

# Issue 4

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## *The Administrative Hearing Process for Suspending Driver Licenses of Individuals Arrested for DWI Wastes Government Resources.*

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### Summary

#### Key Recommendations

- ◆ Require hearings to be held by telephone, and allow witnesses to testify by telephone, unless the judge finds that an in-person hearing or appearance is necessary for the fair administration of justice.
- ◆ Require affidavits of the breath test operators or breath test supervisors to be admissible without the witness's appearance unless the judge finds that justice requires their presence.
- ◆ Require the defense to request breath test operators and breath test supervisors by subpoena.

#### Key Findings

- ◆ DPS' Administrative License Revocation program reflects the State's interest in keeping impaired drivers off the road.
- ◆ The administrative license suspension process, as currently administered, wastes government resources.
- ◆ Other state agencies hold hearings primarily by phone.

#### Conclusion

Protecting citizens from drunk drivers is paramount for the Texas Legislature. As a result, the Legislature established the Administrative License Revocation (ALR) program in 1995 to discourage drunk driving by authorizing DPS to swiftly suspend the license of a person arrested for driving while intoxicated. The law and rules governing the hearings in which drivers may contest their license suspensions, however, have in some cases led to proceedings where law enforcement officers and employees are routinely requested or subpoenaed as in-person witnesses even when their testimony may not be needed. In fact, having all witnesses appear in person at an administrative hearing is inefficient, and generally unnecessary. Allowing the State Office of Administrative Hearings to conduct more ALR hearings by telephone, and making other statutory modifications to discourage the misuse of law enforcement witnesses, will result in a more efficient ALR system.

## Support

### DPS' Administrative License Revocation program reflects the State's interest in keeping impaired drivers off the road.

- ◆ The Texas Legislature established the Administrative License Revocation (ALR)<sup>1</sup> program in 1995 to discourage drunk driving and prevent drivers arrested for driving while intoxicated from continuing to drive while their criminal cases are pending. State law allows a peace officer to request a breath specimen and arrest any individual the officer has probable cause to believe is operating a motor vehicle or watercraft while intoxicated. Law defines intoxication as having a blood alcohol concentration of 0.08 or higher, or not having the normal use of mental or physical faculties because of alcohol, a controlled substance, or any other drug or combination of substances. Alcohol concentration limits are lower for minors and commercial motor vehicle operators.
- ◆ Peace officers and other individuals certified by DPS can administer breath tests. Technical supervisors, employed by DPS or other governmental entities, maintain and direct the operation of breath test instruments. Currently 53 technical supervisors oversee 5,300 breath test operators from more than 900 law enforcement agencies.
- ◆ With some exceptions, the law requires a peace officer to immediately confiscate the license of a driver who is arrested for driving while intoxicated and whose specimen exceeds the limit; these cases are referred to as *failure cases*, because the individual failed the breath test. The officer must also confiscate the license of an individual who refuses to submit to a test after being arrested, referred to as *refusal cases*. The officer then issues the driver a temporary permit. The arrested driver receives notice of the right to request a hearing to contest the proposed license suspension, including notice that a request for a hearing stays the suspension until the judge rules, and that if the driver does not request a hearing within 15 days the suspension will automatically go into effect in 40 days. DPS charges a \$125 fee to reinstate the license after a suspension expires. The following textbox describes ALR license suspension periods.

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*A peace officer must confiscate the license of someone arrested for driving while intoxicated.*

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#### **License Suspension Periods\***

|   |          |
|---|----------|
| Refusal to submit specimen – adult .....                            | 180 days |
| Specimen of .08 or greater – adult.....                             | 90 days  |
| Refusal to submit specimen – minor .....                            | 180 days |
| Specimen of .01 or greater – minor .....                            | 60 days  |
| Refusal to submit specimen – commercial motor vehicle operator..... | One year |
| Specimen of .04 or greater – commercial motor vehicle operator..... | One year |

\* Suspension enhancements for subsequent offenses apply in all categories.

- ◆ State law authorizes the State Office of Administrative Hearings (SOAH) to conduct administrative license suspension hearings, presided over by administrative law judges (ALJs). The issues the defendant can challenge at the hearing include: whether the peace officer had reasonable suspicion to stop the individual, probable cause to arrest the individual, the validity of the test results if the individual consented to a test after being arrested, or certain aspects of the arrest in cases where the individual did not consent to provide a breath sample.
- ◆ Hearings take place in regional SOAH offices or by telephone conference call. An attorney represents the Department in the hearings. Defendants have the right to be represented by counsel, but are not required to be present at the hearing. Certain constitutional protections apply to the process for revoking a license to some extent, but not at the level afforded a defendant in a criminal process.
- ◆ DPS issued 100,472 notices of suspension to drivers in fiscal year 2007. Defendants requested hearings in 26,492, or 26 percent of the cases. The outcomes of the hearings appear in the table, *Hearing Dispositions*.

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*Defendants are not required to be present at ALR hearings.*

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**Hearing Dispositions – FY 2007**

| Disposition                    | Explanation   | Number | Percent of Hearings |
|--------------------------------|---|--------|---------------------|
| Affirmed, defaulted, or waived | ALJ upholds revocation, or defendant defaults by not appearing or waiving the hearing.  | 19,512 | 74%                 |
| Dismissed                      | Case dismissed due to unavailability of witnesses or for other reasons. Defendant wins. | 4,842  | 18%                 |
| Negative                       | ALJ finds DPS did not meet burden of proof. Defendant wins.                             | 2,138  | 8%                  |

**The administrative license suspension process, as currently administered, wastes government resources.**

- ◆ Texas law does not allow the ALR hearing to be held by telephone unless all the parties consent, regardless of whether a valid need exists for an in-person hearing. In fiscal year 2007, only 5,181 ALR hearings took place by telephone – 20 percent of all cases scheduled and decided. Conducting a hearing in person rather than allowing the parties or witnesses to attend via telephone results in higher travel and hearing expenses for the State, as well as wasting local law enforcement resources when peace officers are taken off patrol or paid overtime to make live appearances. The officers must be compensated for any overtime spent attending hearings, and often must spend hours at the hearing location waiting to be called to testify but then get dismissed without ever being summoned.

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*In fiscal year 2007, only 20 percent of ALR hearings were conducted by telephone.*

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Sunset staff interviews with peace officers reflected their frustration with misuses of the process that may compromise their job as public safety officers by interfering with their scheduled off-duty rest hours. The officers noted that most DWI arrests are made during evening and overnight shifts.

- ◆ Breath test operators and breath test supervisors must attend hearings when requested by the defendant, even if an affidavit could sufficiently attest to the validity of the test or the reliability of the instrument used to analyze the specimen. The law requires DPS to ensure the appearance of the relevant breath test operator or technical supervisor if the defendant in a failure case requests, without a subpoena or showing of need for the testimony. Without the requirement for a subpoena, no controls exist to ensure witnesses are not called as a matter of course in each failure case, whether needed or not.
- ◆ The law allows the operator or supervisor to attest to the reliability of the test and the test equipment by affidavit in lieu of personal appearance at the hearing. If the defendant requests one or both of them in person, however, the witness must attend or the affidavit is not admissible. Without being allowed to admit the affidavit as evidence, the Department cannot put its proof of the defendant's blood alcohol level before the judge, and the case must be dismissed or continued.

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*Judges dismiss  
many cases  
because witnesses  
are unable  
to attend the  
hearings.*

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In 2007, defendants requested the breath test operators and supervisors in 30 percent of all failure hearings; 41 percent of these cases were dismissed. Although DPS does not regularly track data on the reason for case dismissals, numerous individuals interviewed by Sunset staff indicated that ALJs must dismiss many cases because requested witnesses were unavailable to attend the hearing, even though no question regarding the test results or equipment existed. Requesting witnesses without a clear need for their presence suggests defendants hope the witnesses cannot attend and their case will be dismissed.

### **Other state agencies hold hearings primarily by phone.**

- ◆ Unemployment compensation hearings conducted by the Texas Workforce Commission take place by telephone conference call unless the hearing administrator determines that an in-person hearing is necessary. Factors that the administrator may consider include a party with a physical impairment who cannot effectively participate by telephone, evidence a party wishes to present that would make a hearing by telephone impractical, or any other reason in the administrator's discretion.
- ◆ North Dakota allows ALR hearings to be conducted by phone or electronic means as long as each participant has an opportunity to participate in the entire proceeding and if the procedure does not substantially prejudice or infringe on the rights and interests of any party. Hearing officers in

Colorado have discretion whether to conduct ALR hearings in person or by phone, and several other states routinely hold all ALR hearings by phone.

## Recommendations

### Change in Statute

#### **4.1 Require hearings to be held by telephone, and allow witnesses to testify by telephone, unless the judge finds that an in-person hearing or appearance is necessary for the fair administration of justice.**

This recommendation would establish a telephone hearing as the procedure to be used in ALR hearings, unless the judge affirmatively finds that a hearing cannot be fairly held by telephone and a specific situation requires an in-person meeting. If SOAH holds an in-person hearing, the law would allow individual witnesses, including peace officers, to testify by telephone unless the judge finds that such testimony will prejudice one of the parties. Holding hearings by phone would save travel and hearing expenses for the State, increase the hours peace officers may spend on patrol, and reduce the need for local law enforcement departments to pay overtime.

#### **4.2 Require affidavits of the breath test operators or breath test supervisors to be admissible without the witness's appearance unless the judge finds that justice requires their presence.**

This recommendation would apply to in-person hearings. The Transportation Code would prohibit a party to a hearing from requiring the presence of the breath test operator or supervisor if they submitted properly certified affidavits that contained the information necessary to confirm the breath test results and the reliability of the equipment, unless the administrative law judge determined their presence is necessary. This recommendation would prevent breath test operators and supervisors from being taken off duty to attend hearings where their testimony is not needed, using state and local law enforcement agencies' resources more efficiently.

#### **4.3 Require the defense to request breath test operators and breath test supervisors by subpoena.**

This recommendation would apply to cases where a breath test operator and breath test supervisor were needed at the hearing to provide testimony in addition to their affidavits. The statute would require the defendant to issue a subpoena to request the presence of operators and supervisors, rather than merely filing a request for the witnesses from the Department. Requiring subpoenas would help eliminate the potential for defendants to request breath test operators and supervisors without a clear need for their presence.

### Fiscal Implication

Allowing hearings to be held by telephone would have a positive fiscal impact to the State and local communities. Peace officers, breath test operators, and breath test supervisors would be available to participate in ALR hearings when necessary, but would not frequently be pulled from job-related duties to do so. While ALJs may spend some additional time evaluating requests for live hearings and subpoenas, those costs would be overshadowed by savings in travel and overtime. Also, costs for telephone conferencing would increase. The actual fiscal impact on the State, as well as local governments, cannot be estimated for this report.

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<sup>1</sup> The term administrative license revocation is commonly used to describe the process of administratively suspending a license, so the terms revocation and suspension will be used interchangeably.

## *Responses to Issue 4*

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### **Recommendation 4.1**

***Require hearings to be held by telephone, and allow witnesses to testify by telephone, unless the judge finds that an in-person hearing or appearance is necessary for the fair administration of justice.***

### **Agency Response to 4.1**

DPS management agrees with this recommendation. (Thomas A. Davis, Jr., Director – Department of Public Safety)

The Public Safety Commission is in general agreement with all of the Sunset Commission staff recommendations. (Allan B. Polunsky, Chairman – Public Safety Commission)

### **Affected Agency Response to 4.1**

We have reviewed the recommendations for changes in ALR hearings and are in agreement with them. If the proposed changes are adopted, the hearing process would be more efficient for both the State Office of Administrative Hearings and for the witnesses in the hearings. (John H. Beeler, ALR Team Leader – State Office of Administrative Hearings)

### **For 4.1**

Lisa Fondren, Technical Supervisor – Fondren Forensics, Inc., Bedford

### **Against 4.1**

Larry Boyd

Hunter Biederman, Frisco

### **Modification**

1. Authorize administrative law judges to decide whether hearings will be held by telephone. (Sunset staff, at the request of Sunset Advisory Commission Members)

### **Recommendation 4.2**

***Require affidavits of the breath test operators or breath test supervisors to be admissible without the witness's appearance unless the judge finds that justice requires their presence.***

### **Agency Response to 4.2**

DPS management agrees with this recommendation. (Thomas A. Davis, Jr., Director – Department of Public Safety)

The Public Safety Commission is in general agreement with all of the Sunset Commission staff recommendations. (Allan B. Polunsky, Chairman – Public Safety Commission)

### **Affected Agency Response to 4.2**

We have reviewed the recommendations for changes in ALR hearings and are in agreement with them. If the proposed changes are adopted, the hearing process would be more efficient for both the State Office of Administrative Hearings and for the witnesses in the hearings. (John H. Beeler, ALR Team Leader – State Office of Administrative Hearings)

#### **For 4.2**

None received.

#### **Against 4.2**

Larry Boyd

Hunter Biederman, Frisco

### ***Recommendation 4.3***

***Require the defense to request breath test operators and breath test supervisors by subpoena.***

#### **Agency Response to 4.3**

DPS management agrees with this recommendation. (Thomas A. Davis, Jr., Director – Department of Public Safety)

The Public Safety Commission is in general agreement with all of the Sunset Commission staff recommendations. (Allan B. Polunsky, Chairman – Public Safety Commission)

### **Affected Agency Response to 4.3**

We have reviewed the recommendations for changes in ALR hearings and are in agreement with them. If the proposed changes are adopted, the hearing process would be more efficient for both the State Office of Administrative Hearings and for the witnesses in the hearings. (John H. Beeler, ALR Team Leader – State Office of Administrative Hearings)

#### **For 4.3**

None received.

#### **Against 4.3**

Larry Boyd

Hunter Biederman, Frisco

## ***Commission Decision***

Adopted Recommendations 4.2 and 4.3.

## *Legislative Action*

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House Bill 2730 requires the defendant, in administrative license revocation cases, to issue a subpoena to request the presence of breath test operators and supervisors, rather than merely filing a request for these witnesses. (Recommendation 4.2) However, the Legislature did not adopt the Sunset Commission's recommendation to require affidavits of operators or supervisors to be admissible without the witness's appearance unless the judge finds that justice requires their presence.

