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ATTORNEY GENERAL OPINION NO. 89-10

Mark A. Burghart
General Counsel
Kansas Department of Revenue
Docking State Office Building
Topeka, Kansas 66612-1588

Re: Automobiles and Other Vehicles--Drivers' Licenses; General Provisions--Examinations, Seizure Disorders

Synopsis: The Department of Revenue's procedure for suspending the driver's license of an individual found to have sustained a seizure involving the loss of consciousness while in the waking state within the preceding 12 months meets Fourteenth Amendment due process hearing requirements. While a full evidentiary hearing is not available to the licensee until after the suspension becomes effective, the degree of deprivation (in view of the opportunity for a hearing within 30 days and the availability of a restricted license in hardship cases) and any risk of erroneous deprivation are outweighed by the government's interest in highway safety. Cited herein: K.S.A. 8-237; K.S.A. 1988 Supp. 8-247; 8-255; 8-259; K.A.R. 92-52-11; United States Constitution, Amendment XIV.

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Dear Mr. Burghart:

As General Counsel for the Department of Revenue, you request our opinion regarding the constitutionality of the hearing

procedures afforded individuals whose drivers' licenses are suspended due to a finding that they suffer from certain seizure disorders. Specifically you question whether due process requirements are met when a full blown administrative hearing at which the licensee is able to appear personally is not available until after the driver's license has been suspended.

K.S.A. 1988 Supp. 8-255(a)(3) authorizes the division of motor vehicles to suspend an individual's driving privileges "upon a showing by its records or other sufficient evidence the person: . . . is incompetent to drive a motor vehicle. . . ." Pursuant to its rule making authority, the Department of Revenue has promulgated K.A.R. 92-52-11 which states in part:

> "A licensee shall be deemed incompetent to drive within the meaning of K.S.A. [1988] Supp. 8-255(a)(3) . . . if the licensee has sustained a seizure involving a loss of consciousness in the waking state within the preceding one year, unless the medical advisory board determines to the contrary."

See also K.S.A. 8-237(c) and K.S.A. 1988 Supp. 8-247(e)(7) regarding issuance and renewal of drivers' licenses.

K.S.A. 1988 Supp. 8-255(c) authorizes the division of motor vehicles to suspend a driver's license prior to giving notice and an opportunity to be heard. The licensee must be notified immediately upon suspension and, if requested, a hearing must be afforded within 30 days of the request. Pursuant to this authorization, the following procedures were developed:

1. From various sources of information, the Department learns that a licensee suffers from a seizure disorder, primarily epilepsy. For example, the licensee might indicate on this driver's license renewal form that he suffers "from epilepsy, or from any other form or loss of consciousness or impairment of consciousness from any medical cause," or the Department might receive a complaint from a law enforcement officer indicating that the person was involved in an accident caused by a seizure.

2. In response to that information, the Department requests that the licensee complete a form seeking specific medical information. When the "medical papers" have been completed and returned, the licensee's case is customarily submitted to the medical advisory board which contains, among other health care professionals, a neurologist specializing in seizure disorders. The board's consideration of the licensee's case is limited to an examination of the completed "medical papers" and a summary of his driving record. Personal appearances by the licensee before the board are not permitted.

According to policy, the board's consideration of the case is circumscribed by the standard set out in K.A.R. 92-52-11 -- i.e. has the licensee sustained a seizure involving the loss (including impairment) of consciousness in the waking state within the preceding year. If that standard is met, the board recommends a withdrawal of driving privileges until the licensee has been one year seizure-free.

3. The board's recommendation is then submitted to the director of vehicles. The director then immediately issues his order of revocation of driving privileges. In his order, the director notifies the licensee of the right to an administrative hearing before a hearing examiner as authorized by K.S.A. 1988 Supp. 8-255(c).

4. At the hearing, the examiner receives any additional evidence provided by the licensee and hears the arguments. He then reports his findings to the director. Based on the examiner's report of the hearing, the director takes whatever action is appropriate. Presumably, the matter may be submitted to the medical advisory board if new evidence is disclosed at the hearing. If the previous revocation is sustained,the licensee is notified.

5. Thereafter, the licensee may obtain de novo judicial review of the revocation order in the county of his residence pursuant to K.S.A. 1988 Supp. 8-259. Upon proper application, the licensee may obtain from the Court a stay of the revocation order.

As stated previously, you ask whether this procedure meets constitutional due process requirements insofar as the "administrative hearing" and the licensee's right to appear personally do not occur until after the license has been suspended.

The Fourteenth Amendment to the United States Constitution dictates that any state denial of life, liberty or property requires due process of law. The United States Supreme Court has held that an issued driver's license is a property interest protected by the Fourteenth Amendment. Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90, 94 (1971); Dixon v. Love, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172, 180 (1977); Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321, 329 note 7 (1979); Illinois v. Batchelder, 463 U.S. 1112, 103 S.Ct. 3513, 77 L.Ed.2d 1267, 1271 (1983). The question thus becomes the extent to which the due process clause requires an evidentiary hearing prior to the deprivation of a driver's license under these circumstances, even if such a hearing is provided thereafter.

In Bell v. Burson, 29 L.Ed.2d at 96, the court stated:

> "The hearing required by the Due Process Clause must be 'meaningful,' Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed.2d 62, 66, 85 S.Ct. 1187 (1965), and 'appropriate to the nature of the case.' Mullane v. Central Hanover Bank & Trust Co., 1339 U.S. 306] at 313, 94 L.Ed. [865] at 872, 873 [(1950)].
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> . . . .
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> "[I]t is fundamental that except in emergency situations due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and an opportunity for hearing appropriate to the nature of the case' before the termination becomes effective."

Arguably, the suspension of an individual's driver's license due to a recent occurrence of a seizure involving loss of consciousness in the waking state qualifies as an emergency situation. In any event, we are of the opinion that the procedures used by the Department, as outlined above, are "meaningful" and "appropriate to the nature of the case" when applied to persons with this type of seizure disorder.

The balancing test used by the United States Supreme Court to determine whether the procedures afforded are meaningful and

appropriate is stated in Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, 33 (1976):

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." See also Mackey v. Montrym, 61 L.Ed.2d at 329, 330.

In weighing the private interest affected by the official action, we must consider the degree of potentially wrongful deprivation. Matthews v. Eldridge, 47 L.Ed.2d at 37. While an individual whose driver's license has been suspended cannot be made entirely whole if the suspension is later vacated, we believe that the opportunity for a timely hearing (within 30 days) and the availability of a restricted license in hardship cases [K.S.A. 1988 Supp. 8-247(e)(7)] greatly minimize the severity of the deprivation. In Dennis v. Love, supra, the statutory procedure in question required the provision of notice immediately upon suspension (as does our statute), and, within 20 days of receiving a written request, the scheduling of a full evidentiary hearing for a date "as early as practical." Finally, the licensee could obtain a restricted permit for commercial use or in case of hardship pending the hearing results. 52 L.Ed.2d at 178. Based on these facts, the court concluded that "the nature of the private interest here is not so great as to require us 'to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.' Matthews v. Eldridge, 424 U.S. at 343, 47 L.Ed.2d 18, 96 S.Ct. 893. See Cunett v. Kennedy, 416 U.S. 134, 40 L.Ed.2d 15, 94 S.Ct. 1633 (1974)." Id. at 180. In Mackey v. Montrym, 61 L.Ed.2d at 330, the court played down the importance of the provisions for hardship relief making this requirement questionable, though such provisions

certainly enhance the chances of the procedures being held constitutional.

In determining the risk of an erroneous deprivation in the absence of a full evidentiary hearing prior to the suspension of a license, several factors must be considered. In Dixon v. Love, the court relied heavily on the fact that, under the Illinois Secretary's regulations, suspension decisions were largely automatic. 52 L.Ed.2d at 180. While K.A.R. 92-52-11 allows the Kansas medical advisory board discretion in recommending suspension of a license even if a seizure has occurred within the preceding twelve months, you advise us that the policy is to recommend suspension any time the standard of one seizure involving loss of consciousness in the waking state within the preceding one year is met, thus limiting this discretion. The United States District Court in Rohr v. Smith and Becker v. Smith, Nos. 85-1010-K and 85-1168-K, respectively, at p. 21 (D. Kan. 1986) found this policy to be persuasive on this point. If the suspension is, for all practical purposes, mandatory rather than discretionary, the risk of erroneous deprivation is significantly lessened.

Further, it is important whether the suspension is based on objective facts or subjective criteria. See Dixon v. Love, 52 L.Ed. 2d at 180, 181, 182; Mackey v. Montrym, 61 L.Ed.2d at 331. In Mackey v. Montrym, 61 L.Ed.at at 331, the court noted that "when prompt post deprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be". Here, the medical advisory board bases its recommendation on the medical information supplied by the licensee and the licensee's physician, and a summary of the licensee's driving record. We believe this information is relatively objective in nature and forms a reasonably reliable basis for determining whether the facts necessary to suspend a license exist.

Finally, in determining the risk of error, it should be considered whether reliability would be enhanced by a full evidentiary pre-suspension hearing. In view of the nature of the determination to be made and the policy of suspending across the board, we do not believe a full evidentiary

pre-suspension hearing is likely to affect the outcome of most of these cases.

The final factor in the court's three-prong balancing test is the government's interest in summarily suspending a license. In Dixon v. Love, the government's interest in "highway safety and the prompt removal of a safety hazard" was held sufficient to bypass a pre-termination hearing. 52 L.Ed.2d at 181. Bell v. Burson is distinguished by the fact that highway safety was not the underlying concern. 29 L.Ed.2d at 95. Here the interest is clearly public safety and thus weighs heavily in favor of allowing the state to bypass a pre-suspension full evidentiary hearing. See Derouchie v. Kelly, 149 N.Y.S.2d 694, 696 (1956).

In conclusion, the Department of Revenue's procedure for suspending the driver's license of an individual found to have sustained a seizure involving the loss of consciousness while in the waking state within the preceding 12 months meets Fourteenth Amendment due process hearing requirements. While a full evidentiary hearing is not available to the licensee until after the suspension becomes effective, the degree of deprivation and any risk of erroneous deprivation are outweighed by the government's interest in highway safety.

Very truly yours,

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