

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

April 8, 2008

Opinion No. 08-91

Constitutionality of Proposed Tennessee Administrative License Revocation Act of 2008

QUESTION

Would SB4196 / HB4213, which, if enacted, authorizes a law enforcement officer to seize at the time of arrest the driver license card of a person who is charged with driving under the influence, violate the driver's right to due process?

OPINION

No. SB4196 / HB4213, if enacted, would not violate the due process rights of a person cited for driving under the influence.

ANALYSIS

SB4196 and HB4213 are the House and Senate versions of the Tennessee Administrative License Revocation Act of 2008 ("TALRA"), a bill which, if enacted, would establish a system for the administrative revocation of a driver license upon the arrest of the driver for driving under the influence ("DUI").

Under TALRA, officers of the Tennessee Highway Patrol and other properly trained and certified officers of sheriff and police departments will have the authority to seize, at the time of arrest, the license card of a driver who is arrested for DUI. SB4196 / HB4213 (§§ 55-50-904(a) through (d) and (h)). If the license card is seized, the officer is required to give the arrested driver an interim driving permit.¹ SB4196 / HB4213 (§ 55-50-904(e)). Once the license card is seized, the driver may also apply for an interim photo identification card.² SB4196 / HB4213 (§ 55-50-904(f)).

After seizure of the license card, the officer must forward the card and all information relevant to the enforcement action to the Department of Safety within five working days. SB4196 / HB4213 (§ 55-50-905(a)). The Department will review these documents to determine if the license

¹Under TALRA, the officer may seize a license card only if the breathalyzer or blood test results show that the driver has exceeded the legal limits for intoxication or if the driver has refused to submit to a test.

²The interim license is valid for a period of ninety days after issuance or until the Department of Safety revokes the license, whichever comes first. SB4196 / HB4213 (§ 55-50-904(e)).

ought to be revoked. SB4196 / HB4213 (§ 55-50-906). If the Department determines that the license should be revoked, notice will be sent to the driver who will then have ten days to request a hearing.³ SB4196 / HB4213 (§ 55-50-907) If no hearing is requested in a timely manner, the suspension become final. SB4196 / HB4213 (§ 55-50-905(f)). If a hearing is requested, the department must, within fifteen days after receipt of a request for a hearing, set a hearing date. The statute does not require that the actual hearing be held within fifteen days after receipt of the notice. It requires only that a hearing date be selected during that period of time. SB4196 / HB4213 (§§ 55-50-905 through 55-50-908). If the driver receives an adverse decision from the department, he or she has a right to judicial review of the decision. SB4196 / HB4213 (§ 55-50-909). If a person makes a timely request for a hearing, that request will effectively stay the effective date of the revocation of that person's driving privileges until all administrative appeals are exhausted under the Uniform Administrative Procedures Act. SB4196 / HB4213 (§ 55-50-907(b)).

Although driving is a privilege and not a right, license holders have a sufficient property interest in the license to entitle the holder to due process before revocation. *Bell v. Burson*, 402 U.S. 535 (1971).⁴ However, the United States Supreme Court has upheld situations where a license may be suspended or revoked before giving the license holder a hearing. *See Mackey v. Montrym*, 443 U.S. 1 (1979); *Dixon v. Love*, 431 U.S. 105 (1977). In both cases, the Supreme Court upheld statutes that authorized the pre-hearing suspension of driver licenses for different types of driving offenses. As the Court's reasoning shows, the statutes were upheld, at least in part, because they provided for prompt post-deprivation hearings.⁵

The hearing provisions under TALRA provide adequate due process. Like the revocation programs in *Mackey* and *Dixon*, TALRA provides for a prompt hearing following administrative revocation. After receipt of notice of revocation, the driver may request a hearing, which stays the effective date of the revocation. SB4196 / HB 4213 (§ 55-50-907). Within 15 days of the request, the Department shall set a hearing date, and the driver will be given notice of the time and place of the hearing. SB4196 / HB4213 (§ 55-50-908). Following an evidentiary hearing, the hearing officer shall issue a final written order within 30 days. *Id.* Judicial review at the administrative decision is permitted. SB4196 / HB4213 (§ 55-50-909).

In *Dixon*, the Court stated that whether due process was afforded required

³Under TALRA, the department is required to make its determination at least five days before the effective date of the revocation order. If it fails to do so, the revocation is stayed pending such decision. SB4196 / HB4213 (§ 55-50-906(b)).

⁴In *Bell*, the Court noted that people often need a driver license to continue to earn a livelihood. *Bell*, 402 U.S. at 539. As a result, the holder of such licenses have a sufficient property interest that states must provide some kind of hearing before a final deprivation can occur.

⁵In *Mackey*, the challenged statute authorized the pre-hearing suspension of a driver license if a DUI suspect refused to take a breath or blood test. *Mackey*, 443 U.S. at 5-6. In *Dixon*, the summary suspension could be entered if, based on court documents, a driver accumulated a sufficient number of points for moving violations. *Dixon*, 431 U.S. at 107-08. In both cases, the Court employed a balance-of-interest test to determine whether the statutes were constitutional. *Mackey*, 443 U.S. at 10-11; *Dixon*, 431 U.S. at 113. In both cases, the fact that the driver received a prompt post-deprivation hearing was a significant factor. *Mackey*, 443 U.S. at 15; *Dixon*, 431 U.S. at 113.

consideration of the following factors: the importance of the interest at stake; the risk of an erroneous decision from the procedures that are used; the probable value of any other additional safeguards; and the government's interest, including the function involved and the extra fiscal and administrative costs that additional procedures would involve. *Dixon*, 431 U.S. at 113 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). TALRA satisfies this test.

Although a person has an important interest in a driver license, that interest is not so significant as to require a full evidentiary hearing before it can be taken. *Dixon*, 431 U.S. at 113. At the same time, the procedures afforded under TALRA are sufficient to reduce the risk of an erroneous decision. After the officer submits the required documents and evidence to the department, those items are reviewed to determine whether there is sufficient evidence to revoke the license. SB4196 / HB4213 (§ 55-50-906). If sufficient evidence exists, the driver is notified and is given an opportunity for an evidentiary hearing, SB4196 / HB4213 (§ 55-50-907(b)), and for judicial review of the administrative decision. SB4196 / HB4213 (§ 55-50-909).⁶ This level of due process protection exceeds the minimum required by *Mackey* and *Dixon*.

If enacted, the statute would provide a maximum 180-day term for an interim license. Because of the time limits provided in TALRA, a person could lose driving privileges before completion of the hearing process. TALRA adequately addresses those concerns. As explained above, TALRA provides for a prompt hearing, during which time the revocation is stayed, and for judicial review.⁷ Consistent with *Mackey* and *Dixon*, the procedure affords due process.

⁶The proposed legislation provides a level of due process that is consistent with, or more stringent than, other jurisdictions that have administrative license revocation statutes. *See, e.g.*, Ala. Code § 32-5A-300, *et seq.* (upheld by *Moman v. City of Leeds*, 748 So. 2d 226, (Ala. Crim. App. 1999)); Ark. Code Ann. § 5-65-104 (upheld by *Pyron v. Arkansas*, 953 S.W.2d 874 (Ark. 1997)); Ga. Code Ann. § 40-5-67 (upheld in *Kirkpatrick v. Georgia*, 464 S.E.2d 882 (Ga. Ct. App. 1995)); *Rodriguez v. Georgia*, 565 S.E.2d 458 (Ga. 2002)); N.C. Gen. Stat. § 20-16; Ohio Rev. Code Ann. § 4511.196; S.C. Code Ann. § 56-5-2951; Tex. Transp. Code Ann. § 524.001, *et seq.* (does not raise a double jeopardy issue as found in *Tharp v. Texas*, 935 S.W.2d 157 (Tex. Crim. App. 1996)); Va. Code Ann. § 46.2-391.2 (is not a criminal punishment as found in *Ingram v. Virginia*, 514 S.E.2d 792 (Va. Ct. App. 1999)) (license suspension found to be remedial in nature as found in *Nicely v. Virginia*, 477 S.E.2d 11 (Va. Ct. App. 1996)); *see also Kernan v. Tanaka*, 856 P.2d 1207 (Haw. 1993).

⁷In addition, TALRA provides for dismissal of the case if the officer fails to appear at the hearing on the first setting. The Uniform Administrative Procedures Act also provides a way for a driver to retain driving privileges while a case is on appeal. Tenn. Code Ann. § 4-5-322(c). The proposed 180-day maximum period by which the Department of Safety could issue temporary driving permits, SB4196 / HB4213 (§55-50-904(g)), would not affect the authority of the Chancery Court to issue a stay of license revocation. SB4196 / HB4213 (§ 55-50-909(b)) provides that the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-322, governs the judicial review of administrative license revocation. Both Tenn. Code Ann. § 4-5-322(c) and the proposed SB4196 / HB4213 (§ 55-50-909(a)) state that the filing of a petition for judicial review in Chancery Court does not stay enforcement of the administrative revocation order. Nevertheless, Tenn. Code Ann. § 4-5-322(c) establishes a mechanism by which the Court has the discretion to stay enforcement of the license revocation order. If granted, the Department of Safety would have to comply with the Court's order by furnishing the petitioner with some form of permit or license authorizing the petitioner to drive.

ROBERT E. COOPER, JR.
Attorney General and Reporter

GORDON W. SMITH
Associate Solicitor General

BENJAMIN A. WHITEHOUSE
Assistant Attorney General

Requested by:

The Honorable Joe M. Haynes
State Senator
Twentieth Senatorial District
5 Legislative Plaza
Nashville, Tennessee 37243