3-0205-16000-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF ADMINISTRATION

In the Matter of the Appeal of the Determination of the Responsible Authority For the City of Richfield that Certain Data Concerning Antonio F. Bragg Are Accurate and/or Complete.

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy at 9:30 a.m. on September 8, 2004 at the Office of Administrative Hearings in Minneapolis, Minnesota. The OAH record closed at the end of the hearing.

Mary D. Tietjen, Esq., Kennedy & Graven, 470 Pillsbury Center, 200 South Sixth Street, Minneapolis, MN 55402, appeared on behalf of the City of Richfield.

Antonio F. Bragg, PO Box 581411, Minneapolis, MN 55458, appeared on his own behalf without counsel.

NOTICE

This report is a recommendation only, not a final decision. The Acting Commissioner of Administration will make the final decision. Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the Acting Commissioner of Administration shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present arguments to the Acting Commissioner. Exceptions to this Recommended Order, if any, shall be filed with Kent Allin, Acting Commissioner of Administration, 658 Cedar St., Suite 305A, St. Paul, MN 55155.

If the Acting Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Acting Commissioner, or upon the expiration of the deadline for doing so. The Acting Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

The issue is whether data concerning Antonio Bragg contained in a police incident report dated February 2, 2002, are accurate and/or complete within the meaning of the Minnesota Government Data Practices Act.[1]

The Administrative Law Judge concludes that the data contained in the report are reasonably accurate and complete.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On February 2, 2002, a police officer for the City of Richfield arrested Antonio Bragg on suspicion of driving while intoxicated. The City subsequently charged Bragg with driving while impaired (DWI) and refusal to take a breath test, which is a gross misdemeanor, because he had declined to take a breath test in the past ten years. A jury convicted Bragg of DWI in April 2002. Because of the revocation of his driver's license, Bragg lost his job as a construction and maintenance laborer with the City of Minneapolis.[2]

2. In this proceeding, Bragg contends that portions of the incident report completed by the arresting officer at or about the time of his arrest are inaccurate. Bragg did not testify concerning his version of events during the hearing, but relied instead on the testimony contained in the transcript of his criminal trial.

3. The incident report provides that Bragg's occupation was loss prevention at a Menard's store in Richfield at the time of the arrest. Bragg claims this is false, and he provided evidence that he was employed by the City of Minneapolis at the time.[3] In some previous contact with the City, Bragg had identified his employer as Menard's and his occupation as loss prevention, and this information was stored in the City's computer system. When the incident report was typed, the typist used it to complete those areas of the form.[4] The City does not dispute Mr. Bragg's challenge to his occupation. Based on information available to the City at the time, however, the report was reasonably accurate and complete.

4. Bragg also challenges the stated time of the traffic stop. The report states that the arresting officer stopped Bragg at the intersection of I-494 and Nicollet Avenue at 1:32 a.m. and arrived at the Richfield Police Station for booking at 2:28 a.m. on February 2, 2002.[5] Bragg contends he was stopped at 11:00 p.m. and that he arrived at the Richfield Police Department between 12:30 a.m. and 12:45 a.m.[6] The time reflected in the report—1:32 a.m.—is entered into the City's computer by dispatch personnel when the officer calls in the traffic stop, along with the squad number, location, and plate number of the stopped car.[7] The incident report also provides that the officer observed Bragg in the booking room from 2:28 to 2:42 a.m.; that the Implied Consent Advisory was read at 2:39 a.m.; and that Bragg was transported to the jail at 2:58 a.m. on that date. The report is thus internally consistent with the time frame of a traffic stop occurring at 1:32 a.m. Furthermore, the record shows that the officer printed Bragg's driving record at 2:14 a.m., and time on the Implied Consent Advisory form also indicates the advisory was read at 2:39.[8] The incident report accurately reflects the time of the traffic stop.

5. The next challenge is to the officer's stated reason for stopping Bragg's car. The report provides that while the officer was driving northbound on Nicollet Avenue, he observed Bragg's car approaching the red light at the top of the exit ramp at a high rate of speed. After braking late, Bragg's "vehicle came to a stop approximately three quarters of a car length into the intersection."[9] Bragg then backed the car down the exit ramp behind the light and waited for the light to change. He then made a left turn and proceeded southbound on Nicollet Avenue, at which time the officer stopped the car. Bragg contends he drove the vehicle approximately one quarter of a car length into the intersection before backing up behind the light.[10] The officer estimated that Bragg drove three quarters of a car length into the intersection because he saw that Bragg's rear wheel was on the bumper line at the top of the ramp.[11] The incident report accurately describes the reason for the stop.

6. After he stopped the car, the officer spoke with Bragg and asked for his driver's license and proof of registration, which Bragg provided. During their conversation, it appeared that Bragg had something in his mouth, and the officer asked him what it was. Bragg stated it was a cough drop and held out his tongue so the officer could see it. At this time the officer detected the odor of alcohol. The report provides that when the officer asked Bragg if he had been drinking, "Bragg stated he had consumed several beers, but he did not know how many."[12] Bragg claims he said he "consumed a couple earlier that day."[13] This contention is not consistent with Bragg's testimony in the criminal trial.[14] The police officer credibly testified that he wrote the incident report shortly after the arrest while the events were fresh in his memory.[15] The report is reasonably accurate in describing Bragg's response to the question.

7. The report then provides that the officer asked Bragg whether he would perform field sobriety tests, which Bragg agreed to do. As he exited the vehicle, it appeared to the officer that Bragg reached into his mouth, removed an unknown object, and placed something down near the driver's seat inside the vehicle. The report continues:

> At this time Bragg was handcuffed, checked for circulation and double locked. Bragg was advised he was being handcuffed for officer safety reasons and he was not under arrest at that time. The immediate area around Bragg's feet inside the vehicle was searched and officers could not locate any illegal contraband.
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> Prior to starting the field sobriety tests the handcuffs were removed from Bragg.[16]

8. Bragg contends he was not handcuffed at any time, nor was he advised that he was not under arrest before he was placed in the squad car. Bragg also maintains the officer told him after searching the car that he was going to be charged with driving while impaired, and that Bragg requested that the officer administer the field sobriety tests.[17] The officer testified credibly that Bragg was handcuffed as described in the report.

9. Although Bragg maintains that he was the person who asked for the field sobriety tests, he also maintains that the City should supplement the report to indicate that the officer failed to advise him of alternative methods of field sobriety testing, which may have been appropriate because Bragg had suffered vertebral injuries in a car accident several years before. During the criminal trial, Bragg testified that he thought his spine injuries would impact his performance of the field sobriety tests; however, he also testified that because he performed the tests adequately the injuries did not impact his performance.[18] The Administrative Law Judge finds that the incident report accurately describes the officer's request that Bragg perform field sobriety tests.

10. The next challenge is to the report's description of Bragg's appearance. It provides that "Bragg's eyes were bloodshot and watery, staring and glassy. His speech was slurred and he appeared confused at times. His balance and gait both swayed left to right. His balance appeared to be wobbling and his gait staggering to his sides."[19] Mr. Bragg claims these statements were false.[20] The police officer testified credibly that Bragg appeared as described in the report.

11. The report provides that "field sobriety tests were conducted between two squad cars. The area was well lit with a slight breeze and temperature of approximately ten degrees. The weather was clear and dry."[21] Bragg contends that two squads were not involved and that only the arresting officer's squad car was present.[22] The officer credibly testified that another squad assisted him, but the other officer's only involvement in the arrest was to complete the vehicle impound sheet. The incident report accurately describes the presence of another squad car.

12. Bragg advances several challenges to statements concerning the conduct of the field sobriety tests. The report states that while the officer was instructing him how to perform the test, "Bragg failed to stand as instructed and continued to move his feet to his left and right in an attempt to stabilize his balance."[23] Bragg contends the report should say that he listened to the instructions and completed the task "with little to no problems."[24] The arresting officer credibly testified that Bragg performed the field sobriety test in the manner described in the incident report.[25]

13. In describing Bragg's performance of the one-leg stand portion of the field sobriety test, the report states that the officer repeated the instruction when Bragg performed the test improperly by raising his leg so that his thigh was parallel to the ground, with his knee bent.[26] The report then continues that after the officer instructed him to extend his right leg and point his toe, Bragg

> immediately began to hop on his left foot in an attempt to stabilize his balance. He then stood on his left foot, but began to wave his right extended leg from left to right utilizing it to stabilize his balance. Bragg started waving his leg at the count of seven. With each passing second his leg waved in a more exaggerated fashion. I instructed Bragg to stop

> the test at the count of thirteen because I feared he would lose his balance and fall.[27]

Bragg claims the instructions were not repeated and he did not perform the test improperly.[28] The officer credibly testified that the Bragg performed the test in the manner described in the report.

14. With regard to Bragg's performance on the walk and turn portion of the field sobriety test, the incident report provides that Bragg failed to stand as instructed, counted out of line, turned improperly, and failed to step heel-to-toe.[29] Bragg contends he performed the tests as directed and that they "were fairly easy."[30] The officer credibly testified that Bragg performed the walk and turn test in the manner described in the report.[31]

15. In describing the horizontal gaze nystagmus portion of the field sobriety test, the incident report states that Bragg was wearing glasses at the time, and the officer asked whether he could see without them. The report specifically provides that Bragg said he normally wears glasses for reading or driving and did not have any other abnormalities with his eyes.[32] Bragg claims he said he wore glasses only for cosmetic purposes.[33] The disputed statements are not materially different. The incident report is reasonably accurate in describing this exchange.

16. The preliminary breath test (PBT) is a field sobriety test. Bragg declined to perform a PBT because "it was his right not to," and because he said that the cough drops he had been sucking contained alcohol and would affect the PBT reading.

17. The incident report reflects the officer's conclusion that "[f]rom my observations, the odor of an alcoholic beverage, and Bragg's field sobriety performance, I felt that he was clearly under the influence of an alcoholic beverage." Bragg maintains the report should be corrected to read "Bragg felt that from his passing performance of the field sobriety test, there were no outstanding warrants for arrest and observation of agent's behavior, he had passed field sobriety test. However, agent was reluctant to release Bragg. Prior to field sobriety test and being placed under arrest, agent indicated to Bragg that he was going to arrest him for a DWI." The report accurately states the officer's conclusion and the basis for it.

18. The next challenge concerns the towing of Bragg's vehicle. The report states that the vehicle was impounded for safekeeping. It does not provide what the cost was to retrieve the vehicle after it was towed, and Bragg contends the report should be supplemented to provide that he had to pay $206.19 at the impound lot. The omission of the cost of the tow does not make the incident report inaccurate or incomplete.[34]

19. The report further indicates that the officer read Bragg "his Constitutional rights per Miranda" and that when asked whether he wanted to consult

with an attorney before deciding whether to take a breath test, Bragg declined the opportunity.[35] Bragg contends that (1) the officer did not read him his Miranda rights, and (2) Bragg nonetheless told the officer he wanted to consult an attorney, and the officer did not allow him to do so.[36] The Implied Consent Advisory form contains the question "Do you want to consult with an attorney," and Bragg's direct response to the question is noted as "I'll do that later."[37] When the officer asked the follow-up question, "But not now?" Bragg responded "Right."[38]

20. Bragg next contends the incident report inaccurately states that he refused to submit to an alcohol breath test. Bragg claims he was never offered a breath test.[39] The Implied Consent Advisory form indicates that when asked if he would take a breath test, Bragg responded "No I won't at this point."[40] When asked why he refused the test, the form indicates Bragg stated "Cause it's my right."[41]

21. When the police officer went through the Implied Consent Advisory with Bragg, he made an audiotape of the process. The tape includes both the reading of the advisory and the responses thereto. The original tape was received in evidence during the trial and was played for the jury. Bragg maintained during the trial that the voice on the tape was not his.

22. The incident report accurately and completely describes the implied consent advisory process, including the reading of Miranda rights, the right to consult an attorney, and the offer of a breath test. It also accurately and completely describes Bragg's responses to the questions asked by the officer.

23. Finally, the incident report provides that Bragg would be charged with second-degree DWI because "Bragg has one prior DWI on 06/08/96." Bragg denies that he had a DWI on this date.[42] The record reflects that Bragg had a prior implied consent revocation for refusing to take a breath test on this date.[43] Furthermore, he stipulated to the prior revocation during the criminal trial so that the jury would not be advised of the prior revocation.[44] The police report is reasonably accurate in describing the basis for the enhanced charge.

Procedural Findings

24. Bragg requested that the City of Richfield correct data contained in the incident report in a letter dated February 18, 2004.

25. The City declined to make the requested corrections in a letter dated March 17, 2004.

26. Bragg appealed the City's decision to the Commissioner in a letter dated March 30, 2004.

27. The Notice and Order for Hearing were served on June 25, 2004, scheduling a contested case hearing on September 8, 2004.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Administration have jurisdiction in this matter pursuit to Minn. Stat. §§ 13.04, subd. 4 and 14.50, and Minn. R. 1205.1600.

2. The Department of Administration has complied with all of the relevant substantive and procedural requirements of law or rule.

3. The Department of Administration has given proper notice of the hearing in this matter and has the authority to take the action proposed.

4. The Petitioner, Antonio Bragg, is the subject of data on private individuals, which is maintained by the City of Richfield.

5. The City of Richfield is a political subdivision of the State and is subject to the provisions of the Minnesota Government Data Practices Act.[45]

6. An individual may contest the accuracy or completeness of public or private data relating to him or her and may appeal the determination of the responsible authority in this regard pursuant to the provisions of the Administrative Procedure Act.[46]

7. The burden of proof in this proceeding is upon the Petitioner to prove by a preponderance of the evidence that the data is not accurate and/or complete.[47]

8. "Accurate" means that the data in question is reasonably correct and free from error.[48]

9. "Complete" means that the data in question reasonably reflects the history of an individual's transactions with the particular entity. Omissions in an individual's history that place the individual in a false light shall not be permitted.[49]

10. A person who is the subject of private data may challenge the accuracy not only of facts, but also conclusions contained in that data.[50]

11. The City of Richfield agreed during the hearing to update Bragg's occupation and business address in the incident report to reflect his occupation and business address as of February 2, 2002.

12. Bragg has otherwise failed to demonstrate by a preponderance of the evidence that any challenged data in the incident report are inaccurate or incomplete.

13. These Conclusions are reached for the reasons set forth above in the Memorandum that follows. The Memorandum is hereby incorporated into these Conclusions by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that:

1. The Commissioner of Administration issue an order requiring that the Incident Report document maintained by the City of Richfield be amended with regard to Bragg's occupation and business address at the time of his arrest, as set forth above, and that the correction be made within 30 days of the date of the Commissioner's final order; and

2. The Commissioner of Administration DISMISS all other challenges to the accuracy or completeness of the report.

Dated: October 8, 2004

/s/ Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Tape recorded, no transcript prepared.

NOTICE

Pursuit to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

During the criminal trial, the prosecution proved beyond a reasonable doubt that Bragg was guilty of driving while intoxicated. In this hearing, Bragg has failed to prove by a preponderance of the evidence that any of the challenged data in the police report, which are the essential facts upon which the conviction is based, are inaccurate or incomplete.

In addition to the data specifically challenged, Bragg contends that because the City failed to retain the booking videotape of him, his ability to challenge certain of the data is impaired. This issue was thoroughly examined during the criminal trial. Whether the City's reuse of the videotape was appropriate or consistent with its document

retention policies is beyond the scope of this proceeding. Bragg also argues that he recently requested an audiotape of the officer's initial conversation with dispatch personnel concerning the time of the stop, and that the City has improperly failed to provide him with this data. The City maintains the audiotapes are kept only for 90 days. Again, the City's compliance with retention policies is beyond the scope of this proceeding, which is limited to an examination of the accuracy of the data in the report.

K.D.S

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[1] Minn. Stat. §§ 13.01-.90.
[2] Testimony of Officer Gifford.
[3] Ex. 12.
[4] Testimony of Officer Gifford; Ex. 10.
[5] Ex. 9.
[6] *Id*.
[7] Gifford Testimony; Ex. 4 at 34.
[8] Ex. 1; Ex. 5.
[9] Ex. 3.
[10] Ex. 9. Bragg appears to believe, incorrectly, that the report suggests he drove the car three quarters of the way through the intersection, as opposed to three quarters of a car length into the intersection.
[11] Testimony of Officer Gifford; Ex. 4 at 37.
[12] Ex. 3.
[13] Ex. 9.
[14] At one point during the trial, Bragg acknowledged that he "may have had a beer" during that day, but he insisted that the officer never asked him anything about alcohol consumption during the incident. *See* Ex. 4 at 158-59 ("[L]et me be clear, he never asked me if I had been drinking. So I want to be clear on that.") *See also id*. ("He never asked me anything regarding alcohol."). At no place in the transcript does Bragg state that he had consumed a couple of beers earlier that day.
[15] Testimony of Officer Gifford.
[16] Ex. 3.
[17] Ex. 9.
[18] Ex. 4 at 162.
[19] Ex. 3.
[20] Ex. 9.
[21] Ex. 3.
[22] Ex. 9.
[23] Ex. 3.
[24] Ex. 9.
[25] Testimony of Officer Gifford; Ex. 4 at 46.
[26] Ex. 3.
[27] Ex. 4 at 44-46.
[28] Ex. 9.
[29] Ex. 3.
[30] Ex. 9.
[31] Testimony of Officer Gifford; Ex. 4 at 46-49.
[32] Ex. 3.
[33] Ex. 9.
[34] *See* Minn. R. 1205.1500, subp. 2(B).
[35] Ex. 3.
[36] Ex. 9.
[37] Ex. 5.
[38] *Id*.

[39] Ex. 9.
[40] Ex. 5.
[41] *Id*.
[42] Ex. 3.
[43] Ex. 1; Ex. 4 at 23-24.
[44] Ex. 4 at 24-25.
[45] Minn. Stat. §§ 13.01, subd. 1, 13.02, subd. 11.
[46] Minn. Stat. § 13.04, subd. 4
[47] Minn. R. 1400.7300, subp. 5
[48] Minn. R. 1205.1500, subp. 2(A).
[49] Minn. R. 1205.1500, subp. 2(B).
[50] *Hennepin County Community Services Dept. v. Hale*, 470 N.W.2d 159 (Minn. Ct. App. 1991).