

PAUL W. BURMASTER P.A.

Attorney and Counselor at Law

Santa Fe Law Building
8000 Foster
Overland Park, KS 66204
(913) 648-1464

Fax (913) 648-7774

** Licensed in Kansas and Missouri*

To: House Judiciary Committee

From: Paul W. Burmaster

Date: January 10, 2016

Subject: H.B. 2289 – Regarding Administrative Driver's License Hearings

Chairman Barker and Members of the Committee:

Thank you for giving me the time to address this Committee and testify regarding the importance of HB2289.

This bill seeks to address some errors in fundamental fairness in administrative license hearings in Kansas. As this Committee may know, these hearings recently came under fire by the Kansas Court of Appeals in *Manzano v. Kansas Department of Revenue*, 50 Kan.App.2d 263 (2014)(finding that the hearing was a "sham"). These hearings require that a driver must pay for his right to a hearing, but he is denied the police reports or even the ability to argue if his stop was unlawful. This bill seeks to correct these inequities.

The need for Police reports is obvious. The Driver must request and pay for his license hearing in order to fight the suspension of his license. And, the Driver bears the burden to show the suspension is unwarranted. He is allowed to access a copy of any video evidence for purposes of the hearing, but the statute does not *specifically* allow for the discovery of the police report. And, it is a routine practice in

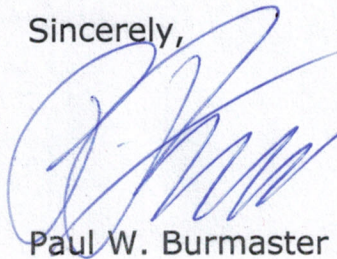
Leavenworth and Douglas counties, and probably others, to deny access to the reports for purposes of the license hearing until the charges are filed -- which in these counties regularly takes over a year (well after the license hearing is over). This problem should be corrected so that drivers can see the reports and the evidence against them, and so that the hearing officers can make informed determinations in reaching their rulings.

The Driver should also be allowed to challenge the stop of his vehicle if it is unlawful. Under the current law, a police officer may stop a driver for any reason or no reason at all. In such a case, the driver can challenge the validity of the stop under the 4th Amendment *in criminal court, but not in the license hearing*. In 2008, in Martin v. KDOR, 285 Kan. 625, 176 P.3d 938, the Kansas Department of Revenue successfully argued that the basis for the stop was not an available issue specifically listed in the statute and accordingly the driver could not argue the stop -- *even if it was unconstitutional*. Thus, a police officer may stop a driver for any reason, or no reason, and the driver may lose their license for 3 years on a first offense (one year suspension and two more years with an interlock).

These omissions in the statute are likely accidental, but open the door for abuse of process. These omissions in the statute should be corrected. I ask that you support HB2289 for these reasons.

Thank you for your time and attention to my testimony.

Sincerely,



Paul W. Burmaster

EXHIBITS

**OFFICER'S CERTIFICATION AND NOTICE OF SUSPENSION
(SEE REVERSE SIDE FOR HEARING INFORMATION)**

INSTRUCTIONS: This form is to be used to certify a test refusal or test failure. A copy of the completed form is required to be served upon the person; a copy is to be forwarded to the Division of Vehicles within seven (7) days after service on the driver; and a copy should be retained by a certifying officer.

DRIVER INFORMATION

Name (Last)	(First)	(M/I)	Date of Birth
Current Address		City	
		State	
Driver's License No.	State of Issuance	Zip	

CDL YES ☐ NO ☐

CMV YES ☐ NO ☐ (If yes, CDL-5 form required also)

HAZ MAT YES ☐ NO ☐

ADDRESS: The above address will be treated as a change of address if different from that on file with the Division of Vehicles and will be used for all correspondence with the person unless the Division of Vehicles is notified by the person in writing of a different address or a change of address. You can change your address on the Internet, by mail or fax to Driver Control, or by going to any Kansas Driver's License Examining Station or Driver Control.

LAW ENFORCEMENT OFFICER'S CERTIFICATION

CERTIFICATION INSTRUCTIONS: To certify a test refusal or test failure, (1) each officer must complete the statement, if necessary, (2) at least one officer must initial on the line to the left of each of the statements intended to be certified and (3) each officer who initials a statement must sign in the space provided below.

- ____ 1. On _____, 20____, reasonable grounds existed to believe that the above-named person, within the State of Kansas in _____ County,
☐ had been operating a vehicle while under the influence of alcohol and/or drugs in violation of state statute, city ordinance or county resolution, or ☐ had been attempting to operate a vehicle while under the influence of alcohol and/or drugs in violation of state statute, city ordinance or county resolution (if certifying a failure of a test, the officer must certify that reasonable grounds existed to believe the person was operating a vehicle); and/or ☐ had been driving a commercial vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; and/or ☐ is under 21 years of age while having alcohol or other drugs in such person's system.
- ____ 2. The person had been placed under arrest or otherwise taken into custody or had been involved in a vehicle accident or collision.
- ____ 3. The person was presented oral and written notice as required by K.S.A. 6-1001(k) and amendments thereto.
- ____ 4. Check one: ☐ The person refused to submit to or complete testing as requested by a law enforcement officer. ☐ The result of the test showed that the person had an alcohol concentration of .08 or greater in such person's blood or breath. **NOTE:** Please attach a readable copy of the test report.
5. Reason(s) for the initial contact and/or stop: ☐ committed traffic violation(s) (explain below); ☐ officer arrived at scene of accident; ☐ vehicle already stopped; ☐ other (explain)
- ____ 6. Reasonable grounds for my belief that the person was operating or attempting to operate a vehicle: ☐ saw person operate; ☐ person identified self as driver; ☐ other (explain)
- ____ 7. Reasonable grounds for my belief that the person was under the influence of alcohol and/or drugs: ☐ odor of alcoholic beverages; ☐ alcoholic beverage containers found in vehicle; ☐ failed sobriety tests; ☐ slurred speech; ☐ bloodshot eyes; ☐ difficulty in communicating; ☐ poor balance or coordination; ☐ person stated alcohol/drugs consumed; ☐ failed preliminary breath test; ☐ other (explain)
- ____ 8. A copy of this document which contains a Notice of Driver's License Suspension is being served on the above-named person on _____, 20____ by (check one)
☐ personal service; ☐ mailing by first-class mail to the address shown above. **NOTE:** Personal service is required if a determination of refusal or failure is made while the person is in custody.

IF CERTIFYING A FAILURE OF A BREATH TEST, STATEMENTS 9, 10 AND 11 MUST ALSO BE COMPLETED AND CERTIFIED

- ____ 9. The testing equipment used was certified by the Kansas Department of Health and Environment.
- ____ 10. The testing procedures used were in accordance with the requirements set out by the Kansas Department of Health and Environment.
- ____ 11. The person who operated the testing equipment was certified by the Kansas Department of Health and Environment to operate such equipment.

I hereby certify to the Division of Vehicles that each of the statements I have initialed above are true and accurate, under penalty of K.S.A. 8-1002(b), and amendments thereto.

Title and name (printed): _____
Agency name: _____
Agency address: _____
City/state/zip: _____

Title and name (printed): _____
Agency name: _____
Agency address: _____
City/state/zip: _____

Signature of Law Enforcement Officer

Signature of Law Enforcement Officer

TEMPORARY DRIVER'S LICENSE

THIS NOTICE IS:

☐ **NOT VALID** as a temporary license for the reason that your license: ☐ has expired; ☐ has been revoked; ☐ has been suspended; ☐ has been cancelled; or ☐ you have no driver's license.

☐ **VALID** as a temporary license until the 30th day after the date of service of this document. You must carry this notice with you when driving. This temporary license allows the operation of the same classes of vehicles and is subject to the same restrictions as the driver's license surrendered.

Any temporary driver's license will end and your driving privileges will be suspended on the 30th day after service of this document unless an administrative hearing has been timely requested. THE INSTRUCTIONS FOR REQUESTING AN ADMINISTRATIVE HEARING ARE ON THE REVERSE SIDE OF THIS FORM.

Before a test or tests are administered, the officer is required by K.S.A. 8-1001, and amendments thereto, to provide the person the oral and written notices contained on the implied consent advisory (DC-70). If the person was driving a commercial motor vehicle, as defined by Kansas law, the oral and written notice required by K.S.A. 8-2,145 should also be given. If the person is under the age of 21, the oral and written notice required by K.S.A. 8-1567a should also be given.

ALCOHOL ACTIONS CHART

(Rev 7/1/2013)

UNDER 21					
CHEMICAL TEST RESULT	1st Occurrence	2nd Occurrence	3rd Occurrence	4th Occurrence	5th Occurrence
BAC .02 - .0799	30/330 days interlock No exam DC35/DC36	1-yr SUS No exam DC40	1-yr SUS No exam DC40	1-yr SUS No exam DC40	1-yr SUS No exam DC40
A61 (D19)					
ALL AGES					
BAC .08 to .1499	1st Occurrence	2nd Occurrence	3rd Occurrence	4th Occurrence	5th Occurrence
CHEMICAL TEST FAILURE	30/6 mo or 1 yr Interlock \$100 reinstatement fee DC32/DC36	1-yr SUS/1-yr Interlock \$200 reinstatement fee DC37/DC30/DC36	1-yr SUS/2-yr Interlock \$300 reinstatement fee DC37/DC30/DC36	1-yr SUS/3-yr Interlock \$400 reinstatement fee DC37/DC30/DC36	1-yr SUS/10-yr Interlock \$400 reinstatement fee. DC37/DC30/DC36
D15 (D12/D16/D19)					
DUI CONVICTION	30/6 mo or 1 yr Interlock \$100 reinstatement fee DC32/DC36	1-yr SUS/1-yr Interlock \$200 reinstatement fee DC37/DC30/DC36	1-yr SUS/2-yr Interlock \$300 reinstatement fee DC37/DC30/DC36	1-yr SUS/3-yr Interlock \$400 reinstatement fee DC37/DC30/DC36	1-yr SUS/10-yr Interlock \$400 reinstatement fee. DC37/DC30/DC36
D11/ RK2 (D12/D16/D19)					
ALL AGES					
CHEM TEST REF - CONV	1st Occurrence	2nd Occurrence	3rd Occurrence	4th Occurrence	5th Occurrence
CT REFUSAL CONVICTION	30/6 mo or 1 yr Interlock \$100 reinstatement fee DC32/DC36	1-yr SUS/1-yr Interlock \$200 reinstatement fee DC37/DC30/DC36	1-yr SUS/2-yr Interlock \$300 reinstatement fee DC37/DC30/DC36	1-yr SUS/3-yr Interlock \$400 reinstatement fee DC37/DC30/DC36	1-yr SUS/10-yr Interlock \$400 reinstatement fee. DC37/DC30/DC36
.08 - .1499 or refusal					
A12/ RK2 (D12/D16/D19)					
CT REFUSAL CONVICTION	1-yr SUS/1-yr Interlock \$100 reinstatement fee DC37/DC34/DC36	1-yr SUS/2-yr Interlock \$200 reinstatement fee DC37/DC30/DC36	1-yr SUS/3-yr Interlock \$300 reinstatement fee DC37/DC30/DC36	1-yr SUS/4-yr Interlock \$400 reinstatement fee DC37/DC30/DC36	1-yr SUS/10-yr Interlock \$400 reinstatement fee. DC37/DC30/DC36
.15 or greater					
A12/ RK2 (D10/D16/D19)					
ALL AGES					
BAC .15 OR GREATER	1st Occurrence	2nd Occurrence	3rd Occurrence	4th Occurrence	5th Occurrence
CHEMICAL TEST FAILURE	1-yr SUS/1-yr Interlock \$100 reinstatement fee DC37/DC34/DC36	1-yr SUS/2-yr Interlock \$200 reinstatement fee DC37/DC30/DC36	1-yr SUS/3-yr Interlock \$300 reinstatement fee DC37/DC30/DC36	1-yr SUS/4-yr Interlock \$400 reinstatement fee DC37/DC30/DC36	1-yr SUS/10-yr Interlock \$400 reinstatement fee. DC37/DC30/DC36
A90 (D10/D16/D19)					
DUI CONVICTION	1-yr SUS/1-yr Interlock \$100 reinstatement fee DC37/DC34/DC36	1-yr SUS/2-yr Interlock \$200 reinstatement fee DC37/DC30/DC36	1-yr SUS/3-yr Interlock \$300 reinstatement fee DC37/DC30/DC36	1-yr SUS/4-yr Interlock \$400 reinstatement fee DC37/DC30/DC36	1-yr SUS/10-yr Interlock \$400 reinstatement fee. DC37/DC30/DC36
A10/ RK2 (D10/D16/D19)					
ALL AGES					
CHEMICAL TEST REFUSAL	1st Occurrence	2nd Occurrence	3rd Occurrence	4th Occurrence	5th Occurrence
ADMINISTRATIVE	1-yr SUS/2-yr Interlock \$400 reinstatement fee DC37/DC34/DC36	1-yr SUS/3-yr Interlock \$600 reinstatement fee DC37/DC30/DC36	1-yr SUS/4-yr Interlock \$800 reinstatement fee DC37/DC30/DC36	1-yr SUS/5-yr Interlock \$1,000 reinstatement fee DC37/DC30/DC36	1-yr SUS/10-yr Interlock \$1,000 reinstatement fee DC37/DC30/DC36
D13 (D10/D16/D19)					

Under 21/Above 21 no longer applies to determine sanctions for D15/D11 with a BAC .08 to .799

*Conviction for a refusal to a chemical test. The sanction is the same as a D15/D11 with BAC .08 to .799, and A90/A10 .15 or greater.

*The sanction is NOT the same as an ADMINISTRATIVE Chemical Test Refusal

*If the sanction is for an administrative CT Refusal the driver MUST wait 90 days before applying for a restricted IID. If the sanction is for conviction CT Refusal the driver

at the sanction is for conviction CT Refusal the driver MUST wait 45 days before applying for a restricted IID.

*Set of limited IID restrictions, pursuant to KSA 8-282. This only applies to a FIRST A90, A10 or a FIRST D13.

Use the current limited IID restrictions on all other occurrences.

*When retro modifying a sanction, any suspension time served in excess of the one year suspension, will be credited towards the IID restriction ** IF **

(1) the person's driving record indicates no driving by the person during the application suspension or revocation period

(2) the person completes a form indicating that the person did not drive during the applicable suspension or revocation period

NEW: RK2 The suspension for aggravated battery w/ DUI should follow the conviction under K.S.A. 8-1567 (A10, A12, D11)

6 Month IID
driver fee
D14, A30,
FR5, VR2,
VR1, HR1,
HR2, FA1,
FE2, D11,
D16, A12,
RE8, RK2,
RK6, ANY
SUS, REV
OR CAN
(INCLUDING
GRR2) ON
RECORD 2
MOVING
VIOLATION
S ON
SEPARATE
OCCASION
S WITHIN A
12 MONTH
PERIOD

Administrative Hearing Section
Driver License Appeals
PO box 2744
915 SW Harrison St.
Topeka KS 66612-2744



Telephone: (785) 296-6911
FAX: (785) 296-0275
DCAdmin.Hearing@kdor.ks.gov

Nick Jordan, Secretary
Lisa Kaspar, Director of Vehicles
David Clauser, General Counsel

Sam Brownback, Governor

February 18, 2015

MERRIAM KS 66203

DOB:
DL#:

NOTICE OF HEARING

A representative from the Division of Vehicles will conduct an administrative hearing at the **ADMINISTRATION BUILDING, LOWER LEVEL ROOM 209, 111 S CHERRY, OLATHE, KS 66061**, at **03/24/2015 01:30 PM** regarding the suspension or revocation due to:

DRIVER'S LICENSE FOR COMMERCIAL HABITUAL VIOLATIONS (K.S.A. 8-2, 142)

We subpoenaed the following witness(es) to this hearing as requested in your hearing request:

Witness (officer):
Witness (officer):

Notice of hearing has been sent to the following attorney:

**PAUL BURMASTER ATTY
8000 FOSTER
OVERLAND PARK KS 66204**

If your case concerns a refusal to submit to chemical testing or a blood test of .08 or greater resulting in a chemical test failure, the pre-hearing discovery prescribed and limited by K.S.A. 8-1020 is attached – the Officer's certification and notice of suspension. If your case concerns a failure of a chemical test as a result of a breath test of .08 or greater, pre-hearing discovery will be mailed to you at a later date, but prior to the scheduled administrative hearing.

In order to prepare for this hearing, it is ordered that the licensee or person acting as their attorney is authorized to personally review any video or audio tape record made of the events upon which the administrative action was based prior to this hearing and to obtain copies upon payment of a fee. This review must take place at a reasonable time designated by the law enforcement agency listed below at the location where the documents are kept.

Law enforcement agency: KANSAS HIGHWAY PATROL

It is your responsibility to contact the law enforcement agency identified above to arrange for a review or purchase of relevant tape records at the location where the tapes are kept.

Your failure to attend the above scheduled hearing will result in the suspension, restriction, suspension then restriction, or revocation of your driving privileges as applicable. Failure of a non-law enforcement witness to appear is not grounds for dismissal. Also, failure of a certifying officer(s) to appear whom the licensee did not request at the time the hearing request was made is not grounds for dismissal.

If you need an interpreter at the hearing, please contact the Administrative Hearing Section in writing, by mail or fax, at least seven days prior to the hearing date. You must also indicate what type of interpreter you will need, (Spanish, Asian, sign language, etc.). We will arrange to have an interpreter attend the hearing to assist you with the translation of the hearing procedures.

Pursuant to K.S.A. 8-259, all orders issued at the hearing may be appealed to district court within 10 days after the effective date of the order.

Sincerely,

Administrative Hearing Section
Driver License Appeals
Department of Revenue

Attach

CO/DC: sls

HR2

SOME RELEVANT CASE LAW AND POINTS

Martin v. KDOR, 285 Kan. 625, 176 P.3d 938 (2008) Reason for the stop not listed in the statute for the issues to be considered at a license hearing.

Manzano v. KDOR, 50 Kan.App.2d 263 (2014) (DL hearing “sham”).

Checkpoints : State v. Deskins, 234 Kan. 529, 673 P.2d 1174 (1983)
Supreme Court held checkpoints/roadblocks to be lawful

Anonymous Call: State v. Slater, 67 Kan. 694, 986 P.2d 1038 (1999)
Investigatory stop of drunk driver lawful based upon tip

Safety Stop: City of Liberal v. Carranza, 78 P.3d 497 (Table), 2003
WL 22479568 (Kan.App.) Unpublished Disposition.
Police officers justified in stopping motorists for public
safety reasons

Passed out or asleep: Technically, these aren't stops at all. They are voluntary contacts. The driver is already stopped. The officer just arrives. Therefore, neither of these types of contacts would be affected.

Accidents: Drivers have a duty to stop and remain to render aid at an accident. If they don't – stopping them is perfectly lawful. If the car is undriveable, or if the driver remains, there is no stop. The officer just arrives.