

January 13, 2021

Senate Transportation Committee

Via electronic submission

Re: Testimony in Opposition of S.B. 2113.

Dear Members of the Senate Transportation Committee:

My name is Luke Heck, and I am a criminal defense attorney at the Vogel Law Firm in Fargo, ND. I submit this written testimony in opposition to S.B. 2113 as a result of the constitutional implications that this proposed bill would have on motorists' rights. In short, the North Dakota Supreme Court has repeatedly held that "[i]t is well settled that a driver's license is a protectable property interest that may not be suspended or revoked without due process."¹ In acknowledging this constitutional protection, the Supreme Court has held that the Department of Transportation's failure to hold an in-person hearing, but instead a remote hearing telephonically, violates motorists' due process rights.² In making this conclusion, the Court reiterated,

"In testimony by telephone the image of the witness cannot be seen nor does it disclose if the witness is using or relying upon any notes or documents and, as a result, meaningful communication is effectively curtailed or prevented.... Above all, in testimony by telephone the trier of facts is put in a difficult, if not impossible, position to take into account the demeanor of the witness in determining the witness' credibility"³

In other words, the elimination of in-person administrative hearings would wholly deprive North Dakota motorists of their ability to meaningfully defend against the adverse action that the Department seeks to take against their driving privileges, and could trigger significant due process implications.

¹ *Morrell v. N. Dakota Dep't of Transp.*, 1999 ND 140, ¶ 8, 598 N.W.2d 111, 114; *see also Sabinash v. Director of Dept. of Transp.*, 509 N.W.2d 61, 63 (N.D.1993); *see also Kobilansky v. Liffbrig*, 358 N.W.2d 781, 786 (N.D.1984) (stating a driver's license is a protectable property interest to which the guarantee of procedural due process applies).

² *See Wolfer v. N. Dakota Dep't of Transp.*, 2010 ND 59, 780 N.W.2d 645, 648; *see also Landsiedel v. Dir., N.D. Dep't of Transp.*, 2009 ND 196, 774 N.W.2d 645.

³ *See Wolfer* at ¶ 15 (citing *Lawrence v. Delkamp*, 2008 ND 111, ¶ 10, 750 N.W.2d 452).

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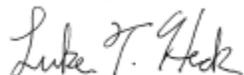
Moreover, the elimination of in-person administrative hearings would create significant practical issues as well, as evidenced by some notable issues that have occurred as a result of the Department holding administrative hearings via videoconference during the pandemic. First, in an administrative hearing for one of my clients, held via videoconference, one of the police officers involved was disconnected from the videoconference. He was unable to reconnect, and as a result had to attend telephonically in lieu of video for his testimony, contrary to the Governor's Executive Order for that particular timeframe. At that same hearing, I, on behalf of my client, sought to offer squad car video evidence into the record. The administrative hearing officer admitted the squad car video into evidence while on videoconference. However, he could not review the squad car video prior to his deadline to issue a decision on my client's driving privileges because the hearing was held a day prior to the deadline, cloud-based filing share attempts did not work due to the police department's squad car video programming, and the only alternative way for him to receive the video evidence was by mail, which was physically impossible due to the hearing being held in the late afternoon on the day preceding the 30-day deadline to hold the hearing. As a result, my client's license was suspended without consideration of evidence offered by her, despite the same being admitted into the record.

Second, my law partner has a similar tale of turbulence with remote hearings during the pandemic. In one instance, his client's administrative hearing was disrupted due to a police officer testifying while at home. While testifying, an individual at the officer's location was loudly playing video games during the hearing, creating significant issues with the officer attempting to testify, and disrupting the administrative hearing irreparably altogether. In another, issues arose with the Department's admission of hearing exhibits due to the inability to have an in-person hearing. In this circumstance, the hearing officer did not adequately identify which particular serial numbered Intoxilyzer device record that was being offered, and because the hearing was remote, my law partner was unable to conduct an after the fact clarification of the exhibit, or any self-review prior to the exhibit being offered in to evidence.

Undoubtedly defense attorneys around the State have had similar issues as those I have outlined above during the period where videoconference hearings were received. These issues are real, are far from one-off aberrations, and create legitimate issues for motorists to be able to adequately defend themselves against the Department's proposed taking of their driving privileges.

As a result of the constitutional and practical implications that this legislation would create, I respectfully ask the committee to consider one of two options. First, I would ask the committee to reject S.B. 2113. Alternatively, I would respectfully propose that in lieu of the current proposal, the statute be modified to permit remote hearings if, and only if, a remote hearing is agreed to by the motorist.

Sincerely,



Luke T. Heck