

2017 HOUSE TRANSPORTATION

HB 1328

2017 HOUSE STANDING COMMITTEE MINUTES

Transportation Committee
Fort Totten Room, State Capitol

HB 1328
2/2/2017
27887

- Subcommittee
 Conference Committee

Committee Clerk Signature

Mary Brucker

Explanation or reason for introduction of bill/resolution:

A bill relating to surrendering driver's license, mailing of temporary operator's permit, and venue of administrative hearings.

Minutes:

Attachments #1 - 3

Chairman Ruby opened the hearing on HB 1328.

Representative Maragos, District 3, introduced HB 1328. We are extending constructive delivery time from 48 to 72 hours and we're changing "person" to "individual". It proposes to assign a mailing address if the person doesn't have it on him or won't provide it then it states the last mailing address with the Department of Transportation will be considered the individual's current address. There's a part in here that says you should have the hearing in the county that the person resides in or was arrested in. There are others here to testify why there is a need for this bill.

Ryan Sandburg, Attorney from Minot, North Dakota, spoke to support HB 1328 and provided written testimony. See attachment #1. Our organization requested this bill be changed. There are four amendments in this bill. The second and third amendments are related. Sections 2, 3, and 4 are related to DUIs. The first amendment isn't necessarily related to the DUI laws. Right now the law says when a DOT is going to suspend, revoke, or cancel someone's license they usually mail that out. They say it is considered constructive delivery after 48 hours. We'd like it to be 72 hours because it is consistent with other rules. North Dakota Rules of Civil Procedure Rules 6(e) requires three days mailing. North Dakota Rules of Criminal Procedure Rule 49 requires three days mailing. Sometimes it takes longer than two days to get to the person.

Chairman Ruby: On page 2, line 5 in existing language it also says 72 hours.

Ryan Sandburg: Yes, we just want to make it consistent. There's not much of a difference there, it's only an extra 24 hours. The next change we want to see regards to DUI laws. Mr. Sandburg explained his written testimony and the DUI process. We need to have one amendment: page 4, lines 23-24 may need to change the language to the same language as page 3, lines 7-9 where it says, "in the county in which the resident incident occurred

unless the individual consents to a different county or consents to a hearing by telephone the individual shall mail or communicate” that language should be included on page 4, lines 23-24. Section 3, line 22 is language regarding revocation so it’s a little different but it’s not so we want to have the hearing in person for that also.

Representative Jones: You said you had an officer that was writing the address on the licenses routinely. You also said he keeps records on updated addresses. Were the mailings being sent to what the officer was writing on the ticket or were they reviewing that against the database the DOT had and sending it to the latest address they had?

Ryan Sandburg: The officer was sending it to the address on his driver’s license which was outdated. They get a copy of the report of notice form and they addressed the envelope to his old license that was on his driver’s license.

Representative Jones: Is that routine or was that one particular individual? It seems counterintuitive that they should be using the database from the DOT for all updates. That’s why we have laws so they have to keep it updated.

Ryan Sandburg: In my experience it was one particular county that was doing it. It was a mistake that they assumed was the correct address and they didn’t confirm.

Representative Paur: You should track a bill on this that we heard in Judiciary that changes the ability to electronically appear at these administrative hearings. It will be coming to the Senate I imagine.

Ryan Sandburg: Are you talking about appearing?

Representative Paur: It was originally by closed circuit television but we started expanding that.

Ryan Sandburg: Yes, that is a possibility. I’ve never had a case like that so far. The problem you have with that is the equipment you’re going to need is very expensive and is usually leased out. It would work really good though.

Representative Paur: I think most of the courtrooms have that ability. I like your idea of having it in the county where it is charged.

Representative Nelson: It was cases of juveniles, sexual abuse, incapacitated adults, or they just weren’t capable of appearing in court.

Ryan Sandburg: I believe there is a bill the Department of Transportation requested and the testimony was around January 5 but you haven’t voted on it yet. They were making changes on it about the hearing officer deciding where the hearing will take place by phone. They may have added in there by fax or video.

Chairman Ruby: I know that attorneys don’t like the administrative process very well because it has a much lower burden of proof. We’ve had discussions in here that it was fairly easy to get off from a charge because of technicalities and things and this was one way to

capture that. When you mentioned the administrative hearing process going to district court, is that argued on the process being done properly or is it done on the merits of the case?

Ryan Sandburg: I believe it is the case on that one. The district judge can only overturn the decision of a hearing officer. When it comes to factual issues you base it at the high burden. They were able to witness the witness testifying and their demeanor so we're not going to second guess that. You don't have a right to hold a hearing on the appeal side.

Representative Nelson: I am concerned because you don't get a new hearing in court. The Judiciary has an ethics commission so if the judge shows up drunk you have a place to make a complaint. Is there any similar place for an administrative officer to go with a similar complaint?

Ryan Sandburg: I suppose you could make a complaint to the state bar. I don't believe Judiciary are deemed judges in the eyes of that. So there's really no place for that.

Ashley Flagstad, Attorney from Minot, spoke to support HB 1328. I had a client, a Minot resident, who was charged with a DUI in Ward County. I timely requested his administrative hearing and requested an in person hearing. At that point, I received a notice from the Department of Transportation setting forth the date and time for that hearing. A few days later I received an amended notice of the hearing with no communication to me. The notice stated the hearing would be taking place at a different time and date and would be taking place in Cass County. I wasn't free that day so I wouldn't be able to attend the in person hearing I had requested. I filed a motion objecting to that amended notice and change of venue. The venue is an important if not an intricate part of due process. Consequently, the Department of Transportation overruled my objection so I had to clear my court calendar and meetings and travelled the day from Minot to Fargo all for about a 45-minute hearing. That was a long day for me. Venue is something that attaches to for the defendant. Due process piggybacks on that. In addition, I don't think my client needed to be penalized for that.

James W. Martens, Martens Attorney at Law from Bismarck, spoke to support for HB 1328 and provided written testimony. See attachment #2. Ended testimony at 41:45. Mr. Martens shared a story from Jeff Nearing about a hearing in another city and the inconveniences that went along with that. A hearing needs to be at a place where the incident occurred.

Jackson Lofgren, President of the North Dakota Association of Criminal Defense Lawyers: I have spent the majority of my career as a prosecutor. I would hear cops tell me all the time about these DOT admin hearings. I never really paid much attention to all that until later when I went into private practice. We do a lot of DOT admin work now. I didn't realize as a prosecutor how many pitfalls and how difficult the DOT administrative process is for your normal individual. The ability to drive is a big issue for many people. If some individuals lose their licenses they wouldn't be able to do their jobs as a truck driver, crop sprayer, etc. The timeline to request a DOT administrative hearing is 10 days and that depends on what type of case it is. Postal standards are getting slower. It's not unusual to have a letter sent from Minot take six to seven days to get somewhere in North Dakota.

Chairman Ruby: This bill doesn't necessarily fix that discrepancy, does it?

Jackson Lofgren: No, this bill doesn't fix the system, but at least it adds a little more fairness to the process. The timeframe is just too short for something so important. The DOT process is a very difficult process to be successful at. If we were to have a process based on the criminal conviction, that person is going to get their day in court and that would be a lot fairer for the individual. This bill would help fix the issues where people are getting notices sent to addresses where they are no longer living. It gives 72 hours versus 48 hours which gives them more of a chance so they know they aren't supposed to be driving rather than finding out when it's a little too late pulled over on the side of the road. I also stress the importance of in person hearings because otherwise the police could be looking at their manuals when asked questions.

Representative Nelson: How does it show on a person's driving record if he's had his license taken away but was never charged or convicted of DUI?

Jackson Lofgren: It will show on their driving abstract. It will never say DUI conviction but it will say complied consent and the length of time they had their license taken.

Representative Nelson: If a person was in that period of time when his license was suspended and he went to criminal court and found not guilty, does that have any effect on his license suspension?

Jackson Lofgren: None whatsoever.

There was no further support for HB 1328.

Darcy Rosendahl, P.E. Deputy Director, North Dakota Department of Transportation, spoke in opposition to HB 1328. Written testimony was provided. See attachment # 3.

Chairman Ruby: Do you think there would be additional expenses to the department under this if this passed?

Darcy Rosendahl: I don't believe there would be any additional expenses, it would just be the logistics.

Vice Chairman Rick C. Becker: The reasons you give for keeping it the way it is for convenience, scheduling, and so forth, which holds true for the criminal hearing. What is it about the administrative hearing that we don't need to have that same process? Or are you suggesting that criminal hearing should also be at the convenience of the state rather than the location where the offense was incurred?

Darcy Rosendahl: We just apply what's in statute. I don't know why it was developed that way.

Chairman Ruby: Section 4 was your biggest concern but do you see any problems in sections 2 or 3?

Darcy Rosendahl: We have no problems outside of section 4.

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Chairman Ruby: Are there any further questions? Is there any further testimony for HB 1328? Seeing none we will close the hearing.

2017 HOUSE STANDING COMMITTEE MINUTES

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2/3/2017
27892

- Subcommittee
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Committee Clerk Signature

Mary Brucher

Explanation or reason for introduction of bill/resolution:

A bill relating to surrendering driver's license, mailing of temporary operator's permit, and venue of administrative hearings.

Minutes:

No attachments

Chairman Ruby brought HB 1328 back before the committee. DOT had some concerns on the ability for their scheduling. I didn't think that was justification for having people travel all over the state for a one-hour hearing. Any thoughts from the committee?

Representative Owens: For years, defense attorneys have been trying to turn this into a having it in as small an area as we can have it because they don't want people to show up so they can throw it out. They are trying to take it from civil to criminal. They keep doing this. I don't disagree that it's inconvenient. The bill doesn't do a whole lot that they've asked for, the only thing is in the town in which the incident occurred is highly restrictive in the opposite direction to me. I'd like to see something more in the middle of the road like having a hearing held in a location of 150 miles in which the incident occurred. That forces both of them to meet halfway in my mind.

Representative Sukut: Why would we bend over backwards for the person that has the DUI since he is the one that created the problem? Representative Weisz's viewpoint was that the person that should be doing the travelling since he created the problem, not the state so why should the state be paying extra money to meet someplace where it's convenient for the person with the DUI. Representative Owens provides another possible solution but Representative Weisz had a good point.

Chairman Ruby: On the criminal side it's in the court where it happened so I'm surprised that they don't allow that hearing to be held there.

Representative Nelson: Let's remember you're not guilty until you're convicted of something so it's really not proper to talk to them as if they have been. Both the officer and the offender were in the place where the offense supposedly occurred that day so if it's not too far for the DOT to send an officer to work, I don't know why it's too far to send them in to have a hearing. It says they can have it someplace else if they agree to it. It seems to me that the county

where both the officer and the person were located is a reasonable starting point for where to have these hearings, just as it is on the criminal side. They aren't complaining they can't do this on the criminal side so I don't know why it's such a problem on the civil side.

Representative Paur: I would like to propose an amendment and taking the language on page 3, lines 7-9 and insert it on page 4 on line 24, after "director".

Chairman Ruby: They wanted the same language there as they have here. We have to decide whether we it stays in or comes off or gets amended to be somewhat more flexible.

Representative Paur: I would like to see it stay in. I think that is extremely reasonable.

Vice Chairman Rick C. Becker: I think it is fine to adopt the amendment because it seems that if we like where it's currently at on page 3 then we would want consistency. Then we can decide to pass the bill or do not pass the bill but I like the idea of adopting it for consistency.

Chairman Ruby: I like the simplicity of doing an amendment. We can amend these and then just have that amended language into that section. Is there a proposal to change the language on page 3, lines 7-8 and on 26-27?

Representative Owens: MADE A MOTION TO ADOPT AMENDMENT lines 7-8 read "in person hearing in a location to be held within 150 miles unless individual consents to a different location."

Chairman Ruby: And that same language on lines 26-27 and that same amendment to be added on page 4?

Representative Owens: Correct, and on page 4, line 27 "before a hearing officer." I'm not sure where it goes though so I'll let Legislative Council handle that.

Chairman Ruby: It would have to be around line 24.

Representative Owens: That's where I had it marked.

Vice Chairman Rick C. Becker: Can you repeat it one more time for me please?

Representative Owens: For the purposes of simplicity I will start on page 3, line 6 right after the reference to this section, "the director shall afford the individual an opportunity for an in person hearing to be held in a location within 150 miles in which the incident occurred unless the individual consents to a different location or consents to a hearing by".

Chairman Ruby: It's interesting to me with the changes from "person" to "individual", this section of code hasn't been updated in quite some time because that change has taken place over the last several years when the word "person" became expanded to mean all kinds of business entities.

Representative Jones: On lines 26-27 on page 3, do we need similar wording there?

Chairman Ruby: Yes, it should be understood that language would be added to the amended or changed bill with the new language on lines 7-8, on lines 26-27, and then in subsection 3 wherever that fits.

Representative Westlind: SECONDED

Chairman Ruby: Is there further discussion?

ROLL CALL VOTE: 8 YES 3 NO 3 ABSENT

MOTION CARRIED

Chairman Ruby: What are the wishes of the committee on this amended bill?

Representative Nelson: I have a concern at the beginning of the bill where it says, "the director upon cancelling or revoking an operator's license shall require that the license must be surrendered to and be retained by the director." They testified repeatedly here that they don't do that anymore, they electronically say it's no longer a valid license. I think we should update that language before we kick this bill out of here. **MADE A MOTION TO FURTHER AMEND** delete lines 10-11 and renumber accordingly.

Vice Chairman Rick C. Becker: SECONDED

Chairman Ruby: Is there further discussion?

VOICE VOTE: MOTION CARRIED

Chairman Ruby: What are the wishes of the committee on this further amended bill?

Vice Chairman Rick C. Becker: MADE A MOTION FOR A DO PASS AS AMENDED

Representative Owens: SECONDED

Vice Chairman Rick C. Becker: I think this is a good bill. I understand the general sentiment that Representative Sukut and Representative Weisz were discussing but you've got all sorts of due process involved for people who are accused. I hate to be quite so cavalier saying they got themselves into this situation so we don't care if it's inconvenient. I'd like to see due process for everyone. Losing your license is a very big deal. When you have one person as judge, jury, and prosecutor it's questionable whether it's due process but I think this makes it slightly better for the accused.

Chairman Ruby: Is there further discussion?

ROLL CALL VOTE: 11 YES 0 NO 3 ABSENT

MOTION CARRIED

Representative Paur: When Mr. Sandburg was testifying and I mentioned the video testimony, I was in error so I apologize.

Vice Chairman Rick C. Becker will carry this bill.

February 3, 2017

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2/3/17
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PROPOSED AMENDMENTS TO HOUSE BILL NO. 1328

Page 1, line 10, overstrike "The director upon canceling or revoking an operator's license shall require that the"

Page 1, overstrike line 11

Page 1, line 12, overstrike "2."

Page 1, line 17, overstrike "3." and insert immediately thereafter "2."

Page 3, line 7, replace "in the county in which" with "to be held at a location within one hundred fifty miles [241.40 kilometers] of"

Page 3, line 7, replace "occurred" with an underscored comma

Page 3, line 8, replace "county" with "location"

Page 3, line 25, remove the overstrike over "and"

Page 3, line 26, after "place" insert "location"

Page 3, line 26, replace "in the county in which" with "within one hundred fifty miles [241.40 kilometers] of"

Page 3, line 26, replace "occurred" with an underscored comma

Page 3, line 27, replace "county" with "location"

Page 4, line 24, overstrike "place" and insert immediately thereafter "location"

Page 4, line 24, after the second "director" insert ", within one hundred fifty miles [241.40 kilometers] of the incident, unless the individual consents to a different location or consents to have the hearing by telephone"

Renumber accordingly

Date: 2-3-17
 Roll Call Vote #: 1

**2017 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 1328**

House Transportation Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Owens Seconded By Westlind

Representatives	Yes	No	Representatives	Yes	No
Chairman Dan Ruby	✓		Rep. Gretchen Dobervich	✓	
Vice Chair. Rick C. Becker	✓		Rep. Marvin Nelson		✓
Rep. Bert Anderson	A				
Rep. Jim Grueneich	✓				
Rep. Terry Jones	✓				
Rep. Emily O'Brien	✓				
Rep. Mark Owens	✓				
Rep. Gary Paur		✓			
Rep. Randy Schobinger		✓			
Rep. Gary Sukut	✓				
Rep. Robin Weisz	A				
Rep. Greg Westlind	✓				

Total (Yes) 8 No 3

Absent 3

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

P.3 Line 7-8 + Lines 26-27 + Sub. 3 -

Owens - P.3 Line to 8 "The person hearing to be held 150 change."

Date: 2-3-17
 Roll Call Vote #: 2

**2017 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 1328**

House Transportation Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Nelson Seconded By Becker

Representatives	Yes	No	Representatives	Yes	No
Chairman Dan Ruby			Rep. Gretchen Dobervich	A	
Vice Chair. Rick C. Becker			Rep. Marvin Nelson		
Rep. Bert Anderson	A				
Rep. Jim Grueneich					
Rep. Terry Jones					
Rep. Emily O'Brien					
Rep. Mark Owens					
Rep. Gary Paur					
Rep. Randy Schobinger					
Rep. Gary Sukut					
Rep. Robin Weisz	A				
Rep. Greg Westlind					

*Voice Vote
All aye.*

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Delete Lines 10-11 & renumber.

Date: 2-3-17
 Roll Call Vote #: 3

**2017 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 1328**

House Transportation Committee

Subcommittee

Amendment LC# or Description: _____

- Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Becker Seconded By Owens

Representatives	Yes	No	Representatives	Yes	No
Chairman Dan Ruby	✓		Rep. Gretchen Dobervich	✓	
Vice Chair. Rick C. Becker	✓		Rep. Marvin Nelson	✓	
Rep. Bert Anderson	A				
Rep. Jim Grueneich	✓				
Rep. Terry Jones	✓				
Rep. Emily O'Brien	✓				
Rep. Mark Owens	✓				
Rep. Gary Paur	✓				
Rep. Randy Schobinger	✓				
Rep. Gary Sukut	✓				
Rep. Robin Weisz	A				
Rep. Greg Westlind	✓				

Total (Yes) 11 No 0

Absent 3

Floor Assignment Becker

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1328: Transportation Committee (Rep. D. Ruby, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). HB 1328 was placed on the Sixth order on the calendar.

Page 1, line 10, overstrike "The director upon canceling or revoking an operator's license shall require that the"

Page 1, overstrike line 11

Page 1, line 12, overstrike "2."

Page 1, line 17, overstrike "3." and insert immediately thereafter "2."

Page 3, line 7, replace "in the county in which" with "to be held at a location within one hundred fifty miles [241.40 kilometers] of"

Page 3, line 7, replace "occurred" with an underscored comma

Page 3, line 8, replace "county" with "location"

Page 3, line 25, remove the overstrike over "~~and~~"

Page 3, line 26, after "~~place~~" insert "location"

Page 3, line 26, replace "in the county in which" with "within one hundred fifty miles [241.40 kilometers] of"

Page 3, line 26, replace "occurred" with an underscored comma

Page 3, line 27, replace "county" with "location"

Page 4, line 24, overstrike "place" and insert immediately thereafter "location"

Page 4, line 24, after the second "director" insert ", within one hundred fifty miles [241.40 kilometers] of the incident, unless the individual consents to a different location or consents to have the hearing by telephone"

Renumber accordingly

2017 SENATE TRANSPORTATION

HB 1328

2017 SENATE STANDING COMMITTEE MINUTES

Transportation Committee
Lewis and Clark Room, State Capitol

HB 1328
3/17/2017
29387

- Subcommittee
 Conference Committee

Committee Clerk Signature

Mary Munda

Explanation or reason for introduction of bill/resolution:

Relating to surrendering driver's license, mailing of temporary operator's permit, and venue of administrative hearings.

Minutes:

Attachments #1-3

Chairman Laffen: Called hearing of HB 1328 to order. Welcome Andy Maragos.

Representative Andrew Maragos: I bring HB to you for Ryan Sandberg who requested the bill be heard.

Chairman Laffen: Any questions? None. Thank you.

Ryan Sandberg, Attorney from Minot: There are a couple of amendments that we are asking for and I passed out the handout for you. See attachment #1. I would like to go through this with you.

Chairman Laffen: Can you explain the bill first?

Ryan: Yes. Suspension starts in 48 hours and we are requesting to go from 2 days to 3 days for suspension.

He proceeded to explain the rest of the attachment and the changes. There are no new amendments.

Discussion on a previous bill and this is a new one so some bills have the same language in them.

Senator Clemens: If you are picked up for DUI they can take your license right?

Ryan: It depends on if you refuse to take the test or not.

Chairman Laffen: If I remember right this line was taken out of a previous bill because the highway patrol wants you to be able to keep your license for ID. They know anyway that it is suspended.

Ryan: Went on to explain the criminal and civil processes of getting a DUI from his attachment.

Chairman Laffen: You have added more than what is in the bill so let's go back and with one sentence tell us the 4 changes please.

Ryan: Section 1 changes it from 2 days to 3 days. Section 2, the arresting officer confirms mailing address. Section 3 confirms mailing address again. Section 4 clarifies that the hearing has to take place in person and at the location within 150 miles of the incident.

Senator Clemens: basically if someone requests a hearing it is because they received notice they either failed the breathalyzer or they were beyond the .08, correct? **Answer:** Correct.

Chairman Laffen: Any other questions? None. Thank you. Further testimony in favor?

(31:00) James Martens, Attorney in Bismarck: See attachment #2. Story about a client in the attachment. The intent of the bill is just to have some fairness in the DOT hearings.

Senator Campbell: This judicial law has been going on for years and years and years. Is there 1 in 500 you would have an issue or is it happening more and more with officers being shifted around?

James: It is happening more often and the surge of oil in the western part of the state made more instances. But you are right in a sense as on average you will have your local officer. It has been an increased problem in recent years.

Senator Casper: We heard in the explanation before you about the criminal and civil processes. The civil process gets to the heart that driving is a privilege not a right, and I just am trying to understand the justification of people not having to drive across the state, then don't get a DUI.

James: You certainly have a point.

Senator Casper: Am I missing something here? I am trying to reeducate myself.

James: You have the right to a hearing before you lose the privilege. Until you are proven guilty you have the right to drive and have the hearing closer. So I would like to see something that would be fair and makes sense.

Senator Casper: Maybe there is a better way I could have asked that question. So the justification here is we would be doing something in the name of fairness to levitate an undue burden. Are we violating the constitution by not giving them due process, which I think not?

James: It is an issue of due process and it has been overruled many times and there is some additional expense in an administrative appeal too.

Senator Rust: Have they started using Skype for a video hearing?

James: There can be undue influence in having a telephonic hearing from background help or coaching. In the regular hearings there are safeguards in place. People in person is the best way right now. It is not happening a lot as far as I know.

Senator Rust: I have never had a DUI so I need to understand when does the criminal change to the civil?

James: They occur at the same time. You are charged with a crime and they are already taking action before you ever get in front of a judge and jury. In the mean time you have only so many days to get things done and organized, and on the other side the DOT is busy doing the paperwork getting your permit and paperwork done.

Senator Rust: So the crime of driving drunk is the criminal part and taking my license is the civil? Answer: Correct;

Chairman Laffen: Any other questions? None. Thank you. Any further testimony in favor of HB 1328?

(50:47) Ashley Flagstad, attorney from Minot: I was retained to represent a client on a DUI, requested a hearing at DOT in Minot, the notice was sent to me that it was going to take place in Minot. Then I received an amended notice because the officer had transferred to Fargo and the hearing was to take place at the Fargo DOT office, the same date and the same time. I had to clear my court schedule and my client was not able to get the day off to travel for the whole day. I did file a motion for an objection for the change of venue and because of the DOT's discretion they did not allow that, and overruled my objection. I did have to drive to Fargo and it was a very long day for a 45-minute hearing. So the 150-mile radius, will still be a half day if they have to travel all that way. I just want everyone to keep in mind that venue is not part of the due process and that's what these cases are all about. Thank you. Any questions?

Chairman Laffen: Questions? None. Thank you. Further testimony in favor? None. Opposition?

(53:06) Darcy Rosendahl, Deputy Director of NDDOT: See Attachment #3.

Chairman Laffen: Does that bill deal with this distance? Answer: Yes.

Senator Casper: What are you doing? We have good people in ND and we are very common sense and I defend them often. We have great buerocrats in our houses and we don't need to micromanage every law and everything they do. So it seems to me you guys should be able to drive to Minot or Bismarck to handle this issue. Why Fargo or Grand Forks?

Darcy: You are wondering why our hearing officers don't travel?

Senator Casper: No I am just wondering why you send a guy that gets a DUI in Williston to Fargo, when he could come to Bismarck?

Darcy: It is related to what they said. The one that lived in Watford City and got picked up by an officer, that officer was transferred to Fargo. Fargo was not going to let the officer travel back to Watford City for the hearing and so to try have a fair hearing and have everyone there it was scheduled in Fargo. Our officers routinely travel and it is usually in the area they serve. They always try to come up with a reasonable solution and site for the hearings or doing a telephone hearing.

Chairman Laffen: Does the officer move or do they ever come back or do they always follow where the officer went?

Darcy: I am not sure I can answer that for you. Like I said, they try and work out a reasonable solution and I am guessing if the officer could come back he would or even meet half way if that would work.

Senator Casper: Would the city of Fargo let the officer come back if the needed to testify in district court In Bismarck about the criminal proceedings regarding the DUI?

Darcy: I couldn't answer that question. I don't know what they would do>

Chairman Laffen: Any other questions? None. Thank you. Further opposition? None. Neutral testimony on HB 1328? None **We are closing the hearing on HB 1328.**

2017 SENATE STANDING COMMITTEE MINUTES

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Lewis and Clark Room, State Capitol

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3/17/2017
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- Subcommittee
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Committee Clerk Signature

Mary Munder

Explanation or reason for introduction of bill/resolution:

Relating to the surrendering driver's license, mailing of temporary operator's permit, and venue of administrative hearings.

Minutes:

Chairman Laffen: Opened the discussion on HB 1328.

Senator Casper: I am going to move for a Do Not Pass on engrossed HB 1328.

Senator Casper proceeded to explain the bill one more time and state why he was against it. It is a privilege to have a driver's license. There are 2 tracks, criminal and civil. I think we should let this go through the process and see where we are in the next 2 years.

Chairman Laffen: I also heard the same thing from a different attorney, the only good part of it was tightening up where the hearings would be held, but it isn't worth keeping.

Senator Nelson: I understand the mail, so going from 48 to 72 hours was a consideration. I would have been fine with the bill if we deleted section 4.

Chairman Laffen: We do have a motion for a Do Not Pass on engrossed HB 1328. Do we have a second?

Senator Clemens: Seconded.

Chairman Laffen: Discussion?

Roll Call taken: Yeas-5, Nay-0, Absent-1 Motion passed.

Senator Casper will carry the bill.

Hearing closed on HB 1328.

Date: 3-17-17
Roll Call Vote #: 1

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO.

HB 1328

Senate Transportation Committee

Subcommittee

Amendment LC# or Description: _____

- Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
Other Actions: Reconsider _____

Motion Made By Casper Seconded By Clemens

Senators	Yes	No	Senators	Yes	No
Chairman Lonnie J. Laffen	✓		Senator Carolyn Nelson	✓	
Senator Tom Campbell					
Senator David Rust	✓				
Senator David Clemens	✓				
Vice Chairman Jonathan Casper	✓				

Total (Yes) 5 No 0

Absent 1

Floor Assignment Casper

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1328, as engrossed: Transportation Committee (Sen. Laffen, Chairman)
recommends **DO NOT PASS** (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING).
Engrossed HB 1328 was placed on the Fourteenth order on the calendar.

2017 TESTIMONY

HB 1328

HB 1328
2-3-17
#1

HOUSE BILL 1328
HOUSE TRANSPORTATION COMMITTEE
FEBRUARY 3, 2017
SPONSOR: REP. MARAGOS

**Section 1. Amendent- 2 days to 3 days
Starts on Line 14 on page 1 .**

Current

1. 48 hours (or 2 days) when suspension/revocation starts

Change

1. Seventy-Two (or 3 days) when suspension/revocation starts

Reasons:

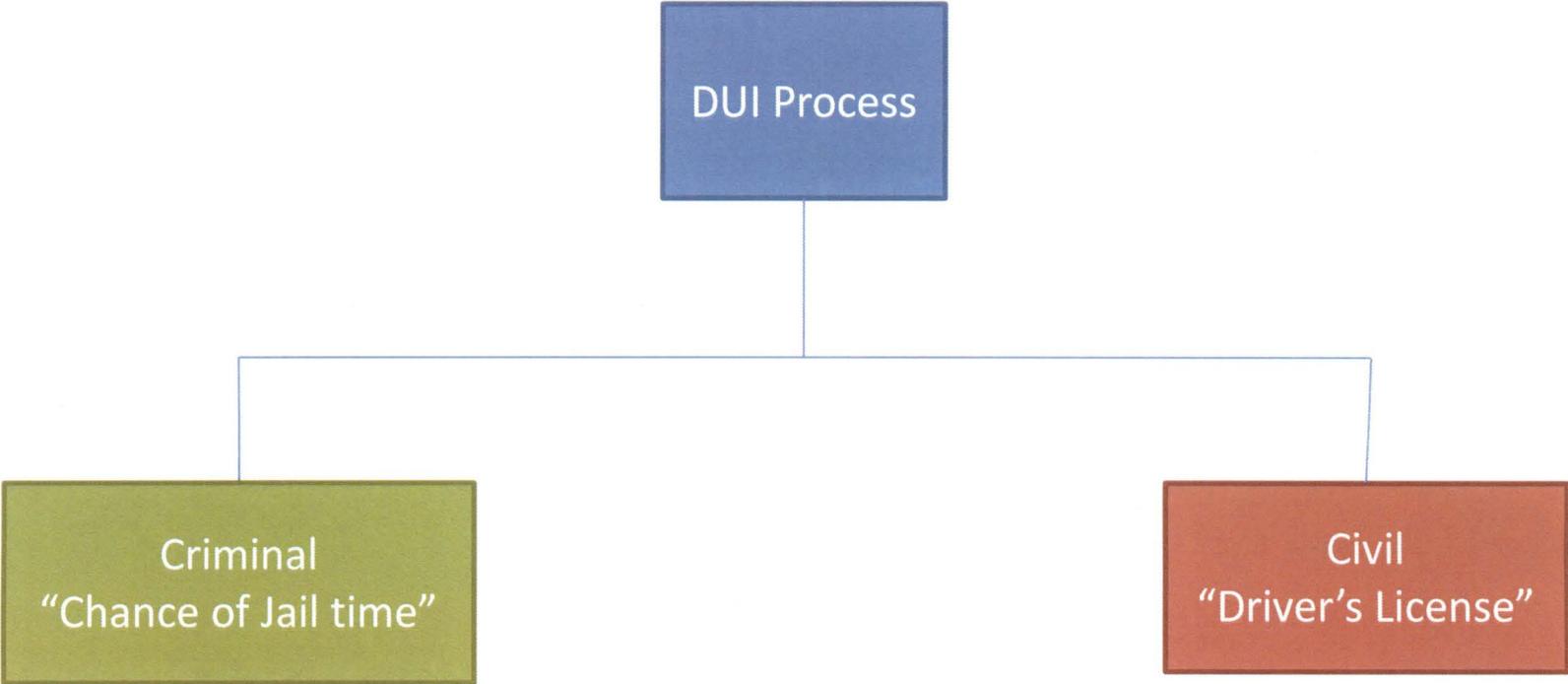
1. Consistency with other rules
 - a) N.D.R.Civ.P. Rule 6(e)
 - i. 3 days mailing
 - b) N.D.R.Crim.P. Rule 49
 - i. 3 days mailing;
 - c) N.D.R.Crim.P. Rule 45(c)
 - i. 3 days mailing;
 - d) N.D.R.App.P. Rule 26(c)
 - i. 3 days mailing.

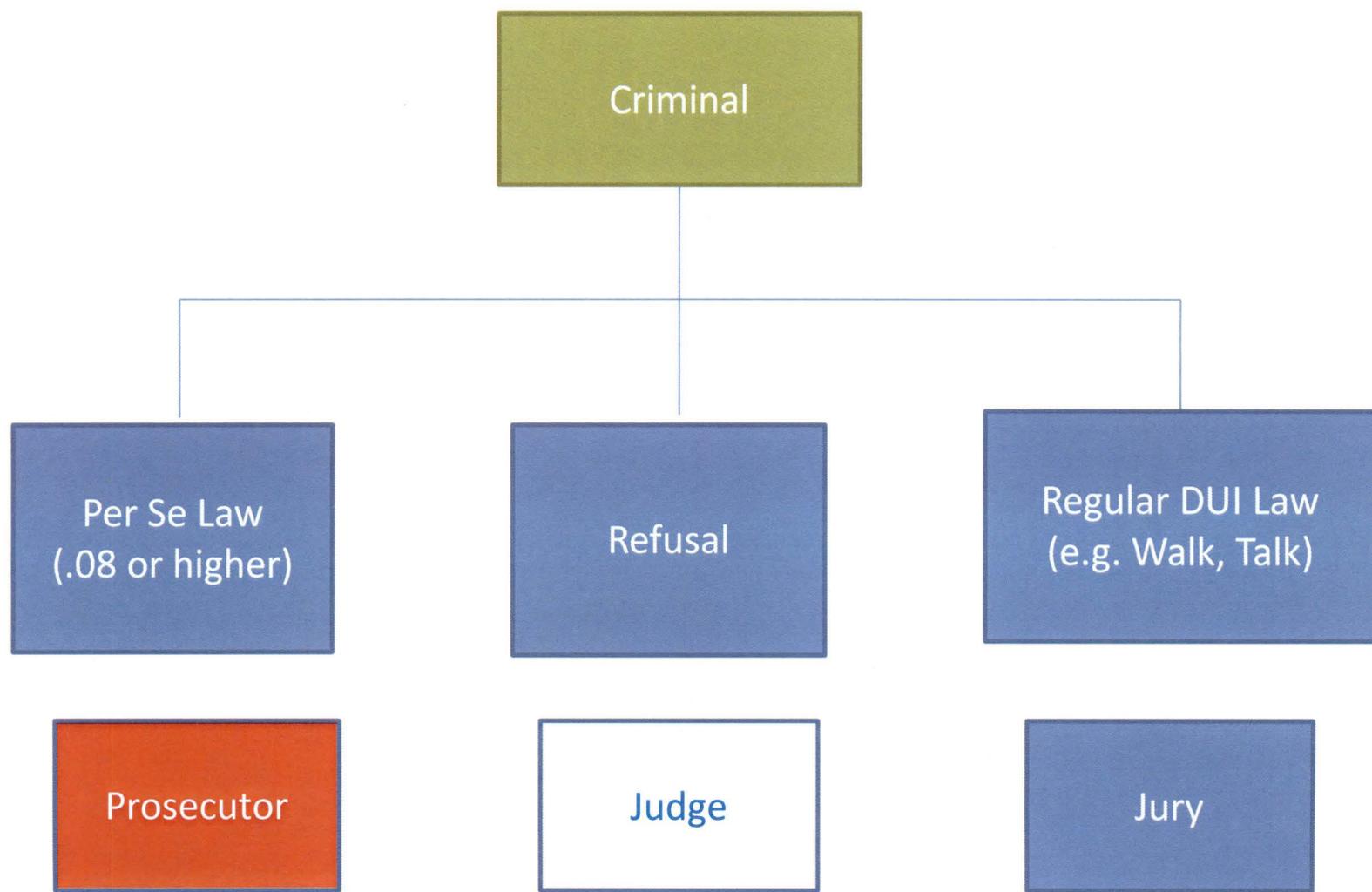
HB 1328

1

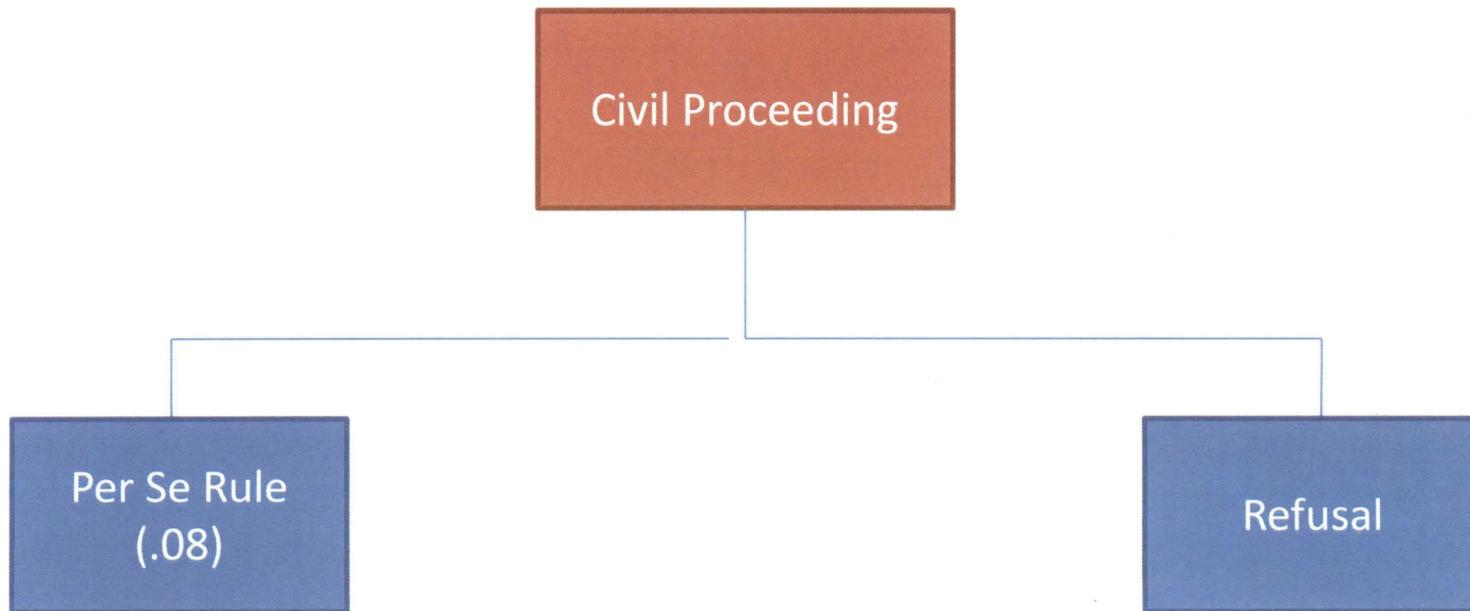
HB 1328
2-3-17
#1 p. 1

DUI Process





Plead Guilty/Found Guilty= Suspension of Driving Privileges



Swift

1. Know 31 days from:
 - i. Evidentiary Breath
 - a) Usually Date of Arrest
 - ii. Blood or Urine Test
 - a) Usually 2 weeks from Date of Arrest

Hearing Request

1. 10 days from date receive Report and Notice Form
 - a) Lose Right to Fight if not within this time frame

Example of Report & Notice Form

REPORT AND NOTICE UNDER CHAPTER 39-20 OR 39-06.2 NDCC
North Dakota Department of Transportation, Drivers License Division
SFN 9362 (Rev. 02-2010)

Date of Occurrence 5-28-2011		Time of Driving 11:13		Physical Control/Crash <input type="checkbox"/> A.M. <input type="checkbox"/> P.M.		Time of Arrest/Lawfully Detained 11:56		Citation Number 5123495	
Name BR...		City STANLEY		State ND		Zip Code 58783		ICN	
Residence Address ...		County of Occurrence MOUNTAIN		City of Occurrence STANLEY		Enforcement Agency STANLEY PD		Area Code & Phone Number	
DLN	State	Date of Birth	Class	Endorsement	Rel Code	Sex	Height		
	ND	1/1/78	A	1		M	5-10		

RECEIVED
DRIVERS LICENSE &
TRAFFIC SAFETY DIV.
2011 JUN -1 AM 10:44
ENVELOPE POSTMARKED
MAY 31 2011

On the above date, there existed reasonable grounds to believe that the above-named person was operating:

Non-Commercial motor vehicle **A00186803** ★
 Commercial motor vehicle (CMV)
 CMV transporting hazardous materials, in violation of NDCC Section 39-08-01 or 39-06.2-10.2

The above named person:

Was advised according to the law enforcement implied consent advisory on the bottom portion of the driver's copy of this notice
 Refused onsite screening test (NDCC Section 39-20-14 or 39-06.2-10.2)

Was placed under arrest and informed that he or she will be charged with the offense of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or drugs.
 Was lawfully detained and officer has probable cause to believe that the driver was operating a CMV, or under twenty-one (21) years of age, while having alcohol or drugs in his or her system.

Location of Arrest or Where Detained
US HWY 21 FRONTAGE RD (ACROSS FROM WEST ELET CENEX)

Refused under NDCC, Section 39-20-01 or 39-06.2-10.2 a chemical test or tests of BLOOD BREATH URINE
 Provided specimen of BLOOD BREATH URINE Time Obtained _____ AM PM Test Results _____
 for testing under NDCC Chapter 39-20 or 39-06.2-10.2
 Additional specimen of BLOOD BREATH URINE Time Obtained _____ AM PM Test Results _____

TEMPORARY OPERATOR'S PERMIT: (To be issued to driver. Mark valid or not valid.)
 ND License/Permit attached? Yes No Lost

This permit is: **VALID** as a Temporary Operator's Permit for 25 days from date of issue (unless terminated earlier by hearing officer) **NOT VALID** as a Temporary Operator's Permit because:
 Non-Licensed Driver
 License Suspended/Revoked
 Current permit under NDCC 39-06.2

THIS PERMIT IS VOID UNLESS ACCOMPANIED BY THE NUMBERED CITATION SHOWN ABOVE
 THIS PERMIT IS NOT VALID FOR OPERATING A CMV UNTIL _____ AM PM ON (MM/DD/CCYY)

I certify that I personally issued Mailed this Temporary Operator's Permit to the driver on MM/DD/CCYY **05/29/2011**
JOHN F. TRONSET 1236 **John F. Tronset 1236**
Name of Officer/Badge or ID Number (PLEASE PRINT) Signature of Officer

OFFICER'S STATEMENT OF PROBABLE CAUSE: (Check appropriate boxes and explain.)

Reasonable suspicion to stop or reason lawfully detained: <input type="checkbox"/> erratic driving Explain: NEGLECTED TO <input checked="" type="checkbox"/> traffic violation Explain: SIGNAL WHEN REQUIRED <input type="checkbox"/> crash <input type="checkbox"/> already stopped	Probable cause to arrest/lawfully detain: <input checked="" type="checkbox"/> odor of alcoholic beverage Explain: REFUSED SFST <input checked="" type="checkbox"/> poor balance Explain: REFUSED INTOX 8000 <input type="checkbox"/> failed field sobriety test(s) <input type="checkbox"/> failed screening test
--	---

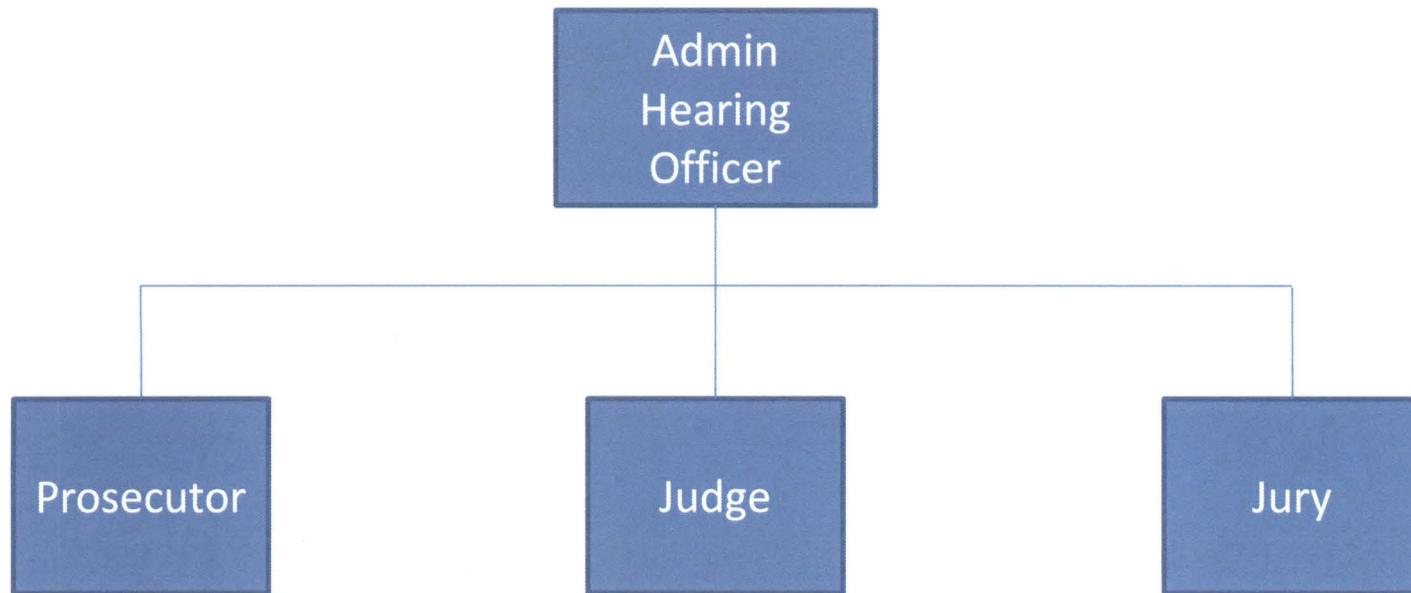
I personally certify as a law enforcement officer that this written report is true and correct to the best of my knowledge at the time of writing this report.
 Dated this **29th** day of (MM/CCYY) **05/2011**
JOHN F. TRONSET 1236 **John F. Tronset 1236**
Name of Officer/Badge or ID Number (PLEASE PRINT) Signature of Officer/Badge or ID Number

LAW ENFORCEMENT IMPLIED CONSENT ADVISORY
NON-COMMERCIAL: Refusal to submit to onsite screening or chemical test(s) requested by a law enforcement officer will result in revocation of your driving privileges for up to four years.
COMMERCIAL: Refusal to submit to onsite screening or chemical test(s) requested by a law enforcement officer will result in being immediately placed out of service for a period of 24 hours and being disqualified from operating a commercial motor vehicle for a period of not less than one year under NDCC 39-06.2-10.

DOT hires Admin Hearing Officer

1. Paid by the DOT
2. Trained by DOT
3. Provided Office By DOT to conduct Hearing.

Civil Hearing



Location

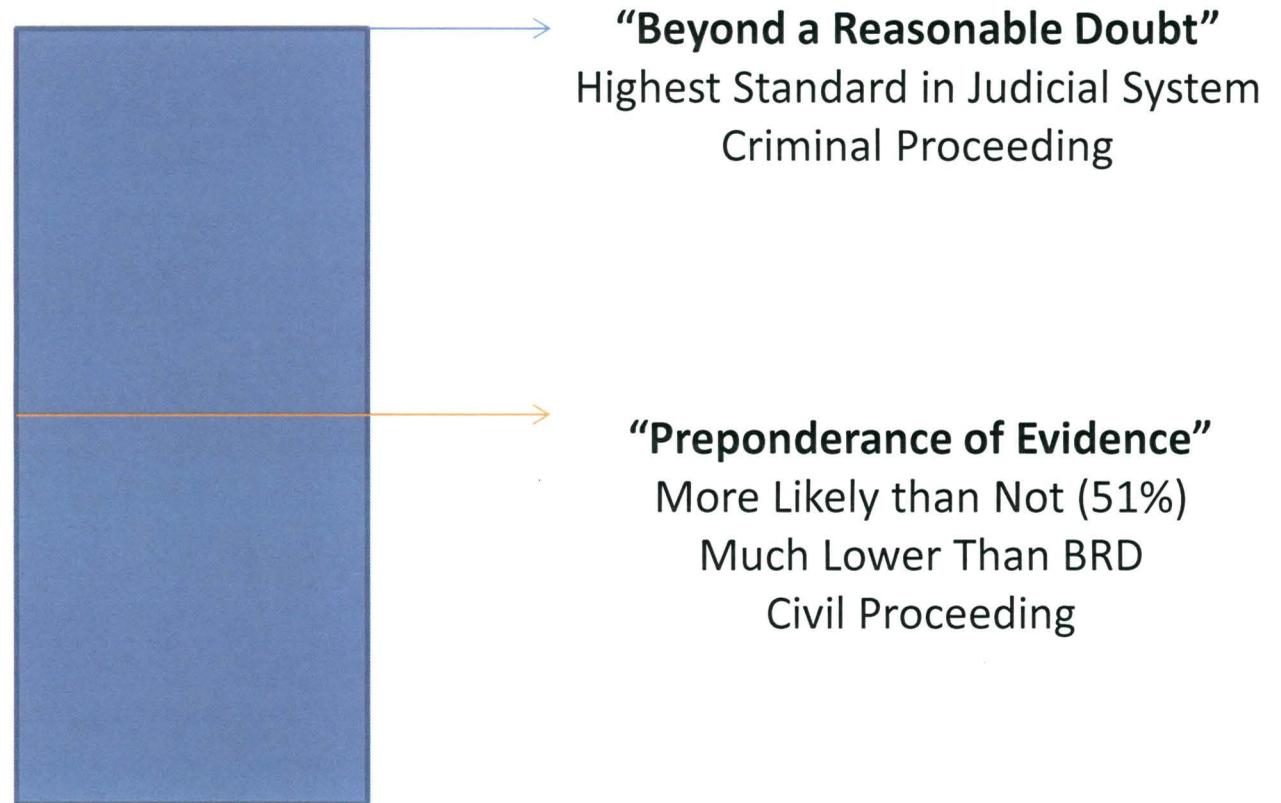
- a) In Person, unless Defendant agrees by phone
 - i. Wolfer v. DOT, 2010 ND 59
- b) Hearing officer sets:
 - i. City and Building
 - ii. Date and Time
 - a) Law Enforcement-1st
 - b) Take or Leave It

Requirements:

- a. Testify Under Oath
- b. Recorded

Appeal to District Court

1. No new hearing
2. Defer to Admin Hearing Officer
3. Rarely Win



Burden of Proof

Section 2 & 3. Amendment: Confirming
Mailing Address for Resident/Non-Resident
of North Dakota

Starts: Line 6 on Page 2 for Section 2
Line 27 on Page 2 for Section 3

Current Law

1. No Requirement to Obtain Current Mailing Address

Change

1. Confirm Mailing Address

Reason for Change

1. Only will occur with blood or urine test
2. Deadline
 - a) Wrong Address
 - i. Past 10 days to Request Hearing

Section 4. Amendment- Location of Hearing Starts on Line 6 of page 3

Current Law

1. Location is set by Hearing Officer

Changes

1. Location is county where arrest occurred, unless Defendant consents to other county, or by telephone
2. In Person Hearing

Reasons for Change to Location

1. Travel

a) Example:

- a) Incident Occurs in Williams County
- b) Hearing Officer Set Hearing for Cass County
- c) 12 hour round trip

2. Consistency

- a) Criminal Proceeding has to take place in county where DUI arrest occurred;
- b) Civil Proceeding should also take place in county where DUI arrest occurred.

Reasons for In-person Hearing

In Person Hearings

1. Hear
 - a) Tone of Voice
2. Visual
 - a) Witness' Demeanor
 - b) Witness crossing his/her hands?
 - c) Defensive Posture
 - d) Looking at Notes
 - e) Looking at Manual;
 - f) Coached by someone
3. Smell
 - a) Smell of Booze?
4. Exhibits
 - a) Entered into Evidence
 - b) Video and Photographs
 - c) Easy to introduce if in person

Phone Hearings

1. Hear
 - a) Only hear tone of voice
2. Visual
 - a) Can't see if reading from notes
 - b) Can't see if reading manual
 - c) Can't see if witness is being coached?
 - d) Can't see if evasive
3. Smell
 - a) Can't smell booze?
4. Exhibits
 - a) How do you see exhibits?
 - b) Need to get exhibits before or after;
 - c) Confusing without exhibits in front.



HB1328
2-3-17
#2

402 East Main Avenue, Suite 100, Bismarck, ND 58501 | E. jwmartens@martenspllc.com | P. 701.223.2000 | www.martenspllc.com

January 27, 2017

Hon. Dan Ruby
House Transportation Committee
600 E. Boulevard Ave.
Bismarck, ND 58505

RE: House Bill 1328

Dear Chairman Ruby and Members of the Committee:

I am writing in support of House Bill 1328 which hopefully will apply some common sense to the administrative hearing process with the Department of Transportation ("DOT"), and avoid what happened with a hearing for a client of mine this past fall.

My client was stopped in Morton County by a Highway Patrolman from Grand Forks who was in the area due to the call for additional law enforcement presence for the Dakota Access Pipeline protest. My client timely requested an administrative hearing. An administrative hearing officer from the DOT's main office in Bismarck set a date and time for the hearing to be held at the DOT in Bismarck after conferring with my office. A formal Notice was issued and mailed by the Department, setting the date, time and location of the hearing in Bismarck.

Shortly thereafter I received an e-mail from another hearing officer from Grand Forks, inquiring about my availability for an administrative hearing for the same client concerning the same incident date. I replied that a hearing had already been set for a particular date and time by the Bismarck hearing officer and copied the Bismarck hearing officer on my e-mail. The Grand Forks hearing officer then issued a Notice unilaterally setting a telephonic hearing for the same date and time.

Unfortunately, unilateral action such as this is not new to the DOT and has been struck down by our Supreme Court on more than one occasion. I have attached copies of the decisions in Landsiedel and Wolfer for the Committee's review; however, I want to point out the particular discussion in paragraph 15 of the Wolfer decision, which hits the nail on the head when it comes to the problem with a telephonic hearing:

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. . . . The explanatory note to Federal Rule of Civil Procedure 43 explains, "The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."¹

After bringing these opinions to the hearing officers' attention, the Grand Forks hearing officer then issued a third Notice setting the hearing for the same date and time, but to be held at the DOT's district office in Grand Forks.

As such, my client, who was working in McKenzie County, and I were required to travel to Grand Forks for the hearing. What's more, the trooper who made the stop also had to travel from Mandan, where he was still on "DAPL duty", at the taxpayers' expense. Never mind the fact that for any criminal proceeding on the matter we all would be required to appear in District Court in Mandan.

Unfortunately, my client's case is not unique. There are others who have been subject to such scheduling by DOT which, to me, underscores what has all appearances of becoming an unjust proceeding against an accused driver. For example, attorney Jeff Nehring of Williston has had a McKenzie County matter unilaterally venued in Fargo and has had Williams County hearings unilaterally venued in Devils Lake, including one where the arresting officer failed to appear for the hearing. Such unilateral scheduling in locations totally inconvenient to the accused and their counsel shows a lack of impartiality from what is supposed to be a removed, neutral third party in the form of an administrative hearing officer.

Normally, in the setting of an administrative proceeding, any hearing on a matter takes place at the seat of the administrative agency (i.e., Bismarck or Washington, DC), or at one of that agency's regional offices in or near the location where the matter or dispute arises. For example, the Public Service Commission normally holds its hearings at the Capitol in Bismarck, but is well known to hold hearings on permits in the counties where the

¹ Wolfer v. N.D. Dep't of Transp., 2010 ND 59, ¶ 15, 780 N.W.2d 645, 649 (quoting Lawrence v. Delkamp, 2008 ND 111, ¶ 10, 750 N.W.2d 452, 455 (quoting Gust v. Gust, 345 N.W.2d 42, 45 (N.D. 1984); Fed. R. Civ. P. 43, expl. note). Moreover, the explanatory note to Rule 43 of the Federal Rules of Civil Procedure also provides that holding a hearing by phone or other transmission "cannot be justified merely by showing that it is inconvenient for the witness to attend" the proceeding. There must be "good cause and compelling circumstances . . . such as accident or illness" for such appearances to be allowed. Id. The Rule also requires that when such appearances are permitted safeguards be put in place to "protect against influence by persons present with the witness." Id.

proposed regulated utility activity is going to occur. In the federal context, certain agencies' regulatory codes specifically provide for administrative hearings to be held either at the main office in DC, a place where the parties are actually located, or at a location that is convenient to all the parties. North Dakota's Administrative Agencies Practices Act also contemplates the parties to a hearing agreeing on a mutually convenient location for a hearing except where the location of the hearing is set by statute.²

The provisions of the Century Code concerning general suspension of operator's licenses, specifically Section 39-06-33, requires hearings under Section 39-06-32 be held "in the county of the licensee's residence, unless the parties agree to a different time and place for the hearing." Coincidentally, Section 39-06-32 applies to suspensions for refusal to submit to an implied consent chemical test or an administrative suspension for DUI on an Indian reservation or in another state. However, the location requirement of Section 39-06-33 has been held to apply only to hearings held under Section 39-06-32.³

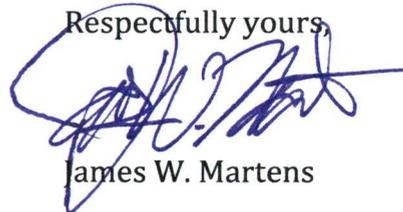
The proposed changes in House Bill 1328 do not go as far as the restriction in Section 39-06-33. They merely require that a hearing be held where the alleged offense occurred.

In the end, it comes down to fundamental fairness. Just as one would never expect to have to answer in court in Fargo for something that happened in Williston, one should not have to endure an administrative hearing in Hankinson for something that occurred in Crosby. And when one living in Minot is entitled to a hearing in Ward County for a suspension on a DUI in Montana, they certainly should be able to have an implied consent hearing on an alleged DUI that occurred in Mott in Hettinger County.

North Dakotans deserve an administrative proceeding against their driving privileges that will be fair. The changes proposed in House Bill 1328 do just that. Please vote "do pass" on House Bill 1328.

Thank you for your time and consideration.

Respectfully yours,



James W. Martens

² N.D.C.C. § 28-32-21(1)(c), (3)(b). See also North Dakota Office of Administrative Hearings, Frequently Asked Questions: When and where will the hearing be? (available at <https://www.nd.gov/oah/FAQ.html#6>).

³ State v. Kouba, 319 N.W.2d 161, 162-163 (N.D. 1982) (Kouba's suspension was for exceeding 12 points on his license).

▲ Caution
As of: February 2, 2017 7:15 PM EST

Wolfer v. N.D. DOT

Supreme Court of North Dakota

April 6, 2010, Filed

No. 20090346

Reporter

2010 ND 59 *, 780 N.W.2d 645 **, 2010 N.D. LEXIS 58 ***

Christian Robert Wolfer, Plaintiff and Appellant v. North Dakota Department of Transportation, Defendant and Appellee

Subsequent History: Related proceeding at State v. Wolfer, 2010 ND 63, 780 N.W.2d 650, 2010 N.D. LEXIS 59 (Apr. 6, 2010)

Prior History: [***1] Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable David E. Reich, Judge.

Disposition: REVERSED.

Core Terms

telephonically, hearing officer, hearings, district court, driving privilege, due process, notice, unilaterally, testifying, requires, driver, officer's, suspend, argues

Case Summary

Procedural Posture

Plaintiff driver appealed the judgment of the District Court of Burleigh County, South Central Judicial District, North Dakota, affirming the decision of defendant, the North Dakota Department of Transportation, to suspend his driving privileges for 365 days.

Overview

Plaintiff was arrested for driving under the influence. The Department of Transportation scheduled a license suspension hearing. The notice did not indicate any portion of the hearing would be conducted telephonically. The Supreme Court of North Dakota held that the Department violated plaintiff's right to due process at the hearing when it took the arresting officer's testimony telephonically. Plaintiff was entitled to due process in his administrative hearing, because a driver's license was a protectable property interest. N.D. Cent. Code §

39-20-05 demonstrated that the legislature intended for the Department to conduct in-person hearings, and the Department could not unilaterally determine hearings would be conducted telephonically. The dangers of telephonic testimony were evident, as the hearing officer could not see the police officer to judge his demeanor or determine if he was testifying from notes. The officer was also unable to diagram the roadway where the stop occurred or demonstrate how he conducted the field sobriety test. This led to an unfair hearing.

Outcome

The Department's order suspending plaintiff's driving privileges and the district court's judgment affirming the Department's order were both reversed.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HNI [↓] The Supreme Court of North Dakota's standard of review of a driver's license suspension is well established: The authority of the North Dakota Department of Transportation to suspend driving privileges is governed by statute, and the Department must meet basic and mandatory statutory requirements to have the authority to suspend driving privileges. The Supreme Court of North Dakota reviews the Department's decision to suspend driving privileges under the Administrative Agencies Practice Act, N.D. Cent. Code ch. 28-32.

Administrative Law > Judicial Review > Standards of Review > General Overview

4B 1328
2-3-17
#2 p.5

HN2 [↓] Under *N.D. Cent. Code § 28-32-49*, the Supreme Court of North Dakota must affirm the Department's order unless: (1) The order is not in accordance with the law. (2) The order is in violation of the constitutional rights of the appellant. (3) The provisions of this chapter have not been complied with in the proceedings before the agency. (4) The rules or procedure of the agency have not afforded the appellant a fair hearing. (5) The findings of fact made by the agency are not supported by a preponderance of the evidence. (6) The conclusions of law and order of the agency are not supported by its findings of fact. (7) The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant. (8) The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge. *N.D. Cent. Code § 28-32-46*.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

HN3 [↓] An agency's decisions on questions of law are fully reviewable.

Administrative Law > ... > Hearings > Right to Hearing > Due Process

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Transportation Law > Private Vehicles > Operator Licenses > Constitutional Implications

HN4 [↓] A driver is entitled to due process in an administrative license suspension hearing, because a driver's license is a protectable property interest. Due process requires notice and an opportunity to be heard. Notice is sufficient if it informs the party of the nature of the proceedings so there is no unfair surprise.

Administrative Law > Agency Adjudication > Hearings > General Overview

HN5 [↓] *N.D. Cent. Code § 28-32-35* permits hearings to be conducted telephonically in some circumstances.

Administrative Law > Agency Adjudication > Hearings > General

Overview

HN6 [↓] See *N.D. Cent. Code § 28-32-35*.

Administrative Law > Agency Adjudication > Hearings > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN7 [↓] *N.D. Cent. Code § 39-20-05* demonstrates that the legislature intended for the Department of Transportation to conduct in-person license suspension hearings, and the Department cannot unilaterally determine hearings will be conducted telephonically. The Department must conduct in-person hearings because *N.D. Cent. Code § 39-20-05* requires the hearing officer to immediately deliver his or her decision to the driver, but provides for mail delivery if the driver fails to appear.

Administrative Law > Agency Adjudication > Hearings > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN8 [↓] In addition to permitting telephonic hearings, *N.D. Cent. Code § 28-32-35* also requires hearing officers regulate the course of the hearing in conformity with this chapter and any other applicable laws. The Administrative Agencies Practice Act therefore requires that the Department's hearing officers comply with its procedural requirements in license suspension cases as well as those embodied in other applicable statutes, including *N.D. Cent. Code § 39-20-05*. Because *N.D. Cent. Code § 39-20-05* does not permit the Department to unilaterally determine hearings will be telephonic, *N.D. Cent. Code § 28-32-35* also prohibits the Department from making such determinations.

Counsel: Danny L. Herbel, Bismarck, ND, for plaintiff and appellant.

Michael T. Pitcher, Assistant Attorney General, Office of Attorney General, Bismarck, ND, for defendant and appellee.

Judges: Gerald W. VandeWalle, C.J., Dale V. Sandstrom, Daniel J. Crothers, Mary Muehlen Maring, Carol Ronning Kapsner. Opinion of the Court by VandeWalle, Chief Justice.

Opinion by: Gerald W. VandeWalle

Opinion

[**646] VandeWalle, Chief Justice.

[*P1] Christian Robert Wolfer appealed from the district court's judgment affirming the Department of Transportation's suspension of his driving privileges for 365 days. We reverse because the Department did not conduct the hearing in accordance with the law when the hearing officer unilaterally decided to conduct a portion of the hearing telephonically.

I.

[*P2] On April 25, 2009, Wolfer was arrested for driving under the influence of intoxicating liquor. Wolfer requested a hearing on the suspension or revocation of his driving privileges. The Department scheduled a hearing for June 3, 2009, and sent Wolfer a notice. The notice did not indicate any portion of the hearing would be conducted [***2] telephonically or that any testimony would be taken telephonically.

[*P3] At the hearing, North Dakota Highway Patrol Officer Thomas Iverson testified telephonically. The day before the hearing, Officer Iverson had a telephone conversation with the hearing officer and Wolfer's attorney. Officer Iverson discussed the possibility that he would not be able to testify in person in Bismarck because he would be in Devils Lake for a job interview. At the hearing, Wolfer objected to the hearing officer allowing Officer Iverson to testify telephonically on due process grounds. He objected because the notice did not indicate there would be telephonic testimony. He argued taking telephonic testimony would substantially prejudice and infringe his right to a fair hearing because the hearing officer would not be able to judge Officer Iverson's demeanor or credibility. Wolfer asserted the hearing officer would not be able to determine if Officer Iverson was alone in the room from which he was testifying, or if he was testifying from notes or documents. Wolfer also argued there was not good cause to take telephonic testimony.

[*P4] The hearing officer offered to continue the hearing, but Wolfer stated he was [***3] not able to take additional time off work for another hearing. After determining the parties would not be able to agree on a new date for the hearing, the hearing officer asked Officer Iverson if there was anyone else in the room with him, and Officer Iverson said there was not. The hearing officer then overruled Wolfer's objection and admonished Officer Iverson to testify only from memory, and to notify the hearing officer when he was testifying from his report. The hearing officer explained Wolfer's right to due process was not violated because "[t]he only thing that is different from a hearing where the trooper is in person is that

his testimony is by telephone."

[*P5] Before Officer Iverson testified, the hearing officer advised him of the penalty for perjury and Officer Iverson took the oath. Wolfer's attorney objected to the oath because the oath was not given in person and the hearing officer could not verify the identity of the person taking the oath telephonically. The hearing officer overruled the objection. The hearing officer again had Officer Iverson confirm that he was alone and again admonished him to testify from memory, and to inform the hearing officer before he referred [***4] to his notes.

[*P6] During his cross-examination of Officer Iverson, Wolfer's attorney asked Officer Iverson if he was able to diagram the roadway where he stopped Wolfer's vehicle. Officer Iverson stated he would not be able to do so, because he was not present at the hearing. Wolfer's attorney also asked Officer Iverson if he would be able to demonstrate how he performed the horizontal gaze nystagmus test. Officer [**647] Iverson responded he would not be able to do so because he was not present at the hearing. Wolfer's attorney did not ask Officer Iverson to verbally describe the roadway or how he performed the horizontal gaze nystagmus test. At the close of Officer Iverson's testimony, the hearing officer stated, "I will note for the record that I recognized the voice of Thomas Iverson testifying here today. I've had Trooper Iverson testify at numerous hearings in the past."

[*P7] The hearing officer concluded Wolfer had not demonstrated any prejudice as a result of Officer Iverson's telephonic testimony. Thus, his right to due process had not been violated. The hearing officer suspended Wolfer's driving privileges for 365 days.

[*P8] Wolfer appealed the hearing officer's decision to the district court. [***5] The district court affirmed the decision. The district court explained, "Section 28-32-35 specifically permit[s] the use of telephonic testimony at administrative hearings." The district court also asserted, "Wolfer cannot claim that his due process rights were violated due to his surprise that testimony would be offered telephonically when he declined the hearing officer's invitation for a continuance and elected to proceed with the hearing." According to the district court, the cross-examination of Officer Iverson did not demonstrate prejudice because Wolfer's attorney did not ask Officer Iverson to verbally describe the road where he stopped Wolfer, or how he conducted the horizontal gaze nystagmus test. The district court explained Wolfer could have shown prejudice if he had asked for the testimony and the testimony was ineffective. Regarding the telephonic oath, the district court cited Lawrence v. Delkamp, 2008 ND 111, P 15, 750 N.W.2d 452 and stated, "Under the facts and

circumstances of the instant case, it appears that in the hearing officer's discretion there existed good cause and adequate safeguards in place to allow Trooper Iverson to testify by telephone." The district [***6] court determined the hearing officer did not violate Wolfer's right to due process.

II.

[*P9] On appeal, Wolfer argues the Department violated his right to due process, and did not conduct the hearing according to the law, when it took Officer Iverson's testimony telephonically. The Department argues Wolfer was not prejudiced by the telephonic testimony.

[*P10] HN1 [↑] This Court's standard of review of a driver's license suspension is well established:

The Department's authority to suspend driving privileges is governed by statute, and the Department must meet basic and mandatory statutory requirements to have the authority to suspend driving privileges. Schaaf v. N.D. Dep't of Transp., 2009 ND 145, P 9, 771 N.W.2d 237. This Court reviews the Department's decision to suspend driving privileges under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. Barros v. N.D. Dep't of Transp., 2008 ND 132, P 7, 751 N.W.2d 261. HN2 [↑] Under N.D.C.C. § 28-32-49, we must affirm the Department's order unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before [***7] the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge. N.D.C.C. § 28-32-46. HN3 [↑] "An agency's decisions on questions of law are fully reviewable." Kiecker v. N.D. Dep't of Transp., 2005 ND 23, P 8, 691 N.W.2d 266 (quoting Huff v. Bd. of Medical Examiners, 2004 ND 225, P 8, 690 N.W.2d 221).

Landsiedel v. Dir., N.D. Dep't of Transp., 2009 ND 196, P 6, 774 N.W.2d 645.

III.

[*P11] Wolfer argues his due process rights were violated. HN4 [↑] Wolfer was entitled to due process in his administrative hearing because a driver's license is a protectable property interest. Morrell v. N.D. Dep't of Transp., 1999 ND 140, P 8, 598 N.W.2d 111 (citing Sabinash v. Dir., N.D. Dep't of Transp., 509 N.W.2d 61, 63 (N.D. 1993)). [***8] Due process requires notice and an opportunity to be heard. Id. at P 9 (citing Saakian v. N.D. Workers Comp. Bur., 1998 ND 227, P 11, 587 N.W.2d 166). "Notice is sufficient if it informs the party of the nature of the proceedings so there is no unfair surprise." Id. (citing Saakian, at P 11). Wolfer argues he was unfairly surprised by the officer's telephonic testimony.

[*P12] We recently discussed hearings conducted telephonically by the Department of Transportation in Landsiedel. In that case, a consolidation of two separate appeals, the hearing officers conducted the hearings by telephone, outside the presence of the drivers and witnesses. Landsiedel, 2009 ND 196, PP 3, 5, 774 N.W.2d 645. We noted HN5 [↑] N.D.C.C. § 28-32-35 permits hearings to be conducted telephonically in some circumstances:

HN6 [↑] A hearing may be conducted in total or in part by making use of telephone, television, facsimile services, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if practicable, to see the entire proceeding while it is taking place, and if such use does not substantially prejudice or infringe on the rights and interests of any party.

Id. at P 9 (quoting [***9] N.D.C.C. § 28-32-35). We also explained HN7 [↑] N.D.C.C. § 39-20-05 "demonstrates the Legislature intended for the Department to conduct in-person hearings, and the Department cannot unilaterally determine hearings will be conducted telephonically." Id. at P 12. We noted the Department must conduct in-person hearings because the statute requires the hearing officer to "immediately deliver" his or her decision to the driver, but provides for mail delivery if the driver fails to appear. Id. We reconciled N.D.C.C. §§ 28-32-35 and 39-20-05, stating:

HN8 [↑] In addition to permitting telephonic hearings, N.D.C.C. § 28-32-35 also requires hearing officers "regulate the course of the hearing in conformity with this chapter and . . . any other applicable laws . . ." The Administrative Agencies Practice Act therefore requires

that the Department's hearing officers comply with its procedural requirements as well as those embodied in other applicable statutes, including *N.D.C.C. § 39-20-05*. Because *N.D.C.C. § 39-20-05* [**649] does not permit the Department to unilaterally determine hearings will be telephonic, *N.D.C.C. § 28-32-35* also prohibits the Department from making such determinations.

Id. at P 13. We held the [***10] hearings were not conducted in accordance with the law and remanded the cases for further proceedings. *Id. at P 15*.

[*P13] We recognize the hearing officer and the district court did not have the benefit of this Court's decision in *Landsiedel* at the time of the hearing or the appeal. Nevertheless, the Department attempts to distinguish *Landsiedel* from this case. In *Landsiedel*, we stated, "Only where the hearing officer and driver are both physically present may the Department give effect to [*N.D.C.C. § 39-20-05*]." *Id. at P 12*. The Department notes that, unlike *Landsiedel* and *Neu*, *Wolfer* and the hearing officer were present in the same place. Only the witness appeared telephonically. Thus, the Department argues, it conducted the hearing in accordance with the law.

[*P14] *Landsiedel* clearly states the Department cannot unilaterally decide to hold a portion of the hearing telephonically. *Id.* *Wolfer* objected to Officer Iverson testifying by telephone. The hearing officer unilaterally decided to take Officer Iverson's testimony telephonically. In addition, the notice in this case did not indicate any portion of the hearing would be conducted telephonically or that testimony would be taken telephonically. [***11] *Wolfer* was unfairly surprised when the hearing officer decided to take telephonic testimony without notice.

[*P15] We have previously discussed the potential problems associated with telephonic testimony:

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.

Lawrence v. Delkamp, 2008 ND 111, P 10, 750 N.W.2d 452 (quoting *Gust v. Gust*, 345 N.W.2d 42, 45 (N.D. 1984)). The explanatory note to *Federal Rule of Civil Procedure 43* explains, "The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a

witness face-to-face is accorded great value in our tradition." *Id.* (quoting *Fed. R. Civ. P. 43*, expl. note). These dangers of telephonic testimony were evident in the [***12] hearing in this case, as the hearing officer could not see Officer Iverson to judge his demeanor, or determine if he was testifying from notes or other documents. Officer Iverson was also unable to diagram the roadway where the stop occurred or demonstrate how he conducted the horizontal gaze nystagmus test because he was not present at the hearing. The hearing officer's unilateral decision to take telephonic testimony led to an unfair hearing and violated *Wolfer's* right to due process.

IV.

[*P16] We reverse the Department's order suspending *Wolfer's* driving privileges and the district court's judgment affirming the Department's order.

[*P17] Gerald W. VandeWalle, C.J.

Dale V. Sandstrom

Daniel J. Crothers

Mary Muehlen Maring

Carol Ronning Kapsner

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Landsiedel v. Dir., N.D. DOT

Supreme Court of North Dakota

November 17, 2009, Filed

No. 20090056, No. 20090057

Reporter

2009 ND 196 *; 774 N.W.2d 645 **; 2009 N.D. LEXIS 196 ***

Darren Jay Landsiedel, Petitioner and Appellant v. Director, North Dakota Department of Transportation, Respondent and Appellee; Jentry Gordon Neu, Petitioner and Appellant v. Director, North Dakota Department of Transportation, Respondent and Appellee

Prior History: [***1] Appeal from the District Court of McLean County, South Central Judicial District, the Honorable David E. Reich, Judge. Appeal from the District Court of Stark County, Southwest Judicial District, the Honorable Zane Anderson, Judge.

Disposition: REVERSED AND REMANDED.

Core Terms

hearing officer, telephonic, hearings, driver, driving privilege, requires, administrative hearing, general provision, suspend, notice, administrative agency, provisions, revocation, suspension, statutes, revoke

Case Summary

Procedural Posture

Appellant drivers, separately, sought review of judgments from the District Court of Stark County, Southwest Judicial District (North Dakota), which upheld the decisions of appellee North Dakota Department of Transportation (Department) to suspend their driving privileges for alcohol-related offenses.

Overview

The Department held telephonic hearings in both cases, to which both drivers objected. Upon review, the court found that an ordinary reading of *N.D. Cent. Code § 39-20-05* demonstrated that the North Dakota Legislature intended for the Department to conduct in-person hearings, and the Department could not unilaterally determine hearings would

be conducted telephonically. Neither driver waived his right to an in-person hearing under *N.D. Cent. Code § 39-20-05*. Further, the Department did not determine whether the use of telephones substantially prejudiced or infringed upon the parties' rights. Accordingly, the court held that the Department failed to conduct the underlying administrative hearings in accordance with the law.

Outcome

The court reversed the revocation and suspensions and remanded the cases for further proceedings.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN1 [↓] The North Dakota Department of Transportation's (Department) authority to suspend driving privileges is governed by statute, and the Department must meet basic and mandatory statutory requirements to have the authority to suspend driving privileges. The Supreme Court of North Dakota reviews the Department's decision to suspend driving privileges under the Administrative Agencies Practice Act, *N.D. Cent. Code ch. 28-32*.

Administrative Law > Judicial Review > Standards of Review > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN2 [↓] Under *N.D. Cent. Code § 28-32-49*, the Supreme Court of North Dakota must affirm the North Dakota Department of Transportation's suspension order unless: 1.

The order is not in accordance with the law. 2. The order is in violation of the constitutional rights of the appellant. 3. The provisions of this chapter have not been complied with in the proceedings before the agency. 4. The rules or procedure of the agency have not afforded the appellant a fair hearing. 5. The findings of fact made by the agency are not supported by a preponderance of the evidence. 6. The conclusions of law and order of the agency are not supported by its findings of fact. 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant. 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge. N.D. Cent. Code § 28-32-46. An agency's decisions on questions of law are fully reviewable.

Administrative Law > Agency Adjudication > Hearings > General Overview

HN3 [↓] Statutory interpretation is a question of law, fully reviewable on appeal. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D. Cent. Code § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D. Cent. Code § 1-02-07. If 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 effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable, the special provision must be construed to control over the general provision. N.D. Cent. Code § 1-02-07.

Administrative Law > Agency Adjudication > Hearings > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN4 [↓] N.D. Cent. Code § 39-20-05 specifically regulates the North Dakota Department of Transportation's conduct of administrative hearings regarding the suspension or revocation of driving privileges for alcohol-related offenses. The statute provides a hearing must be before a hearing officer assigned by the director and at a time and place designated by the director. N.D. Cent. Code § § 39-20-05(2), 39-20-05(3). After the hearing, the hearing officer shall immediately deliver a copy of the decision to the driver. N.D. Cent. Code § 39-20-05(5). If the hearing officer decides to

suspend or revoke the driver's license, the hearing officer shall immediately take possession of the person's temporary operator's permit. If the hearing officer finds in favor of the driver, the hearing officer shall sign, date, and mark on the person's permit an extension of driving privileges and return the permit to the person. Where a driver fails to appear at the hearing without justification, the hearing officer shall, on the date for which the hearing is scheduled, mail to the person, by regular mail a copy of the decision. N.D. Cent. Code § 39-20-05(6). N.D. Cent. Code § 39-20-05 does not specifically mention telephones or telephonic hearings.

Administrative Law > ... > Hearings > Right to Hearing > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN5 [↓] The Administrative Agencies Practice Act, N.D. Cent. Code ch. 28-32, also regulates the North Dakota Department of Transportation's conduct of hearings under N.D. Cent. Code ch. 39-20. Prior to conducting a hearing, an administrative agency shall designate the time and place for the hearing or the parties may agree on a definite time and place for hearing with the consent of the agency having jurisdiction. N.D. Cent. Code § 28-32-21(1)(c). N.D. Cent. Code § 28-32-35 permits administrative agencies to conduct telephonic hearings under certain circumstances: A hearing may be conducted in total or in part by making use of telephone, television, facsimile services, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if practicable, to see the entire proceeding while it is taking place, and if such use does not substantially prejudice or infringe on the rights and interests of any party.

Administrative Law > Agency Adjudication > Hearings > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN6 [↓] The Administrative Agencies Practice Act, N.D. Cent. Code ch. 28-32, requires an administrative hearing officer to conduct hearings in conformity with any other applicable laws. N.D. Cent. Code § 28-32-35. Thus, the North Dakota Department of Transportation's hearing officers must conduct license-revocation hearings in conformity with the general requirements of N.D. Cent. Code ch. 28-32, as well as the more specific requirements of N.D. Cent. Code ch. 39-20.

Administrative Law > Agency Adjudication > Hearings > General Overview

Governments > Legislation > Interpretation

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN7 [↓] N.D. Cent. Code § 1-02-02 requires the Supreme Court of North Dakota interpret statutes in their ordinary sense, unless a contrary intention plainly appears. Subsections (2) and (3) of N.D. Cent. Code § 39-20-05 provide the hearing must be before a hearing officer assigned by the director and at a time and place designated by the director. N.D. Cent. Code § 39-20-05(5) requires the hearing officer immediately deliver a copy of the decision to the driver at the end of the hearing. If the hearing officer decides to suspend or revoke the driver's license, the hearing officer shall immediately take possession of the person's temporary operator's permit. If the hearing officer finds in favor of the driver, the hearing officer shall sign, date, and mark on the person's permit an extension of driving privileges and return the permit to the person. N.D. Cent. Code § 39-20-05(5). If a driver fails to appear at the hearing, the hearing officer shall mail a copy of the decision to the person. N.D. Cent. Code § 39-20-05(6).

Administrative Law > Agency Adjudication > Hearings > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN8 [↓] An ordinary reading of N.D. Cent. Code § 39-20-05 demonstrates the North Dakota Legislature intended for the North Dakota Department of Transportation (Department) to conduct in-person hearings. By specifically providing for mail delivery where the driver fails to appear at the hearing, but requiring the hearing officer immediately deliver the decision where the driver appears, an ordinary reading of the statute demonstrates the Legislature intended for the Department to conduct in-person hearings. Only where the hearing officer and driver are both physically present may the Department give effect to these words. Similarly, a hearing officer cannot immediately take possession of or sign, date, and mark a driver's temporary permit unless the permit is physically present, which also requires both the hearing officer and the driver to be physically present. An ordinary reading of N.D. Cent. Code § 39-20-05 demonstrates the Legislature intended for the Department to conduct in-person hearings, and the Department cannot unilaterally determine hearings will be

conducted telephonically.

Administrative Law > Agency Adjudication > Hearings > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN9 [↓] Although N.D. Cent. Code § 28-32-35 provides agencies may conduct telephonic hearings, the statute does not conflict with N.D. Cent. Code § 39-20-05, which prohibits the North Dakota Department of Transportation (Department) from unilaterally requiring hearings to be conducted telephonically. In addition to permitting telephonic hearings, N.D. Cent. Code § 28-32-35 also requires hearing officers regulate the course of the hearing in conformity with this chapter and any other applicable laws. The Administrative Agencies Practice Act, N.D. Cent. Code ch. 28-32, therefore requires that the Department's hearing officers comply with its procedural requirements as well as those embodied in other applicable statutes, including N.D. Cent. Code § 39-20-05. Because N.D. Cent. Code § 39-20-05 does not permit the Department to unilaterally determine hearings will be telephonic, N.D. Cent. Code § 28-32-35 also prohibits the Department from making such determinations. As it is possible to give effect to both statutes, the Supreme Court of North Dakota need not determine whether the specific provision, N.D. Cent. Code § 39-20-05, is an exception to the general provision, N.D. Cent. Code § 28-32-35, or whether the Legislature intended the general provision to prevail. N.D. Cent. Code § 1-02-07.

Counsel: For petitioner and appellant (No. 20090056, No. 20090057): Michael R. Hoffman(argued), Bismarck, ND.

For respondent and appellee: Michael T. Pitcher (argued) and Andrew Moraghan (on brief), Assistant Attorneys General, Office of Attorney General, Bismarck, ND.

For respondent and appellee: Michael T. Pitcher (argued), Assistant Attorney General, Office of Attorney General, Bismarck, ND.

Judges: Carol Ronning Kapsner, Mary Muehlen Maring, Daniel J. Crothers, Dale V. Sandstrom, Gerald W. VandeWalle, C.J. Opinion of the Court by Kapsner, Justice.

Opinion by: Carol Ronning Kapsner

Opinion

[**646] Kapsner, Justice.

[*P1] Darren Landsiedel and Jentry Neu separately appealed district court judgments upholding the decisions of the Department of Transportation to suspend their driving privileges for alcohol-related offenses. The Department held telephonic hearings in both cases, to which Landsiedel and Neu objected. We consolidated their appeals to determine whether N.D.C.C. § 39-20-05 permits [***2] the Department to conduct telephonic hearings regarding alcohol-related offenses under N.D.C.C. ch. 39-20. We hold the Department failed to conduct these administrative hearings in accordance with the law, reverse the revocation and suspension of Landsiedel and Neu's driver's licenses, and remand the cases for further proceedings consistent with this opinion.

I.

[*P2] A McLean County deputy sheriff arrested Landsiedel for driving under the influence of alcohol in June 2008. The Department issued a report and notice to Landsiedel informing him it intended to revoke his driving privileges. Landsiedel requested an administrative hearing under N.D.C.C. § 39-20-05. The Department's hearing officer issued a notice of hearing on June 20, 2008, scheduling the hearing for July 11, 2008 at the McLean County Courthouse. The hearing officer included a handwritten notation at the bottom of the notice stating: "I will be calling the sheriff's office to take testimony telephonically." On June 30, 2008, the hearing officer issued an amended notice of hearing, changing the date of the hearing to July 8, 2008. The amended notice of hearing did not include a notation about telephonic testimony.

[*P3] On July 8, 2008, [***3] Landsiedel, his counsel, the deputy, and a witness appeared in person at the McLean County Courthouse. The hearing officer telephoned the courthouse from Bismarck. Landsiedel's counsel objected to the hearing officer conducting the hearing by telephone, arguing the hearing officer could not properly judge the credibility of the witnesses over the phone. The hearing officer overruled Landsiedel's objection and revoked his driving privileges for one year. Landsiedel appealed the hearing officer's decision to the district court, which affirmed the revocation.

[*P4] In a separate case, a Dickinson police officer arrested Neu in August 2008 for driving while under the influence of alcohol. The Department issued a report and notice to Neu informing him it intended to revoke his driving privileges. Neu requested an administrative hearing under N.D.C.C. § 39-20-05. The Department's hearing officer sent a notice of administrative hearing to Neu, his counsel, and the arresting officer, indicating the hearing officer would hold the hearing by telephone.

[*P5] The telephonic hearing was held on August 20, 2008. Neu and the arresting officer appeared from separate telephones in Dickinson, while Neu's counsel [***4] and the hearing officer appeared from separate telephones in Bismarck. The hearing officer asked Neu's counsel if he received an email with the exhibits attached, and counsel indicated he had not. The hearing officer offered to postpone the hearing so Neu's counsel could go to the Department's Bismarck office to view the exhibits. Neu's counsel stated he would not go to the office because the Department should have personally provided him with the exhibits. Neu's counsel then objected to the hearing being held by telephone, claiming it substantially prejudiced Neu's right to a fair hearing. The hearing officer overruled the objection and suspended Neu's driving privileges for two years. Neu appealed the hearing officer's [**647] decision to the district court, which affirmed the suspension.

II.

[*P6] HNI[↑] The Department's authority to suspend driving privileges is governed by statute, and the Department must meet basic and mandatory statutory requirements to have the authority to suspend driving privileges. Schaaf v. N.D. Dep't of Transp., 2009 ND 145, P 9, 771 N.W.2d 237. This Court reviews the Department's decision to suspend driving privileges under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. [***5] Barros v. N.D. Dep't of Transp., 2008 ND 132, P 7, 751 N.W.2d 261. HNI[↑] Under N.D.C.C. § 28-32-49, we must affirm the Department's order unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46. "An agency's decisions on questions of law are fully reviewable." Kiecker v. N.D. Dep't of Transp., 2005 ND 23, P 8, 691 N.W.2d 266, (quoting Huff v. Bd. of

Medical Examiners, 2004 ND 225, P 8, 690 N.W.2d 221).

[*P7] In *Schaaf, 2009 ND 145, P 11, 771 N.W.2d 237*, [***6] this Court outlined the rules of statutory interpretation:

HN3 [↑] Statutory interpretation is a question of law, fully reviewable on appeal. *In re P.F., 2008 ND 37, P 11, 744 N.W.2d 724*. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. *N.D.C.C. § 1-02-02*. Statutes are construed as a whole and are harmonized to give meaning to related provisions. *See N.D.C.C. § 1-02-07*. If 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 effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable, the special provision must be construed to control over the general provision. *N.D.C.C. § 1-02-07*.

[*P8] **HN4** [↑] *Section 39-20-05, N.D.C.C.*, specifically regulates the Department's conduct of administrative hearings regarding the suspension or revocation of driving privileges for alcohol-related offenses. The statute provides a hearing "must be before a hearing officer assigned by the director and at a time and place designated by the director." *N.D.C.C. §§ 39-20-05(2), 39-20-05(3)*. [***7] After the hearing, the hearing officer "shall immediately deliver" a copy of the decision to the driver. *N.D.C.C. § 39-20-05(5)*. If the hearing officer decides to suspend or revoke the driver's license, the hearing officer "shall immediately take possession of the person's [**648] temporary operator's permit . . ." *Id.* If the hearing officer finds in favor of the driver, the hearing officer "shall sign, date, and mark on the person's permit an extension of driving privileges" and "return the permit to the person." *Id.* Where a driver "fails to appear at the hearing without justification," the hearing officer "shall, on the date for which the hearing is scheduled, mail to the person, by regular mail . . . a copy of the decision . . ." *N.D.C.C. § 39-20-05(6)*. *Section 39-20-05, N.D.C.C.*, does not specifically mention telephones or telephonic hearings.

[*P9] **HN5** [↑] The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, also regulates the Department's conduct of hearings under N.D.C.C. ch. 39-20. *Kobilansky v. Liffbrig, 358 N.W.2d 781, 786 (N.D. 1984)* ("[A]dministrative proceedings conducted by the [Department] pursuant to NDCC Ch. 39-20, the implied consent statutes, are governed by the provisions [***8] of NDCC Ch. 28-32, *Agnew v. Hjelle, 216 N.W.2d 291, 294 (N.D. 1974)* . . ."). Prior to conducting a hearing, an administrative agency "shall designate the time and place for the hearing . . . or the parties

may agree on a definite time and place for hearing with the consent of the agency having jurisdiction." *N.D.C.C. § 28-32-21(1)(c)*. *Section 28-32-35, N.D.C.C.*, permits administrative agencies to conduct telephonic hearings under certain circumstances:

A hearing may be conducted in total or in part by making use of telephone, television, facsimile services, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if practicable, to see the entire proceeding while it is taking place, and if such use does not substantially prejudice or infringe on the rights and interests of any party.

HN6 [↑] The Administrative Agencies Practice Act also requires an administrative hearing officer to conduct hearings in conformity with "any other applicable laws." *N.D.C.C. § 28-32-35*. Thus, the Department's hearing officers must conduct license-revocation hearings in conformity with the general requirements of N.D.C.C. ch. 28-32, as well as the more specific [***9] requirements of N.D.C.C. ch. 39-20.

III.

[*P10] Landsiedel and Neu argue *N.D.C.C. § 39-20-05* does not permit the Department to conduct telephonic hearings regarding alcohol-related offenses, and the revocation and suspension of their driving privileges should be overturned because the Department violated their right to a fair hearing. The Department argues it did not violate Landsiedel and Neu's right to a fair hearing because *N.D.C.C. § 28-32-35* permits telephonic hearings, while *N.D.C.C. § 39-20-05* does not prohibit them.

[*P11] **HN7** [↑] *Section 1-02-02, N.D.C.C.*, requires this Court interpret statutes "in their ordinary sense, unless a contrary intention plainly appears . . ." *Subsections (2) and (3) of N.D.C.C. § 39-20-05* provide "the hearing must be before a hearing officer assigned by the director and at a time and place designated by the director." *Section 39-20-05(5), N.D.C.C.*, requires the hearing officer "immediately deliver" a copy of the decision to the driver at the end of the hearing. If the hearing officer decides to suspend or revoke the driver's license, the hearing officer "shall immediately take possession of the person's temporary operator's permit." *Id.* If the hearing officer finds [***10] in favor of the driver, the hearing officer "shall sign, date, and mark on the person's permit an extension of driving privileges" and "return the permit to the person." *N.D.C.C. § 39-20-05(5)*. If a driver fails to appear at the hearing, [**649] the hearing officer shall mail a copy of the decision to the person. *N.D.C.C. § 39-20-05(6)*.

[*P12] **HN8** [↑] An ordinary reading of *N.D.C.C. § 39-20-05* demonstrates the Legislature intended for the Department to

conduct in-person hearings. By specifically providing for mail delivery where the driver fails to appear at the hearing, but requiring the hearing officer "immediately deliver" the decision where the driver appears, an ordinary reading of the statute demonstrates the Legislature intended for the Department to conduct in-person hearings. Only where the hearing officer and driver are both physically present may the Department give effect to these words. Similarly, a hearing officer cannot "immediately take possession of" or "sign, date, and mark" a driver's temporary permit unless the permit is physically present, which also requires both the hearing officer and the driver to be physically present. We find an ordinary reading of N.D.C.C. § 39-20-05 demonstrates [***11] the Legislature intended for the Department to conduct in-person hearings, and the Department cannot unilaterally determine hearings will be conducted telephonically.

[*P13] HN9 [↑] Although N.D.C.C. § 28-32-35 provides agencies "may" conduct telephonic hearings, the statute does not conflict with N.D.C.C. § 39-20-05, which prohibits the Department from unilaterally requiring hearings to be conducted telephonically. In addition to permitting telephonic hearings, N.D.C.C. § 28-32-35 also requires hearing officers "regulate the course of the hearing in conformity with this chapter and . . . any other applicable laws" The Administrative Agencies Practice Act therefore requires that the Department's hearing officers comply with its procedural requirements as well as those embodied in other applicable statutes, including N.D.C.C. § 39-20-05. Because N.D.C.C. § 39-20-05 does not permit the Department to unilaterally determine hearings will be telephonic, N.D.C.C. § 28-32-35 also prohibits the Department from making such determinations. As it is possible to give effect to both statutes, this Court need not determine whether the specific provision, N.D.C.C. § 39-20-05, is an exception to the general [***12] provision, N.D.C.C. § 28-32-35, or whether the Legislature intended the general provision to prevail. See N.D.C.C. § 1-02-07 ("[I]f 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.").

[*P14] Neither Landsiedel or Neu waived his right to an in-person hearing under N.D.C.C. § 39-20-05. Further, the Department did not determine whether the use of telephones substantially prejudiced or infringed upon the parties' rights.

IV.

[*P15] We hold the Department failed to conduct these

administrative hearings in accordance with the law, reverse the revocation and suspension of Landsiedel and Neu's driver's licenses, and remand the cases for further proceedings consistent with this opinion.

- [*P16] Carol Ronning Kapsner
- Mary Muehlen Maring
- Daniel J. Crothers
- Dale V. Sandstrom
- Gerald W. VandeWalle, C.J.

End of Document

HOUSE TRANSPORTATION COMMITTEE
February 3, 2017 – Ft. Totten Room

HB1328
2-3-17
#3

North Dakota Department of Transportation
Darcy Rosendahl, P.E., Deputy Director

HB 1328

Good afternoon Mr. Chairman and members of the committee. I'm Darcy Rosendahl, Deputy Director of the North Dakota Department of Transportation (Department). Thank you for giving me the opportunity to provide information today. The Department opposes HB 1328, specifically Section 4 of the bill.

Section 4 would require the Department to conduct an implied consent administrative hearing "in the county in which the incident occurred, unless the individual consents to a different county or consents to a hearing by telephone." This change would possibly impact law enforcement officers' ability to participate in the administrative hearing and the hearing officer's flexibility to make an efficient hearing schedule. That would increase the possibility of a dismissal of the suspension due to the "no show" technicality, which prevents a prompt removal of a potentially dangerous driver from the roads.

Upon citation (report and notice form) by a law enforcement officer, an individual has 10 days to request an administrative hearing. State law also says the hearing must be held within 30 days of that citation (report and notice form) by the law enforcement officer. If an individual takes the full 10 days to request the hearing, it leaves less than 20 days for the hearing officer to schedule the hearing when you subtract mailing days and weekends.

The hearing officer works with the individual's attorney and law enforcement to establish a time and place for a hearing. The hearing officer considers a number of items including other hearings taking place in that area, and the law enforcement officer's location and work schedule. Hopefully all parties can agree to a time and location. When they can't agree, the hearing officer needs the authority to decide on time and location to assure a fair and efficient hearing schedule can be developed to meet all the requirements of state law.

If Section 4 would pass, the person requesting the hearing would now control the allocation of the law enforcement agency's and Department's time and resources. In some circumstances, the end result could be that a law enforcement officer may not be able to attend a hearing away from the officer's regular posting, resulting in the hearing being dismissed without the testimony of the officer. It may also impact the hearing officer's ability to efficiently schedule multiple hearings in one location, increasing travel for the hearing officer and making it more difficult to get the hearings accomplished in the 30 day time frame established in law.

The Department would ask for a Do Not Pass recommendation on HB 1328. Thank you for your time and consideration. I'd be happy to answer any questions the committee may have.

HB 1328 3-14-17

Attachment #1

Cover page 1

Section 1. Amendent- 2 days to 3 days Starts on Line 14 on page 1 .

Current

1. 48 hours (or 2 days) when suspension/revocation starts

Change

1. Seventy-Two (or 3 days) when suspension/revocation starts

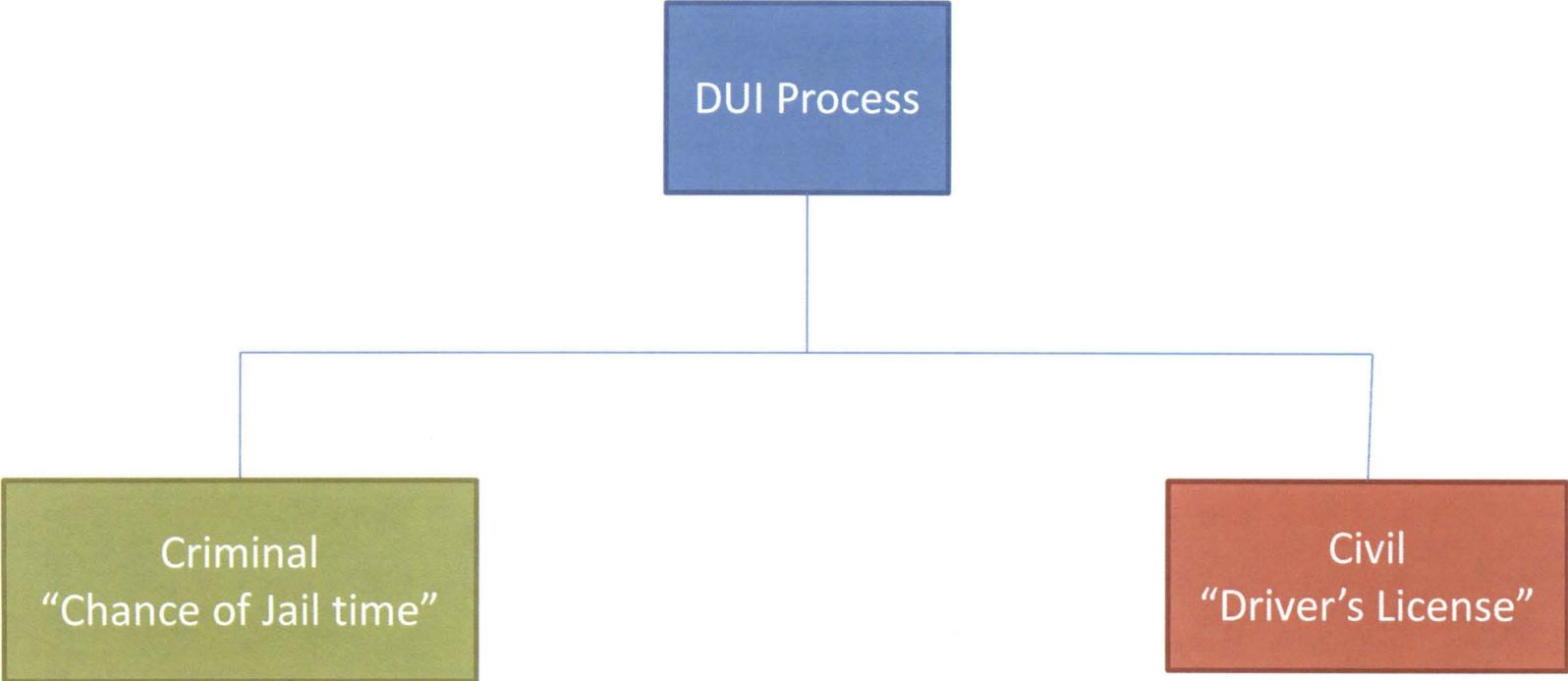
Reasons:

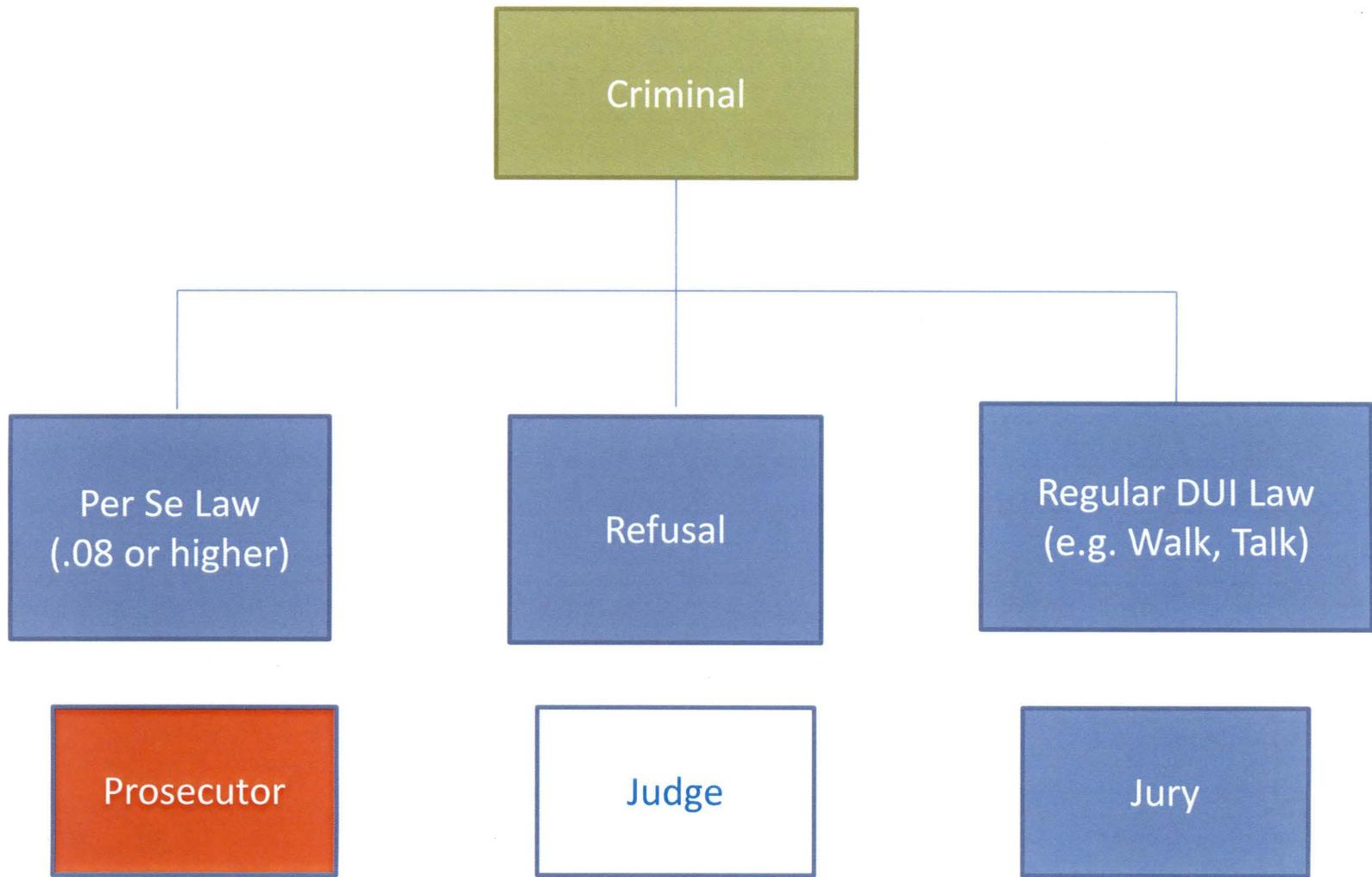
1. Consistency with other rules
 - a) N.D.R.Civ.P. Rule 6(e)
 - i. 3 days mailing
 - b) N.D.R.Crim.P. Rule 49
 - i. 3 days mailing;
 - c) N.D.R.Crim.P. Rule 45(c)
 - i. 3 days mailing;
 - d) N.D.R.App.P. Rule 26(c)
 - i. 3 days mailing.

DUI Process

HB 1328

Attachment # 1 pg 2
HB 1328 3-17-17

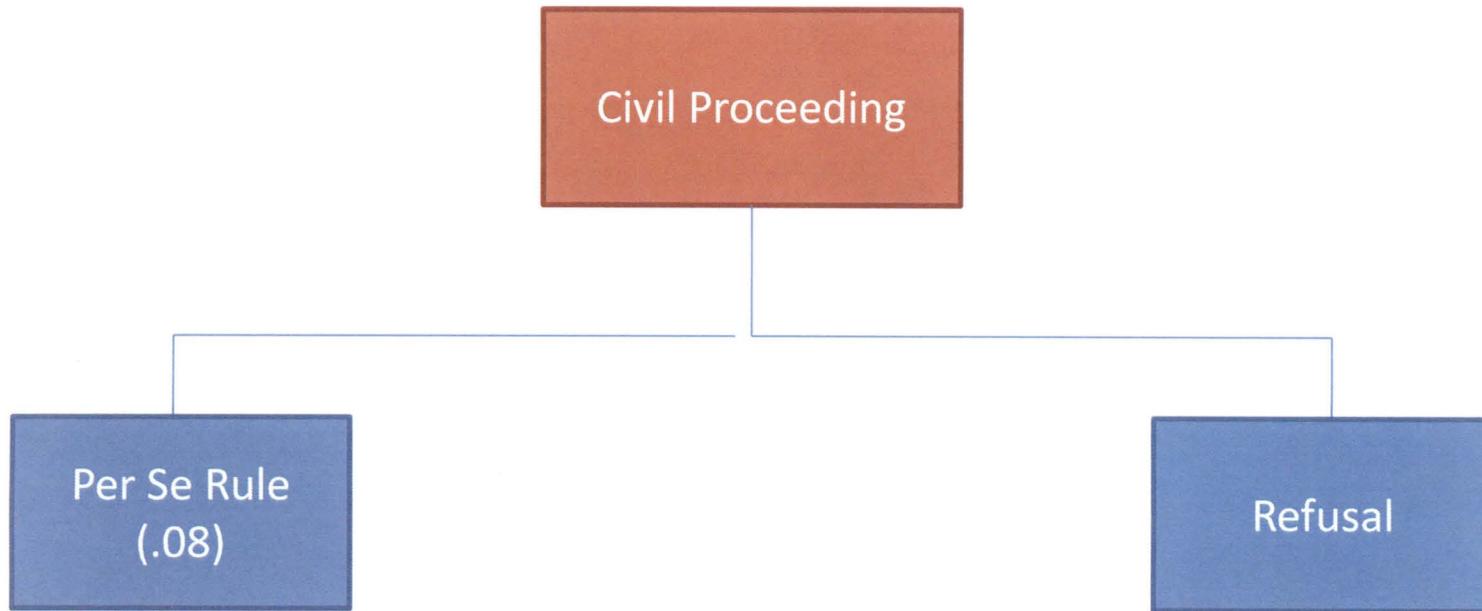




Plead Guilty/Found Guilty= Suspension of Driving Privileges

HB 1328

Attachment #1 pg 5
HB 1328 3-17-17



Swift

1. Know 31 days from:
 - i. Evidentiary Breath
 - a) Usually Date of Arrest
 - ii. Blood or Urine Test
 - a) Usually 2 weeks from Date of Arrest

Hearing Request

1. 10 days from date receive Report and Notice Form
 - a) Lose Right to Fight if not within this time frame

Example of Report & Notice Form

REPORT AND NOTICE UNDER CHAPTER 39-20 OR 39-06.2 NDCC

North Dakota Department of Transportation, Drivers License Division
SFH 9362 (Rev. 02-2010)

Date of Occurrence 5-28-2011		Time of Driving/Physical Control/Crash 11:13		Time of Arrest/Lawfully Detained 11:56		Citation Number 5123495	
Name BE...		City L		State N		Zip Code 58101	
Residence Address 11		County of Occurrence MOUNTAIN		City of Occurrence STANLEY		Enforcement Agency STANLEY PD	
Area Code & Phone Number		State N		Date of Birth 1/1		Class A	
DLN 1		Endorsement 1		Sex M		Height 5-10	

MAY 31 2011
 RECEIVED IN
 ENVELOPE POSTMARK
 2011 JUN -1 AM 10:44
 RECEIVED
 DRIVERS LICENSE &
 TRAFFIC SAFETY DIV.

On the above date, there existed reasonable grounds to believe that the above-named person was operating:

Non-Commercial motor vehicle
 Commercial motor vehicle (CMV) **A00186803**
 CMV transporting hazardous materials, in violation of NDCC Section 38-08-01 or 39-06.2-10.2

The above named person:

Was advised according to the law enforcement implied consent advisory on the bottom portion of the driver's copy of this notice
 Refused onsite screening test (NDCC Section 39-20-14 or 39-06.2-10.2)

Was placed under arrest and informed that he or she will be charged with the offense of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or drugs.
 Was lawfully detained and officer has probable cause to believe that the driver was operating a CMV, or under twenty-one (21) years of age, while having alcohol or drugs in his or her system.

Location of Arrest or Where Detained:
US HWY 21 FRONTAGE RD (ACROSS FROM WEST EYE CENEX)

Refused under NDCC, Section 39-20-01 or 39-06.2-10.2 a chemical test or tests of BLOOD BREATH URINE
 Provided specimen of BLOOD BREATH URINE Time Obtained _____ AM/PM Test Results _____
 Additional specimen of BLOOD BREATH URINE Time Obtained _____ AM/PM Test Results _____

TEMPORARY OPERATOR'S PERMIT: (To be issued to driver. Mark valid or not valid.)

ND License/Permit attached? Yes No Lost

This permit is: VALID as a Temporary Operator's Permit for 25 days from date of issue (unless terminated earlier by hearing officer) NOT VALID as a Temporary Operator's Permit because:
 Non-Licensed Driver
 License Suspended/Revoked
 Current permit under NDCC 39-06.2

THIS PERMIT IS VOID UNLESS ACCOMPANIED BY THE NUMBERED CITATION SHOWN ABOVE
 THIS PERMIT IS NOT VALID FOR OPERATING A CMV UNTIL _____ AM/PM ON (MM/DD/CCYY)

I certify that I personally Issued Mailed this Temporary Operator's Permit to the driver on MM/DD/CCYY **05/29/2011**

JOHN F. TRANSET 1236
Name of Officer/Badge or ID Number (PLEASE PRINT)
John F. Transet 1236
Signature of Officer

OFFICER'S STATEMENT OF PROBABLE CAUSE: (Check appropriate boxes and explain.)

Reasonable suspicion to stop or reason lawfully detained: <input type="checkbox"/> erratic driving Explain: NEGLECTED TO <input checked="" type="checkbox"/> traffic violation Explain: SIGNAL WHEN REQUIRED <input type="checkbox"/> crash <input type="checkbox"/> already stopped	Probable cause to arrest/lawfully detain: <input checked="" type="checkbox"/> odor of alcoholic beverage Explain: REFUSED SFST <input checked="" type="checkbox"/> poor balance Explain: REFUSED INTOX 8000 <input type="checkbox"/> failed field sobriety test(s) <input type="checkbox"/> failed screening test
--	---

I personally certify as a law enforcement officer that this written report is true and correct to the best of my knowledge at the time of writing this report.

Dated this **29th** day of (MM/CCYY) **05/2011**

JOHN F. TRANSET 1236
Name of Officer/Badge or ID Number (PLEASE PRINT)
John F. Transet 1236
Signature of Officer/Badge or ID Number

LAW ENFORCEMENT IMPLIED CONSENT ADVISORY

NON-COMMERCIAL: Refusal to submit to onsite screening or chemical test(s) requested by a law enforcement officer will result in revocation of your driving privileges for up to four years.
 COMMERCIAL: Refusal to submit to onsite screening or chemical test(s) requested by a law enforcement officer will result in being immediately placed out of service for a period of 24 hours and being disqualified from operating a commercial motor vehicle for a period of not less than one year under NDCC 39-06.2-10.

DRIVERS LICENSE DIVISION
HB 1328

EXHIBIT 1b

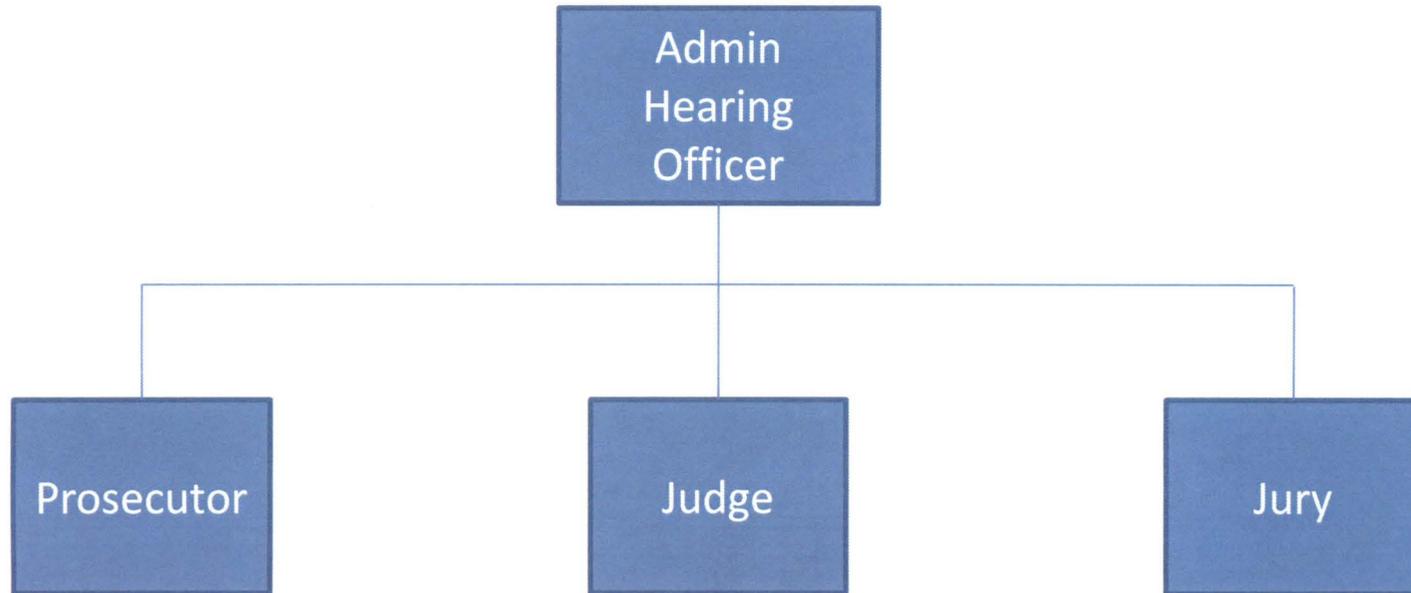
Attachment # 1
pg 7

NB 1328
3-17-17

DOT hires Admin Hearing Officer

1. Paid by the DOT
2. Trained by DOT
3. Provided Office By DOT to conduct Hearing.

Civil Hearing



Location

- a) In Person, unless Defendant agrees by phone
 - i. Wolfer v. DOT, 2010 ND 59
- b) Hearing officer sets:
 - i. City and Building
 - ii. Date and Time
 - a) Law Enforcement-1st
 - b) Take or Leave It

Requirements:

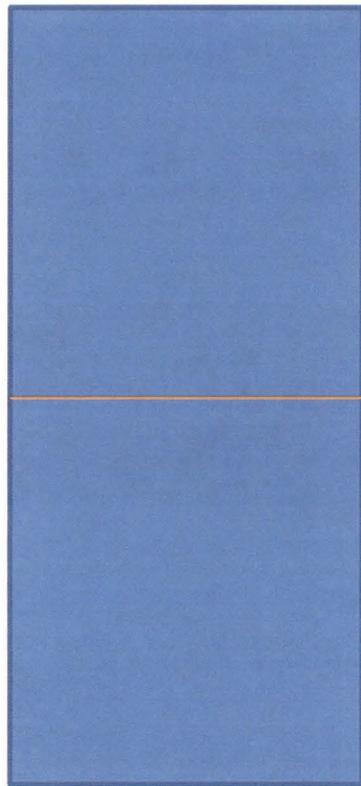
- a. Testify Under Oath
- b. Recorded

HB 1328

Attachment #1 pg 9
HB 1328 3-17-17

Appeal to District Court

1. No new hearing
2. Defer to Admin Hearing Officer
3. Rarely Win



“Beyond a Reasonable Doubt”
Highest Standard in Judicial System
Criminal Proceeding

“Preponderance of Evidence”
More Likely than Not (51%)
Much Lower Than BRD
Civil Proceeding

Burden of Proof

HB 1328

Attachment # 1

pg. 11

HB 1328 3-17-17

Section 2 & 3. Amendment: Confirming
Mailing Address for Resident/Non-Resident
of North Dakota

Starts: Line 6 on Page 2 for Section 2
Line 27 on Page 2 for Section 3

Current Law

1. No Requirement to Obtain Current Mailing Address

Change

1. Confirm Mailing Address

Reason for Change

1. Only will occur with blood or urine test
2. Deadline
 - a) Wrong Address
 - i. Past 10 days to Request Hearing

Section 4. Amendment- Location of Hearing Starts on Line 6 of page 3

Current Law

1. Location is set by Hearing Officer

Changes

1. Location is county where arrest occurred, unless Defendant consents to other county, or by telephone
2. In Person Hearing

Reasons for Change to Location

1. Travel
 - a) Example:
 - a) Incident Occurs in Williams County
 - b) Hearing Officer Set Hearing for Cass County
 - c) 12 hour round trip
2. Consistency
 - a) Criminal Proceeding has to take place in county where DUI arrest occurred;
 - b) Civil Proceeding should also take place in county where DUI arrest occurred.

Reasons for In-person Hearing

In Person Hearings

1. Hear
 - a) Tone of Voice
2. Visual
 - a) Witness' Demeanor
 - b) Witness crossing his/her hands?
 - c) Defensive Posture
 - d) Looking at Notes
 - e) Looking at Manual;
 - f) Coached by someone
3. Smell
 - a) Smell of Booze?
4. Exhibits
 - a) Entered into Evidence
 - b) Video and Photographs
 - c) Easy to introduce if in person

Phone Hearings

1. Hear
 - a) Only hear tone of voice
2. Visual
 - a) Can't see if reading from notes
 - b) Can't see if reading manual
 - c) Can't see if witness is being coached?
 - d) Can't see if evasive
3. Smell
 - a) Can't smell booze?
4. Exhibits
 - a) How do you see exhibits?
 - b) Need to get exhibits before or after;
 - c) Confusing without exhibits in front.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1328

Page 3, Line 7, replace "one hundred fifty miles [241.40 kilometers] of" with "the judicial district in which"

Page 3, Line 8, after incident insert "occurred"

Page 3, Line 27, replace "one hundred fifty miles [241.40 kilometers] of" with "the judicial district in which"

Page 3, Line 28, after incident insert "occurred"

Page 4, Line 26, replace "one hundred fifty miles [241.40 kilometers] of" with "the judicial district in which"

Page 4, Line 26, after incident insert "occurred"



Attachment # 2 pg 1
NB 1328 3-17-17

402 East Main Avenue, Suite 100, Bismarck, ND 58501 | E. jwmartens@martenspllc.com | P. 701.223.2000 | www.martenspllc.com

March 16, 2017

Hon. Lonnie J. Laffen
Senate Transportation Committee
600 E. Boulevard Ave.
Bismarck, ND 58505

RE: House Bill 1328

Dear Chairman Laffen and Members of the Committee:

I am writing in support of House Bill 1328 which hopefully will apply some common sense to the administrative hearing process with the Department of Transportation ("DOT"), and avoid what happened with a hearing for a client of mine last year. Passage of this bill by your colleagues in the House was a tremendous step forward. However, there are greater improvements which could be made through amendment to strengthen the statutory changes proposed in this legislation to make the administrative hearing process fair for all parties involved.

This past fall my client was stopped in Morton County by a Highway Patrolman from Grand Forks who was in the area due to the call for additional law enforcement presence for the Dakota Access Pipeline protest. My client timely requested an administrative hearing. An administrative hearing officer from the DOT's main office in Bismarck set a date and time for the hearing to be held at the DOT in Bismarck after conferring with my office. A formal Notice was issued and mailed by the Department, setting the date, time and location of the hearing in Bismarck.

Shortly thereafter I received an e-mail from another hearing officer from Grand Forks, inquiring about my availability for an administrative hearing for the same client concerning the same incident date. I replied that a hearing had already been set for a particular date and time by the Bismarck hearing officer and copied the Bismarck hearing officer on my e-mail. The Grand Forks hearing officer then issued a Notice unilaterally setting a telephonic hearing for the same date and time.

Unfortunately, unilateral action such as this is not new to the DOT and has been struck down by our Supreme Court on more than one occasion. I have attached copies of the decisions in Landsiedel and Wolfer for the Committee's review; however, I want to point

out the particular discussion in paragraph 15 of the Wolfer decision, which hits the nail on the head when it comes to the problem with a telephonic hearing:

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. . . . The explanatory note to Federal Rule of Civil Procedure 43 explains, "The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."¹

After bringing these opinions to the hearing officers' attention, the Grand Forks hearing officer then issued a third Notice setting the hearing for the same date and time, but to be held at the DOT's district office in Grand Forks.

As such, my client, who was working in McKenzie County, and I were required to travel to Grand Forks for the hearing. What's more, the trooper who made the stop also had to travel from Mandan, where he was still on "DAPL duty", at the taxpayers' expense. Never mind the fact that for any criminal proceeding on the matter we all would be required to appear in District Court in Mandan.

Unfortunately, my client's case is not unique. There are others who have been subject to such scheduling by DOT which, to me, underscores what has all appearances of becoming an unjust proceeding against an accused driver. For example, attorney Jeff Nehring of Williston has had a McKenzie County matter unilaterally venued in Fargo and has had Williams County hearings unilaterally venued in Devils Lake, including one where the arresting officer failed to appear for the hearing. Such unilateral scheduling in locations totally inconvenient to the accused and their counsel shows a lack of impartiality from what is supposed to be a removed, neutral third party in the form of an administrative hearing officer.

¹ Wolfer v. N.D. Dep't of Transp., 2010 ND 59, ¶ 15, 780 N.W.2d 645, 649 (quoting Lawrence v. Delkamp, 2008 ND 111, ¶ 10, 750 N.W.2d 452, 455 (quoting Gust v. Gust, 345 N.W.2d 42, 45 (N.D. 1984); Fed. R. Civ. P. 43, expl. note) (emphasis added). Moreover, the explanatory note to Rule 43 of the Federal Rules of Civil Procedure also provides that holding a hearing by phone or other transmission "cannot be justified merely by showing that it is inconvenient for the witness to attend" the proceeding. There must be "good cause and compelling circumstances . . . such as accident or illness" for such appearances to be allowed. Id. The Rule also requires that when such appearances are permitted safeguards be put in place to "protect against influence by persons present with the witness." Id.

Normally, in the setting of an administrative proceeding, any hearing on a matter takes place at the seat of the administrative agency (i.e., Bismarck or Washington, DC), or at one of that agency's regional offices in or near the location where the matter or dispute arises. For example, the Public Service Commission normally holds its hearings at the Capitol in Bismarck, but is well known to hold hearings on permits in the counties where the proposed regulated utility activity is going to occur. In the federal context, certain agencies' regulatory codes specifically provide for administrative hearings to be held either at the main office in DC, a place where the parties are actually located, or at a location that is convenient to all the parties. North Dakota's Administrative Agencies Practices Act also contemplates the parties to a hearing agreeing on a mutually convenient location for a hearing except where the location of the hearing is set by statute.²

The provisions of the Century Code concerning general suspension of operator's licenses, specifically Section 39-06-33, requires hearings under Section 39-06-32 be held "in the county of the licensee's residence, unless the parties agree to a different time and place for the hearing." Coincidentally, Section 39-06-32 applies to suspensions for refusal to submit to an implied consent chemical test or an administrative suspension for DUI on an Indian reservation or in another state. However, the location requirement of Section 39-06-33 has been held to apply only to hearings held under Section 39-06-32.³

The proposed changes in House Bill 1328 do not go as far as the restriction in Section 39-06-33. In its original format, the changes proposed by this bill would have merely required a hearing be held in the county where the alleged offense occurred. However, in its current amended form, the bill provides for a hearing within 150 miles of the incident.

Unfortunately, while the amendments made by the House Transportation Committee do rid us of situations such as those my client and Mr. Nehring's clients faced – the cross-state siting of hearings – they still pose a problem in that officers and individuals would be required to travel considerable distances for hearings. With the current 150 mile language, an administrative hearing on a DUI from Minot could be held in Devils Lake or Bismarck; a DUI in Williston could end up with a hearing in Minot or Dickinson; or a DUI in Jamestown could end up with a hearing in Devils Lake, Bismarck, or Fargo. Moreover, you create a potential problem in that there would have to be a definitive determination of the actual distance from the site of the incident to the hearing location and how that distance should be measured.

A better solution would be to require administrative hearings to be held in the same judicial district as where the incident occurred. This would work better logistically for

² N.D.C.C. § 28-32-21(1)(c), (3)(b). See also North Dakota Office of Administrative Hearings, Frequently Asked Questions: When and where will the hearing be? (available at <https://www.nd.gov/oah/FAQ.html#6>).

³ State v. Kouba, 319 N.W.2d 161, 162-163 (N.D. 1982) (Kouba's suspension was for exceeding 12 points on his license).

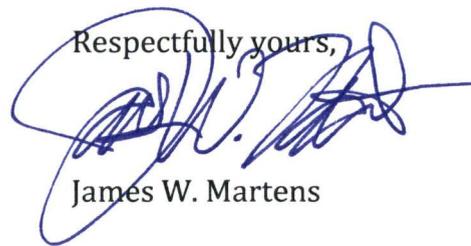
both law enforcement and the accused. It would also make better sense in terms of venue for any potential appeal of an administrative decision to the district court.⁴

In the end, it comes down to fundamental fairness and common sense. Just as one would never expect to have to answer in court in Fargo for something that happened in Park River, one should not have to endure an administrative hearing in Bismarck for something that occurred in Bottineau. And when one living in Crosby is entitled to a hearing in Divide County for a suspension on a DUI in Montana, they certainly should be able to have an implied consent hearing on an alleged DUI that occurred in Mott in Stark or Hettinger County.

North Dakotans deserve an administrative proceeding against their driving privileges that will be fair. The changes proposed in House Bill 1328 do just that. Please approve the proposed amendment to require hearings to be held within the same judicial district where the incident occurred and vote "do pass" on House Bill 1328.

Thank you for your time and consideration.

Respectfully yours,



James W. Martens

⁴ Under the Administrative Agencies Practices Act, an appeal of an agency determination is to be filed with "the district court of the county in which the hearing or a part thereof was held." N.D.C.C. § 28-32-42(3)(a).

Wolfer v. N.D. DOT

Supreme Court of North Dakota

April 6, 2010, Filed

No. 20090346

Reporter

2010 ND 59 *; 780 N.W.2d 645 **; 2010 N.D. LEXIS 58 ***

Christian Robert Wolfer, Plaintiff and Appellant v. North Dakota Department of Transportation, Defendant and Appellee

Subsequent History: Related proceeding at State v. Wolfer, 2010 ND 63, 780 N.W.2d 650, 2010 N.D. LEXIS 59 (Apr. 6, 2010)

Prior History: [***1] Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable David E. Reich, Judge.

Disposition: REVERSED.

Core Terms

telephonically, hearing officer, hearings, district court, driving privilege, due process, notice, unilaterally, testifying, requires, driver, officer's, suspend, argues

Case Summary

Procedural Posture

Plaintiff driver appealed the judgment of the District Court of Burleigh County, South Central Judicial District, North Dakota, affirming the decision of defendant, the North Dakota Department of Transportation, to suspend his driving privileges for 365 days.

Overview

Plaintiff was arrested for driving under the influence. The Department of Transportation scheduled a license suspension hearing. The notice did not indicate any portion of the hearing would be conducted telephonically. The Supreme Court of North Dakota held that the Department violated plaintiff's right to due process at the hearing when it took the arresting officer's testimony telephonically. Plaintiff was entitled to due process in his administrative hearing, because a driver's license was a protectable property interest. N.D. Cent. Code §

39-20-05 demonstrated that the legislature intended for the Department to conduct in-person hearings, and the Department could not unilaterally determine hearings would be conducted telephonically. The dangers of telephonic testimony were evident, as the hearing officer could not see the police officer to judge his demeanor or determine if he was testifying from notes. The officer was also unable to diagram the roadway where the stop occurred or demonstrate how he conducted the field sobriety test. This led to an unfair hearing.

Outcome

The Department's order suspending plaintiff's driving privileges and the district court's judgment affirming the Department's order were both reversed.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HNI [↓] The Supreme Court of North Dakota's standard of review of a driver's license suspension is well established: The authority of the North Dakota Department of Transportation to suspend driving privileges is governed by statute, and the Department must meet basic and mandatory statutory requirements to have the authority to suspend driving privileges. The Supreme Court of North Dakota reviews the Department's decision to suspend driving privileges under the Administrative Agencies Practice Act, N.D. Cent. Code ch. 28-32.

Administrative Law > Judicial Review > Standards of Review > General Overview

3-17-17

2010 ND 59, *59; 780 N.W.2d 645, **645; 2010 N.D. LEXIS 58, ***1

HN2 [↓] Under *N.D. Cent. Code § 28-32-49*, the Supreme Court of North Dakota must affirm the Department's order unless: (1) The order is not in accordance with the law. (2) The order is in violation of the constitutional rights of the appellant. (3) The provisions of this chapter have not been complied with in the proceedings before the agency. (4) The rules or procedure of the agency have not afforded the appellant a fair hearing. (5) The findings of fact made by the agency are not supported by a preponderance of the evidence. (6) The conclusions of law and order of the agency are not supported by its findings of fact. (7) The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant. (8) The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge. *N.D. Cent. Code § 28-32-46*.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

HN3 [↓] An agency's decisions on questions of law are fully reviewable.

Administrative Law > ... > Hearings > Right to Hearing > Due Process

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Transportation Law > Private Vehicles > Operator Licenses > Constitutional Implications

HN4 [↓] A driver is entitled to due process in an administrative license suspension hearing, because a driver's license is a protectable property interest. Due process requires notice and an opportunity to be heard. Notice is sufficient if it informs the party of the nature of the proceedings so there is no unfair surprise.

Administrative Law > Agency Adjudication > Hearings > General Overview

HN5 [↓] *N.D. Cent. Code § 28-32-35* permits hearings to be conducted telephonically in some circumstances.

Administrative Law > Agency Adjudication > Hearings > General

Overview

HN6 [↓] See *N.D. Cent. Code § 28-32-35*.

Administrative Law > Agency Adjudication > Hearings > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN7 [↓] *N.D. Cent. Code § 39-20-05* demonstrates that the legislature intended for the Department of Transportation to conduct in-person license suspension hearings, and the Department cannot unilaterally determine hearings will be conducted telephonically. The Department must conduct in-person hearings because *N.D. Cent. Code § 39-20-05* requires the hearing officer to immediately deliver his or her decision to the driver, but provides for mail delivery if the driver fails to appear.

Administrative Law > Agency Adjudication > Hearings > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN8 [↓] In addition to permitting telephonic hearings, *N.D. Cent. Code § 28-32-35* also requires hearing officers regulate the course of the hearing in conformity with this chapter and any other applicable laws. The Administrative Agencies Practice Act therefore requires that the Department's hearing officers comply with its procedural requirements in license suspension cases as well as those embodied in other applicable statutes, including *N.D. Cent. Code § 39-20-05*. Because *N.D. Cent. Code § 39-20-05* does not permit the Department to unilaterally determine hearings will be telephonic, *N.D. Cent. Code § 28-32-35* also prohibits the Department from making such determinations.

Counsel: Danny L. Herbel, Bismarck, ND, for plaintiff and appellant.

Michael T. Pitcher, Assistant Attorney General, Office of Attorney General, Bismarck, ND, for defendant and appellee.

Judges: Gerald W. VandeWalle, C.J., Dale V. Sandstrom, Daniel J. Crothers, Mary Muehlen Maring, Carol Ronning Kapsner. Opinion of the Court by VandeWalle, Chief Justice.

Opinion by: Gerald W. VandeWalle

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Opinion

[**646] VandeWalle, Chief Justice.

[*P1] Christian Robert Wolfer appealed from the district court's judgment affirming the Department of Transportation's suspension of his driving privileges for 365 days. We reverse because the Department did not conduct the hearing in accordance with the law when the hearing officer unilaterally decided to conduct a portion of the hearing telephonically.

I.

[*P2] On April 25, 2009, Wolfer was arrested for driving under the influence of intoxicating liquor. Wolfer requested a hearing on the suspension or revocation of his driving privileges. The Department scheduled a hearing for June 3, 2009, and sent Wolfer a notice. The notice did not indicate any portion of the hearing would be conducted [***2] telephonically or that any testimony would be taken telephonically.

[*P3] At the hearing, North Dakota Highway Patrol Officer Thomas Iverson testified telephonically. The day before the hearing, Officer Iverson had a telephone conversation with the hearing officer and Wolfer's attorney. Officer Iverson discussed the possibility that he would not be able to testify in person in Bismarck because he would be in Devils Lake for a job interview. At the hearing, Wolfer objected to the hearing officer allowing Officer Iverson to testify telephonically on due process grounds. He objected because the notice did not indicate there would be telephonic testimony. He argued taking telephonic testimony would substantially prejudice and infringe his right to a fair hearing because the hearing officer would not be able to judge Officer Iverson's demeanor or credibility. Wolfer asserted the hearing officer would not be able to determine if Officer Iverson was alone in the room from which he was testifying, or if he was testifying from notes or documents. Wolfer also argued there was not good cause to take telephonic testimony.

[*P4] The hearing officer offered to continue the hearing, but Wolfer stated he was [***3] not able to take additional time off work for another hearing. After determining the parties would not be able to agree on a new date for the hearing, the hearing officer asked Officer Iverson if there was anyone else in the room with him, and Officer Iverson said there was not. The hearing officer then overruled Wolfer's objection and admonished Officer Iverson to testify only from memory, and to notify the hearing officer when he was testifying from his report. The hearing officer explained Wolfer's right to due process was not violated because "[t]he only thing that is different from a hearing where the trooper is in person is that

his testimony is by telephone."

[*P5] Before Officer Iverson testified, the hearing officer advised him of the penalty for perjury and Officer Iverson took the oath. Wolfer's attorney objected to the oath because the oath was not given in person and the hearing officer could not verify the identity of the person taking the oath telephonically. The hearing officer overruled the objection. The hearing officer again had Officer Iverson confirm that he was alone and again admonished him to testify from memory, and to inform the hearing officer before he referred [***4] to his notes.

[*P6] During his cross-examination of Officer Iverson, Wolfer's attorney asked Officer Iverson if he was able to diagram the roadway where he stopped Wolfer's vehicle. Officer Iverson stated he would not be able to do so, because he was not present at the hearing. Wolfer's attorney also asked Officer Iverson if he would be able to demonstrate how he performed the horizontal gaze nystagmus test. Officer [**647] Iverson responded he would not be able to do so because he was not present at the hearing. Wolfer's attorney did not ask Officer Iverson to verbally describe the roadway or how he performed the horizontal gaze nystagmus test. At the close of Officer Iverson's testimony, the hearing officer stated, "I will note for the record that I recognized the voice of Thomas Iverson testifying here today. I've had Trooper Iverson testify at numerous hearings in the past."

[*P7] The hearing officer concluded Wolfer had not demonstrated any prejudice as a result of Officer Iverson's telephonic testimony. Thus, his right to due process had not been violated. The hearing officer suspended Wolfer's driving privileges for 365 days.

[*P8] Wolfer appealed the hearing officer's decision to the district court. [***5] The district court affirmed the decision. The district court explained, "Section 28-32-35 specifically permit[s] the use of telephonic testimony at administrative hearings." The district court also asserted, "Wolfer cannot claim that his due process rights were violated due to his surprise that testimony would be offered telephonically when he declined the hearing officer's invitation for a continuance and elected to proceed with the hearing." According to the district court, the cross-examination of Officer Iverson did not demonstrate prejudice because Wolfer's attorney did not ask Officer Iverson to verbally describe the road where he stopped Wolfer, or how he conducted the horizontal gaze nystagmus test. The district court explained Wolfer could have shown prejudice if he had asked for the testimony and the testimony was ineffective. Regarding the telephonic oath, the district court cited Lawrence v. Delkamp, 2008 ND 111, P 15, 750 N.W.2d 452 and stated, "Under the facts and

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circumstances of the instant case, it appears that in the hearing officer's discretion there existed good cause and adequate safeguards in place to allow Trooper Iverson to testify by telephone." The district [***6] court determined the hearing officer did not violate Wolfer's right to due process.

II.

[*P9] On appeal, Wolfer argues the Department violated his right to due process, and did not conduct the hearing according to the law, when it took Officer Iverson's testimony telephonically. The Department argues Wolfer was not prejudiced by the telephonic testimony.

[*P10] HNI [↑] This Court's standard of review of a driver's license suspension is well established:

The Department's authority to suspend driving privileges is governed by statute, and the Department must meet basic and mandatory statutory requirements to have the authority to suspend driving privileges. Schaaf v. N.D. Dep't of Transp., 2009 ND 145, P 9, 771 N.W.2d 237. This Court reviews the Department's decision to suspend driving privileges under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. Barros v. N.D. Dep't of Transp., 2008 ND 132, P 7, 751 N.W.2d 261. HN2 [↑] Under N.D.C.C. § 28-32-49, we must affirm the Department's order unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before [***7] the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

[**648] 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge. N.D.C.C. § 28-32-46. HN3 [↑] "An agency's decisions on questions of law are fully reviewable." Kiecker v. N.D. Dep't of Transp., 2005 ND 23, P 8, 691 N.W.2d 266 (quoting Huff v. Bd. of Medical Examiners, 2004 ND 225, P 8, 690 N.W.2d 221).

Landsiedel v. Dir., N.D. Dep't of Transp., 2009 ND 196, P 6, 774 N.W.2d 645.

III.

[*P11] Wolfer argues his due process rights were violated. HN4 [↑] Wolfer was entitled to due process in his administrative hearing because a driver's license is a protectable property interest. Morrell v. N.D. Dep't of Transp., 1999 ND 140, P 8, 598 N.W.2d 111 (citing Sabinash v. Dir., N.D. Dep't of Transp., 509 N.W.2d 61, 63 (N.D. 1993)).

[***8] Due process requires notice and an opportunity to be heard. Id. at P 9 (citing Saakian v. N.D. Workers Comp. Bur., 1998 ND 227, P 11, 587 N.W.2d 166). "Notice is sufficient if it informs the party of the nature of the proceedings so there is no unfair surprise." Id. (citing Saakian, at P 11). Wolfer argues he was unfairly surprised by the officer's telephonic testimony.

[*P12] We recently discussed hearings conducted telephonically by the Department of Transportation in Landsiedel. In that case, a consolidation of two separate appeals, the hearing officers conducted the hearings by telephone, outside the presence of the drivers and witnesses. Landsiedel, 2009 ND 196, PP 3, 5, 774 N.W.2d 645. We noted HN5 [↑] N.D.C.C. § 28-32-35 permits hearings to be conducted telephonically in some circumstances:

HN6 [↑] A hearing may be conducted in total or in part by making use of telephone, television, facsimile services, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if practicable, to see the entire proceeding while it is taking place, and if such use does not substantially prejudice or infringe on the rights and interests of any party.

Id. at P 9 (quoting [***9] N.D.C.C. § 28-32-35). We also explained HN7 [↑] N.D.C.C. § 39-20-05 "demonstrates the Legislature intended for the Department to conduct in-person hearings, and the Department cannot unilaterally determine hearings will be conducted telephonically." Id. at P 12. We noted the Department must conduct in-person hearings because the statute requires the hearing officer to "immediately deliver" his or her decision to the driver, but provides for mail delivery if the driver fails to appear. Id. We reconciled N.D.C.C. §§ 28-32-35 and 39-20-05, stating:

HN8 [↑] In addition to permitting telephonic hearings, N.D.C.C. § 28-32-35 also requires hearing officers "regulate the course of the hearing in conformity with this chapter and . . . any other applicable laws . . ." The Administrative Agencies Practice Act therefore requires

that the Department's hearing officers comply with its procedural requirements as well as those embodied in other applicable statutes, including N.D.C.C. § 39-20-05. Because N.D.C.C. § 39-20-05 [**649] does not permit the Department to unilaterally determine hearings will be telephonic, N.D.C.C. § 28-32-35 also prohibits the Department from making such determinations.

Id. at P 13. We held the [***10] hearings were not conducted in accordance with the law and remanded the cases for further proceedings. Id. at P 15.

[*P13] We recognize the hearing officer and the district court did not have the benefit of this Court's decision in *Landsiedel* at the time of the hearing or the appeal. Nevertheless, the Department attempts to distinguish *Landsiedel* from this case. In *Landsiedel*, we stated, "Only where the hearing officer and driver are both physically present may the Department give effect to [N.D.C.C. § 39-20-05]." Id. at P 12. The Department notes that, unlike *Landsiedel* and *Neu*, *Wolfer* and the hearing officer were present in the same place. Only the witness appeared telephonically. Thus, the Department argues, it conducted the hearing in accordance with the law.

[*P14] *Landsiedel* clearly states the Department cannot unilaterally decide to hold a portion of the hearing telephonically. Id. *Wolfer* objected to Officer Iverson testifying by telephone. The hearing officer unilaterally decided to take Officer Iverson's testimony telephonically. In addition, the notice in this case did not indicate any portion of the hearing would be conducted telephonically or that testimony would be taken telephonically. [***11] *Wolfer* was unfairly surprised when the hearing officer decided to take telephonic testimony without notice.

[*P15] We have previously discussed the potential problems associated with telephonic testimony:

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.

Lawrence v. Delkamp, 2008 ND 111, P 10, 750 N.W.2d 452 (quoting Gust v. Gust, 345 N.W.2d 42, 45 (N.D. 1984)). The explanatory note to Federal Rule of Civil Procedure 43 explains, "The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a

witness face-to-face is accorded great value in our tradition." Id. (quoting Fed. R. Civ. P. 43, expl. note). These dangers of telephonic testimony were evident in the [***12] hearing in this case, as the hearing officer could not see Officer Iverson to judge his demeanor, or determine if he was testifying from notes or other documents. Officer Iverson was also unable to diagram the roadway where the stop occurred or demonstrate how he conducted the horizontal gaze nystagmus test because he was not present at the hearing. The hearing officer's unilateral decision to take telephonic testimony led to an unfair hearing and violated *Wolfer's* right to due process.

IV.

[*P16] We reverse the Department's order suspending *Wolfer's* driving privileges and the district court's judgment affirming the Department's order.

[*P17] Gerald W. VandeWalle, C.J.

Dale V. Sandstrom

Daniel J. Crothers

Mary Muehlen Maring

Carol Ronning Kapsner

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Landsiedel v. Dir., N.D. DOT

Supreme Court of North Dakota

November 17, 2009, Filed

No. 20090056, No. 20090057

Reporter

2009 ND 196 *; 774 N.W.2d 645 **; 2009 N.D. LEXIS 196 ***

Darren Jay Landsiedel, Petitioner and Appellant v. Director, North Dakota Department of Transportation, Respondent and Appellee; Jentry Gordon Neu, Petitioner and Appellant v. Director, North Dakota Department of Transportation, Respondent and Appellee

Prior History: [***1] Appeal from the District Court of McLean County, South Central Judicial District, the Honorable David E. Reich, Judge. Appeal from the District Court of Stark County, Southwest Judicial District, the Honorable Zane Anderson, Judge.

Disposition: REVERSED AND REMANDED.

Core Terms

hearing officer, telephonic, hearings, driver, driving privilege, requires, administrative hearing, general provision, suspend, notice, administrative agency, provisions, revocation, suspension, statutes, revoke

Case Summary

Procedural Posture

Appellant drivers, separately, sought review of judgments from the District Court of Stark County, Southwest Judicial District (North Dakota), which upheld the decisions of appellee North Dakota Department of Transportation (Department) to suspend their driving privileges for alcohol-related offenses.

Overview

The Department held telephonic hearings in both cases, to which both drivers objected. Upon review, the court found that an ordinary reading of *N.D. Cent. Code § 39-20-05* demonstrated that the North Dakota Legislature intended for the Department to conduct in-person hearings, and the Department could not unilaterally determine hearings would

be conducted telephonically. Neither driver waived his right to an in-person hearing under *N.D. Cent. Code § 39-20-05*. Further, the Department did not determine whether the use of telephones substantially prejudiced or infringed upon the parties' rights. Accordingly, the court held that the Department failed to conduct the underlying administrative hearings in accordance with the law.

Outcome

The court reversed the revocation and suspensions and remanded the cases for further proceedings.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HNI [↓] The North Dakota Department of Transportation's (Department) authority to suspend driving privileges is governed by statute, and the Department must meet basic and mandatory statutory requirements to have the authority to suspend driving privileges. The Supreme Court of North Dakota reviews the Department's decision to suspend driving privileges under the Administrative Agencies Practice Act, *N.D. Cent. Code ch. 28-32*.

Administrative Law > Judicial Review > Standards of Review > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN2 [↓] Under *N.D. Cent. Code § 28-32-49*, the Supreme Court of North Dakota must affirm the North Dakota Department of Transportation's suspension order unless: 1.

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The order is not in accordance with the law. 2. The order is in violation of the constitutional rights of the appellant. 3. The provisions of this chapter have not been complied with in the proceedings before the agency. 4. The rules or procedure of the agency have not afforded the appellant a fair hearing. 5. The findings of fact made by the agency are not supported by a preponderance of the evidence. 6. The conclusions of law and order of the agency are not supported by its findings of fact. 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant. 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge. N.D. Cent. Code § 28-32-46. An agency's decisions on questions of law are fully reviewable.

suspend or revoke the driver's license, the hearing officer shall immediately take possession of the person's temporary operator's permit. If the hearing officer finds in favor of the driver, the hearing officer shall sign, date, and mark on the person's permit an extension of driving privileges and return the permit to the person. Where a driver fails to appear at the hearing without justification, the hearing officer shall, on the date for which the hearing is scheduled, mail to the person, by regular mail a copy of the decision. N.D. Cent. Code § 39-20-05(6). N.D. Cent. Code § 39-20-05 does not specifically mention telephones or telephonic hearings.

Administrative Law > Agency Adjudication > Hearings > General Overview

Administrative Law > ... > Hearings > Right to Hearing > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN3 [down arrow] Statutory interpretation is a question of law, fully reviewable on appeal. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D. Cent. Code § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D. Cent. Code § 1-02-07. If 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 effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable, the special provision must be construed to control over the general provision. N.D. Cent. Code § 1-02-07.

HN5 [down arrow] The Administrative Agencies Practice Act, N.D. Cent. Code ch. 28-32, also regulates the North Dakota Department of Transportation's conduct of hearings under N.D. Cent. Code ch. 39-20. Prior to conducting a hearing, an administrative agency shall designate the time and place for the hearing or the parties may agree on a definite time and place for hearing with the consent of the agency having jurisdiction. N.D. Cent. Code § 28-32-21(1)(c). N.D. Cent. Code § 28-32-35 permits administrative agencies to conduct telephonic hearings under certain circumstances: A hearing may be conducted in total or in part by making use of telephone, television, facsimile services, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if practicable, to see the entire proceeding while it is taking place, and if such use does not substantially prejudice or infringe on the rights and interests of any party.

Administrative Law > Agency Adjudication > Hearings > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

Administrative Law > Agency Adjudication > Hearings > General Overview

Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension

HN4 [down arrow] N.D. Cent. Code § 39-20-05 specifically regulates the North Dakota Department of Transportation's conduct of administrative hearings regarding the suspension or revocation of driving privileges for alcohol-related offenses. The statute provides a hearing must be before a hearing officer assigned by the director and at a time and place designated by the director. N.D. Cent. Code § 39-20-05(2), 39-20-05(3). After the hearing, the hearing officer shall immediately deliver a copy of the decision to the driver. N.D. Cent. Code § 39-20-05(5). If the hearing officer decides to

HN6 [down arrow] The Administrative Agencies Practice Act, N.D. Cent. Code ch. 28-32, requires an administrative hearing officer to conduct hearings in conformity with any other applicable laws. N.D. Cent. Code § 28-32-35. Thus, the North Dakota Department of Transportation's hearing officers must conduct license-revocation hearings in conformity with the general requirements of N.D. Cent. Code ch. 28-32, as well as the more specific requirements of N.D. Cent. Code ch. 39-20.

Attachment # 2 pg. 12
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Administrative Law > Agency Adjudication > Hearings > General Overview

Governments > Legislation > Interpretation

Transportation Law > Private Vehicles > Operator

Licenses > Revocation & Suspension

HN7 [↓] N.D. Cent. Code § 1-02-02 requires the Supreme Court of North Dakota interpret statutes in their ordinary sense, unless a contrary intention plainly appears. Subsections (2) and (3) of N.D. Cent. Code § 39-20-05 provide the hearing must be before a hearing officer assigned by the director and at a time and place designated by the director. N.D. Cent. Code § 39-20-05(5) requires the hearing officer immediately deliver a copy of the decision to the driver at the end of the hearing. If the hearing officer decides to suspend or revoke the driver's license, the hearing officer shall immediately take possession of the person's temporary operator's permit. If the hearing officer finds in favor of the driver, the hearing officer shall sign, date, and mark on the person's permit an extension of driving privileges and return the permit to the person. N.D. Cent. Code § 39-20-05(5). If a driver fails to appear at the hearing, the hearing officer shall mail a copy of the decision to the person. N.D. Cent. Code § 39-20-05(6).

Administrative Law > Agency Adjudication > Hearings > General Overview

Transportation Law > Private Vehicles > Operator

Licenses > Revocation & Suspension

HN8 [↓] An ordinary reading of N.D. Cent. Code § 39-20-05 demonstrates the North Dakota Legislature intended for the North Dakota Department of Transportation (Department) to conduct in-person hearings. By specifically providing for mail delivery where the driver fails to appear at the hearing, but requiring the hearing officer immediately deliver the decision where the driver appears, an ordinary reading of the statute demonstrates the Legislature intended for the Department to conduct in-person hearings. Only where the hearing officer and driver are both physically present may the Department give effect to these words. Similarly, a hearing officer cannot immediately take possession of or sign, date, and mark a driver's temporary permit unless the permit is physically present, which also requires both the hearing officer and the driver to be physically present. An ordinary reading of N.D. Cent. Code § 39-20-05 demonstrates the Legislature intended for the Department to conduct in-person hearings, and the Department cannot unilaterally determine hearings will be

conducted telephonically.

Administrative Law > Agency Adjudication > Hearings > General Overview

Transportation Law > Private Vehicles > Operator

Licenses > Revocation & Suspension

HN9 [↓] Although N.D. Cent. Code § 28-32-35 provides agencies may conduct telephonic hearings, the statute does not conflict with N.D. Cent. Code § 39-20-05, which prohibits the North Dakota Department of Transportation (Department) from unilaterally requiring hearings to be conducted telephonically. In addition to permitting telephonic hearings, N.D. Cent. Code § 28-32-35 also requires hearing officers regulate the course of the hearing in conformity with this chapter and any other applicable laws. The Administrative Agencies Practice Act, N.D. Cent. Code ch. 28-32, therefore requires that the Department's hearing officers comply with its procedural requirements as well as those embodied in other applicable statutes, including N.D. Cent. Code § 39-20-05. Because N.D. Cent. Code § 39-20-05 does not permit the Department to unilaterally determine hearings will be telephonic, N.D. Cent. Code § 28-32-35 also prohibits the Department from making such determinations. As it is possible to give effect to both statutes, the Supreme Court of North Dakota need not determine whether the specific provision, N.D. Cent. Code § 39-20-05, is an exception to the general provision, N.D. Cent. Code § 28-32-35, or whether the Legislature intended the general provision to prevail. N.D. Cent. Code § 1-02-07.

Counsel: For petitioner and appellant (No. 20090056, No. 20090057): Michael R. Hoffman(argued), Bismarck, ND.

For respondent and appellee: Michael T. Pitcher (argued) and Andrew Moraghan (on brief), Assistant Attorneys General, Office of Attorney General, Bismarck, ND.

For respondent and appellee: Michael T. Pitcher (argued), Assistant Attorney General, Office of Attorney General, Bismarck, ND.

Judges: Carol Ronning Kapsner, Mary Muehlen Maring, Daniel J. Crothers, Dale V. Sandstrom, Gerald W. VandeWalle, C.J. Opinion of the Court by Kapsner, Justice.

Opinion by: Carol Ronning Kapsner

Opinion

[**646] Kapsner, Justice.

[*P1] Darren Landsiedel and Jentry Neu separately appealed district court judgments upholding the decisions of the Department of Transportation to suspend their driving privileges for alcohol-related offenses. The Department held telephonic hearings in both cases, to which Landsiedel and Neu objected. We consolidated their appeals to determine whether N.D.C.C. § 39-20-05 permits [***2] the Department to conduct telephonic hearings regarding alcohol-related offenses under N.D.C.C. ch. 39-20. We hold the Department failed to conduct these administrative hearings in accordance with the law, reverse the revocation and suspension of Landsiedel and Neu's driver's licenses, and remand the cases for further proceedings consistent with this opinion.

I.

[*P2] A McLean County deputy sheriff arrested Landsiedel for driving under the influence of alcohol in June 2008. The Department issued a report and notice to Landsiedel informing him it intended to revoke his driving privileges. Landsiedel requested an administrative hearing under N.D.C.C. § 39-20-05. The Department's hearing officer issued a notice of hearing on June 20, 2008, scheduling the hearing for July 11, 2008 at the McLean County Courthouse. The hearing officer included a handwritten notation at the bottom of the notice stating: "I will be calling the sheriff's office to take testimony telephonically." On June 30, 2008, the hearing officer issued an amended notice of hearing, changing the date of the hearing to July 8, 2008. The amended notice of hearing did not include a notation about telephonic testimony.

[*P3] On July 8, 2008, [***3] Landsiedel, his counsel, the deputy, and a witness appeared in person at the McLean County Courthouse. The hearing officer telephoned the courthouse from Bismarck. Landsiedel's counsel objected to the hearing officer conducting the hearing by telephone, arguing the hearing officer could not properly judge the credibility of the witnesses over the phone. The hearing officer overruled Landsiedel's objection and revoked his driving privileges for one year. Landsiedel appealed the hearing officer's decision to the district court, which affirmed the revocation.

[*P4] In a separate case, a Dickinson police officer arrested Neu in August 2008 for driving while under the influence of alcohol. The Department issued a report and notice to Neu informing him it intended to revoke his driving privileges. Neu requested an administrative hearing under N.D.C.C. § 39-20-05. The Department's hearing officer sent a notice of administrative hearing to Neu, his counsel, and the arresting officer, indicating the hearing officer would hold the hearing by telephone.

[*P5] The telephonic hearing was held on August 20, 2008. Neu and the arresting officer appeared from separate telephones in Dickinson, while Neu's counsel [***4] and the hearing officer appeared from separate telephones in Bismarck. The hearing officer asked Neu's counsel if he received an email with the exhibits attached, and counsel indicated he had not. The hearing officer offered to postpone the hearing so Neu's counsel could go to the Department's Bismarck office to view the exhibits. Neu's counsel stated he would not go to the office because the Department should have personally provided him with the exhibits. Neu's counsel then objected to the hearing being held by telephone, claiming it substantially prejudiced Neu's right to a fair hearing. The hearing officer overruled the objection and suspended Neu's driving privileges for two years. Neu appealed the hearing officer's [**647] decision to the district court, which affirmed the suspension.

II.

[*P6] HNI [↑] The Department's authority to suspend driving privileges is governed by statute, and the Department must meet basic and mandatory statutory requirements to have the authority to suspend driving privileges. Schaaf v. N.D. Dep't of Transp., 2009 ND 145, P 9, 771 N.W.2d 237. This Court reviews the Department's decision to suspend driving privileges under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. [***5] Barros v. N.D. Dep't of Transp., 2008 ND 132, P 7, 751 N.W.2d 261. HN2 [↑] Under N.D.C.C. § 28-32-49, we must affirm the Department's order unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46. "An agency's decisions on questions of law are fully reviewable." Kiecker v. N.D. Dep't of Transp., 2005 ND 23, P 8, 691 N.W.2d 266, (quoting Huff v. Bd. of

Medical Examiners, 2004 ND 225, P 8, 690 N.W.2d 221).

[*P7] In *Schaaf, 2009 ND 145, P 11, 771 N.W.2d 237*,
[***6] this Court outlined the rules of statutory interpretation:

HN3 [↑] Statutory interpretation is a question of law, fully reviewable on appeal. *In re P.F., 2008 ND 37, P 11, 744 N.W.2d 724*. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. *N.D.C.C. § 1-02-02*. Statutes are construed as a whole and are harmonized to give meaning to related provisions. See *N.D.C.C. § 1-02-07*. If 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 effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable, the special provision must be construed to control over the general provision. *N.D.C.C. § 1-02-07*.

[*P8] **HN4** [↑] *Section 39-20-05, N.D.C.C.*, specifically regulates the Department's conduct of administrative hearings regarding the suspension or revocation of driving privileges for alcohol-related offenses. The statute provides a hearing "must be before a hearing officer assigned by the director and at a time and place designated by the director." *N.D.C.C. §§ 39-20-05(2), 39-20-05(3)*. [***7] After the hearing, the hearing officer "shall immediately deliver" a copy of the decision to the driver. *N.D.C.C. § 39-20-05(5)*. If the hearing officer decides to suspend or revoke the driver's license, the hearing officer "shall immediately take possession of the person's [***648] temporary operator's permit . . ." *Id.* If the hearing officer finds in favor of the driver, the hearing officer "shall sign, date, and mark on the person's permit an extension of driving privileges" and "return the permit to the person." *Id.* Where a driver "fails to appear at the hearing without justification," the hearing officer "shall, on the date for which the hearing is scheduled, mail to the person, by regular mail . . . a copy of the decision . . ." *N.D.C.C. § 39-20-05(6)*. *Section 39-20-05, N.D.C.C.*, does not specifically mention telephones or telephonic hearings.

[*P9] **HN5** [↑] The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, also regulates the Department's conduct of hearings under N.D.C.C. ch. 39-20. *Kobilansky v. Liffbrig, 358 N.W.2d 781, 786 (N.D. 1984)* ("[A]dministrative proceedings conducted by the [Department] pursuant to NDCC Ch. 39-20, the implied consent statutes, are governed by the provisions [***8] of NDCC Ch. 28-32, *Agnew v. Hjelle, 216 N.W.2d 291, 294 (N.D. 1974)* . . ."). Prior to conducting a hearing, an administrative agency "shall designate the time and place for the hearing . . . or the parties

may agree on a definite time and place for hearing with the consent of the agency having jurisdiction." *N.D.C.C. § 28-32-21(1)(c)*. *Section 28-32-35, N.D.C.C.*, permits administrative agencies to conduct telephonic hearings under certain circumstances:

A hearing may be conducted in total or in part by making use of telephone, television, facsimile services, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if practicable, to see the entire proceeding while it is taking place, and if such use does not substantially prejudice or infringe on the rights and interests of any party.

HN6 [↑] The Administrative Agencies Practice Act also requires an administrative hearing officer to conduct hearings in conformity with "any other applicable laws." *N.D.C.C. § 28-32-35*. Thus, the Department's hearing officers must conduct license-revocation hearings in conformity with the general requirements of N.D.C.C. ch. 28-32, as well as the more specific [***9] requirements of N.D.C.C. ch. 39-20.

III.

[*P10] Landsiedel and Neu argue *N.D.C.C. § 39-20-05* does not permit the Department to conduct telephonic hearings regarding alcohol-related offenses, and the revocation and suspension of their driving privileges should be overturned because the Department violated their right to a fair hearing. The Department argues it did not violate Landsiedel and Neu's right to a fair hearing because *N.D.C.C. § 28-32-35* permits telephonic hearings, while *N.D.C.C. § 39-20-05* does not prohibit them.

[*P11] **HN7** [↑] *Section 1-02-02, N.D.C.C.*, requires this Court interpret statutes "in their ordinary sense, unless a contrary intention plainly appears . . ." *Subsections (2) and (3) of N.D.C.C. § 39-20-05* provide "the hearing must be before a hearing officer assigned by the director and at a time and place designated by the director." *Section 39-20-05(5), N.D.C.C.*, requires the hearing officer "immediately deliver" a copy of the decision to the driver at the end of the hearing. If the hearing officer decides to suspend or revoke the driver's license, the hearing officer "shall immediately take possession of the person's temporary operator's permit." *Id.* If the hearing officer finds [***10] in favor of the driver, the hearing officer "shall sign, date, and mark on the person's permit an extension of driving privileges" and "return the permit to the person." *N.D.C.C. § 39-20-05(5)*. If a driver fails to appear at the hearing, [***649] the hearing officer shall mail a copy of the decision to the person. *N.D.C.C. § 39-20-05(6)*.

[*P12] **HN8** [↑] An ordinary reading of *N.D.C.C. § 39-20-05* demonstrates the Legislature intended for the Department to

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conduct in-person hearings. By specifically providing for mail delivery where the driver fails to appear at the hearing, but requiring the hearing officer "immediately deliver" the decision where the driver appears, an ordinary reading of the statute demonstrates the Legislature intended for the Department to conduct in-person hearings. Only where the hearing officer and driver are both physically present may the Department give effect to these words. Similarly, a hearing officer cannot "immediately take possession of" or "sign, date, and mark" a driver's temporary permit unless the permit is physically present, which also requires both the hearing officer and the driver to be physically present. We find an ordinary reading of N.D.C.C. § 39-20-05 demonstrates [***11] the Legislature intended for the Department to conduct in-person hearings, and the Department cannot unilaterally determine hearings will be conducted telephonically.

administrative hearings in accordance with the law, reverse the revocation and suspension of Landsiedel and Neu's driver's licenses, and remand the cases for further proceedings consistent with this opinion.

[*P16] Carol Ronning Kapsner

Mary Muehlen Maring

Daniel J. Crothers

Dale V. Sandstrom

Gerald W. VandeWalle, C.J.

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[*P13] HN9 Although N.D.C.C. § 28-32-35 provides agencies "may" conduct telephonic hearings, the statute does not conflict with N.D.C.C. § 39-20-05, which prohibits the Department from unilaterally requiring hearings to be conducted telephonically. In addition to permitting telephonic hearings, N.D.C.C. § 28-32-35 also requires hearing officers "regulate the course of the hearing in conformity with this chapter and . . . any other applicable laws . . ." The Administrative Agencies Practice Act therefore requires that the Department's hearing officers comply with its procedural requirements as well as those embodied in other applicable statutes, including N.D.C.C. § 39-20-05. Because N.D.C.C. § 39-20-05 does not permit the Department to unilaterally determine hearings will be telephonic, N.D.C.C. § 28-32-35 also prohibits the Department from making such determinations. As it is possible to give effect to both statutes, this Court need not determine whether the specific provision, N.D.C.C. § 39-20-05, is an exception to the general [***12] provision, N.D.C.C. § 28-32-35, or whether the Legislature intended the general provision to prevail. See N.D.C.C. § 1-02-07 ("[I]f 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.").

[*P14] Neither Landsiedel or Neu waived his right to an in-person hearing under N.D.C.C. § 39-20-05. Further, the Department did not determine whether the use of telephones substantially prejudiced or infringed upon the parties' rights.

V.

[*P15] We hold the Department failed to conduct these

SENATE TRANSPORTATION COMMITTEE
March 17, 2017 – Lewis & Clark Room

attachment # 3 pgs
HB 1328 3-17-17

North Dakota Department of Transportation
Darcy Rosendahl, P.E., Deputy Director

HB 1328

Good afternoon Mr. Chairman and members of the committee. I'm Darcy Rosendahl, Deputy Director of the North Dakota Department of Transportation (Department). Thank you for giving me the opportunity to provide information today. The Department opposes HB 1328, specifically Section 4 of the bill.

The Department favors HB 1129, our agency bill, with a proposed amendment.

Thank you for your time and consideration. I'd be happy to answer any questions the committee may have.