

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

SEAN ERIK GIBB,

Plaintiff and Respondent,

v.

DEPARTMENT OF MOTOR VEHICLES,

Defendant and Appellant.

A137117

(Contra Costa County
Super. Ct. No. N12-0525)

Vehicle Code section 23136,¹ the “zero tolerance law,” makes it unlawful for a person under the age of 21 to drive a vehicle with any measurable blood alcohol concentration (BAC).² Respondent Sean Erik Gibb, then 18 years old, was stopped by police while driving. An officer administered preliminary alcohol screening (PAS) breath tests, which showed that Gibb’s blood alcohol level was well in excess of the measurable threshold of .01 percent. The officer temporarily suspended Gibb’s driver’s license and reported the matter to the Department of Motor Vehicles (Department or DMV). (§§ 13380, subd. (a); 13388, subd. (b).) Gibb requested a DMV administrative hearing on the license suspension, and the hearing officer reimposed the suspension.

¹ All further statutory references are to the Vehicle Code unless otherwise indicated.

² “Notwithstanding Sections 23152 and 23153, it is unlawful for a person under the age of 21 years who has a blood-alcohol concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test or other chemical test, to drive a vehicle.” (§ 23136, subd. (a).)

Gibb petitioned for a writ of mandate to overturn the license suspension, arguing that no admissible evidence was presented on the reliability of the blood alcohol test results and the officer's sworn statement certifying the results was insufficient to establish reliability. The trial court granted the petition, and the Department appeals. We reverse.

I. BACKGROUND

On September 5, 2011, Gibb was arrested by Danville police for driving under the influence of alcohol while under the age of 21. His driver's license was immediately suspended, and he was given a temporary driver's license pending the outcome of an administrative hearing to determine whether he was driving in violation of section 23136.

The arresting officer, Danville Police Officer Michael Jimenez, prepared a sworn statement on the suspension on DMV form DS 367M ("Under Age 21 Officer's Statement"; hereafter Sworn Statement), as required under section 13380.³ According to the statement, Jimenez had pulled the vehicle over for an extinguished tail light shortly after midnight. He observed that the driver, Gibb, had bloodshot or watery eyes and slurred speech and smelled of alcohol. Gibb submitted to PAS breath tests,⁴ which detected a BAC of .088 percent at 12:22 a.m. and of .074 percent at 12:37 a.m.

³ "(a) If a peace officer serves a notice of an order of suspension pursuant to Section 13388, or arrests any person for a violation of Section 23140, 23152, or 23153, 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 23136, 23140, 23152, or 23153, a report of the results of any chemical tests that were conducted on the person or the circumstances constituting a refusal to submit to or complete the chemical testing pursuant to Section 13388 or 23612, a copy of any notice to appear under which the person was released from custody, and, if immediately available, a copy of the complaint filed with the court. . . . [¶] (b) The peace officer's sworn report shall be made on forms furnished or approved by the [D]epartment." (§ 13380.)

⁴ "For the purposes of this section, a [PAS] test device is an instrument designed and used to measure the presence of alcohol in a person based on a breath sample." (§ 13388, subd. (c).)

On the Sworn Statement, Jimenez certified under penalty of perjury that all information in the statement was true and correct. He further certified with respect to the test results “that (1) I obtained the above PAS test results in the regular course of my duties, (2) I used PAS Model . . . 968/AlcoSensor PST, Serial # 29968, Manufactured by Intoximeters, Inc., (3) I administered this PAS test properly in accordance with the manufacturer’s guidelines and instructions, (4) I have received training on the proper operation of this device and administration of the PAS test and am competent and qualified to operate the device, and (5) the device was functioning properly at the time of the test.”

Gibb obtained counsel and requested a DMV administrative hearing to contest the license suspension.

The Administrative Hearing

At the February 15, 2012 administrative hearing, the Department introduced the Sworn Statement and calibration records regarding the PAS device that was used to test Gibb, which were subpoenaed from the Danville Police Department. Gibb’s hearsay and lack of foundation objections to these exhibits were overruled.

Gibb specifically asked that any officers testifying against him be physically present at the hearing and expressly withheld his consent to testimony by telephone. Nevertheless, the DMV hearing officer allowed the Danville Police Department’s PAS calibration officer, Seth Culver, to appear by telephone “due to the officer only giving testimony to the calibration of the AlcoSensor test and the serial number listed, . . . as to whether or not the machine was in proper working order . . . at the time the machine was used with Mr. Gibb.” Culver testified that he had received training in calibration and maintenance of PAS devices in March 2011, and was specifically trained in the AlcoSensor IV Intoximeter model that was used to test Gibb. Referring to information in the PAS log that had been admitted in evidence and that he had prepared, Culver testified that the PAS device used to test Gibb was in proper working order at the time that test was administered.

The hearing officer reimposed the license suspension based on the following relevant findings: “As based on the lack of sufficient evidence to rebut the chemical test results, it is hereby determined that [Gibb] submitted to and completed a [PAS] test of his breath, with results of .088% B.A.C. at 12:22 AM on 9/05/11 and .074% B.A.C. at 12:37 AM on 9/05/11. [¶] . . . [¶] Officer Culver testified based upon the calibration log, his training and experience the device used on 9/5/11 (#29968) was in proper working order. [¶] The [D]epartment concludes substantial evidence and reasonable inferences support the finding while driving [Gibb] had a blood-alcohol level of at least .01%. Absent evidence to the contrary, [r]e-imposing the suspension is warranted.”

The Writ Proceeding

Gibb filed a petition for writ of mandate in the superior court, seeking judicial review of the administrative decision. He argued that Culver’s testimony should be stricken because he had never consented to Culver’s testifying by telephone and that without Culver’s testimony there was insufficient evidence to support the suspension, as there was no foundation for admission of the breath test evidence. The Department agreed it was improper to allow Culver to testify by telephone without Gibb’s consent, but argued the test results were admissible even without Culver’s testimony.

The court granted the writ petition. Citing *Coniglio v. Department of Motor Vehicles* (1995) 39 Cal.App.4th 666 (*Coniglio*), the court ruled that Culver’s testimony had to be stricken and “there was no other evidence establishing the reliability of the particular PAS device used in this case. [¶] An officer’s sworn statement that, when tested, a licensee’s PAS test showed the presence of alcohol in the licensee’s blood is legally sufficient evidence if and only there is a basis for believing that the test which detected blood alcohol was reliable. (*Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, 140 [*Davenport*].)”

II. DISCUSSION

A. Timeliness of Appeal

As a preliminary matter, we reject Gibb’s argument that the Department’s appeal should be dismissed as untimely.

The court filed its written, signed order granting the petition for writ of mandate on July 16, 2012. The order is entitled “Notice of Decision,” it bears a file stamp, and it includes a “Certificate of Service by Mail” indicating it was served on the parties by the deputy clerk of the court on July 16. On August 3, the court filed an “Order and Judgment,” which reiterated that the petition was granted and also set forth the court’s award of attorney fees and costs. The August 3 order bears a file stamp, but does not show that it was served on any party. (The record includes a proof of service of the *proposed* order, which was served on the Attorney General’s office by Gibb on July 20.) The Department filed a notice of appeal on November 16.

California Rules of Court, rule 8.104⁵ provides, as relevant here, that “a notice of appeal must be filed on or before the earliest of:

“(A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled ‘Notice of Entry’ of judgment or a file-stamped copy of the judgment, showing the date either was served;

“(B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled ‘Notice of Entry’ of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or

“(C) 180 days after entry of judgment.” (Rule 8.104(a)(1).) As used in subdivision (a), “ ‘judgment’ includes an appealable order if the appeal is from an appealable order.” (Rule 8.104(e).)

Gibb argues the appeal is untimely because the Department “did not file a Notice of Appeal within 60 days from the date [it] was served with either the Order of Notice of Decision or the Order and Judgment.” He does not specify which provisions of rule 8.104(a)(1) allegedly apply here and thus fails to account for the requirements of the rule. Under rule 8.104(a)(1)(A) and (B), a 60-day appeal period is triggered only if the clerk or another party serves “a document entitled ‘Notice of Entry’ of judgment or a file-

⁵ All rule references are to the California Rules of Court unless otherwise indicated.

stamped copy of the judgment.” The July 16, 2012 “Notice of Decision” does not qualify as a judgment within the meaning of rule 8.104(a) because, as an order granting a petition for a writ of mandate, it was not an immediately appealable order. (See Code Civ. Proc., § 904.1; rule 8.104(e).) The August 3 order was a judgment within the meaning of the rule, but nothing in the record indicates that either the clerk or a party served a file-stamped copy of this judgment or a notice of entry of the judgment on or after August 3. All the record discloses is that Gibb had served the Department with the *proposed* order on July 20. To the extent Gibb intends to argue that some combination of these documents collectively satisfied the requirements of rule 8.104(a)(1)(A) or (B), we reject the argument as unsupported by legal authority. (See *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 905 [rule 8.104(a)(1) requires a single document that is sufficient in itself to satisfy all of the rule’s conditions].)

Because the record does not show that either subdivision (A) or (B) of rule 8.104(a)(1) applies, the 180-day time period of subdivision (C) governs and the appeal is timely.

B. *The Petition for Writ of Mandate*

The Department argues that the trial court erred in issuing a writ requiring the Department to restore Gibb’s license. We agree.

1. *Overview of Statutory Scheme*

The driver’s license suspension scheme, often referred to as the administrative per se law, requires a person who is determined to have been driving with a prohibited amount of alcohol in his or her blood to have driving privileges suspended without the need for an actual conviction for a criminal offense. (*Lake v. Reed* (1997) 16 Cal.4th 448, 454 (*Lake*).) “ ‘[T]he express legislative purposes of the administrative suspension procedure are: (1) to provide safety to persons using the highways by quickly suspending the driving privilege of persons who drive with excessive blood-alcohol levels; (2) to guard against erroneous deprivation by providing a prompt administrative review of the suspension; and (3) to place no restriction on the ability of a prosecutor to pursue related criminal actions. [Citations.]’ [Citation.]” (*Id.* at p. 454.)

The zero tolerance law is designed to penalize the presence of alcohol in the blood of anyone under the age of 21 who operates a motor vehicle. (*Coniglio, supra*, 39 Cal.App.4th at p. 673; see also *In re Jennifer S.* (2009) 179 Cal.App.4th 64, 72 [by setting prohibited blood alcohol level at “the lowest detectable amount, [section 23136] penalizes the consumption of alcohol, contemporaneous with the driving of an automobile”].) “[T]he goal of section 23136 is to enhance public safety, and indirectly, to discourage young people from consuming *any* alcohol before driving.” (*Bobus v. Department of Motor Vehicles* (2004) 125 Cal.App.4th 680, 685, italics added.) A zero tolerance law violation is subject only to civil penalties, to be administered by the DMV through the administrative per se procedures. (*Coniglio*, at p. 673.)

A peace officer who has reasonable cause to believe that a person is in violation of section 23136 must ask that person to take a PAS test to determine the presence of alcohol in the person. (§ 13388, subd. (a).) If the person complies and the test reveals a BAC of 0.01 percent or greater, the officer must serve the person with a notice of order of suspension of the person’s driving privilege, confiscate the person’s driving license, issue a temporary license, and send the DMV 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 23136, . . . [and] a report of the results of any chemical tests that were conducted on the person” (§§ 13380, subd. (a); 13388, subd. (b).) The sworn statement must be made on official DMV forms. (§ 13380, subd. (b).)

The DMV next conducts an internal administrative review process. (§§ 13353.2, 13557.) If a license suspension is imposed following this review, the licensee may request an administrative hearing on the matter. (§§ 13557, subd. (b)(4); 13558, subd. (a); 14100, subd. (a).) At the hearing, the Department bears the burden of proving by a preponderance of the evidence the following: “(A) The peace officer had reasonable cause to believe that the person had been driving a motor vehicle in violation of Section 23136 [¶] (B) The person was . . . lawfully detained. [¶] (C) The person was driving a motor vehicle . . . [¶] (iii) [w]hen the person was under 21 years of age and had

a [BAC] of 0.01 percent or greater, as measured by a preliminary alcohol screening test, or other chemical test” (§§ 13557, subd. (b)(3), 13558, subd. (c)(2); *Komizu v. Gourley* (2002) 103 Cal.App.4th 1001, 1005.)

Since the process is administrative, the evidentiary standards are somewhat relaxed. An administrative hearing before the DMV “does not require the full panoply of the Evidence Code provisions used in criminal and civil trials.” (*Petricka v. Department of Motor Vehicles* (2001) 89 Cal.App.4th 1341, 1348 (*Petricka*)). At the administrative hearing, the Department “shall consider its official records and may receive sworn testimony.” (§ 14104.7.) In other respects, Government Code section 11513, which applies to administrative hearings generally, governs the admission of evidence. (§ 14112, subd. (a); *Lake, supra*, 16 Cal.4th at p. 458; *Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 987.) “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. [¶] . . . Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection 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).)

As noted, the Department bears the burden of proof at the hearing. (*Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 536; *Santos v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 537, 549.) Since a driver’s license is a protectable property interest, there must be a showing by “substantial competent evidence of facts supporting the suspension.” (*Davenport, supra*, 6 Cal.App.4th at p. 139.)

If a suspension is upheld by the hearing officer, the driver may file a petition for review of the hearing officer’s decision in the superior court. (§ 13559, subd. (a).) “If the court finds that the [D]epartment exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner,

or made a determination which is not supported by the evidence in the record, the court may order the [D]epartment to rescind the order of suspension or revocation and return, or reissue a new license to, the person.” (*Ibid.*) Under the sufficiency of the evidence prong, the “court is required to determine, based on its independent judgment, ‘whether the weight of the evidence supported the administrative decision.’” [Citation.]” (*Lake, supra*, 16 Cal.4th at pp. 456–457.) The court may not consider any evidence outside the record of the hearing. (§ 13559, subd. (a).) “The administrative findings come before the superior court with a ‘strong presumption of correctness,’ and the burden rests on the petitioner to establish administrative error. [Citation.]” (*Hildebrand v. Department of Motor Vehicles* (2007) 152 Cal.App.4th 1562, 1568 (*Hildebrand*).)

On appeal of a trial court’s sufficiency of the evidence determination, “we ‘need only review the record to determine whether the trial court’s findings are supported by substantial evidence.’ [Citation.] ‘We must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court’s decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court’s. [Citation.] We may overturn the trial court’s factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings. [Citation.]’ [Citation.]” (*Lake, supra*, 16 Cal.4th at p. 457.) We review the trial court’s evidentiary rulings for abuse of discretion. (*Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1217.)

2. *Sufficiency of the Administrative Hearing Evidence.*

The Department does not dispute that the hearing officer erroneously admitted Culver’s telephonic testimony and agrees that the testimony must be disregarded in determining whether the Department met its burden of proof.⁶ However, the Department

⁶ The Department does not argue that the calibration records on the PAS device, which were received in evidence at the administrative hearing, should be considered in determining whether the Department met its burden of proof at the hearing. While the records may have been otherwise admissible (see *Lake, supra*, 16 Cal.4th at pp. 460–462), there was no foundation offered for the records here other than Culver’s testimony.

contends that the remaining evidence admitted at the hearing was competent and admissible and was sufficient to establish the Department's prima facie case, particularly in the absence of any contrary evidence presented by Gibb. We agree.

Here, the competent evidence before the administrative hearing officer, and before the trial court, relating to Gibb's consumption of alcohol consisted entirely of the Sworn Statement. Gibb objected to introduction of the Sworn Statement as hearsay. But, "[i]n proceedings to suspend or revoke a driver's license, the facts necessary to justify suspension can be established by the use of the sworn statement of the arresting officer, attesting to matters within the officer's personal knowledge, even though the officer does not personally appear and the licensee offers contrary proof. [Citations.]" (*Davenport, supra*, 6 Cal.App.4th at pp. 139–140.)

a. *Hearsay Exception*

The Sworn Statement falls within the official public records exception to the hearsay rule. (Evid. Code, § 1280; *Lake, supra*, 16 Cal.4th at p. 461; *Gananian v. Zolin* (1995) 33 Cal.App.4th 634, 639 (*Gananian*).) This exception makes admissible a writing made to record an act, condition or event if the writing "was made by and within the scope of duty of a public employee," "at or near the time of the act, condition, or event," and "[t]he sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid.Code, § 1280.) "An officer's Vehicle Code section 13353 statement meets these criteria because it is made by a public employee within the scope of his or her duty and at or near the time of the event and the source of information—[here,] the officer's firsthand observations—indicate trustworthiness. [Citations.]" (*Imachi v. Department of Motor Vehicles* (1992) 2 Cal.App.4th 809, 815 (*Imachi*).) The trustworthiness of the officer's statements is bolstered by the evidentiary presumption that official duties are regularly performed. (Evid. Code, § 664.) "[T]he essential 'circumstantial probability of trustworthiness' justifying the common law

Therefore, we do not separately consider either admissibility or foundation for this record, nor do we consider the content.

exception to the hearsay rule for official statements ‘is related in its thought to the presumption that public officers do their duty. When it is a part of the *duty of a public officer* to make a statement as to a fact coming within his official cognizance, the great probability is that he does his duty and makes a correct statement The fundamental circumstance is that an official duty exists to make an accurate statement, and that this special and weighty duty will usually suffice as a motive to incite the officer to its fulfillment. . . . It is the influence of the official duty, broadly considered, which is taken as the sufficient element of trustworthiness, justifying the acceptance of the hearsay statement.’ [Citation.]” (*Fisk v. Department of Motor Vehicles* (1981) 127 Cal.App.3d 72, 78–79.) Under sections 13353 and 13380, officers have a duty to report accurately the facts of an arrest for drunk driving and the results of an incident blood-alcohol test. (*Davenport, supra*, 6 Cal.App.4th at p. 143, citing § 13353 & former § 23158.2.) “ ‘[T]he 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. [Citations.]” (*Imachi, supra*, 2 Cal.App.4th at p. 815, citing *Snelgrove v. Department of Motor Vehicles* (1987) 194 Cal.App.3d 1364, 1375 (*Snelgrove*); see also *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1232 (*Manriquez*); *Baker v. Gourley* (2000) 81 Cal.App.4th 1167, 1172.)⁷

b. *Foundation*

The fact that an officer’s sworn statement falls within a hearsay exception does not mean, however, that every matter in the sworn statement is admissible and legally sufficient to support a finding. “Each matter sworn to must itself be supported by an adequate foundation of personal knowledge by the officer and any other appropriate

⁷ See also *Mackler v. Alexis* (1982) 130 Cal.App.3d 44, 55; *Burge v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 384, 388; *Poland v. Department of Motor Vehicles* (1995) 34 Cal.App.4th 1128, 1136; *Hildebrand, supra*, 152 Cal.App.4th at p. 1570.)

guarantee of reliability, or that matter is not admissible and cannot be relied upon. [Citations.]” (*Davenport, supra*, 6 Cal.App.4th at p. 140.)

Gibb challenges the sufficiency of the foundational evidence for the PAS test results in the absence of Culver’s calibration testimony. He insists the Sworn Statement cannot establish an adequate foundation because Jimenez “did not calibrate the machine nor did he have any personal knowledge of whether the machine was maintained, in good working order, accurate or reliable.” The trial court, in granting the writ of mandate, agreed that without Culver’s testimony “there was no other evidence establishing the reliability of the particular PAS device used in this case.”⁸

We agree the Department must lay a proper foundation for BAC test results it presents at an administrative hearing. To show the test results meet minimum standards of reliability, the Department must submit proof of “(1) properly functioning equipment, (2) a properly administered test, and (3) a qualified operator.” (*People v. Williams* (2002) 28 Cal.4th 408, 417 (*Williams*).)

When the test results are offered to establish a particular BAC level, it is well established that an officer’s section 13353 sworn statement reporting the test results, and certifying that the results were obtained consistent with the requirements of California Code of Regulations title 17,⁹ is sufficient to establish such a foundation. “The recorded test results are presumptively valid and the DMV is not required to present additional foundational evidence. [Citation.]” (*Shannon v. Gourley* (2002) 103 Cal.App.4th 60, 65;

⁸ Gibbs suggests the fact that the hearing was twice continued in order to secure Culver’s testimony shows that the hearing officer granted the continuances “because she believed that Officer Culver was a necessary witness to establish the reliability” of equipment used to measure Gibb’s BAC, and that she also believed that the evidence would be insufficient without the testimony. The hearing officer’s statements cited by Gibb simply describe the testimony Culver was expected to provide for the purpose of explaining her decision to allow the testimony to be received by phone rather than in person, implying (if anything) that she did not consider the evidence to be crucial to the case.

⁹ All further references to Title 17 or Regulations are to title 17 of the California Code of Regulations.

see also *Williams, supra*, 28 Cal.4th at pp. 416–417; see Regs., § 1215 et seq.; *Taxara v. Gutierrez* (2003) 114 Cal.App.4th 945, 949; *Manriquez, supra*, 105 Cal.App.4th at pp. 1232–1233.) The presumption arises from the official duty of law enforcement personnel to comply with regulations that govern the conduct of blood alcohol tests used in this context (Title 17) and the regulations’ assurance of reliability. (See *Davenport, supra*, 6 Cal.App.4th at pp. 140–142 & fn. 4; see also *Petricka, supra*, 89 Cal.App.4th at pp. 1347–1348 [official duty presumption supplies foundation for test results absent contrary evidence]; *Morgenstern v. Department of Motor Vehicles* (2003) 111 Cal.App.4th 366, 374 [same]; *Hernandez v. Gutierrez* (2003) 114 Cal.App.4th 168, 172 [same].) However, certification of Title 17 compliance is not the only method to establish the necessary foundation. If reliability of the result is otherwise established (by proof of the three foundational elements identified in *Williams*), noncompliance with certain Title 17 regulations goes to the weight, rather than the admissibility, of the evidence. (*Williams, supra*, 28 Cal.4th at p. 414.)

The Attorney General contends, erroneously, that Jimenez’s certification and official recordation of the PAS test results provided prima facie proof of “both [T]itle 17 compliance and the alternative . . . criteria” and that the PAS results “enjoy[] the presumption of reliability that flows from the application of Evidence Code sections 660, 664 and 1280.” The DS 367M form provides for certification of PAS results and/or for “Chemical Test” results, but only the chemical test results section includes certification of Title 17 compliance by the “Breath Test Machine Operator.” Jimenez completed only the PAS section of the form.

In that PAS certification, Jimenez identified the model and serial number of the machine used, and affirmatively certified under penalty of perjury that he had “received training on the proper operation of this [PAS] device and administration of the PAS test and am competent and qualified to operate the device;” and that he had “administered this PAS test properly in accordance with the manufacturer’s guidelines and instructions.” Both statements concern matters within his personal knowledge, and neither was contradicted or rebutted by other evidence. Since he had a duty to properly administer

the test, the Evidence Code section 664 presumption of official duty regularly performed applied. Jimenez thus established at least prima facie that a “qualified operator” had performed a “properly administered test,” and Gibb failed to show otherwise.

Jimenez further certified that the PAS device was “functioning properly at the time of the test.” Only the foundation for this last statement is truly subject to challenge, and only on this point is Culver’s proffered testimony relevant. The issue then is whether testimony as to *calibration* (i.e. accuracy) of the PAS device is essential to a finding of reliability, when the actual operator’s uncontroverted certification otherwise provides evidence that the device was “functioning properly.” We believe not, at least in circumstances where the quantitative content result is not the determinative issue for the license suspension.

There is a distinction between breath-testing devices that determine the *concentration* of alcohol in the blood versus devices that simply determine the *presence* of alcohol in the blood. (*People v. Bury* (1996) 41 Cal.App.4th 1194, 1202.) Title 17 regulations, which require that instruments testing for BAC be routinely checked for accuracy and precision (Regs., § 1220.2, subd. (a)(5)), “apply to PAS tests that determine the *concentration* of alcohol in the blood but not those that determine only its *presence*.” (*Williams, supra*, 28 Cal.4th at p. 414, fn. 2 [rejecting as dicta the statement in *Coniglio* that Title 17 never applies to PAS tests].)¹⁰ It is the *presence* of measurable alcohol in

¹⁰ *Coniglio* also dealt with a zero tolerance license suspension. The trial court granted a writ of mandate directing the Department to reinstate the driver’s license of the minor on the basis that the Department failed to establish compliance of the PAS device with Title 17 requirements. (*Coniglio, supra*, 39 Cal.App.4th at pp. 670–671.) The Sixth District analyzed the Title 17 regulations and concluded they did not apply to PAS tests that were performed to determine the *presence* of alcohol in drivers under the age of 21, largely because the regulations apply to devices that measure the *concentration* of alcohol in blood, not the presence of alcohol in blood. (*Id.* at pp. 677–681.) The court concluded that Title 17 regulations did not apply to the PAS device and found in that instance the arresting officer’s live testimony at the administrative hearing was insufficient to establish the reliability of test administered. (*Id.* at pp. 681, 684–685.) The court reached this conclusion finding that lack of testimony about how the device was maintained or whether the standards for calibration were established precluded a finding of reliability.

the system of a person under 21 that triggers the license suspension penalties under section 23136.

The Legislature has expressly designated the PAS test as a means of measuring and proving whether a driver under age 21 has a BAC of 0.01 percent or greater. (§§ 23136, subds. (a) & (b), 13388, subd. (a), 13353.2, subd. (a)(2).) Section 13388 in fact requires an officer to use a PAS test device if one is immediately available. “By designating the PAS test as the proper testing device, and by keeping .01 as the threshold blood-alcohol level, the Legislature made clear that the zero tolerance law meant just that—zero tolerance. To this end, the Legislature directed that the PAS test be used to detect the *presence* of alcohol, rather than a particular quantification.” (*Coniglio, supra*, 39 Cal.App.4th at p. 676, italics added.) “Given the Legislature’s repeated reference to the PAS test within the zero tolerance law, and its repeated direction that the device be used to measure the presence of alcohol in the blood, rather than a particular [BAC], we conclude that the Legislature has found the PAS test to be a reliable method for enforcing the zero tolerance law.” (*Id.* at p. 677.)

If the PAS test itself is deemed to be a reliable method of detecting the presence of blood alcohol, what then is required to establish that the PAS device was “functioning properly” at the time the test was administered? Jimenez certified that it was. Certainly he had personal knowledge based on his own observations that the machine was operable, and when Jimenez used it “properly in accordance with the manufacturer’s guidelines and instructions” it generated test results well in excess of the .01 percent measurable threshold. Jimenez also reported that he observed that Gibb had bloodshot and watery eyes, an odor of alcoholic beverage on his person, and slurred speech, providing circumstantial corroboration and another “appropriate guarantee” (*Davenport, supra*,

(*Ibid.*) The court declined to rely upon the “official duty” presumption (Evid. Code, § 664) since it had found that Title 17 was inapplicable to the PAS test, and in the absence of “ ‘governing statutes or regulations’ ” regulating the testing and reliability of the PAS test, the test result could not be presumed reliable. (*Id.* at pp. 683–684.)

6 Cal.App.4th at p. 140) that the machine was in fact operating properly in measuring the *presence* of alcohol.

Gibb argues *Coniglio, supra*, 39 Cal.App.4th 666 is “controlling” and requires the Department to present “testimony” establishing that the PAS device was in good working order. *Coniglio* holds only that the Department cannot rely on the presumption of an official duty regularly performed (Evid. Code, § 664) to establish a foundation for PAS test results that are offered to prove a person under 21 drove while alcohol was present in his or her blood. However, nothing in *Coniglio* requires that *live* testimony be presented to establish the necessary foundation, and as we have discussed, the law is well settled otherwise. Even in the absence of an evidentiary presumption as to the good working order of the machine, we believe that Jimenez’s Sworn Statement was sufficient under the circumstances to provide a prima facie foundation that the PAS device reliably measured the presence of alcohol in Gibb’s system at the time of his arrest, regardless of whether the device was shown to have accurately measured the precise quantity of alcohol in Gibb’s system.

Gibb argues the trial court was free to disregard the officer’s certification “because the record shows that . . . Jimenez did not calibrate the machine nor did he have any personal knowledge of whether the machine was maintained, in good working order, accurate or reliable.” Gibb cites no record evidence to support this statement; however, we presume he refers to Culver’s telephonic testimony concerning the PAS accuracy logs maintained by the Danville Police Department. Indeed, he writes, “In reality, the only reason why . . . Jimenez may believe that the device was functioning properly is because it is maintained by . . . Culver.”

Gibb is wrong for three reasons. First, at Gibb’s own request, Culver’s testimony was stricken from the record. Consequently, the court could not infer from Culver’s testimony that Jimenez did not personally know whether the device was working properly. Second, Culver’s testimony did not demonstrate that Jimenez lacked personal knowledge that the device was working properly, for the reasons stated *ante*. Third, even if we assume that Jimenez relied on reports from Culver to certify that the device was

working properly, the certification would be admissible as an exception to the hearsay rule because Culver had a duty to report his own observations accurately. Statements in an official record may satisfy the trustworthiness element of Evidence Code section 1280, subdivision (c) even if they are not within the personal knowledge of the public officer who prepared the report. “[F]or the [official record hearsay] exception to apply, ‘[i]t is not necessary that the person making the entry have personal knowledge of the transaction. [Citations.]’ [Citation.] Assuming satisfaction of the exception’s other requirements, ‘[t]he trustworthiness requirement . . . is established by a showing that the written report is based upon the observations of public employees who have a *duty* to observe the facts and report and record them correctly.’ [Citation.]” (*Gananian, supra*, 33 Cal.App.4th at pp. 639–640, fn. omitted; see also *McNary v. Department of Motor Vehicles* (1996) 45 Cal.App.4th 688, 694–695 [following *Gananian*]; *Hildebrand, supra*, 152 Cal.App.4th at pp. 1570–1572 [same].)

c. *Sufficiency of the Department’s Evidence*

Because the Sworn Statement was admissible as an official record and laid a proper foundation for the PAS test results, the statement was competent evidence that could be used to fulfill the Department’s burden of proof at the hearing. (Gov. Code, § 11513, subd. (c); *Gananian, supra*, 33 Cal.App.4th at p. 639.) Despite the absence of live testimony, “[t]he due process concern for cross-examination and confrontation [i]s satisfied by the licensee’s ability to subpoena the officer himself if desired.”¹¹ (*Snelgrove, supra*, 194 Cal.App.3d at p. 1371 [describing holding of *Burkhart v. Department of Motor Vehicles* (1981) 124 Cal.App.3d 99, 110]; see *id.* at pp. 1375–1376 [agreeing with *Burkhart*’s due process analysis].) Gibb presented no evidence and does not contend that he was denied an opportunity to subpoena witnesses in order to confront and cross-examine them. The Department accordingly satisfied its burden of proof.

¹¹Gibb was entitled to request “subpoenas or subpoenas duces tecum, or both, . . . for attendance or production of documents at the hearing.” (§ 14104.5, subd. (a).)

In conclusion, the trial court’s implied ruling that Jimenez’s certification was inadmissible evidence on the reliability of the PAS test was legally incorrect and thus an abuse of discretion. It follows that the court’s ruling that “there was no . . . evidence establishing the reliability of the particular PAS device used in this case” was not supported by substantial evidence. We therefore reverse the court’s grant of the petition for writ of mandate.

III. DISPOSITION

The judgment granting the writ of mandate is reversed.

Bruiniers, J.

We concur:

Jones, P. J.

Simons, J.