the form must be considered. DMV form DS 367 is titled "Age 21 and Older Officer's Statement." The form consists of three pages. The first and second pages are the officer's statement. The third page is the "Administrative Per Se Suspension/Revocation Order and Temporary Driver License." On both pages 1 and 2 are spaces to identify the violation, in which the officer may check one or more boxes for "0.08 or more BAC Chemical Test Results," "Chemical Test Refusal (Complete Reverse)," "0.01% or more BAC (DUI Probation)" "0.04% or more BAC (Commercial Vehicle)" and "PAS or Other Chemical Refusal (DUI Probation)." On each page, the only box checked is "Chemical Test Refusal (Complete Reverse)."

On the back of page 1 (top half) is the chemical test admonition, which the officer can read verbatim to the driver, and includes an advisement describing the consequences for the failure to submit as required by section 23612, subd. (a)(1)(D).) Immediately following the content of the advisement is a section in which the officer records the driver's response to the following admonitions: "Will you take a Preliminary Alcohol Screening Test (DUI Probation);" "Will you take a breath test;" and "Will you take a blood test." Here, Officer Zirate marked all three boxes and wrote "No" in the blank line to indicate the driver refused the tests.

On the back of page 1 (bottom half), there is a drug admonition, which the officer can read verbatim to the driver, and it describes the consequences of the failure to submit to a chemical test for to determine if the driver is under the influence of drugs. Here, Officer Zirate recorded the driver's refusal to take a blood test or urine test.

On the back of page 1 at the very top, both admonitions are preceded by a preprinted affirmation that: "I admonished the driver on date:." Each admonition is followed by a section that states: "Admonition Read by a Different Officer:" which instructs: "If the above [relevant] Admonition was read to arrestee by another officer, indicate that officer's information." For each, Officer Zirate responded with his own name, badge number, agency, and telephone number.

Pages 2 and 3 both include sections in which the violation must be identified. On both pages, Officer Zirate checked only "Chemical Test Refusal (Complete Reverse)."

The court does not find Officer Zirate's errors to be of sufficient magnitude as to either undermine the trustworthiness of the report or the presumption that his duty was regularly performed. The addition of Officer Zirate's name to the admonitions sections on the back of page 1 was certainly unnecessary given that the entire section is preceded by an attestation indicating the signing officer in fact gave the admonition. But the additional information, collectively or singly, does not

signal error that suggests confusion or inattentiveness. The information provided is fundamentally accurate.

The only positive notation related to the preliminary alcohol screening test was found on the back of page 1 (AR010) in the section designed to record the driver's response to the chemical test admonition, where Officer Zirate recorded a "no" response. Officer Zirate did not otherwise identify the charged violation as one suffered by a DUI probationer at any point on pages 1, 2 or 3 of the form. (AR009, AR011, AR013.) The court thus finds that the positive notation was at best a clerical error; it does not represent confusion or inattention such that undermines the trustworthiness of the form.

Finally, petitioner's argument that Officer Zirate's use of initials instead of a signature within the narrative portion of Officer's Statement further undermines the report's trustworthiness is unavailing. The court is not convinced that the initials are not Officer Zirate's signature. Evidence Code section 1453, provides, in part, 'A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of… (b) A public employee of any public entity in the United States." Officer Zirate's signature appears to be made up primarily of his initials. (Compare AR009—certification under penalty of perjury with AR011 Narrative.) In any event, Officer Zirate otherwise certified under penalty of perjury that the "information contained on *all* pages of this Officer's statement is true and correct." (AR 009.) The court rejects the contention that Officer Zirate was "not paying very close attention, or otherwise not following the instructions set forth in Form DS 367 when he completed his sworn statement." (See Opening Brief, p. 6, ll. 27-28.)

Petitioner argues that by reading DeLeon the PAS admonishment, Officer Zirate made DeLeon feel as if he was required to submit to a chemical breath test. Petitioner further argues that by admonishing DeLeon twice, Officer Zirate most likely confused DeLeon about his options—namely, whether he had the choice to submit to a chemical breath test—and most certainly increased the coercive pressure DeLeon felt about his choice to submit to a blood test. There is no evidence in the record that DeLeon was confused, as he did not testify at the APS hearing. Nor is there anything otherwise in the record that suggests DeLeon manifested any confusion. Chemical test admonitions given by peace officers are not inherently misleading or confusing. (*Blitzstein v. DMV* (1988) 199 Cal.App.3d 138, 142, 143.)[7]

5. DMV Hearing Officer Haley Did Not Act Impartially

[7] In any event, the Chemical Test Admonition specifically states: "If you are on DUI Probation, you are required to submit toa Preliminary Alcohol Screening Test." (AR010.) Thus, the necessity of this test is expressly conditioned on the existence of DUI probation and a driver who is not on DUI Probation, such as petitioner here, is necessarily excluded from this statement. Moreover, the suggestion that petitioner was confused by the reading of the Chemical Test Admonition and Drug Admonition about whether he had the choice to submit to a chemical breath test is not sound. Both admonitions specify that the driver has a choice to submit to a blood or breath test. (AR010.)

In his reply brief, petitioner changes tact and argues for the first time that DMV Hearing Officer Haley failed to act with impartiality in admitting the documentary exhibits against DeLeon at the APS hearing based on *California DUI Lawyers Assn. v. Department of Motor Vehicles* (2022) 77 Cal.App.5th 517 (*California DUI Lawyers*.).

In that case, the California DUI Lawyers Association (CDLA) brought suit against the DMV challenging, among other things, DMV's practice of allowing a single individual to serve both as advocate for the DMV and hearing officer in APS hearings. (*Id*. at p. 530.)

The challenge implicated the constitutionality of section 14112, subdivision (b) which provides, "Subdivision (a) of Section 11425.30 of the Government Code does not apply to a proceeding for issuance, denial, revocation, or suspension of a driver's license pursuant to" division 6 of the Vehicle Code wherein APS hearing provisions are found. (§ 14112, subd. (b); *California DUI Lawyers, supra*, 77 Cal.App.5th at p. 533.) Government Code section 11425.30 provides, in relevant part, "A person may not serve as presiding officer in an adjudicative proceeding in any of the following circumstances: [¶] (1) The person has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. [¶] (2) The person is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage." (Gov. Code, § 11425.30, subd. (a).) Thus, as enacted, section 14112, subdivision (b), operated to excuse the DMV from complying with the strictures of Government Code section 11425.30 for purposes of APS hearings.

The *California DUI Lawyers* court found DMV's practice of allowing a single individual to occupy the role of both advocate and adjudicator created an unacceptable risk of bias and, thus, violated due process under the Fourteenth Amendment and the California Constitution, article I, section 7. (*California DUI Lawyers, supra,* 77 Cal.App.5th at pp. 532–533.) Consequently, the court held section 14112, subdivision (b) "unconstitutional to the extent it permits the DMV to combine the advocacy and adjudicatory roles in a single APS hearing officer." (*California DUI Lawyers*, at p. 533.) The court ordered judgment in the matter be modified to provide "the DMV is permanently enjoined and restrained from having its APS hearing officers function as advocates for the position of the DMV in addition to being finders of fact in the same adversarial proceeding." (*California DUI Lawyers, supra*, 77 Cal.App.5th. at p. 538.)

Notably, however, in a footnote to its opinion, the *California DUI Lawyers* court wrote, "CDLA concede[d] the DMV may task the same person with both collecting and developing the evidence and rendering a final decision. (See, e.g., *Today's Fresh Start* [(2013)] 57 Cal.4th [197] , 220, 159 Cal.Rptr.3d 358, 303 P.3d 1140 [The same individual in an administrative agency may be tasked with

'developing the facts and rendering a final decision'].) He or she must refrain, however, from advocating on behalf of the DMV as the Driver Safety Manual currently mandates (i.e., present the DMV's case and 'promote driver safety,' with no corresponding duty to present any evidence that would support the position of the driver at the hearing)." (*California DUI Lawyers, supra*, 77 Cal.App.5th at p. 533, fn. 5.)

DeLeon contends that from the *California DUI Lawyers* holding, "[i]t follows that Haley necessarily acted with bias (or at least created an unacceptable risk of bias) when he introduced the documentary evidence against DeLeon at his APS hearing." (Reply, p. 4, ll. 17-18.)

Not so. DeLeon did not cite and presumably did not consider the recently decided *Knudsen v. Department of Motor Vehicles* (2024) 101 Cal.App.5th 186. There, the court considered a similar challenge to the APS hearing process as is presented here. *Knudsen* held, "to resolve such a challenge, it is first necessary to determine whether a particular driver's due process right to an impartial adjudicator was violated. Consistent with *DUI Lawyers*, that determination is made by assessing the administrative record and the revocation decision to see if the public hearing officer actually acted as both an adjudicator and an advocate, or merely acted as an adjudicator and a collector and developer of evidence. If the relevant documents demonstrate that the hearing officer did not act as an advocate, then the driver's due process right to an impartial adjudicator was not violated, and the constitutional issue is resolved. If the relevant documents demonstrate that a public hearing officer actually acted as an advocate, then the driver's due process right to an impartial adjudicator is violated." (*Knudsen, supra*, 101 Cal.App.5th at ___.) The court ultimately held: "In sum, the record reflects inaccurate characterizations of important testimony, questions that were inconsistent with developing testimony, and an error of law that significantly benefited the DMV. We conclude that these considerations collectively demonstrate that the public hearing officer acted as an advocate for the DMV. Because the hearing officer acted as an advocate and adjudicator, Knudsen's due process right to an impartial adjudicator was violated. (*DUI Lawyers, supra*, 77 Cal.App.5th at pp. 532–533, 292 Cal.Rptr.3d 608.) As a result, Knudsen is entitled to a new APS hearing. (*Hall, supra*, 3 Cal.App.5th at p. 810, 208 Cal.Rptr.3d 186.)" (*Knudsen v. Department of Motor Vehicles, supra,* 101 Cal.App.5th at p. ____.)

There is no such similar evidence here. Petitioner argues only that bias was shown by the introduction of the documentary evidence against DeLeon at his APS hearing. The simple fact of introduction cannot, itself, be viewed as bias. There must be evidence that Hearing Officer Haley acted as an advocate. As this court has concluded that the admission of the evidence over DeLeon's objection was not error, that act cannot form the basis for bias. Hearing Officer Haley clearly stated on the record: I am prohibited from and will not act as an advocate for the DMV or law

Enforcement." (AR027, ll, 1-3.) The hearing officer then recited the elements forming the basis for decision and presented the Department's the evidentiary exhibits. (AR027-029.) DeLeon then presented his objections to the exhibits. (AR029-034.) The hearing then concluded. No live witness testimony was presented nor did Hearing Officer Haley ask any questions. DeLeon has identified no other potential basis for bias. The court rejects the argument.[8]

To recap, the court concludes the sworn statement and arrest report are both admissible to prove the elements of the DMV's case for suspension. (*Hildebrand v. Department of Motor Vehicles* (2007) 152 Cal.App.4th 1562, 1570.) Substantial evidence from Officer Zarita's Officer's Statement and arrest report support the determination that Officer Zarita properly admonished DeLeon that he was required to submit to chemical testing. Officer Zarita's sworn statement establishes that at 1:31 a.m., he read him the standard chemical test admonition in DS 367. Officer Zarita told DeLeon, "Because I believe you are under the influence of alcohol or a combination of alcohol and drugs, you have the choice of taking a breath or blood test. [¶] If you refuse to submit to, or fail to complete a chemical test, your driving privilege will be administratively suspended for one year or administratively revoked for two or three years by the Department of Motor Vehicles." After receiving this admonition (and the similarly worded Drug Admonition), DeLeon refused to submit to either a blood or breath test.

Based on this evidence, the trial court agrees with the findings of the DMV hearing officer that after placing DeLeon under arrest, using DMV form 367, he correctly admonished DeLeon that he was required to take a breath or blood test, otherwise his license would be suspended. And, that after receiving this admonition, DeLeon refused to submit to either a blood or breath test. The court finds the administrative hearing officer did not abuse his or her discretion because the findings are supported by the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816–817.)

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Conclusion

[8] The court also notes (and petitioner acknowledges) that this objection was not raised at the hearing, nor was it raised in his opening brief, both of which points inure against him. In general, points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument. Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant. (*Tellez v. Rich Voss Trucking, Inc*. (2015) 240 Cal.App.4th 1052, 1066.) Petitioner proposes for the court to exercise its discretion to permit additional briefing on this issue. The court declines to do so. It is not convinced the argument would be successful, nor is there any reason to believe the issue could not have been raised in the opening brief.

This court finds the DS 367, signed under penalty of perjury by Officer Zirate, to be admissible and sufficient to support the findings of the hearing officer. Accordingly, the petition for writ of administrative mandamus is denied.