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2012 IL App (4th) 110509-U

Filed 3/23/12

NO. 4-11-0509

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

HANNAH LESKOSKY,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
JESSE WHITE, Secretary of State of the State of Illinois,	)	No. 10MR394
Defendant-Appellant.	)	Honorable
	)	Patrick J. Londrigan,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Turner and Justice Cook concurred in the judgment.

ORDER

¶ 1 *Held*: Where plaintiff presented a *prima facie* case for rescission by presenting evidence of noncompliance with an administrative regulation and the State failed to produce rebuttal evidence showing that the breath-alcohol test was reliable, the Secretary's decision denying plaintiff's petition to rescind her zero-tolerance implied-consent suspension was against the manifest weight of the evidence.

¶ 2 This case comes before us on administrative review from the circuit court of Sangamon County, which reversed the decision of the Illinois Secretary of State (Secretary) to deny plaintiff's, Hannah Leskosky's, petition to rescind the suspension of her driving privileges. Plaintiff, who was under 21 at the time, was stopped by a police officer for a moving violation and subsequently arrested for alcohol-related violations. Because she submitted to a breath-alcohol test revealing a blood-alcohol concentration greater than 0.00, her driving privileges were suspended under the zero-tolerance provision of the implied-consent law of the Illinois Vehicle Code (Code)

(625 ILCS 5/11-501.8(c) (West 2008)). After our review of the record, we affirm the circuit court's decision to reverse the Secretary's order denying plaintiff's petition to rescind.

¶ 3 I. BACKGROUND

¶ 4 On July 27, 2010, plaintiff filed a complaint for administrative review in the Sangamon County circuit court, challenging the Secretary's order denying her petition to rescind her zero-tolerance, implied-consent three-month suspension. She claimed the Secretary's June 22, 2010, order, which was entered pursuant to the recommendations and findings issued by hearing officer Marc Loro from the May 13, 2010, administrative hearing was against the manifest weight of the evidence, arbitrary, and capricious. The circuit court reversed the decision of the Secretary, who now appeals to this court.

¶ 5 The proceedings before the hearing officer revealed the following facts. On September 19, 2009, at approximately 1:30 a.m., plaintiff, who was 18 years old at the time, was stopped by a police officer for driving without her headlights illuminated. Plaintiff had offered to drive her friend's mother's car because she was more familiar with the area than her friend. However, she was "used to cars that have automatic headlights" and thus, she did not realize she had not turned on the lights, as the area was very well lit at night.

¶ 6 Noticing the odor of alcohol, the police officer asked plaintiff if she had been drinking. According to his police report (the officer did not testify at the administrative hearing), the officer said plaintiff initially denied it but then admitted she had consumed alcohol. On the other hand, plaintiff testified that she had repeatedly told the officer she did not knowingly consume alcohol but, she had been in a situation (visiting a friend at a college dormitory) where alcohol was present. The only way she would have consumed alcohol was if someone had put it in her cup of

soda without her knowledge or consent. However, she said she did not taste alcohol in her drink. She said she does not drink alcohol and, to her knowledge, her friend had not consumed any alcohol that night either.

¶ 7 The police officer administered three field-sobriety tests and indicated that plaintiff had passed all three. Nevertheless, he placed her under arrest for the headlight violation, illegal consumption of alcohol by a minor, and a zero-tolerance violation. After the booking procedures, which were conducted by other officers at the jail, the arresting officer administered a breath-alcohol test. According to plaintiff, the arresting officer did not observe her, nor was he in her presence for the 20 minutes prior to the administration of the test. No one asked if she had been chewing gum or had anything in her mouth, when, in fact, she had gum (Wrigley's Five Solstice brand) in her mouth during the 20-minute period prior to the test and during the test itself. She had been chewing two pieces "for a really long time," as she had no place to dispose of it at the jail. She said she put the gum in her mouth before the traffic stop, approximately 1 1/2 hours before the breath-alcohol test. The test revealed an alcohol content of 0.01. According to plaintiff's counsel, this brand of gum contains glycerol, a sugar alcohol. He argued that the 0.01 result was either from the gum or a calibration margin of error in the testing equipment.

¶ 8 In plaintiff's petition to rescind, she claimed (1) the police did not have probable cause to believe she had consumed any amount of alcohol, and (2) the breath test was administered improperly and in violation of section 1286.310(a)(1) of the Illinois Administrative Code (Administrative Code) (20 Ill. Adm. Code 1286.310(a)(1) (2012), which requires an officer to observe the subject for 20 minutes prior to administering the breath test.

¶ 9 In addition to her own testimony at the hearing, plaintiff presented the affidavit of

Yiran Gu (also known as Elaine), the passenger at the time of the traffic stop. Elaine's statements in her affidavit were consistent with plaintiff's testimony at the hearing. Elaine saw alcohol in the dormitory room they were visiting but neither she nor plaintiff knowingly consumed any alcohol. A host at the party poured soda into red plastic cups for Elaine and plaintiff. They left this dormitory to travel to another dormitory to visit another friend. During this trip, the officer conducted the traffic stop.

¶ 10 According to Elaine, the police officer asked plaintiff repeatedly if she had been drinking; each time plaintiff responded she had not. Finally, when the officer asked again, plaintiff explained "that she had been offered and drank a Diet Coke at her friend's room, that she had noticed a bottle of alcohol in the room so that perhaps someone had spiked her drink, but she did not see anything added to her Diet Coke and did not knowingly drink alcohol." Elaine further stated that she had been friends with plaintiff "for many years" and had never seen her consume alcohol. Elaine denied drinking that evening as well.

¶ 11 Plaintiff also submitted an affidavit from August Johnson, plaintiff's friend who lived in the dormitory where plaintiff and Elaine visited on the night of the incident. Johnson was with plaintiff for five to six hours that evening and did not see her drink any alcohol, nor did Johnson notice that plaintiff smelled of alcohol. According to Johnson, plaintiff "routinely (almost constantly) chews gum and routinely carries a bottle of water with her."

¶ 12 The hearing officer recommended denying plaintiff's petition, finding "it is more likely than not that any alcohol that is in the gum had long been dissipated and expelled by the time that the test was administered[.]" Further, relying on the Fifth District's decision in *People v. Van Bellehem*, 389 Ill. App. 3d 1129, 1137 (2009), the hearing officer found that, even assuming plaintiff

had gum in her mouth "the whole time," the gum did not qualify as a "foreign substance" within the meaning of the Administrative Code (20 Ill. Adm. Code 1286.10 (2012). Thus, the hearing officer found the test results would not have been invalidated by the presence of gum.

¶ 13 For its conclusions of law, the hearing officer found the police had probable cause to conduct a traffic stop and probable cause to believe that plaintiff had consumed alcohol. The police officer's warning to plaintiff regarding the consequences of refusing to submit to or failing the chemical testing was sufficient and compliant with the applicable sections of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/6-208.2 and 11-501.8 (West 2008)). The hearing officer found plaintiff had failed to carry her burden of proof and recommended the Secretary deny her petition, which he did after affirming and adopting the hearing officer's recommendations.

¶ 14 Upon administrative review, the circuit court reversed the Secretary's order and rescinded plaintiff's zero-tolerance implied-consent suspension. This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 Before addressing this appeal on its merits, we must determine whether the appeal is moot. Plaintiff's driver's license was suspended for three months beginning on November 4, 2009. That suspension has long expired. However, because this suspension will remain on the Secretary's internal record, it may be considered in the Secretary's future decisions regarding granting restricted driving permits, reinstating driving privileges, and terminating or cancelling her driver's license. 92 Ill. Adm. 1001.400 (2012). Because this decision may affect plaintiff in the future by having her suspension remain part of the Secretary's internal record, it is not considered moot. It is possible to grant effectual relief to plaintiff despite the fact her suspension has long expired. See *In re Jabari C.*, 2011 IL App (4th) 100295, ¶ 19. We will consider the Secretary's appeal on its merits.

¶ 17 The Secretary's final decision is subject to judicial review under the Administrative Review Law (735 ILCS 5/3-101 through 3-113 (West 2008)). *Arvia v. Madigan*, 209 Ill. 2d 520, 536 (2004); 625 ILCS 5/11-501.8(h) (West 2008)). On administrative review, this court reviews the decision of the Secretary and not the decision of the circuit court, because the Secretary is the fact finder responsible for overseeing testimony, making credibility determinations, and assigning weight to witnesses' statements. *Odom v. White*, 408 Ill. App. 3d 1113, 1115-16 (2011). Our function as the reviewing court is not to reweigh the evidence or to make our own determination of the facts. Instead, we must determine whether the Secretary's findings and decision are against the manifest weight of the evidence. In other words, we must determine whether the opposite conclusion is clearly evident. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992). We cannot reverse the Secretary's findings merely because the opposite conclusion is reasonable or because we may have ruled differently. *Abrahamson*, 153 Ill. 2d at 88. If the Secretary's decision is supported by the evidence in the record, it should be affirmed. *Abrahamson*, 153 Ill. 2d at 88.

¶ 18 The Secretary asks this court to determine whether the 0.01 result was sufficient to constitute a violation of the zero-tolerance provision of the implied-consent law. Plaintiff responds that the result should be attributed either to a margin of error in the testing instrument or as a result of her chewing a glycerol-based gum. Either way, she claims she did not violate the zero-tolerance provision of the Code. Contrary to the Secretary's contention in this appeal, plaintiff had the burden of proof at the administrative hearing to demonstrate by *clear and convincing evidence* that she was entitled to rescission of the suspension order (see 92 Ill. Adm. Code §1001.440(b) (2012), not by a preponderance of the evidence. This court's decision cited by the Secretary to support the asserted

preponderance-of-the-evidence standard involved a suspension for providing false information to obtain a license, not a suspension for an alcohol-related offense. See *Bruce v. White*, 344 Ill. App. 3d 795, 799 (2003) (relying on 1001.100(s) of Title 92 of the Administrative Code (92 Ill. Adm. Code 1001.100(s) (2012), not subpart D (92 Ill. Adm. Code 1001.440(b) (2012) (involving alcohol-related suspensions)). Thus, plaintiff had to prove by clear and convincing evidence that she was entitled to the rescission of her suspension. According to the Secretary, plaintiff failed to carry her burden.

¶ 19 We must affirm the Secretary's decision if there is " 'any evidence which fairly supports the agency's decision.' " *Kalita v. White*, 342 Ill. App. 3d 796, 807 (2003) (quoting *Conklin v. Ryan*, 242 Ill. App. 3d 32, 37 (1993)). The evidence supporting the Secretary's determination is that plaintiff's breath test disclosed an alcohol concentration of 0.01. The evidence also revealed, through plaintiff's own testimony and the affidavits of her two friends, that plaintiff did not knowingly consume any alcoholic beverage on the night in question. Plaintiff was at a location where alcohol was present and it was possible that someone put alcohol in her Diet Coke without her knowledge or consent.

¶ 20 The zero-tolerance provision in the Vehicle Code does not contemplate a culpable mental state. See 625 ILCS 5/11-501.8 (West 2008). Rather, it is considered an absolute-liability offense, like all driving under the influence statutes, without regard to the offender's intent, knowledge, or mental state. We acknowledge that, based on the evidence presented at the hearing, it is not likely that plaintiff knowingly consumed alcohol. According to her testimony, which is supported by her friends' affidavits, she does not drink and did not intend to do so, nor did she believe she did, on the night in question. However, that is not the issue. Plaintiff's mental state or

intent, *i.e.*, whether she knowingly ingested alcohol, is not part of our analysis, as the results of the breath test speak for themselves.

¶ 21 A result of 0.01 constitutes "an alcohol concentration of more than 0.00" so as to justify a suspension under the zero-tolerance provision of the implied-consent law. 625 ILCS 5/11-501.8(d) (West 2008). Even though the hearing officer made a credibility determination regarding plaintiff's truthfulness that she did not knowingly consume alcohol, the fact remained that it was *possible* that someone placed alcohol in her drink. Thus, the hearing officer was presented with at least some credible evidence to rebut a *prima facie* case for rescission based solely on the results of the breath-alcohol test. *People v. Graney*, 234 Ill. App. 3d 497, 503 (1992) ("When the results of a [B]reathalyzer test are challenged, the defendant must make out a *prima facie* case that the test results are not reliable; then the burden shifts to the State to rebut the *prima facie* case.") We will further discuss plaintiff's burden of proof below.

¶ 22 There remains two possibilities to support plaintiff's petition to rescind. One, this court could apply a margin of error to the test results, or two, find that plaintiff's gum accounted for the amount of alcohol found in the results. There are few Illinois cases which have discussed the accuracy of the results gained from a Breathalyzer and all of those were decided when a section of the Administrative Code allowed for a margin of error of "+/- 0.01%." 77 Ill. Adm. Code §510.100(a). However, this section was repealed effective May 7, 2001. See 25 Ill. Reg. 6513, eff. May 7, 2001.

¶ 23 In the earliest of these cases, the Second District addressed the issue of whether a Breathalyzer result is automatically subject to, and reduced by, " 'an industrial tolerance level' " of .01. *People v. Davis*, 180 Ill. App. 3d 749, 750 (1989). There, the defendant voluntarily submitted

to a breath-alcohol test on which she registered a result of 0.10. She filed a petition to rescind her automatic suspension, arguing that the trial court should apply a variance of 0.01 to the results to account for any error of margin in the testing equipment. The court agreed and granted her petition to rescind, finding that it would be improper not to take judicial notice of the margin of error when the test result was exactly 0.10 (the legal limit at the time). *Davis*, 180 Ill. App. 3d at 751.

¶ 24 On appeal by the State, the reviewing court reversed, finding that the trial court erred by taking judicial notice of an " 'industrial tolerance level' " which would effectively lower the 0.10 result. Such a decision rendered meaningless that portion of the driving-under-the-influence statute, which stated that a driver is subject to an automatic suspension if her alcohol concentration is 0.10 or more. *Davis*, 180 Ill. App. 3d at 751. The court held that no automatic variance would be applied to test results. Instead, it would be the motorist's burden to prove the results from the machine may not be accurate. Because the defendant did not present such evidence, she did not satisfy her burden to prove her suspension should have been rescinded. *Davis*, 180 Ill. App. 3d at 754. "[E]xplanation of [her] theory and its relevance should have been introduced by way of expert testimony." *Davis*, 180 Ill. App. 3d at 755.

¶ 25 Likewise, in this case, plaintiff failed to produce any evidence that the Breathalyzer equipment used on the night of her arrest malfunctioned or produced an inaccurate reading based on the equipment itself. However, unlike the motorist in *Davis*, plaintiff's argument is based on a theory that the police officers violated an administrative regulation, causing the test results to be unreliable. In *Davis*, the defendant asserted that her suspension should be rescinded due to inherent inaccurate test results. To satisfy her burden, and to establish a *prima facie* case, the defendant there needed to prove that a margin of error should have been applied to the testing instrument. In this case,

plaintiff asserts that a violation of the Administrative Code, not a margin of error, caused her results to be unreliable. Therefore, in order to establish her *prima facie* case, plaintiff needed to prove that a violation of the regulations occurred.

¶ 26 Section 1286.200 of title 20 of the Administrative Code addresses the accuracy of the equipment and provides as follows:

> "The procedures contained in this subpart are the only procedures for establishing the accuracy of breath testing instruments. A rebuttable presumption exists that an instrument was accurate at the particular time a subject test was performed when the following four conditions are met.
>
> a) The instrument was approved under this [s]ubpart at the time of the subject test.
>
> b) The performance of the instrument was within the accuracy tolerance described in this [s]ubpart according to the last accuracy check prior to the subject test.
>
> c) No accuracy check has been performed subsequent to the subject test or the next accuracy check after the subject test was within the accuracy tolerance described in this [s]ubpart.
>
> d) Accuracy checks have been done in a timely manner, meaning not more than 62 days have passed

since the last accuracy check prior to the subject test."

20 Ill. Adm. Code 1286.200 (2012).

"The burden of challenging the trustworthiness of the [B]reathalyzer test results lies squarely on the defendant as the petitioner in a summary[-]suspension hearing." *People v. Gryczkowski*, 183 Ill. App. 3d 1064, 1070 (1989). Because plaintiff failed to produce any evidence demonstrating that the equipment used produced an inaccurate result, the presumption of accuracy in the testing equipment itself was not rebutted.

¶ 27 The second possibility for plaintiff's success was for her to prove that the gum in her mouth produced the results. Indeed, she asserted that she had an "alcohol-containing substance in her mouth during testing." Relying on our supreme court's decision in *People v. Bonutti*, 212 Ill. 2d 182 (2004), plaintiff claimed the test results were unreliable. In *Bonutti*, the court agreed that the breath-test results should be suppressed after the defendant sufficiently proved that he had an episode of gastroesophageal reflux (effectively the same as regurgitation) immediately prior to the breath analysis. *Bonutti*, 212 Ill. 2d at 192. That is, the court held defendant sufficiently proved that a violation of the regulations, which prohibits regurgitation within the 20 minutes immediately preceding the breath analysis, rendered the test results unreliable. *Bonutti*, 212 Ill. 2d at 192.

¶ 28 In this case, plaintiff asserted that the gum in her mouth during the 20-minute observation period contained glycerol, a form of alcohol, which affected the results of the breath-alcohol test. Because she had this glycerol-based gum in her mouth, an administrative regulation was violated, causing the results to be unreliable.

¶ 29 Section 1286.310 of title 20 of the Administrative Code addresses the 20-minute observation period and provides as follows:

> "The following procedures shall be used to obtain a breath sample to determine a subject's BrAC [(breath-alcohol concentration)] with an approved evidentiary instrument:
>
> a) Prior to obtaining a breath analysis reading from a subject, the BAO [(breath analysis operator)] or another agency employee shall continuously observe the subject for at least 20 minutes.
>
> 1) During the 20[-]minute observation period the subject *shall be deprived of alcohol* and foreign substances and shall not have vomited." (Emphasis added.) 20 Ill. Adm. Code 1286.310(a)(1) (2012).

¶ 30 Plaintiff testified that the testing officer did not observe her for 20 minutes prior to the test, nor did he ask her if she had anything in her mouth. She claims she had alcohol in her mouth during the observation period and during the test itself in violation of the regulation.

¶ 31 The Fifth District has addressed a similar issue resulting from a comparable situation in terms of the reliability of a breath test when the motorist had something in her mouth before and during the test. *Van Bellehem*, 389 Ill. App. 3d at 1129. In *Van Bellem*, the defendant alleged in a motion to suppress the results of her breath test and in a motion to rescind her statutory summary suspension that "she had not been continuously observed for at least 20 minutes before the breath test and that she had not been deprived of foreign substances during the observation period." *Van*

Bellehem, 389 Ill. App. 3d at 1130. She claimed she had gum in her mouth "from the moment she was arrested through the time she took the breath test." *Van Bellehem*, 389 Ill. App. 3d at 1131. The arresting officer claimed she had nothing in her mouth. *Van Bellehem*, 389 Ill. App. 3d at 1131.

¶ 32 The trial court granted the defendant's motions, finding that the arresting officer should have either asked the defendant if she had anything in her mouth or asked her to open her mouth so he could look inside. *Van Bellehem*, 389 Ill. App. 3d at 1132. The appellate court addressed the issue of whether the officer had those obligations and held that "neither the breath-test regulation nor public policy requires any such questions or investigation." *Van Bellehem*, 389 Ill. App. 3d at 1133. "[W]hen considering the foreign-substance portion of the breath-test regulation, the focus should be on proof that the reliability of the test has been affected." *Van Bellehem*, 389 Ill. App. 3d at 1135. Because the defendant failed to present any evidence that gum may have affected the test results, the defendant's argument that the results were unreliable failed. *Van Bellehem*, 389 Ill. App. 3d at 1135.

¶ 33 Contrary to *Bellehem*, plaintiff presented evidence (the packet of gum which stated the ingredients) that the brand of gum she had in her mouth contained alcohol. In analyzing whether there was a violation of a particular administrative regulation, we must ascertain the drafters' intent by first looking to the language of the regulation, giving the language its plain and ordinary meaning. *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 503-04 (2000). Where the language is clear, it must be applied as written. *Michigan Avenue National Bank*, 191 Ill. 2d at 504. The court may also consider the regulation's purpose. *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 55 (2002). The interpretation of a regulation is a question of law and is reviewed *de novo*. *People v. City of Chicago*, 202 Ill. 2d 36, 46 (2002).

¶ 34 As set forth above, the Administrative Code provides that during the 20-minute observation period, "the subject shall be deprived of alcohol." 20 Ill. Adm. Code 1286.310(a)(1) (2012). Though this language is clear and unambiguous, we note that courts have previously stated that the purpose of this regulation is "to ensure that only accurate breath-alcohol tests are admitted into evidence." *Bonutti*, 212 Ill. 2d at 190. Ingesting alcohol or another foreign substance during the 20-minute observation period may render the results unreliable. *People v. Bergman*, 253 Ill. App. 3d 369, 374 (1993).

¶ 35 Referring again to plaintiff's burden of proof at the administrative hearing, we borrow language from the Fifth District. In a 1993 decision, the court stated:

> "[O]n a petition to rescind a statutory summary suspension, the motorist has the initial burden of proof. After the motorist makes a *prima facie* case for rescission, the burden shifts to the State to produce evidence in rebuttal. Upon a defendant's *prima facie* showing of noncompliance with Illinois Public Health regulations [(discussing 77 Ill. Adm. Code § 510.60 (1985), a prior version of the breath-test administration regulations)], the [B]reathalyzer test is presumed invalid and inadmissible. The burden of rebutting that presumption with proof of validity then rests on the State." *Bergman*, 253 Ill. App. 3d at 376.

In other words, once the motorist presents evidence of noncompliance with the regulation or procedures, he does not have to prove that the test result was in fact affected; rather, the State must produce rebuttal evidence showing that the test was reliable. *Graney*, 234 Ill. App. 3d at 504-05,

Village of Bloomingdale v. Meline, 309 Ill. App. 3d 389, 391 (1999).

¶ 36 We find *People v. Miller*, 219 Ill. App. 3d 246 (1991) helpful. In *Miller*, the defendant made a *prima facie* case for rescission based on noncompliance with the then-applicable administrative regulation similar to the current version prohibiting the motorist from ingesting anything during the observation period prior to the breath-alcohol test. *Miller*, 219 Ill. App. 3d at 251. The defendant presented evidence that he had chewing tobacco in his mouth during the 20-minute observation period and swallowed it immediately before taking the Breathalyzer. *Miller*, 219 Ill. App. 3d at 248. The court found, given this evidence, that the defendant had presented a *prima facie* case for rescission, as the regulation prohibiting the ingestion of anything had been violated. *Miller*, 219 Ill. App. 3d at 249. However, the State failed to present any evidence to prove that the tobacco did not affect the test results, as was its burden to do so once it shifted. *Miller*, 219 Ill. App. 3d at 251.

¶ 37 The court held that the defendant did not have the burden to prove that chewing or swallowing tobacco would affect a Breathalyzer result. *Miller*, 219 Ill. App. 3d at 250. Instead, upon the defendant's presentation of proof that the regulation was violated, the burden shifted to the State to prove the results were not affected by the tobacco. *Miller*, 219 Ill. App. 3d at 251. Because the State presented no such evidence, the court held the tests results were invalid and the defendant's statutory summary suspension should have been rescinded. *Miller*, 219 Ill. App. 3d at 251.

¶ 38 The decision in *Miller* makes clear that merely showing noncompliance with an administrative regulation establishes only a *prima facie* case of invalidity, which may be rebutted by evidence that, despite this noncompliance, the Breathalyzer test result is still reliable and therefore still valid and admissible. In the case *sub judice*, we find plaintiff successfully presented a *prima*

facie case that the Breathalyzer test was not performed in compliance with the administrative regulation because she had in her mouth an alcohol-containing substance during the 20-minute observation period and during the breath-alcohol test. This evidence was sufficient to shift the burden of proof to the State to show that, despite this noncompliance, the result of the Breathalyzer test was still reliable and was not affected by the noncompliance. In his findings and recommendations, the hearing officer made such a finding but did not base it on any evidence. Specifically, the hearing officer found "it is more likely than not that any alcohol that is in the gum had long been dissipated and expelled by the time that the test was administered." This conclusion was not based on any evidence presented.

¶ 39 The hearing officer specifically found that plaintiff "was a credible witness[.]" Without any reason to find otherwise, we affirm the hearing officer's credibility determination and find that plaintiff had gum in her mouth during the waiting period and the test itself. Because this is a direct violation of the regulation, we find plaintiff sufficiently presented a *prima facie* case for rescission pursuant to *Miller,* and the State introduced no evidence tending to prove in fact that plaintiff's gum did not affect the test result. "Since the presumption of invalidity of the [B]reathalyzer test result was not directly challenged by the State, [plaintiff] had no occasion to produce further evidence that it was invalid in fact." *Miller*, 219 Ill. App. 3d at 251.

¶ 40 III. CONCLUSION

¶ 41 Accordingly, we hold that the Secretary erred in denying plaintiff's petition to rescind her zero-tolerance implied-consent suspension. We find the Secretary's decision was arbitrary, capricious, or contrary to the manifest weight of the evidence. We affirm the circuit court's judgment.

¶ 42 Affirmed.