BEFORE THE FEDERAL TRADE COMMISSION

In the matter of ECM-2024-139

HIWU

Vs.

Michael Hewitt (Trainer)

MICHAEL HEWITT'S REPLY BRIEF

HIWU's failure to provide due process compliant written notice of "date, time, Lab" -- together with the existence of genuinely ambiguous rule provisions relating to applicable Laboratory Standards – resoundingly necessitates reversal.

11-20-24 Order Addressing Part IV of the ECM Notice

*What effect, if any, does the language in the body of the ECM Notice [at "Part IV, B Sample Analysis"] have on the issues raised in this proceeding?

"You have the right to request the analysis of the B Sample provided HIWU receives a request by (date)

"HIWU will notify you, in writing, *of the scheduled date, time and Laboratory* where the B Sample analysis will be completed…." Failure by CP to act timely waives all rights to B Sample testing (default to A results).

CP's Response to the 11-20-24 Order's Directive

The occurrence of the specific language in the body of ECM Notice Part IV merely reinforces the conclusion argued in the Brief. The information provided in the ECM Notice, as recited by HIWU directly from Rule 3345(a), constitutes notice elements which HIWU is obligated to provide the CP per the applicable Lab Standards. By rule, the provisions described therein are Lab Standards which must be followed by HIWU in

order for a particular test result to be deemed a scientifically legitimate result. Under *Daubert* and applicable proof standards, only legitimate scientifically reliable test results are proper proof of a rule violation. Compliance by HIWU with the ECM notice directive is a mandatory due process requirement. If compliance were not mandatory, the clearly established Lab Standards would be rendered entirely superfluous. The simple and basic act of notifying the CP, in writing, of the "date, time, Lab…."

Is itself one of the mandatory Lab Standards.

It is urged that is why the notice appears in Part IV. There CP is being given the critical information HIWU must provide pursuant to the Lab Standards: the fact that CP will be receiving written notice as to "date, time, Lab." All CP knows is that for which HIWU provides notice. Here CP received a written notice stating his legal rights and notifying him as to the applicable Lab Standards. This notice indicated Mr. Hewitt would be receiving written notice re: "date, time, Lab." None came, ever. Presuming this was the first instance of notice being owed – if these events occurred during the time frame *before the other two AAF's ECM notices were issued* -- then the stipulated facts are HIWU did not provide CP written notice under circumstances where CP had no prior exposure to the disciplinary procedures, written or otherwise. Written notice simply never occurred on the Shack's Way case despite the same written notice being provided for the other two AAF's which followed. In the two cases where proper written notice was provided, the B Sample *failed to confirm*. In this case – presumably the first of the three – HIWU did not provide written notice. Unlike the other two, B Sample testing (purportedly) confirmed, although the testing mechanism was fatally flawed as described above.

Deviation from the Lab Standard constitutes departure. The object of the ECM Notice is to provide due process by giving fair notice of items as designated in the Lab Standards. Due process was denied when a principal element of constitutionally valid notice ("date, time, Lab") was denied. Suffice, ECM Notice promised the information would be provided, in writing. Therefore, notice of "date, time, Lab" was an applicable Lab Standard.

Applicable Rules Pertaining to Lab Standards,
when Considered Together as a Cooperative Whole, are Genuinely Ambiguous

HIWU contends it has no obligation to provide written notice. It chooses to enforce a latter provision of Rule 3345 together with Rule 3122 (d), and ignores the clear language directive in Rule 3345(a).

Compare the provisions in paragraph (a) of Rule 3345 to the provision in paragraph (c). When read together, are these provisions ambiguous? One grants a right. The others take away the right previously granted as if the right never existed in the first place.

Under Rule 3345(a) the Agency "will promptly notify" the CP "in writing" of the following: [the ECM Notice Element Requirements]

(iii) the date, time, and place the B Sample will be analyzed……

Note however below, paragraph (c)'s verbiage appears inconsistent with paragraph (a)'s clear directive because, under Rule 3345 (c):

> "***Any defect***" in the ECM Notice…may be corrected by the Agency and….
>
> **"Shall not in any event invalidate the ECM Notice or effect the due applications of the provisions of the (Lab) protocol**…**in relation**

to that violation."

Here a "correction" would not be meaningful or otherwise procedurally possible at this stage. The time has long passed. But the words "shall not in any event invalidate" and the other language following operates to virtually nullify any obligation created under paragraph (a). Then consider Rule 3122(d). If there were any doubt Rule 3345(a) had been nullified, Rule 3122(d) delivers the knockout punch.

> "Departures of any other Standards or any provisions of the Protocol **shall not invalidate analytical results** or other evidence of violation, and **shall not constitute a defense** to a charge of such violation – provided however if the Covered Person establishes that a departure from any other Standards or any provisions of the Protocol "could reasonably have caused the AAF….the Agency shall have the burden to establish that such departure did not cause the AAF."

Why establish Lab Standards to insure the integrity of the process if, for purposes of due process, openly violating those Lab Standards has no adverse impact on the legitimacy of a particular test result? That is an absurdity. The Arbitrator found failure to provide written notice of the B Sample opening "could not be a basis, by itself, to invalidate the violation" and that Appellant "did not show that the results would have been different" had he attended the B Sample opening. [Order Appealed]

What is the only reasonable interpretation of these combined provisions? That Rule 3345(a) creates a Lab Standard protocol which must be followed by the Agency to preserve the legitimacy and integrity of the lab testing process. It is the nondelegable duty of the Agency to provide a CP written notice of "date time place." Failure to observe this

Lab Standard invalidates the testing because, at that point, CP was being denied a right the Lab Standards required CP be provided.

Of course, Rule 3345's "c" provision contains language which *thoroughly nullifies the "a" provision* by invalidating the Lab Standard paragraph (a) clearly created. If part "c" weren't ambiguous enough, note how Rule 3122(d) purports to directly nullify all the paragraph (a) notice provisions. The policy purportedly becomes CP must now show how not being present at the B Sample opening *would have caused the AAF*; or as the Arbitrator found, whether CP's presence "would have changed the result of the analysis of the B Sample." How could CP possibly know whether his presence would have changed the result? HIWU did not follow Lab Standards! It never provided written notice it promised! CP had no opportunity to observe, confirm his own signature, or attest to chain of custody on the first ECM notice he ever received. Further, even if notice was provided, how exactly could a CP reasonably show the result would be different? The provision creates a ridiculous, unattainable burden. How could a man "prove" his presence at the B Lab would have changed the legitimacy of the testing function wherein Lab Standards were not followed? Just like a cow cannot jump over the moon, a CP cannot meet this absurd standard. According to HIWU's interpretation, CP must "jump over the moon" before any departure from Lab Standards can be used against HIWU. Rule language confers rights then takes those rights away; this makes it appear rights were being provided in the interest of fairness -- when in fact the rights were merely superfluous. Textbook ambiguity. When CP cannot overcome the impossible burden, he is left with no remedy for HIWU's breach of its own Lab Standards. CP gets convicted on the basis of a test result which failed to meet the Lab Standards. Under no

circumstances would statutory interpretation principles permit one rule provision to *comprehensively nullify* another. Under no circumstances would statutory interpretation principles permit such an absurd result.

Case Law

In *Auer vs. Robbins*, 117 S. Ct. 905 (1997) the Court expounded upon the *Chevron* doctrine. Here genuine ambiguities in the applicable rule language necessitates court action and *invalidates* routine judicial deference to the agency interpretations. The decision in *Kisor vs. Wilkie*, 139 S. Ct. 2400 (2019) clarifies *Auer*'s principles. "*Auer* deference" to agency interpretation is almost always appropriate -- but there are exceptions. Here *Auer* deference need not be applied based on the undisputed ambiguity created when Lab Standards provisions become nullified by subsequent provisions which disregard the previously established Lab Standards.

When the statute is "silent or ambiguous" courts must defer to a reasonable construction by the agency charged with its implementation. Per the *Chevron* deference principle, if the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, *as would be necessary in the absence of an administrative interpretation*. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is:

"Whether the agency's answer is based on a permissible construction of the statute." *Kisor* citing *Chevron v. N.R.D.C.*, 104 S.Ct. at 2781-82 (emphasis added). *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984) The *Auer* court held deference is not the answer to every question of interpreting an agency's rules. In fact, far from it. When the reasons for that presumption

do not apply, or countervailing reasons outweigh them, courts should not give deference to an agency's reading, except to the extent it has the "power to persuade." *Christopher,* 132 S.Ct. 2156 (quoting *Skidmore v. Swift & Co.*, 65 S.Ct. 161 (1944)). No such power to persuade exists here. *Auer* deference can in fact be unwarranted. In particular, that will be so when a court concludes that an interpretation does not reflect an agency's authoritative, expertise-based, "fair, or considered judgment." (quoting *Auer*); and *United States v. Mead Corp.*, 121 S.Ct. 2164 (2001) (adopting a similar approach to *Chevron* deference).

This case is one of the few exceptions where *Auer* deference does not and should not apply. The law gives an answer. That answer is there is only one reasonable construction. No reasonable interpretation exists as to how these diametrically opposed provisions could be construed as "fair or considered judgment." One nullifies the other. The regulation is genuinely ambiguous. Thus, the court "has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." See *Christensen*, 120 S.Ct. 1655. *Auer* does not, and indeed could not, go that far. Under *Auer* , as under *Chevron* , the agency's reading must fall "within the bounds of reasonable interpretation." *Arlington v. FCC* , 133 S.Ct. 1863 (2013). "And let there be no mistake: That is a requirement an agency can fail." *Kisor* A court should decline to defer to, as here, a merely "convenient litigating position." *Kisor* citing *Christopher*

Statutes are presumed to have been written for a reason. The legislature would never be presumed to have nullified one clear provision with a later following inconsistent provision.

How This Court Should Treat the Genuine Ambiguity

By recognizing Rule 3345(a) directives as to notice elements are mandatory Lab Standards. The other provisions carry no weight to the extent those provisions are inconsistent with Rule 3345(a).

Conclusion

Reversal is the appropriate remedy for the failure to present test results which were in compliance with applicable Lab Standards.

/s/ John Mac Hayes

_____

John Mac Hayes, OBA#15512
1601 S. Victor Avenue
Tulsa, OK 74104
(405) 826-7793
JohnMacHayesLaw@aol.com
ATTORNEY FOR MICHAEL HEWITT

CERTIFICATE OF SERVICE

This is to certify that on this 2nd day of December 2024, a true and correct copy of the above and foregoing document was e-mailed to the following interested parties:

HIWU Counsel
Christy Heath
John Forgy

/s/ John Mac Hayes