LETTER OPINION
2014-L-02

January 14, 2014

Ms. Rozanna C. Larson
Ward County State's Attorney
PO Box 5005
Minot, ND 58702-5005

Dear Ms. Larson:

Thank you for your letter requesting my opinion on implementing the provisions of H.B. 1263, 2013 N.D. Leg., relating to procedures and demerit points for driving without liability insurance. As you indicate, the 63rd Legislative Assembly made a number of changes to the law concerning the offense of driving without liability insurance. Foremost among the changes was to downgrade the offense from a class B misdemeanor to an infraction. In addition, a charge of driving without liability insurance now is treated in the same manner as a noncriminal traffic offense, allowing the officer to issue a traffic citation permitting the driver to request a hearing and contest the charge; authorizing the driver to forfeit the posted bond and not contest the charge; or allowing the driver to offer proof of insurance in effect at the time of the charge, which could result in a dismissal of the offense. You ask whether the charge of driving without liability insurance is to be treated as an infraction under N.D.C.C. ch. 12.1-32 of the criminal code or a noncriminal offense under N.D.C.C. ch. 39-06.1, the motor vehicle section of the North Dakota Century Code, and which of these section's procedures would more properly be applied to the offense of driving without liability insurance.

Based on the following, it is my opinion that for a first-time offense of driving without liability insurance under N.D.C.C. § 39-08-20, the specific procedures and demerit points contained in N.D.C.C. ch. 39-06.1 control over the more general procedures for treatment of infractions in N.D.C.C. ch. 12.1-32. It is further my opinion that second and subsequent offenses of driving without liability insurance are also governed by the procedures and demerit points contained in N.D.C.C. ch. 39-06.1; however, in order to aid in the implementation of the provisions of H.B. 1263, it would be reasonable but not mandatory for a law enforcement officer to take one of two courses of action. The officer may notify the driver that the driver is being charged with a second or subsequent offense, that the bond will be $300, and that if the driver is convicted either at a hearing or by forfeiting bond, the court will issue an order impounding the "motor vehicle number plates of the

motor vehicle owned and operated by the person at the time of the violation. . .", and thereupon release the driver.[1] Alternatively, if the officer determines it is inadvisable to release the driver upon a promise to appear, the officer may take the driver to the nearest or most accessible magistrate who may advise the driver about the enhanced charge and bond and the mandatory impoundment order and then release the driver on a promise to appear at any subsequent court date.[2]

ANALYSIS

Driving without liability insurance is addressed in N.D.C.C. § 39-08-20 of the motor vehicle section of the Century Code and requires a fine of at least $150 for a first offense and $300 for a second or subsequent offense within a three-year period.[3] In addition, upon conviction for a second or subsequent offense, the court is required to order that the number plates of a motor vehicle owned and operated by the driver at the time of the violation be impounded.[4] Upon receipt of the plates, the court is required to deliver them to the police officer making the arrest and to notify the Department of Transportation. The impoundment continues until such time as the driver provides proof of insurance and pays a $20 fee to the court.[5] House Bill 1263 amended N.D.C.C. § 39-08-20, reducing a violation for driving without liability insurance from a class B misdemeanor to an infraction.[6]

Prior to H.B. 1263, driving without liability insurance could not be processed as a noncriminal traffic violation or utilize the administrative hearing procedures found in N.D.C.C. ch. 39-06.1 because it was listed in N.D.C.C. § 39-06.1-05 as a motor vehicle related offense prohibited from utilizing noncriminal procedures.[7] H.B. 1263 removed driving without liability insurance from the list of exceptions, thereby allowing the application of the noncriminal traffic violation procedures contained in N.D.C.C. §§ 39-06.1-02 and 39-06.1-03.[8] By removing the offense of driving without liability insurance from N.D.C.C. § 39-06.1-05 and permitting a driver charged with this offense to utilize the noncriminal traffic violation procedures in N.D.C.C. ch. 39-06.1, the Legislature, in effect, made driving without liability insurance a noncriminal offense.[9] An individual

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[1] N.D.C.C. § 39-08-20(4).
[2] See N.D.C.C. §§ 39-07-07 and 39-07-09.
[3] N.D.C.C. § 39-08-20(4).
[4] Id.
[5] Id.
[6] See 2013 N.D. Sess. Laws ch. 296, § 7.
[7] 2013 N.D. Sess. Laws ch. 296, § 1. See also N.D.C.C. § 39-06.1-02 (charges for noncriminal traffic offenses) and N.D.C.C. § 39-06.1-03 (administrative hearings for noncriminal traffic violations).
[8] 2013 N.D. Sess. Laws ch. 296, § 1.
[9] N.D.C.C. § 39-06.1-02 provides that a driver cited with a traffic offense not listed in N.D.C.C. § 39-06.1-05 "is deemed to be charged with a noncriminal offense."

charged with driving without liability insurance is permitted, under the relevant procedures in chapter 39-06.1, to appear before a designated official, to contest the charge, or to pay the statutory fee for the violation charged at or before the time scheduled for hearing; to forfeit bond by not appearing at the designated time; and to request a hearing on the issue of the charged violation.[10]

H.B. 1263 also made driving without liability insurance a "moving violation" under the motor vehicle section of the Century Code.[11] Driving without liability insurance was also assigned demerit points for what are now termed "noncriminal violations."[12]

However, although H.B. 1263 made the offense of driving without liability insurance a noncriminal violation, it was characterized as an "infraction." The term "infraction" has a specific meaning under the criminal code.[13] In N.D.C.C. ch. 12.1-32, an infraction is classified as a criminal offense and has specific procedures for trial.[14] The penalty for an infraction set forth in N.D.C.C. § 12.1-32-01(7) provides that for a second infraction offense within a year, an individual "may be sentenced as though convicted of a class B misdemeanor," that an infraction "is punishable as a class B misdemeanor," and that the prosecution must so specify in a long form complaint.[15]

In addition, N.D.C.C. § 12.1-32-03.1(1) of the criminal code provides:

> Except as provided in this subsection, all procedural provisions relating to the trial of criminal cases as provided in the statutes or rules relating to criminal procedure shall apply to the trial of a person charged with an infraction. A person charged with an infraction is not entitled to be furnished counsel at public expense nor to have a trial by jury unless the person may be subject to a sentence of imprisonment under subsection 7 of section 12.1-32-01.[16]

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[10] See N.D.C.C. §§ 39-06.1-02 and 39-06.1-03. The driver may also provide proof of insurance to the court to clear the charge. See N.D.C.C. § 39-08-20(2).
[11] See 2013 N.D. Sess. Law ch. 296, § 2, and N.D.C.C. § 39-06.1-09.
[12] See 2013 N.D. Sess. Laws ch. 296, §§ 2-6, and N.D.C.C. § 39-06.1-10(3)(a)(37) through (39).
[13] See N.D.C.C. ch. 12.1-32 (penalties and sentencing).
[14] See N.D.C.C. §§ 12.1-32-01(7) and 12.1-32-03.1.
[15] Id. (emphasis added). In contrast, N.D.C.C. § 39-08-20(4) provides for an enhanced fine of $300 for any second or subsequent conviction for driving without liability insurance within a three-year period and N.D.C.C. § 39-06.1-10 provides for 12 demerit points for a driver having a previous conviction within 18 months.
[16] N.D.C.C. § 12.1-32-03.1(1).

Further, even though H.B. 1263 adopts the use of the noncriminal procedures contained in N.D.C.C. ch. 39-06.1, under the criminal code, all the statutes and rules of criminal procedure that apply to misdemeanors ". . . shall apply to infractions, including, but not limited to, the powers of law enforcement officers, the jurisdiction of courts, the periods for commencing action and bringing a case to trial, and the burden of proof."[17]

Therefore, it is unclear whether driving without liability insurance is to be processed as a noncriminal offense pursuant to the procedures in the motor vehicle code or as an infraction pursuant to the procedures in the criminal code. Normally, when the Legislature changes an offense from a class B misdemeanor to an infraction, one would look to the definition and procedures relating to infractions in the criminal code to determine how they are to be handled. However, in this instance, with H.B. 1263 the Legislature added language treating this particular infraction as though it were any other noncriminal driving offense, as specified in N.D.C.C. ch. 39-06.1 of the motor vehicle code.

Normally, "[w]ords used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained."[18] Further, "[t]echnical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or as are defined by statute, must be construed according to such peculiar and appropriate meaning or definition."[19]

Thus, it must be considered whether the Legislature intended that the infraction of driving without liability insurance was to be governed by procedures under N.D.C.C. ch. 12.1-32 of the criminal code or N.D.C.C. ch. 39-06.1 of the motor vehicle code:

> "The primary goal in construing the meaning of a statute is to discover the intent of the Legislature." Northern X-Ray Company, Inc. v. Hanson, 542 N.W.2d 733, 735 (N.D. 1996). In seeking to determine legislative intent, courts will look first to the language of the statute. Id. "If a statute's language is clear and unambiguous, the legislative intent is presumed clear on the face of the statute. Id." N.D.A.G. 2003-L-33. "Unless words in a statute are defined in the code, they are to be given their plain, ordinary, and commonly understood meaning." Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990). On the other hand, "[i]f the language of a statute is ambiguous or of doubtful meaning, extrinsic aids may be used to interpret the statute." Id.; N.D.C.C. § 1-02-39. "[L]egislative history may be used to determine legislative intent if the meaning of the statute is ambiguous or unclear." N.D.A.G. 95-L-53.[20]

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[17] N.D.C.C. § 12.1-32-03.1(2).
[18] N.D.C.C. § 1-02-02.
[19] N.D.C.C. § 1-02-03.
[20] N.D.A.G. 2003-L-49.

Since it is arguably unclear or ambiguous as to whether the Legislature intended the infractions of driving without liability insurance to be handled as set out in N.D.C.C. ch. 12.1-32 or N.D.C.C. ch. 39-06.1, extrinsic aids may be considered, including, for example, the object sought to be attained by H.B. 1263, the legislative history, the consequences of a particular construction, and the administrative construction of the statute by the persons charged with its administration.[21]

The prime sponsor of H.B. 1263 noted that the process to handle drivers not carrying liability insurance "is very costly and time consuming. This bill will address the problem by changing Driving without Insurance from a criminal offense to an infraction. The change will allow a simple traffic summons to be issued and streamline the process."[22]

Another proponent of H.B. 1263, an assistant police chief, explained:

> The bill before you today is meant to increase compliance with the requirement of motor vehicle operators and owners to maintain motor vehicle liability insurance through a more efficient means of enforcement. House Bill 1263 will move driving without liability from a class B Misdemeanor to a non-criminal offense. The proposed change will allow a law enforcement officer to issue a traffic citation at the time of the traffic stop. The person cited will also be allowed the opportunity to have the citation dismissed upon the simple act of providing proof of insurance coverage to the court of jurisdiction.[23]

In an earlier exchange before the House Transportation Committee on H.B. 1263, the following was noted:

> Representative Drovdal: Is it necessary to go to court after the driver gets a citation, or can the driver just provide the proof of insurance?
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> Mike Reitan: If the citation is issued as an infraction, the individual would have three options: pay the statutory fee, provide the insurance information prior to the court date, and the citation would be dismissed, or appear in court on the date that is on the citation. In court they could plead guilty or not guilty or provide proof of insurance at that time. . . . We purposely modeled this bill after the driver's license and the registration card. In North

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[21] See N.D.C.C. § 1-02-39.
[22] Hearing on H.B. 1263 Before the Senate Comm. on Transp., 2013 N.D. Leg. (Mar. 14) (Statement of Rep. Gruchalla).
[23] Hearing on H.B. 1263 Before the Senate Comm. on Transp., 2013 N.D. Leg. (Mar. 14) (Statement of Mike Reitan).

> Dakota you are required to have your driver's license and registration card in your vehicle. You can be cited at the time of the stop if you don't have them. They may be later dismissed with proof, as in this case.[24]

Further explanation was provided at a later hearing in this exchange:

> Chairman Oehlke: Having a driver's license doesn't require you to have insurance [if] the vehicle you are driving is the one you are required to have insurance on.
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> Mike Reitan, Assistant Chief of the West Fargo Police Department: In support of HB 1263, The proposed change of moving driving without liability insurance from a class B misdemeanor to a non-criminal offense will allow a law enforcement officer to issue a traffic citation at the time of the traffic stop. HB 1263 not only simplifies the process by which someone is cited for driving without liability insurance it provides an easy mechanism to have the citation dismissed . . . .[25]

As is apparent from the legislative history, the proponents of H.B. 1263 sought to pattern enforcement of the infraction of failure to carry liability insurance after the procedures utilized for other noncriminal traffic offenses, such as failure to have a driver's license or registration card in the vehicle. There were no indications in the legislative history that a second or subsequent offense was intended to be treated as a misdemeanor. In fact, doing so would run counter to the stated purpose of simplifying and streamlining the process of handling this particular charge, and not requiring a court appearance unless the driver chose that option.

In addition to the legislative history of H.B. 1263, consideration of other rules of statutory construction is instructive. Section 1-02-07, N.D.C.C., provides:

> **Particular controls general.** Whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable the special provision must prevail and must be construed as an exception to the general provision, unless the general provision is enacted later and it is the manifest legislative intent that such general provision shall prevail.[26]

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[24] Hearing on H.B. 1263 Before the House Comm. on Transp., 2013 N.D. Leg. (Jan. 25) (Statements of Rep. Drovdal and Mike Reitan).
[25] Hearing on H.B. 1263 Before the Senate Comm. on Transp., 2013 N.D. Leg. (Mar. 14) (Statements of Sen. Oehlke and Mike Reitan).
[26] N.D.C.C. § 1-02-07.

Applying this rule to the situation you present, the procedures for handling infractions under N.D.C.C. ch. 12.1-32 can be reasonably construed as a general provision for handling infractions. In this case, the passage of H.B. 1263 indicates the legislative intent to treat driving without liability insurance offenses as infractions, but subject to procedures contained in N.D.C.C. ch. 39-06.1 dealing with noncriminal traffic offenses. Utilizing the procedures in N.D.C.C. ch. 39-06.1 can be reasonably characterized as a special provision which should prevail and be construed as an exception to the general provisions contained in N.D.C.C. ch. 12.1-32.

Another rule of construction is contained in N.D.C.C. § 1-02-09, which provides, in part:

> **Irreconcilable statutes or constitutional amendments passed during the same session.**
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> 1. Whenever the provisions of two or more statutes passed during the same session of the legislative assembly are irreconcilable, the statute latest in date of final passage by the legislative assembly, irrespective of the date on which it was approved or allowed to become law by the governor or of its effective date, prevails from the time it becomes effective.[27]

As indicated above, N.D.C.C. § 12.1-32-01 was also amended during the 63rd Legislative Assembly. The amendments were contained in S.B. 2251, 2013 N.D. Leg.[28] Because H.B. 1263 was approved after S.B. 2251, to the extent there is a conflict between the provisions of the two bills, H.B. 1263 should prevail.[29]

Finally, another well-established rule of statutory construction requires penal statutes to be strictly construed against the state and in a defendant's favor.[30] As you indicate, applying this rule of construction would favor use of the more streamlined and less onerous procedures contained in N.D.C.C. ch. 39-06.1, most significantly allowing the infraction to be handled by merely forfeiting the appropriate bond to the court, avoiding the necessity of a court appearance for both the driver and the officer.

Based on the foregoing, it is my opinion that a driver cited for a first-time infraction of driving without liability insurance is subject to the procedures and demerit points set out in

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[27] N.D.C.C. § 1-02-09(1).
[28] 2013 N.D. Sess. Laws ch. 104, § 11.
[29] H.B. 1263 was finally approved by the Legislature on April 12, 2013, while S.B. 2251 was finally approved by the Legislature on April 11, 2013.
[30] See, e.g., State v. Corman, 765 N.W.2d 530 (N.D. 2009); State v. Smith, 697 N.W.2d 368 (N.D. App. 2005); State v. Rohrich, 450 N.W.2d 774 (N.D. 1990).

N.D.C.C. ch. 39-06.1, the motor vehicle section, particularly N.D.C.C. §§ 39-06.1-02, 39-06.1-03, and 39-06.1-10.

You next ask about the impact of the requirement in H.B. 1263 mandating that the court issue an order impounding the license plates of a driver for a conviction of a second or subsequent charge of driving without liability insurance. There is no explicit provision in H.B. 1263 requiring a court proceeding for repeat violators who would choose to forfeit bond and thus avoid a court appearance. It might be argued that it would be necessary that a limited appearance should take place as a means of issuing the driver the required order of impoundment of license plates upon conviction by adjudication or admission of guilt.

While it may be better practice to issue an impoundment order to the repeat offender in person, there seems to be no reason why an impoundment order could not be issued and served like any other court order[31] for those persons who choose to forfeit bond and forego a court appearance which thereby results in a conviction. If the repeat offender does not deliver the plates to the court at the time indicated on the order, that person would be facing a class B misdemeanor offense, so there would be a serious incentive for a repeat offender to comply with the impoundment order.[32]

If the officer determines that it would be inadvisable to release a driver upon a promise to appear, the officer may take the driver to the nearest or most accessible magistrate pursuant to N.D.C.C. § 39-07-09. The driver could be advised by the magistrate of the enhanced charge and bond, as well as the possibility of an impoundment order if the driver is convicted of the repeat offense.

Although "[l]egislative intent must first be sought from the language of the statute," Adams Cnty. Record v. Greater N.D. Ass'n, 529 N.W.2d 830, 833 (N.D. 1995), "a statute may be stretched a little bit beyond its literal terms to effectuate its policies." Griffen v. Big Spring Indep. Sch. Dist., 706 F.2d 645, 651 (5th Cir. 1983).[33]

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[31] See, e.g., N.D.R. Civ. P. 5 (civil orders may be served in a number of ways, including handing it to the person or mailing it to the person's last known address); see also N.D.R. Crim. P. 49(c) (when court issues an order on post-arraignment motion, clerk to provide notice by mail, third party carrier, to any affected party, etc.).

[32] N.D.C.C. § 39-08-20(4).

[33] N.D.A.G. 96-L-9; see also N.D.C.C. § 1-02-39(1) and (5). You indicated in an e-mail supplied to this office that the judges in your judicial district have devised an interim procedure for a second or subsequent offense of driving without liability insurance, requiring an offender with a second or subsequent offense to be brought to the jail to post a bond of $150 and to sign a promise to appear at a date certain to deal with the balance of the amount due and to issue an order impounding the plates upon a conviction.

Consequently, it is my opinion that a second or subsequent offense of driving without liability insurance is also governed by the procedures and demerit points contained in N.D.C.C. ch. 39-06.1; however, until this matter can be brought before the Legislative Assembly for clarification and, in order to aid in the implementation of the provisions of H.B. 1263, it would be reasonable, but not mandatory, for a law enforcement officer to take one of two courses of action. The officer may notify the driver that the driver is being charged with a second or subsequent offense, that the bond will be $300, and that if the driver is convicted either at a hearing or by forfeiting bond, the court will issue an order impounding the driver's license plates, and thereupon release the driver. Alternatively, if the officer determines it is inadvisable to release the driver upon a promise to appear, the officer may take the driver to the nearest or most accessible magistrate who may advise the driver about the enhanced charge and bond and the mandatory impoundment order, and then release the driver on a promise to appear at any subsequent court date.[34] Of course, the procedures in N.D.C.C. ch. 39-06.1, in any case, permit the driver to appear and contest the charge at an administrative hearing or to provide evidence of insurance in effect at the time of the citation and seek a dismissal of the charge.[35]

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[36]

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[34] See N.D.C.C. §§ 39-07-07 and 39-07-09.
[35] See Email from Rozanna C. Larson, Ward Cnty. State's Atty., to Aaron Birst (Aug. 1, 2013, 9:32 A.M.) (on file with author).
[36] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).