STATE OF RHODE ISLAND
PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Daniel Houle	:	
	:	**A.A. No. 6AA-2019-58**
v.	:	**(C.A. No. T19-0003)**
	:	**(18001539224)**
State of Rhode Island	:	
(RITT Appeals Panel)	:	

JUDGMENT

This cause came before DuBose, J. on Administrative Appeal, and upon review of the record, memoranda of the parties and a decision having been rendered, it is

ORDERED AND ADJUDGED

The decision of the RITT Appeals Panel is REVERSED.

Dated at Warwick, Rhode Island, this 25th day of January, 2021.

ENTER: **BY ORDER:**

/s/ **/s/**

STATE OF RHODE ISLAND
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Daniel Houle	:	
	:	**A.A. No. 6AA-2019-58**
v.	:	**(C.A. No. T19-0003)**
	:	**(Summons:18001539224)**
State of Rhode Island	:	
(RITT Appeals Panel)	:	

DECISION

DuBose, J. This matter is before the Court on an administrative appeal from a final decision rendered by the Rhode Island Traffic Tribunal Appeals Panel which affirmed the decision of the Trial Magistrate rendered on February 13, 2019. In that decision, the Trial Magistrate found that the State of Rhode Island ('Appellee") satisfied its burden in proving that Daniel Houle ("Appellant") was speeding in violation of R.I.G.L § 31-12-4, "Prima facie limits." Having been found guilty, Appellant was fined $485.00. The crux of Appellant's argument is that the trial magistrate's ruling (that the dash-mounted radar was both properly functioning and properly calibrated to ensure accuracy) is not supported by substantial evidence. For the reasons that follow, this Court finds that the RITT Appeals Panel decision must be REVERSED.

I

Facts and Travel of the Case

A

The Citation and the Trial

The facts of the incident in which Mr. Houle was cited for speeding by Rhode Island State Police Trooper William Reilly (Trooper Reilly) on December 16, 2018, are sufficiently stated in the decision of the panel. The core of the incident is described as follows:

> …
> On December 16, 2018, Trooper Reilly observed a vehicle traveling at a high rate of speed. Tr. at 8:11-13, Feb. 13, 2019 (Vol.1). After activating his dash-mounted radar device, which registered the vehicle's speed at ninety-four miles per hour in a fifty-five miles per hour speed zone, Trooper Reilly conducted a traffic stop of the vehicle. Id. at 8:14-9:7. Trooper Reilly identified the driver of the vehicle as Appellant [Daniel Houle] and issued Appellant a citation for the above-referenced violation. Id. at 9:8-13; 10:18-20. See also Summons No. 18001539224.

Decision of Panel, August 26, 2019, at 1-2.

Appellant was cited for speeding and from the outset adamantly contested the charged violation. The matter proceeded to trial before Rhode Island Traffic Tribunal Magistrate Alan Goulart (Trial Magistrate) on February 13, 2019.

Prior to the commencement of the State's case, counsel for Appellant made a preliminary motion to dismiss. Essentially, counsel posited that, as a prima facie matter, the radar had not been calibrated within a "reasonable time" as is required by both case law[1] and

1. Appellant cites *City of East Providence v DaSilva,* C.A. M16-0002 amended (February 13. 2017). In that case the RITT found that the radar in issue was calibrated within a reasonable time. That radar was last calibrated in February 2015 and was set to expire in February 2016. The date of the citation

Rhode Island State Police Policy-General Order 56 A-1. See February 13th Trial Transcript, at 3. Essential to Appellant's argument was a "certificate of accuracy" dated July 7, 2014 for the radar that was utilized by Trooper Reilly in the instant case. Appellant's motion was denied, and the matter proceeded to trial.

At trial, the officer testified as to the salient facts of the traffic stop in a manner consistent with the foregoing narrative. But much of the officer's testimony was taken up with setting out his credentials and with explaining how the radar unit works and operational protocols. On cross-examination Trooper Reilly explained that with respect to radar units,

> "[t]he only procedure we do is when you turn the cruiser on…you turn your [ ] dash radar mounted unit on. There is a test button. You hit the test button. It calculates and tests the internal calculations of the radar unit itself, for each individual speed…if there is ever an error, it shows a test error and then you cannot use the dash mounted unit." *Id.* at 12:19-13:8

Decision of Panel, at 3. Counsel further questioned Trooper Reilly about his familiarity with the radar in question relative to its history. See February 13th Trial Transcript, at 13-14. Trooper Reilly testified that he was utilizing a borrowed cruiser on the day in question and confirmed he is not familiar with the history of this particular radar. Id. at 14-15.

Upon the State's closing, Appellant, through his counsel, began his defense by introducing the "Certificate of Accuracy" ("CoA") which was marked as Defendant's Exhibit 1. Id. at 15. In response to the Trial Magistrate's questions, Trooper Reilly confirmed that the CoA was in fact the calibration sheet for the radar in question, that the calibration occurred when the radar was first purchased [July,2014], and that he has no knowledge of

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in this case was December 2015 rendering the calibration "valid for approximately three months by the Department's guidelines." (Page 2)

whether it has been calibrated since [2014]. Id. at 16. Based on this testimony, Appellant moved again for a dismissal, which was denied.

Prior to handing down his decision the Trial Magistrate allowed the Appellant to enter two additional exhibits into the record: Defendant's Exhibit B is the RISP General Order and Policy regarding radar operation and care and Defendant's C is the National Highway Traffic and Safety (NHTSA") manual.

The Court then rendered its decision, finding Appellant guilty of the speeding violation. Specifically, the Court found that:

> "In this matter, the evidence which was offered to show that the device was working properly was the testimony of Trooper Reilly. That he *calibrated (*emphasis added*)* the device, and it was properly working on the date of the violation." See February 13th Trial Transcript, at 20-21

Using the radar clocked speed of 94mph in a 55mph zone, the Trial Magistrate applied a statutory formula and a $485 dollar fine was imposed. Id. at 22.

B

Proceedings before the Appeals Panel

Aggrieved by this decision, Mr. Houle filed an immediate appeal. On May 29, 2019 his appeal was heard by an RITT Appeals Panel (the "Panel") composed of Magistrate Noonan (Chair), Administrative Magistrate Abbate, and Chief Magistrate Disandro.[2] In a decision dated August 29, 2019, the Panel rejected Appellant's central argument that "the Trial Magistrate erred because the evidence presented at trial established that the radar

2 The Panel orally granted Appellant's counsel's motion to waive Mr. Houle's appearance pursuant to Rule 23(b) if the RITT Rules of Procedure.

device used to determine Appellant's speed had not been calibrated within a reasonable time." See Decision of Appeals Panel, at 6.

The Panel began its analysis of the Appellant's argument regarding the reliability of the radar unit by noting that our Supreme Court, in *State v. Sprague,* 113 R.I. 351, 322 A.2d 36 (R.I.1974), declared that radar-generated speed readings are admissible if the prosecution (a) shows that "the operational efficiency of the radar unit was tested within a reasonable time by an appropriate method" and (b) presents "testimony setting forth [the Officer's] training and experience in the use of a radar unit."[3] Id. (quoting *Sprague,* 113 R.I. at 357, 322 A.2d at 39-40). The appeals panel then summarized the pertinent portion of Trooper Reilly's testimony:

> "Here the evidence demonstrates that the radar unit used to detect Appellant's speed was 'tested within a reasonable time and by a reasonable method' because Trooper Reilly testified that he tested the radar unit prior to and after his shift that day using 'the test button on the dash-mounted radar unit. Id. (Citing February 13th Trial Transcript, at 9).

With respect to Appellant's key piece of evidence, namely the 2014 CoA, the panel was not impressed. The panel, in essence, found that Trooper Reilly's act of running the internal test was in fact a calibration test. They declared that:

> "[The] Appellant's argument overlooks the fact that Trooper Reilly *calibrated* the radar unit before and after his shift demonstrating that the device had been calibrated *after* July 2014."[ ] The certificate of accuracy does not rebut Trooper Reilly's testimony that he calibrated the unit that day; it merely evidences that a third party calibrated the unit in July 2014. Id. at 7.

Returning to *Sprague,* the panel correctly noted that that decision "only requires that radar

3 The panel appropriately found that prong two under Sprague was satisfied as did the Trial Magistrate. Because this prong is not at issue here on appeal, further analysis relative to it, is not necessary.

and laser units be calibrated 'by an appropriate method' and 'within a reasonable time'." Id. (quoting *Sprague,* 113 R.I. at 357, 322 A.2d at 39-40).

The panel went on to note that it was not permitted to substitute its judgment for that of the trial judge on questions of fact, particularly because its members do not have the opportunity to observe the live testimony of the witness. Id. at 8 (quoting *Link [v. State],* 633 A.2d [1345], 1348 [(R.I. 1993)] (citing *[Liberty Mutual Ins. Co. v.] Janes,* 586 A.2d [536,] 537 [(R.I. 1991))] *and A. Salvati Masonry Inc. v. Andreozzi,* 151 A.3d 745, 749 (R.I. 2017)). The panel therefore found that it had no basis upon which to disturb the Trial Magistrate's finding that Trooper Reilly's testimony satisfied both prongs of the *Sprague* test. And in light of reliable, probative and substantial evidence, the appeal was denied, and the charged violation sustained. Id. at 9.

On September 4, 2019, Appellant filed a timely appeal to the Sixth Division of the District Court.

II

STANDARD OF REVIEW

The standard of review which this Court must employ is enumerated in G.L. 1956 § 31-41.1.-9(d), which provides as follows:

> (d) *Standard of review.* The judge of the district court shall not substitute his or her judgment for that of the appeals panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the appeals panel, or may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the appeals panel's findings, inferences, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the appeals panel;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;

> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This standard is akin to the standard of review found in G.L. 1956 § 42-35-15(g), the State Administrative Procedures Act (APA).

Under the APA standard, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' " *Guarino v. Department of Social Welfare,* 122 R.I. 583, 584, 410 A.2d 425 (1980) (citing G.L. 1956 § 42-35-15(g)(5)). Thus, the Court will not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact. *Cahoone v. Board of Review of the Department of Employment Security,* 104 R.I. 503, 246 A.2d 213 (1968). Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result. *Id.* at 506-507, 246 A.2d at 215.

However, when reviewing the factual determinations of the appeals panel, this Court's role is limited; indeed, it is *doubly* limited — our duty in this case is to decide whether the panel was "clearly erroneous" when it found that the Trial Magistrate's adjudication of Mr. Houle was not "clearly erroneous" — a limited review of a limited review. *See* G.L. 1956 § 31-41.1-8(f) *and* G.L. 1956 § 31-41.1-9(d) (quoted *ante* at 8). *Also Link v. State,* 633 A.2d 1345, 1348 (R.I. 1993) (opining, construing prior law, which was also "substantively identical" to the APA procedure, that the District Court's role was to review the trial record to determine if the decision was supported by competent evidence).

III

APPLICABLE LAW

In the instant matter Appellant was charged with violating section 31-14-2 of the General Laws which states in pertinent part:

> **31-14-2 Prima facie limits. —** Where no special hazard exists that requires lower speed for compliance with § 31-14-1, the speed of any vehicle not in excess of the limits specified in this section or established as authorized in this title shall be lawful, but any speed in excess of the limits specified in this section or established as authorized in this title shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful …

IV

ANALYSIS

A

Positions of the Parties

1

Appellant

In his four-page Memorandum in Support of Appeal, Appellant contends that Trooper Reilly's "hitting the [test] button on the radar device to check [if] it was in proper working order….is not calibration." (*Appellant's Memorandum,* at 2). In support of this position, Appellant cites four sources of authority:

1) The NHTSA Manual-Exhibit B
2) RISP General Order 56 A1-Exhibit C
3) RISP Training PPT Slide deck- Exhibit D
3) *State v. Sprague,* 113 R.I. 351, 322 A.2d 36 (R.I.1974)[4]

In sum, Appellant argues that each of the authorities cited above distinguish "internal tests" from "external calibration tests" both of which are expressly required to ensure that the

4 *Sprague* will be discussed further in the Discussion section of this decision.

radar device is operating properly.

2

The Appellee's Response

In the State's Reply Brief, the Appellee urges this court affirm the Panel's decision based on three legal arguments:

1) The Appellant's Memorandum should not be considered by the court due to it being filed out of time.[5]

2) The Panel acted properly in finding that the Trial Magistrate's decision was supported by reliable, probative and substantial evidence.

3) The Appellant failed to articulate a misapplication in law or other clearly erroneous finding by the Trial Magistrate or Panel.[6]

Appellee's Reply Brief in Response at 3-5

3

The Appellant's Sur-Reply

In his Sur-Reply, Appellant reasserted his contention that the State failed to meet its burden under *Sprague* that requires the State to demonstrate that the radar was functioning properly. He further emphasized that a "clear error" occurred when the State "conflates, mischaracterizes, and uses the term internal circuit test to be interchangeable with calibration."

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5 This objection is later responded to by Appellant in his *Sur-Reply in Support of Appeal.* Because the court finds that this objection is without merit, there is no need to address it any further in this decision.

6 Because arguments 2 and 3 are for all intents and purposes opposite sides on the same coin, I'll address them as consolidated arguments in the Discussion section of this decision.

Appellant's Sur-Reply at 2

In support of this assertion, the Appellant cites the specific provisions in the NHTSA regulations (adopted by the RISP) that distinguishes the internal circuit test from an external calibration test both of which are required to ensure that the device is functioning properly. *Id* at 3.[7]

B

Discussion

The question before this court is whether the Panel acted properly in affirming the Trial Judge's ruling that the State met its burden under *Sprague*. More specifically, was the Panel and by extension the Trial Magistrate's finding that Appellant was speeding clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record under G.L. 1956 § 31-41.1.-9(d)(5). I find that it was.

Calibration

In relying on the precedent established in *Sprague*, the State must demonstrate that "the operational efficiency of the radar unit was tested within a reasonable time by a reasonable method." *Sprague* at 355-357, 39-40. In that case, the officer testified that:

> "[H]e turned on the radar "wait[ed] approximately ten or fifteen minutes for the thing to heat up and then you take a tuning fork and outside you would bring the tuning fork and hold it in the front of the head of the radar and if it is on, if the radar was set properly, it would read 65 miles an hour because that is what the tuning forks are set for, 65."

Id. At Footnote 3.

Because *Sprague* is silent as to what constitutes a "reasonable time and reasonable

7 Note: The State opted to not formally respond to Appellant's Sur-Reply.

method.", this court will seek guidance from the materials submitted into evidence at trial. Here, those materials include the NHTSA Manual-Exhibit B; RISP General Order 56 A1-Exhibit C; RISP Training PPT Slide deck - Exhibit D. Each of the exhibits describe the operational and maintenance protocols that should be followed to ensure the that radar is functioning properly. While I agree with the Panel that "the police department regulations…are not binding upon this court." See Decision of Appeals Panel, at 8, they certainly are relevant and probative and should not be summarily dismissed. Each of the aforementioned exhibits discuss the need for a radar to be subject to both and "internal test" and "a periodic calibration test."[8] The former is used to make sure that the device is functioning; the latter to make sure that the reading is accurate.

In this case, it is without dispute that the radar utilized in Appellant's stop was last calibrated in 2014. Again, while *Sprague* is silent as to whether a radar that hasn't been calibrated in five years is "reasonable", the court does find NHTSA's recommendation "that each radar be tested for measurement accuracy annually" instructive. While not bound by it, the court is also informed by this Panel's holding in *City of East Providence v DaSilva,* C.A. M16-0002 amended (February 13. 2017). "The *DaSilva* panel *merely* [emphasis added] determined that the radar device at issue had been calibrated within a reasonable time-ten months prior to the stop- which was accordance with the police department's internal regulations."

See Panel Decision at Footnote 2. This court disagrees with the Panel's categorization that a calibration determination is "mere." In fact, in contemplation that competent evidence of

8 RISP Training PPT Slide 2 "Radar sets must be calibrated internally and externally prior to use. Internally-when you turn your set on and you see a row of 8888. Externally-Using a tuning fork …."

calibration will be relevant at trial , the RISP requires that:

> "All radar and laser unit maintenance and calibration records will be maintained by Radio technicians. Documentation of all calibration will be available for court purposes."

See RISP General Order 56 A1-Exhibit C at 61.19d. This requirement is further expressly stated in the RISP training materials relative to preparation for court. Again, Troopers are instructed that they "must establish that the set was calibrated externally and internally." See RISP Training PPT at Slide 5.

In this case a clear error occurred when the Panel found "that Trooper Reilly calibrated the radar unit before and after his shift, demonstrating that the device had been calibrated *after* July 2014." See Panel Decision at 7. This conclusion is clearly erroneous in light of competent evidence produced at trial, namely the CoA and Trooper Reilly's testimony.

State's Burden

Under *Sprague,* it is the State's "burden to establish that there is sufficient proof of the accuracy of the radar unit." *Sprague* at 357,40. Contrary to the State's position, *Sprague* does not stand for the proposition that it doesn't have to demonstrate the reliability of the radar used to clock speed. While they properly cite the holding that "radar speed meter ratings are admissible without prior showing of the reliability of the [device] that was used to test the accuracy of the radar unit." See Appellee's Reply at 6 (quoting *Sprague* at 537,40). The State's interpretation fails to acknowledge that the *Sprague* court was referring to the "tuning fork" that was used to tune the "tuning fork". Again, in *Sprague* the officer testified that he calibrated the radar with a tuning fork. The defendant objected on the grounds that there wasn't proof that the tuning fork was accurate. In this case, there was no calibration.

When looking at cases in other jurisdictions, this court was further persuaded by United States Magistrate Judge Borcher's opinion in *United States v O'Shea,* 952 F.Supp.700. In *O'Shea,* the defendant was clocked at going 45 mph in 35mph zone on a military installation. As in this case, the officer testified that he ran the internal test but the device had not been calibrated. Accordingly, on appeal, the lower court conviction was over turned and the defendant was found not guilty. *Id.* at 703.

While not binding on this court, I agree with the rational expressed in *O'Shea* that:

> "There must be foundational evidence presented to establish the scientific reliability of a radar device. The simplest way of doing so is to utilize a single certified tuning fork[9]….Absent use of a tuning fork, the burden is placed upon the prosecution to establish a basis for acceptanceof an internal test result. No such foundation was presented in this case."
> *Id.* at 703.

Here, the only evidence presented at trial that Appellant was operating at 94 mph[10] was the instrumental reading from an uncalibrated radar. The State certainly established through Officer Reilly's testimony that the device was working but it did not establish to that it was calibrated to operate properly.

V

CONCLUSION

The case at bar presents a mixed question of fact and law, and this court's role is to examine the decision of the Panel to determine whether it is supported by competent evidence. Mooney v. DLT, A.A. No. 2017-064 (Dist. Ct. 10/25/2018). This Court conducted a thorough review of the Panel's decision and examined the record of the de novo proceeding which took place before the

9. It is not lost on this court that had the RISP simply followed its protocol by once a year conducting a less than onerous tuning fork test, the State would have met its burden.

10. It must be noted that the accuracy of radar reading is of great importance as the imposed fine is assessed commensurate with the number of miles per hour over the prima facia limit.

Trial Magistrate. Based upon this examination, I find that the Panel's determination was "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." R.I.G.L. 1956 § 31-41.1-9. Accordingly, the decision of the Panel is REVERSED.