

IN THE SUPREME COURT  
STATE OF WASHINGTON

CAUSE NO.: 81473-2

CITY OF BELLEVUE

Petitioner

v.

SHIN H. LEE, ET. AL.

Respondents.

FILED  
JUL 1 2015  
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KING COUNTY  
BY *bjh* *E*

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On Appeal from the  
King County Superior Court  
The Honorable Michael J. Fox, Judge.

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BRIEF OF RESPONDENTS

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**ORIGINAL**

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## I. INTRODUCTION

This court has defined what due process means with regards to drivers license suspensions. *City of Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004). The issue in this case is the Legislature's failure to enact a statute that meets this Court's mandate in *Moore, supra*.

In April and August of 2002, the King County District Court, East Division dismissed Driving While Suspended in the Third Degree charges against defendants Dean Moore and Jason Wilson after finding that they were not afforded an administrative hearing by the Department of Licensing (DOL) either before or after the effective date of their suspensions. These cases were the subject of a petition for direct review before this Court in *Moore, supra*. In *Moore*, this Court affirmed the district court dismissals, holding that RCW 46.20.289 and RCW 46.20.324(1) violated due process. *Moore* at 667, 91 P.3<sup>rd</sup> at

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In direct response to this Court's holding in *Moore*, the Washington State House of Representatives, on March 11, 2005, passed House Bill (HB) 1854, which later became RCW 46.20.245. The Governor signed the bill on May 4, 2005 and RCW 46.20.245 became effective July 1, 2005. The Bill Analysis and Brief Summary of HB 1854 specifically shows that the committee anticipated an actual hearing where "the person whose driving privileges are to be withheld has

the burden to show by a preponderance of the evidence that he or she is not subject to the suspension or revocation.” *HB 1854 Analysis*, pg. 2. RCW 46.20.245, as passed, however, makes this an impossibility. RCW 46.20.245 states, in pertinent part:

(a) An administrative review under this subsection shall consist solely of an internal review of documents and records submitted or available to the department, unless the person requests an interview before the department, in which case all or any part of the administrative review may, at the discretion of the department, be conducted by telephone or other electronic means.

(b) The only issues to be addressed in the administrative review are:

- (i) Whether the records relied upon by the department identify the correct person; and,
- (ii) Whether the information transmitted from the court or other reporting agency or entity regarding the person accurately describes the action taken by the court or other reporting agency or entity.

RCW 46.20.245 (a)(b)(i)(ii). This statute provides for an “internal review” of records and a discretionary “interview” with the driver. The record below shows that the proposed suspended driver is not told the time or the place of their document review; and, if they are granted a “customer service interview”, they are not allowed to present any substantive evidence, subpoena any witnesses or to testify regarding the matter. *CP* at 126-127.

Respondents argue that this statute is facially invalid. The statute fails to provide either procedural or substantive due process as mandated in *Moore, supra*, to Washington State driver's before their driver's licenses are suspended.

## **II. STATEMENT OF THE ISSUES**

A. Did the Superior Court of King County err when it remanded these cases for dismissal, finding that RCW 46.20.245 was facially invalid because it did not afford the Respondents with a meaningful hearing?

(1) Did the Superior Court of King County err when it found that RCW 46.20.245 failed to give the Respondents procedural due process?

(2) Did the Superior Court of King County err when it found that RCW 46.20.245 failed to give the Respondents substantive due process?

B. Does the Due Process Clause of the United States Constitution, as applied to Washington State through the Fourteenth Amendment, require that drivers be given a meaningful hearing at a meaningful time before their drivers' license is suspended?

(1) Must this meaningful hearing provide for procedural due process?

(2) Must this meaningful hearing provide for substantive due process?

C. Does RCW 46.20.245 afford drivers in Washington State a meaningful hearing at a meaningful time before their drivers' licenses are suspended?

(1) Does RCW 46.20.245 provide for procedural due process?

(2) Does RCW 46.20.245 provide for substantive due process?

D. May a criminal conviction for Driving While Suspended under RCW 46.20.342(1)(c) be based upon a drivers license suspension that was unconstitutional and void ab initio?

### **III. STATEMENT OF THE CASE**

Ms. Shin Lee and each of the Respondents were charged with Driving While Suspended in violation of RCW 46.20.342(1)(c). *CP* at 4. Each Respondent received an Order of Suspension from the Washington State Department of Licensing (DOL). *CP* at 37. Each order of suspension alleged that the driver had failed to pay, appear or respond to a traffic infraction; and, advised them that in order to avoid the suspension they had to provide proof that they satisfied the court's requirements. *CP* at 37. It also provided them with an option to request an "administrative review". *CP* at 37 & 78. (Appendix A).

The administrative review procedure in the statute and with the DOL provided no opportunity for notice to the Respondents of the time or date of the review. *CP* at 126. The Respondents were not allowed to testify, to call or subpoena witnesses, or to cross examine witnesses at this review. *CP* at 126-127. Along with the Order of Suspension, an explanation of the driver's rights under the statute was provided to each of the Respondents. *CP* at 79-80. (Appendix B). Each of the Respondents was told that they could not obtain a formal hearing and that the administrative review would be limited to a document review. *CP* at 79. *Id.* In each case the trial court found that RCW 46.20.245 satisfied due process. *CP* at 91-98. (Appendix C). The Respondents appealed the trial court decision to the Superior Court of King County. *CP* at 1. On appeal, the Superior Court of

King County found that RCW 46.20.245 denied the Respondents both procedural and substantive due process, holding RCW 46.20.245 unconstitutional. *CP* at 172-173. (Appendix D). The City of Bellevue sought discretionary review from this Court, and was so granted. *CP* at 174-175. (Appendix E).

#### IV. ARGUMENT

##### A. A Driver's License Cannot be Suspended Without Due Process.

It is a well-settled issue of law in the State of Washington that drivers' licenses may not be suspended or revoked "without that procedural due process required by the Fourteenth Amendment." *Moore* at 670, 91 P.3d at \_\_\_ (quoting from *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971)). *See also, Dixon v. Love*, 431 U.S. 105, 112, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 70 P.3d 947 (2003). This Court, in *State v. Dolson*, 138 Wn.2d 773, 783, 982 P.2d 100 (1999), further added that "a driver cannot be convicted of driving while suspended or revoked if the suspension or revocation violates due process."

Although the procedures may vary and change depending on the interest at stake, "...[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'". *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). In *Mathews*,

the United States Supreme Court set forth a three-factor test to determine whether existing procedures are adequate to protect the interest at stake.

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 requirements would entail.

*Moore* at 670, 91 P.3d at \_\_\_ (citing to *Mathews*, 424 U.S. at 335, cited in *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 78, 838 P.2d 111, \_\_\_ (1992).

B. Analysis of the First *Mathews* Factor.

1. A Driver's License is the Important Private Interest at Stake.

Under the first *Mathews* factor, the court must identify "the nature and weight of the private interest affected by the official action challenged." *Moore* at 670, 91 P.3d at \_\_\_. This Court's first-*Mathews* factor analysis in *Moore* is helpful in a review of this case. In *Moore*, this Court wrote,

[t]he private interest in this case is the driver's interest in the continued use and possession of a driver's license. Depriving a person of the use of his or her vehicle can significantly impact that person's ability to earn a living.

*Moore* at 670, 91 P.3d at \_\_\_.

In *State v. Dolson, supra*, this Court further commented that, "[a] driver's license represents an important property interest." 138 Wn.2d 773, 776-77, 982

P.2d 100 (1999). There can be no question that the private interest affected by the procedures in RCW 46.20.245 is substantial, important, and material property that the government seeks to deprive under the mandate in RCW 46.20.289.

2. The Duration of an Erroneous Suspension Under RCW 46.20.245 Is Indefinite.

The United States Supreme Court has held that, “[t]he duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved.” *Moore*, at 671, 91 P.3d at \_\_\_\_, citing *Mackey v. Montrym*, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979). In *Moore*, this Court noted former RCW 46.20.289 “provides no guaranty such a hearing will take place promptly....Once a suspension takes effect, it remains in effect until the driver can resolve the matter with the court.” *Moore*, at 671, 91 P.3d at \_\_\_\_.

In the instant cases, once a suspension begins, RCW 46.20.289 still requires that “the department shall suspend all driving privileges until the person provides evidence from the court that all penalties and restitution have been paid.” As such, a suspension for an unpaid traffic ticket is for an indefinite period, or at least until the underlying case is resolved. By contrast, a suspension based on a

criminal conviction has a date certain time limit, which may be as short as 30 days.<sup>1</sup>

There should be due process safeguards for agency action that results in an indefinite loss of one's significant property interest. Those protections exist in administrative hearings for DUI defendants and even Habitual Traffic Offenders facing suspension. A suspension for an allegedly unpaid infraction which can lead to an indefinite suspension, however, is afforded none of the protections associated with a due process hearing. Given the nature of the interest at stake in this case, and the unlimited duration of a governmental action against that interest, the first-factor *Mathews* analysis weighs in the Respondents' favor.

C. Analysis of the Second *Mathews* Factor.

1. The Second *Mathews* Factor Addresses Due Process and the Risk of Erroneous Deprivation.

The second *Mathews* factor is the risk of erroneous deprivation of the privacy right at stake. In *Mathews*, the United States Supreme Court clearly noted that "...the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'". *Mathews v. Eldridge*, 424

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<sup>1</sup> [A first-time DUI offender will receive a 90-day suspension administratively for having a breath test above .08, and a concurrent 90-day suspension due to a court conviction for DUI with a breath test under .15. See RCW 46.61.5055 (7)(a)(i). For a Reckless Driving conviction, there is a mandatory 30-day license suspension. See RCW 46.61.500 (2). But an unpaid traffic ticket under RCW 46.20.245 results in a suspension with no termination date.]

U.S. 319,333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)).

This Court discussed the second Mathews factor at length in *Moore, supra*. In its analysis, this Court cited with approval to the United States Circuit Court's decision in *Warner v. Trombetta*, 348 F. Supp. 1068, (M.D. Pa. 1972), *aff'd*, 410 U.S. 919, 93 S.Ct. 1392, 35 L.Ed.2d 583 (1973), requiring a due process hearing. *Trombetta* notes that:

[e]ven if the underlying conviction itself cannot be contested, there still remained the possibility of error, including misidentification of the infractor, miscalculation of the fine by the court, and errors on the report of conviction form.”

*Moore* at 672, 91 P.3d at \_\_\_ (quoting *Trombetta*, 348 F. Supp. at 1071).

In *Moore, supra*, this Court quoted directly from the conclusion in *Trombetta*:

The fatal defect in the statute at bar is that there is no provision made for any type of *administrative hearing* with notice and an opportunity to be heard before the revocation action becomes effective. Hence, the possibility exists that error in a conviction record could result in the revocation of the license of an innocent motorist. Under these circumstances, we conclude that the essentials of due process require the opportunity for some sort of meaningful *administrative hearing* prior to the revocation of an operator's license.

*Moore* at 672, 91 P.3<sup>d</sup> at \_\_\_ (quoting *Trombetta*, 348 F. Supp. at 1071) (emphasis in original).

Unfortunately for the Respondents and every other similarly situated license holder, RCW 46.20.245 does not provide that meaningful administrative hearing.

2. RCW 46.20.245 Does Not Cure the Risk of  
Erroneous Deprivation That This Court was Concerned  
About in Moore.

This Court, in *Moore, supra*, previously cited to two exhibits as examples of the necessity of a pre-suspension hearing. One person suffered an erroneous suspension for almost eight months when DOL was misinformed by the court of a conviction. Another driver was erroneously suspended after being falsely identified by the court as having an unpaid ticket. That driver could not obtain a hearing from the court to correct the matter for over a month after his driver's license was suspended. *Moore* at 673, 91 P.3d at \_\_. Presuming the Legislature enacted RCW 46.20.245 in an attempt to remedy the due process failures mandated by this Court's decision in *Moore*, it fails to achieve this result. RCW 46.20.245 does nothing to address the issues that both the United States Supreme Court was concerned with in *Mathews* and *Trombetta, supra*, and that this Court ordered to be addressed in *Moore, supra*.

RCW 46.20.245 offers neither a hearing at a "meaningful time" or in a "meaningful manner." Nor does it provide for a "meaningful *administrative hearing*" at all. It merely offers a "customer service document review" to a driver

facing a license suspension. The DOL's own representative best described the "customer service document review" to the trial court:

The admin review is based on documentation, driver's not – there's – no driver, no attorney is present. It's just a customer service representative that reviews documents.

*CP* at 121. (Testimony of DOL Management Analyst Carla Weaver-Groseclose).

A "customer service document review" cannot be what this Court imagined when it held in *Moore* that RCW 46.20.289 and RCW 46.20.324(1) were "contrary to the guaranty of due process because they do not provide adequate procedural safeguards to ensure against the erroneous deprivation of a driver's interest in the continued use and possession of his or hers driver's license." *Moore* at 677, 91 P.3d at \_\_\_.

The City of Bellevue's reasoning employs the same analysis as the City of Redmond that was rejected by this Court in *Moore*:

The City maintains that there was no due process violation because *Moore* and *Wilson*, like all drivers who have their licenses suspended under RCW 46.20.289, had an *opportunity to be heard at their respective court hearings* on the underlying violation. But as *Moore* and *Wilson* argued below, that court hearing does not address ministerial errors that might occur when DOL processes information obtained from the courts pertaining to license suspensions and revocations, e.g., misidentification, payments credited to the wrong account, the failure of the court to provide updated information when fines are paid.

*Moore* at 674, 91 P.3d at \_\_. Regardless of what occurs in the courthouse, the issue of RCW 46.20.245's constitutionality applies solely to whether the mandatory administrative procedures satisfy due process.

The City argues that the very ministerial errors raised in *Moore* are now protected by RCW 46.20.245, asking the question: "It is unclear how or what additional or substitute procedural safeguards would better protect against ministerial errors than those procedures already provided in RCW 46.20.245?" *Brief of City of Bellevue*, pg. 9. There is nothing in an internal document review that is likely to correct the types of errors described in *Trombetta*, *supra*. Nor is the "administrative review" defined in RCW 46.20.245 able to address the documented erroneous deprivations previously discussed by this Court in *Moore*. Neither of the errors discussed above would be addressed or corrected by this statute's "administrative review." As the statute states:

An administrative review under this subsection shall consist solely of an internal review of documents and records submitted or available to the Department.

RCW 46.20.245. No amount of internal review of the same records that the DOL has relied upon to initiate its action is likely to identify or to correct court error or identity abuse. This inability to address the identified risks of erroneous deprivation is exacerbated by the presumption in RCW 46.20.245(2)(c) that the underlying court records are correct.

The answer to the City's posed question is simple and straightforward. This Court should require the Legislature to provide the procedural and substantive due process safeguards that were mandated in *Moore, supra*.

3. RCW 46.20.245 Fails to Meet Procedural Due Process.

RCW 46.20.245 has no provisions for a driver facing a suspension action to even know when their "customer service document review" is taking place, much less to testify at it. Drivers are also not allowed to subpoena witnesses or to present evidence. They are merely told the result of the hearing by letter. *CP* at 126-127.

In fact, the DOL admits that they are not able to accommodate even these most basic due process requirements, let alone address the issues of judicial or ministerial errors raised by *Mathews, Trombetta* and *Moore, supra*. DOL's own Management Analyst Carla Weaver-Groseclose explained it best to the trial court:

Q: Okay. Now, if the person requests the review, are they notified as to when this review is going to take place by mail?

A: No, they're not. The Department of Licensing just – gets review documentation in. We do the review, and then we send the driver a letter of what the outcome of the review was.

Q: So what if the person wants to subpoena witnesses or testify at this review? Can they do that?

A: No, they cannot. We don't have that kind of option set up.

Q: Is the review process recorded in any sort of way; in other words, does the person sit down and do this in front of a tape recorder or any sort of recording mechanism?

A: No, it is not. But we have an imaging system where all the documentation that we use to back up what's the action we're going to take is put into that system.

Q: Okay. And that's the paperwork?

A: Yes.

*CP at 126-127.* (Testimony of DOL Management Analyst Carla Weaver-Groseclose). It is clear from the testimony "we don't have that kind of option set up," and from a plain reading of RCW 46.20.245, that the procedural due process mandated by this Court in *Moore* does not exist.

This point is further illustrated in RCW 46.20.245(2)(a), where it states:

An administrative review under this subsection shall consist solely of an internal review of documents and records submitted or available to the department, unless the person requests an interview before the department, in which case all or part of the administrative review may, *at the discretion of the department*, be conducted by telephone or other electronic means (emphasis added).

Under RCW 46.20.245, the driver is not told of the date, time, or place of their "customer service document review". *CP at 126.* Should the driver somehow discover who is conducting this "customer service document review" and then request a telephonic or electronic interview to be heard, the discretion as whether to allow them to even speak to the Department rests solely with the DOL. *See*

RCW 46.20.245(2)(a). *See also CP* at 126-127. (Appendix B). Secret, unrecorded, and virtually unchallengeable administrative reviews are not the kind of hearings that this Court required to occur when it originally struck down RCW 46.20.289 in *Moore, supra*.

4. RCW 46.20.245 Fails to Meet Substantive Due Process.

The document review designed in RCW 46.20.245 provides drivers with none of the substantive due process protections that this Court found were required in *Moore*. The City of Bellevue argues that the “customer service document review” process provides sufficient safeguards to the aggrieved driver.

The only issues to be addressed at these RCW 46.20.245 document reviews, however, are: “(i) Whether the records relied on by the department identify the correct person; and (ii) Whether the information transmitted by the court or other reporting agency or entity regarding the person accurately describes the action taken by the court or other reporting agency or entity.” RCW 46.20.245 (2)(b)(i)(ii). RCW 46.20.245(c) further goes on to state that the notice above is:

...prima facie evidence that the information from the court or other reporting agency or entity regarding the person is accurate. A person requesting administrative review has the burden of showing by a preponderance of the evidence that the person is not subject to the withholding of the driving privilege.

RCW 46.20.245(c). DOL, therefore, must “assume the records that come from the court are the correct name and date of birth.” *CP* at 129.

Under RCW 46.20.245, the burden to show otherwise falls squarely on the petitioner: “a person requesting administrative review has the burden of showing by a preponderance of the evidence that the person is not subject to the withholding of the driving privilege.” Because the sole issues to be decided are deemed proven at the review, and there is no notice given explaining how to contest that determination, there can be no meaningful response to the agency action.

The administrative review process does not afford a meaningful consideration of whether the default order was legitimate, whether the person’s name was improperly used, or whether a payment was wrongfully credited. As such, RCW 46.20.245 is infirm with regards to substantive due process.

5. RCW 46.20.245 Allows for Arbitrary, Capricious, and Discretionary Decision Making.

*Black’s Law Dictionary, Fifth Edition (1979)*, defines “discretionary acts” as “those acts wherein there is no hard and fast rule as to course of conduct that one must or must not take, and, if there is clearly defined rule, such would eliminate discretion.” *Black’s Law Dictionary, Fifth Edition (1979)*, pg. 419.

This Court has also ruled that: “arbitrary and capricious action for purposes of appellate review of administrative agency action, is willful and unreasonable action, without consideration and in disregard of facts and circumstances.” *Heinmiller v. Department of Health*, 127 Wn.2d 595, 609, 903 P.2d 433, *cert. denied*, 518 U.S. 1006 (1996).

RCW 46.20.245 grants DOL the ability to presume the accuracy of the documents it relies upon, and it places the burden on the driver to overcome this presumption. It further allows the DOL to determine when and where a “customer service document review” is to occur without informing the driver. Further, it allows DOL to determine, *at its discretion*, how any interview is to occur and what, if any, information will be taken at this interview. Lastly, the DOL has adopted no Washington Administrative Code (WAC) rules of procedure to cure these problems. RCW 46.20.245 contains no “hard and fast” rules that allow drivers to present evidence on their behalf. The only rules contained in the statute effectively prevent a rational review or presentation of evidence. This creates an unreasonable and willful driver’s license suspension process which is arbitrary and capricious.

6. The “Right” of Appeal in RCW 46.20.245 Offers No Additional Protections Against the Risk of Erroneous Deprivation.

The City further argues that, even if there is a due process violation in these “customer service document reviews”, these due process violations can be cured because RCW 46.20.245 grants the driver the right to an appeal. This right of appeal found in RCW 46.20.245 is in direct response to this Court’s conclusion in *Moore* that motions for relief of judgment under CrRLJ 7.8, a writ of review or a writ of mandamus, or injunctive relief are “costly, time consuming and burdensome, and should be discounted” as an effective or meaningful method of redress. *Moore* at 676, 91 P.3d at \_\_. This right of appeal, however, is a skeletal right at best. The appeal is limited to the same issues as the “customer service document review” and it provides no additional due process protections. The driver that had no opportunity to present evidence in the administrative hearing is bound by the record made at the administrative level.

Under RCW 46.20.245(2)(e), the post-deprivation judicial appeal is “available in the same manner as provided in RCW 46.20.308(9),” and is strictly based on the record made at the “customer service document review.” RCW 46.20.308(9) describes what the judicial appeal process entails. It states, in relevant part:

If the suspension, revocation, or denial is sustained after such a hearing, the person whose license, privilege, or permit is suspended, revoked, or denied has the right to file a petition in the superior court of the county of arrest to review the final order of revocation by the department in the same manner as an appeal from a decision of a court of limited jurisdiction. Notice of appeal must be filed within thirty days after the date the final order is served or the right to appeal is waived. Notwithstanding RCW 46.20.334, RALJ 1.1, or other statutes or rules referencing de novo review, *the appeal shall be limited to a review of the record of the administrative hearing.* The appellant must pay the costs associated with obtaining the record of the hearing before the hearing officer. The filing of the appeal does not stay the effective date of the suspension, revocation, or denial...The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) That were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department. The superior court may reverse, affirm, or modify the decision of the department or remand the case back to the department for further proceedings.

RCW 46.20.308(9) (emphasis added).

A judicial appeal for an unpaid infraction suspension is limited to the record from the “customer service document review;” it is *not* a *de novo* appeal. The superior court must accept the factual determinations supported by substantial evidence; namely, the very same prima facie evidence as the “customer service document review” of whether the appellant is the correctly named party, and, whether the court record accurately *reflects* what was done. This is true even if what was done *occurred in error*.

An appeal of a RCW 46.20.245 “review” effectively prohibits the superior court from considering whether the defendant’s name matches the record or whether the court record “reflects” the “committed” finding, without ever considering the facts, evidence, law, or argument at issue in the underlying case. The procedures outlined in RCW 46.20.245 do not allow for an opportunity to be heard in a meaningful manner at the pre-suspension “customer service document review” phase. Consequently, an appeal on this meaningless record provides the driver with no additional due process safeguards at the appellate level. Offering a license holder the “right” to an appeal does not afford any greater due process protections, when that appeal is limited to the meaningless “customer service document review” below. Moreover, should a license holder appeal, RCW 46.20.245 provides for no automatic stay of the license suspension.

7. *Amunrud* is Inapposite to *Moore* and This Case.

The City of Bellevue, in its brief, also relies heavily on this Court’s decision in *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006). This reliance is misplaced, as the underlying facts in *Amunrud* and the statute addressed in that case, RCW 74.20A.320, are distinctly different from the underlying facts here and from RCW 46.20.245. Mr. Amunrud was a taxi driver who was ordered to pay child support as a result of a paternity action. Mr.

Amunrud petitioned the superior court for a modification of his child support requirements but was denied.

The court, instead, increased his support amount to be consistent with the standard calculation. *Amunrud* at 213, 143 P.3d at \_\_\_. Mr. Amunrud's order on child support specifically advised him that "his privilege to maintain a driver's license or a license to engage in a profession may be suspended under chapter 74.20A RCW if he failed to comply with the order." *Amunrud* at 213, 143 P.3d at \_\_\_. Mr. Amunrud did not appeal this support order nor did he seek to modify it. *Amunrud* at 213, 143 P.3d at \_\_\_.

Mr. Amunrud eventually became \$16,255 in arrears with his child support and the Division of Child Support (DCS) sent Mr. Amunrud a notice of noncompliance and intent to suspend licenses. *Amunrud* at 213, 143 P.3d at \_\_\_. Mr. Amunrud requested and was granted a hearing before an Administrative Law Judge who, and after receiving evidence, ruled against Mr. Amunrud. *Amunrud* at 213, 143 P.3d at \_\_\_.

The City of Bellevue argues that the circumstances in *Amunrud* (adjudicated under RCW 74.20A.320) are the same as in the instant cases (adjudicated under RCW 46.20.245). This is an erroneous reading of this Court's decision in *Amunrud*. While on its face it may appear that RCW 74.20A.320(2)(a) is similar to RCW 46.20.245(b), as it limits the issues in

question to “whether the parent is required to pay child support under a child support order and whether the parent is in compliance with that order...”, this is where the similarities end.

First, RCW 74.20A.320 requires that any noncompliance notice be sent to the license holder by certified mail, or if not successful, by personal service. This ensures greater reliability that the individual facing suspension action is notified regarding the deprivation. In the present case, the Respondents license suspensions were adjudicated under the procedures defined in RCW 46.20.245. By contrast, RCW 46.20.245 suspension notices for unpaid infractions are sent through the regular mail, delivery unconfirmed.

RCW 74.20A.320(2) also requires that a parent may request *an adjudicative proceeding* to contest the suspension. More importantly, RCW 74.20A.320(3) defines what this hearing is to include.

The proceeding under this subsection shall be conducted in accordance with the requirements of chapter 34.05 RCW. The issues that may be considered at the adjudicative proceeding are limited to whether: (a) The person named as the responsible parent is the responsible parent; (b) The responsible parent is required to pay child support under a child support order; and; (c) The responsible parent is in compliance with the order.

It is an important distinction to note that RCW 74.20 hearings are governed by RCW 34.05, the Administrative Procedures Act (APA), while hearings under RCW 46.20.245 are specifically excluded from the APA's procedural protections. The APA excludes driver's license hearings (except under Chapter 46.29) from its coverage. In other non-APA driver's license suspension procedures, the DOL has adopted Washington Administrative Code (WAC) rules defining the procedures for notice and hearing. *See* WAC 308-103 (implied consent suspensions) and WAC 308-104-340 (habitual offender revocations).

The DOL, however, has not adopted any WAC procedures for RCW 46.20.245 administrative reviews. The DOL provided to each Respondent an order of suspension and a request for administrative review form. *CP* at 37 & 78. (Appendices A & B). In addition, the DOL sent to each Respondent a document that informed the driver of their administrative review rights. That document advised the driver in a question and answer format:

Can a customer have a Formal hearing or interview along with an Administrative review on the same action?

NO – An Administrative review does not apply where an opportunity for an informal settlement, driver improvement interview, or formal hearing is otherwise provided by law or rule of the department.

*CP* at 80. (See, Appendix B). In these cases the Respondent's were informed that they would only have access to an internal document review. The only issues to be considered at this "customer service document review" would be whether they were the named party and whether the court had notified the DOL of a failure to pay, appear or respond. This type of procedure fails to address the risk of erroneous deprivation identified by the court in *Moore* and fails to provide any meaningful hearing.

While Mr. Amunrud received an adjudicative proceeding governed by the APA, the Respondents, in this case, received an administrative review consisting "solely of an internal review of documents and records submitted or available to the department..." RCW 46.20.245(2)(a), *supra*. Thus, the City's reliance on *Amunrud* is misplaced. Mr. Amunrud received a substantive due process hearing. He actually received the due process hearing that RCW 46.20.245 precludes the Respondents, and any license holders, from receiving.

Mr. Amunrud's hearing, as with all hearings governed by the APA, was subject to the requirements of RCW 34.05.434. That statute reads in pertinent part:

(1) the agency or the office of administrative hearings shall set the time and place of the hearing and give not less than seven days advance written notice to all parties and to all persons who have filed written petitions to intervene in the matter.

- (2) the notice shall include:
- (a) Unless otherwise ordered by the presiding officer, the names and mailing addresses of all parties to who notice is being given and, if known, the names and addresses of their representatives;
  - (b) If the agency intendeds to appear, the mailing address and telephone number of the office designated to represent the agency in the proceeding;
  - (c) The official file or other reference number and the name of the proceeding;
  - (d) The name, official title, mailing address, and telephone number of the presiding officer, if known;
  - (e) A statement of the time, place and nature of the proceeding;
  - (f) A statement of the legal authority and jurisdiction under which the hearing is to be held;
  - (g) A reference to the particular sections of the statutes and rules involved;
  - (h) A short and plain statement of the matters asserted by the agency; and
  - (i) A statement that a party who fails to attend or participate in a hearing or other stage of an adjudicative proceeding may be held in default in accordance with this chapter.

RCW 34.05.434. In addition, RCW 34.05.437 allows for pleadings, briefs, motions and service. RCW 34.05.446 allows for subpoenas, discovery, and protective orders. Finally, RCW 34.05.452 provides that testimony shall be taken under oath or affirmation and cross examination shall be allowed. *See* RCW 34.05. These are the due process rights that were granted to Mr. Amunrud when he appealed his case before the Administrative Law Judge.

Even the underlying facts are inapposite. Mr. Amunrud's underlying obligation was based upon a superior court adjudication of his parental rights and obligations. The Respondents in this case were alleged to have failed to pay, appear or respond to traffic infractions. A notice of traffic infraction is a determination that the infraction has been committed. *See* RCW 46.63.060. Once a notice of infraction is issued, it constitutes a finding of committed unless it is contested. RCW 46.63.060.

A finding of committed or of failure to pay, appear or respond may be made by a court clerk or even the board of regents of a state university. *See* RCW 46.63.040. An infraction may even be "adjudicated" by a police "municipal violations bureau" under RCW 3.50.030. A violations bureau is, in fact, an executive agency empowered to act in the place of the municipal court.

Every city or town may establish and operate under the supervision of the municipal court a violations bureau to assist the court in processing traffic cases. Each municipal court shall designate the specific traffic offenses and traffic infractions under city or town ordinances which may be processed by the violations bureau...a violations bureau may be authorized to process traffic infractions in conformity with chapter 46.63 RCW.

RCW 3.05.030. This is in distinct contrast to Mr. Amunrud's case where he had a bench trial before a superior court judge.

Unlike Charles Dickens's *Oliver Twist*, who had the audacity to request of Mr. Bumble "please, sir, I want some more", the Respondents in this case are

merely seeking from the DOL the same due process rights and procedures as Mr. Amunrud. Since RCW chapter 46.20 is specifically excluded from the APA, it becomes the responsibility of the Legislature to provide for these due process protections. RCW 46.20.245, by providing merely a “customer service document review” with no “option” for due process, fails to fulfill this Court’s constitutional mandate in *Moore*. This distinction becomes even more astonishing when compared to the due process protections actually provided under the APA to Mr. Amunrud.

In fact, this Court, in *Amunrud*, *supra*, specifically found that *Moore* was inapplicable. “Amunrud’s reliance on *Moore* is misplaced. Unlike former RCW 46.20.289 and .324(1), RCW 74.20A.320 provides a person with the opportunity for an administrative hearing in order to challenge the driver’s license suspension.” *Amunrud* at 218, 143 P.3d at \_\_. This Court then addressed whether Mr. Amunrud received a “meaningful hearing”:

As to Amunrud’s final contention that the board did not consider his unusual circumstances and, thus, he was denied “meaningful” review, his argument is without merit. First, Amunrud could have appealed the March 29, 2002, order that raised his child support payment to \$421 per month. Second, Amunrud could again file a motion to modify support with the court. Amunrud was \$16,255 in arrears on his child support payments and was made aware that failure to make payments could result in the suspension of his driver’s license. Because Amunrud was given the opportunity to be heard at a meaningful time and in a meaningful manner, his right to procedural due process was not violated.

*Amunrud* at 218, 143 P.3d at \_\_. The holding in *Amunrud* actually supports Respondents' demand for the procedural due process that RCW 46.20.245 precludes them from having.

The Respondents, and any license holders facing deprivation pursuant to RCW 46.20.245, on the other hand, are denied a meaningful hearing at a meaningful time. No one is ever told the time or place of these hearings. No due process procedural safeguards exist to allow for either the taking of testimony or the introduction of evidence comparable to those in the APA. There is no judicial officer. It is a secret hearing, conducted at a secret place, and at a secret time. No testimony is taken, only a "customer service document review". This procedure is a far cry from the substantive due process that this Court found Mr. Amunrud deserved and received.

RCW 46.20.245, therefore, fails to meet the due process safeguards that this Court mandated in *Moore, supra*. It also fails to remedy the risk of erroneous deprivation recognized by this Court in *Moore* requiring a true *hearing*. Nor, as noted above, has the DOL attempted to cure the problem. While the DOL has created WAC rules of procedure for adjudicating other specific types of license suspensions, it has chosen not to do so for RCW 46.20.245 suspensions. In sum, the second *Mathews* factor balances strongly in the Respondents' favor.

D. Analysis of the Third *Mathews* Factor.

Under the third *Mathews* factor, the Court must weigh “the government interest, including fiscal and administrative burdens that additional or substitute procedures would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

1. The Government’s Interest in Protecting Public Safety is Less Compelling With Regards to Infractions.

In *City of Bremerton v. Hawkins*, this Court ruled that for criminal matters, due process accrues because of the constitutional protections in those cases. The *Hawkins* Court stated,

[a]lthough a driver's license is a substantial private interest, erroneous deprivation is unlikely because the defendant personally appears before the judge for imposition of the suspension and there is a significant government interest in the license revocation of convicted criminals. 155 Wn.2d 107, 117 P.3d 1132 (2005), *citing* *City of Redmond v. Bagby*, 155 Wn.2d 59, 117 P.3d 1126 (2005).

Courts have consistently held that the government has a substantial interest in license revocations for individuals who commit crimes. As the Illinois Supreme Court stated in analyzing the government’s interest to suspend licenses for persons creating public dangers, “as in *Montrym [v. Mackey]*, the safety hazard is drunk drivers. It is clear that a serious threat to human life and well-being is posed by those drivers. *People v. Edgar*, 112 Ill.2d 101, 492 N.E.2d 187 (1986); *see also, State v. Wiltgen*, 737 N.W.2d 561 (Minn. Sup. Ct. 2007) [“The state has

a compelling interest in highway safety that justifies its efforts to keep impaired drivers off the road, particularly those drivers who have shown a repeated willingness to drive while impaired.”]; *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). [“There is no doubt of the substantial governmental interest in protecting public health and safety by removing drunken drivers from the highways.”]; *Kernan v. Tanaka*, 75 Haw. 1, 856 P.2d 1207 (1993) [“We conclude that the additional safeguard of presuspension judicial intervention is neither necessary as a component of due process nor required to exonerate the legitimate interests of arrestees when weighed against the strong public policy of removing drunken drivers from our highways.”].

For civil infractions, there are sometimes court hearings to decide culpability. Often, however, the stamp of a clerk adjudicates the decision. DOL admits that it does not know if a judge issued the infraction default order before the agency takes action against an individual’s license. *CP* at 113.

In *Redmond v. Moore*, the City argued that all defendants had an opportunity to be heard at court hearings on the underlying violations. *Moore* at 675, 91 P.3d at \_\_\_\_\_. As Wilson and Moore successfully argued, court proceedings do not address ministerial errors, including “misidentification, payments credited to the wrong account, [and] the failure of the court to provide updated information when fines are paid.” *Id.*

In *City of Redmond v. Bagby*, this Court referenced *Moore*, stating, “[w]e implicitly recognized that governmental interest is significantly higher in cases involving criminal offenses.” 155 Wn.2d 59, 117 P.3d 1126 (2005), citing *Moore*, 151 Wn.2d at 677. This Court continued its reasoning, quoting from *Moore*:

[t]he interest in the simple administration of justice by having people resolve minor traffic infractions ‘does not rise to the level of the State’s compelling interest in keeping unsafe drivers off the roadways’.

*Bagby* at 65, 117 P.3d at \_\_\_\_, quoting *Moore, supra*. With infractions, the government’s interest is primarily in the collection of penalties. To enforce those monetary obligations, the government proceeds against an individual by way of a civil case.

The government’s motivation to pursue license suspensions against criminal violators far surpasses the need for suspending persons who fail to pay a ticket. Yet, criminal violators receive greater due process protections through the court system than those persons who failed to pay, appear or respond to a traffic infraction under RCW 46.20.245. When a single traffic infraction finding is entered against an individual, defaulted without any court hearing, and a suspension accrues for an indefinite period of time, there is no compelling public safety interest at issue.

2. The Benefits of Providing a Pre-Deprivation Hearing Outweigh Administrative Burdens to the Department.

Part of the third prong analysis also includes consideration of costs and burdens. This Court has examined financial impacts under *Mathews* before, and in *Nguyen v. Department of Health*, analyzed the test as follows:

[a]s one can quickly discern from a simple reading of the text, this requirement relates to practical and financial burdens to be imposed upon the government were it to adopt a possible substitute procedure for the one currently employed. As the Supreme Judicial Court of Massachusetts phrased it, the last factor examines ‘the government’s interest in the efficient and economic administration of its affairs.’ This requirement does not relate to the interest which the government attempts to vindicate through the procedure itself. 144 Wn.2d 516, 29 P.3d 689 (2000), *citing Thompson v. Commonwealth*, 386 Mass. 811, 438 N.E.2d 33, 37 (1982).

Thus, under the third *Mathews* factor, this Court should also consider whether increased administrative costs far outweigh affording due process protections when an alternative procedure is employed.

The United States Supreme Court spoke to the third *Mathews* factor in *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), holding that the opportunity for a hearing is necessary to determine the possibility of an accident judgment before a license suspension can occur. The Court wrote, “[w]hile the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process.” *Bell*,

*citing Goldberg v. Kelly*, 397 U.S. 254, 261, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), *quoting Kelly v. Wyman*, 294 F. Supp. 893, 901 (SDNY 1968). The *Bell* holding is consistent with this Court's approach to differentiating between pre-deprivation hearings and other types of administrative procedures.

In cases not involving an administrative hearing, the suggested remedy has sometimes been found to be unduly burdensome on DOL. Most recently, in *State v. Nelson*, 158 Wn.2d 699, 147 P.3d 553 (2006), this Court addressed the sufficiency of a DOL revocation order sent to a person's home address while that person was in custody. This Court found that DOL "was not required to track down Nelson once he was released...." *Id.* In *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 70 P.3d 947 (2003), this Court held that DOL is allowed to update addresses based on reliable evidence. *Arroyo-Murillo* held that sending mail to a single address reduces administrative burdens, stating: "although the inconvenience of sending multiple notices to one license holder may be minimal, the cumulative effect of requiring the DOL to do so for all revocation notices would be onerous." *Id.* At 618.

Division Three, in *Weekly v. D.O.L.*, 108 Wn.App. 218, 27 P.3d 1272 (2001), ruled that due process is not violated when witnesses are merely required to appear telephonically at a hearing because confrontation rights are still assured, implying that there may be unnecessary costs for personal appearances. *See also*,

*People v. Flynn*, 328 Ill.App.3d 811, 767 N.E.2d 411 (2002) [Adopting similar reasoning to *Weekly*, the Illinois Court of Appeals wrote: “Administrative burdens and costs would be imposed by requiring live testimony....”]; *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 155 P.3d 1176 (Idaho App. 2006).

By contrast, cases involving administrative hearings where the DOL asserts financial burdens generally result in rulings against the Department. In *State v. Dolson*, 138 Wn.2d 773, 982 P.2d 100 (1999), this Court found that the DOL’s procedures, although convenient for the Department, were inadequate and not reasonably calculated to give license holders notice of a suspension. In *Svengard v. State*, 122 Wn.App. 670, 95 P.3d 364 (2004), Division One found that a license holder may have a disability discrimination claim when DOL refused to accommodate his needs for re-testing, claiming undue expense.

In *Moore, supra*, this Court addressed the third *Mathews* factor directly in relation to license suspensions that had the same underlying basis as this case (i.e. infractions), holding: “[w]e are not persuaded that the burden of providing hearings to those individuals whose licenses have been ordered suspended under RCW 46.20.289 outweighs the risk of error and the benefit of providing hearings with DOL to correct potential ministerial errors.” *Moore* at 664, 913 P.3d at \_\_\_\_\_. (Emphasis added). The same reasoning applies here.

Suspensions imposed under RCW 46.20.289, and pursuant to the requirements in RCW 46.20.245, do not currently allow for hearings that may correct ministerial errors. The benefit of providing a hearing, to one who may request it, outweighs the burden that would be placed on the Department. The Department currently provides hearings regularly in accordance with RCW 46.20.308 for alleged drunk drivers. No additional expertise or procedure is necessary to afford the same pre-deprivation due process protections to a license holder facing suspension for a defaulted traffic ticket. In sum, the third-prong balancing test also favors the Respondents in this case.

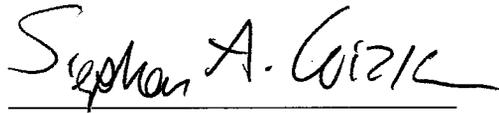
#### V. CONCLUSION

RCW 46.20.245 fails to comport with notions of procedural and substantive due process. License holders facing an indefinite suspension for a defaulted infraction are merely offered a “customer service document review” that fails to cure the potential problems contemplated by this Court in *Redmond v. Moore*. Moreover, no one is told when the review will even occur. Thus, license holders, including the Respondents here, are denied the opportunity for a “hearing,” and to be heard at a meaningful time and in a meaningful manner.

This Court, in *State v. Dolson, supra*, further added that “a driver cannot be convicted of driving while suspended or revoked if the suspension or revocation violates due process.” *Dolson* at 783, 982 P.2d. at \_\_\_ (1999).

This Court should strike down RCW 46.20.245 on its face, and find that the license suspensions in these cases were done without sufficient due process protections. Consequently, Respondent’s request that this Court affirm the lower court’s ruling finding RCW 46.20.245 unconstitutional on its face.

Respectfully submitted this 22nd day of August, 2008

A handwritten signature in black ink that reads "Stephen A. Lotzkar". The signature is written in a cursive, slightly slanted style.

Stephen A. Lotzkar, #21058

Howard S. Stein, #14114

Joshua S. Schaer, #31491

Attorney for Respondents

## **APPENDIX A**

# ATTACHMENT A



## REQUEST FOR ADMINISTRATIVE REVIEW

If you wish to challenge the pending suspension, revocation, disqualification, or denial of your driving privilege, you may request an administrative review.

Only two issues will be considered during the review. These issues are:

- whether our records correctly identify you.
- whether the information we received from the court or other agency accurately describes the action they took.

To request a review, mail or fax this completed form and any other information you want us to consider to:

Department of Licensing  
 Hearings and Interviews  
 PO Box 9031  
 Olympia, WA 98507-9031

Fax Number: (360) 664-8492

The request must be postmarked within 15 days from the date of your notice of suspension, revocation, disqualification, or denial.

Once we have completed our review, you will be notified of the outcome in writing.

If you have additional questions, you may call (360) 902-3878.

ATTORNEY'S NAME (if any) -Do not list public defender		YOUR FULL NAME GROSECLOSE, TEST RECORD	
ATTORNEY'S ADDRESS		YOUR MAILING ADDRESS PO BOX 9030	
ATTORNEY'S CITY, STATE, ZIP		YOUR CITY, STATE, ZIP OLYMPIA, WA 98507	
ATTORNEY'S TELEPHONE NUMBER (include area code)		YOUR DAYTIME PHONE NUMBER (include area code)	
ATTORNEY'S FAX NUMBER (include area code)		YOUR E-MAIL	
ATTORNEY'S E-MAIL ADDRESS		YOUR DATE OF BIRTH January 1, 1901	INCIDENT DATE OR CITATION NUMBER
		WASHINGTON PIC NUMBER GROSETR992BA	
		YOUR SIGNATURE X	



See RCW 46.20.245

The Department of Licensing has a policy of providing equal access to its services.  
 If you need special accommodation, please call (360) 902-3900 or TTY (360) 664-0116.

## **APPENDIX B**

# ATTACHMENT B

## Administrative Review Questions & Answers

### What is an Administrative Review?

Whenever the department proposes to withhold the driving privilege, the person may request in writing an administrative review before the department. The administrative review shall consist solely of an internal review of documents and records submitted or available to the department. A CSS2 from the Hearings and Interview unit will perform the review and issue a written decision to the customer before the action goes into effect.

### What happens during the review process?

The only issues to be addressed in the administrative review are:

1. Whether the records relied on by the department identify the correct person; and
2. Whether the information transmitted from the court or other reporting agency regarding the person accurately describes the action taken by the court or other reporting agency or entity.

A specialist will review all documents received by DOL on the pending action. Check Imaging documents, along with the court records, review the record for accuracy and provide a written response of the results. It is the customer responsibility to provide any other relevant information. If the results are upheld, the action will begin on the 45<sup>th</sup> day. If the results are to dismiss the action, the record will be corrected and the customer notified.

### When will the suspension/revocation begin?

The suspension/revocation will become effective 45 days from the date the notice is mailed, unless one or both issues above prevail during the review process. The customer will be notified (via mail) of the results of the review prior to their effective date.

### Can customer appeal the decision?

Yes – the customer may appeal this final order to the Superior court in the county of residence. The appeal must be filed within thirty days from the date the Administrative Review results is mailed. A \$40 fee to cover the costs of preparing the record must be submitted to the Department of Licensing, Hearings and Interviews, PO Box 9048, Olympia Washington 98507-9048, along with a copy of the filed appeal notice.

### Can customer waive his right to an Administrative review and begin action sooner?

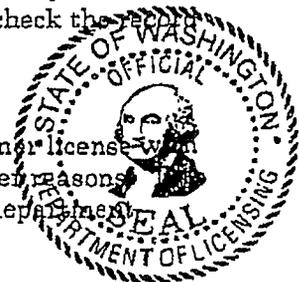
NO – the customer/DOL cannot waive the 45 days to start the suspension earlier.

### Can customer request an Administrative review on actions already on their record?

NO - the administrative review must be postmarked within 15 days from the date the original NOS/NOR was mailed. But you can ask the customer if they believe an error was made by DOL and review the documents in Imaging and check the record for accuracy. This is a basic customer service review.

### Will customer have a TL during the 45-day waiting period?

DOL will not add a TL or issue TL's. The court will mark the customer license with a Red C ( C ) if their driving record is not suspended/revoked for other reasons. The court will indicate to law enforcement that an action is pending with the department.



This will be a valid license as long as record is Clear/Reinstated and license has not expired.

Can customer have a Formal hearing or interview along with an Administrative review on the same action?

NO - An Administrative review does not apply where an opportunity for an informal settlement, driver improvement interview, or formal hearing is otherwise provided by law or rule of the department.



## APPENDIX C

STATE OF WASHINGTON  
KING COUNTY DISTRICT COURT  
EAST DIVISION - BELLEVUE

CITY OF BELLEVUE, )  
Plaintiff, )

vs. )

BRITTANIA K. ALLEN )  
TAYLOR DALE-BENSON )  
JESSIE CHI )  
ROBERT CHRIST )  
CESAR CRISOSTOMO )  
DARRELL V. HESTER )  
SHELLI L. LYTLE )  
CHELSEA P. MULLIGAN )  
RACQUEL B. RAMAC )  
ANDRE STANSBERRY )  
KARL VELEZ, )

Defendants. )

NO. BC 142470  
BC 143124  
BC 143276  
BC 142817  
BC 142412  
BC 138522  
BC 143169  
BC 143446  
BC 143801  
BC 143163  
BC 142822

FINDINGS, CONCLUSIONS  
AND ORDER ON DEFENDANTS'  
MOTION TO DISMISS FOR  
DUE PROCESS VIOLATION

I. INTRODUCTION

The defendants bring this Motion to Dismiss for Due Process Violation arising out of the suspension of their driver's licenses by the Washington Department of Licensing (DOL). The defendants argue RCW 46.20.245 does not provide for a meaningful opportunity to be heard in DOL suspension actions and consequently their procedural due process rights are violated. The defendants' motion is a facial challenge to the statute.

DWLS - DP/APP

The City argues the administrative review procedures provided in RCW 46.20.245 satisfy procedural due process requirements, and the provisions of the Administrative Procedures Act (APA) for adjudicative hearings do not apply to the license suspensions of these defendants.

The record consists of defendants' motion and memorandum, the City's response memorandum, and the defendants' reply memorandum. Additionally the parties have stipulated to the transcript of the hearing in *City of Bellevue v. Milana Attison*, BC 142932, which includes testimony of DOL witnesses and exhibits. The court also considered the oral argument of counsel for defendants, Joshua S. Schaer, and counsel for the City, Jeff Torrey.

## II. FINDINGS

Each of the defendants has been charged by the City of Bellevue with the misdemeanor offense of driving while license suspended in the third degree (DWLS 3<sup>rd</sup>). RCW 46.20.342. The suspensions arose out of the reported failure to respond to a notice of traffic infraction in some manner. In each of the cases a court had advised DOL of the ~~driving violation~~ ~~on a date~~ ~~and~~ ~~the~~ ~~driver~~ ~~was~~ ~~notified~~ ~~of~~ ~~the~~ ~~driver's~~ ~~failure~~ ~~to~~ ~~respond~~, appear, pay, or comply with the terms of a traffic citation, the number of the citation, violation date and reason for the citation.

The suspension notice letter advised the driver to contact the applicable court to find out how to take care of the citation and provide proof to DOL the driver had satisfied

the court's requirements. The driver was also advised he/she may appeal the suspension action and informed how to request an administrative review, by returning the enclosed form or submitting a written request to DOL, postmarked within 15 days from the date of the notice of suspension. Based upon the information presented to the court, it does not appear any of the defendants in these cases requested an administrative review of the suspension action.

### III. ISSUE

Do the provisions of RCW 46.20.245, allowing for administrative review of a DOL action to suspend a driver's license for failing to pay, appear or respond to a notice of traffic infraction, satisfy procedural due process requirements?

### IV. ANALYSIS

The defendants conceded in oral argument the adjudicative procedures set forth in RCW 34.05.410-598 do not apply to DOL's review of driver's license suspensions in this context. Therefore, the only issue remaining is whether the procedures for review set forth in RCW 46.20.245 satisfy procedural due process requirements. The defendants argue RCW 46.20.245 fails to provide for a meaningful opportunity to be heard in DOL revocation or suspension actions. It should be noted the proposed action by DOL in all these cases was a suspension action for failure to pay, appear, or respond to a notice of traffic infraction.

Washington's traffic laws require DOL to suspend all driving privileges of a person when it receives a notice from a court under RCW 46.63.070(6), 46.63.110(6) or

BEST AVAILABLE IMAGE POSSIBLE

46.64.025 that the person has failed to respond to a notice of traffic infraction, failed to appear at a hearing, violated a promise to appear in court, or failed to comply with the terms of a traffic citation, except parking violations. RCW 46.20.289. Effective July 1, 2005, the suspension takes effect, *pursuant to the provisions of RCW 46.20.245*, and remains in effect until DOL receives a certificate from the court showing the case has been adjudicated. A reissuance fee must also be paid before a new license is issued to the person. RCW 46.20.311. If DOL receives a certificate of adjudication from the court prior to the effective date of the suspension, the suspension does not take effect. RCW 46.20.289. If after an administrative review DOL finds in the driver's favor, the suspension would also not take effect.

Prior to July 1, 2005 Washington's traffic laws did not require DOL to provide for any type of pre-suspension review or hearing for these types of license suspensions. The Washington Supreme Court's decision in *Redmond v. Moore*, 151 Wn.2d 664, 91 P.3<sup>rd</sup> 875 (2004) changed that practice. In *Redmond v. Moore* the Supreme Court held that the mandatory suspension of driver's licenses pursuant to RCW 46.20.289, without the opportunity for an administrative hearing, violated due process. The Court found the statutes did "not provide adequate procedural safeguards to ensure against the erroneous deprivation of a driver's interest in the continued use and possession of his or her driver's license." *Id* at 677.

As a result of the Court's decision in *Redmond v. Moore*, the Legislature amended RCW 46.20.289 and adopted RCW 46.20.245 to allow for an administrative review of the DOL's action to suspend a driver's license. Under RCW 46.20.245(1), DOL must give written notice of the suspension to the person by mail or personal service. The

notice must specify the date upon which the suspension will be effective, which shall not be less than forty-five days after the original notice is given. The driver must request the review in writing and postmark the request within fifteen days of the date of the DOL's notice of suspension. If the person fails to make the request within the required time period, the person is considered to have defaulted and loses his or her right to the administrative review, unless DOL finds good cause for the request after the fifteen-day period has expired.

RCW 46.20.245(2) defines the limited nature and extent of the administrative review process and the opportunity for judicial review.

- (a) An administrative review under this subsection shall consist solely of an internal review of documents and records submitted or available to the department, unless the person requests an interview before the department, in which case all or any part of the administrative review may, at the discretion of the department, be conducted by telephone or other electronic means.
- (b) The only issues to be addressed in the administrative review are:
  - (i) Whether the records relied on by the department identify the correct person; and
  - (ii) Whether the information transmitted from the court or other reporting agency or entity regarding the person accurately describes the action taken by the court or other reporting agency or entity.
- (c) For the purposes of this section, the notice received from a court or other reporting agency or entity, regardless of form or format, is *prima facie* evidence that the information from the court or other reporting agency or entity regarding the person is accurate. A person requesting administrative review has the burden of showing by a preponderance of the evidence that the person is not subject to the withholding of the driving

privilege.

- (d) The action subject to the notification requirements of subsection (1) of this section shall be stayed during the administrative review process.
- (e) Judicial review of a department order affirming the action subject to the notification requirements of subsection (1) of this section after an administrative review shall be available in the same manner as provided in RCW 46.20.308(9).

The law is well-settled that driver's licenses may not be suspended or revoked without procedural due process required by the Fourteenth Amendment. *Redmond v. Moore* at 614; *Dixon v. Love*, U.S. 103, 112, 97 S.Ct. 1723, 32 L.Ed. 2d 172 (1977); *Musgrave v. Drug Judge*, 121 U.S. 213, 222, 80 S.Ct. 897, 47 L.Ed. 2d 118 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965), *City of Remond v. Arroyo-Murillo*, 149 Wn. 2d 607, 612, 70 P.3d 947 (2003).

In *Redmond v. Moore* the Court discussed several other states' procedures for providing review of license suspensions, but the Court did not specify the type or extent of administrative hearing drivers should receive for these types of license suspensions. The Court noted that while the procedures may vary according to the interest at stake, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id* at 670.

The Supreme Court recently provided some guidance on the type of pre-suspension review for a driver's license suspension that passes constitutional muster. In *Amurud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006), the Court upheld the provisions of RCW 74.20A.320 involving an administrative hearing of a driver's license suspension for failure to pay child support. The Court found the appellant's reliance on

*Redmond v. Moore* was misplaced because the statute being challenged did provide the person an opportunity to appeal, the opportunity for an administrative hearing to challenge the suspension, and a stay of proceeding pending the outcome of the administrative hearing and for an additional six months. Similar to RCW 46.20.245, the administrative hearing in *Amunrud* limited the scope of the issues that could be reviewed during the administrative hearing process. The Court found Mr. Amunrud was given an opportunity to be heard at a meaningful time and in a meaningful manner and, therefore, his right to procedural due process was not violated. *Id* at 218.

In the present case RCW 46.20.245 provides similar protections. There is now an opportunity to appeal the notice of suspension, the opportunity for an administrative review, the opportunity for an interview before DOL<sup>1</sup>, a stay of proceeding pending the administrative review decision, and the opportunity for judicial review. Although the scope of review is limited to the two issues set forth in the statute, that type of limitation does not violate due process. As noted in *Amunrud*, and by the dissent in *Redmond v. Moore*, drivers have other avenues to address mistakes or other issues associated with the underlying reason for the suspension of a driver's license. The DOL has no authority to change a court's decision. The driver must present those issues or mistakes to the appropriate court.

The administrative review process provided by RCW 46.20.245 certainly reduces the likelihood of an erroneous deprivation of a person's driver's license due to

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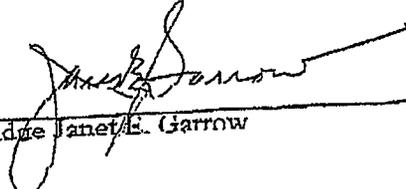
<sup>1</sup> In addition to the written request for administrative review, either by form or other writing, RCW 46.20.245 provides the opportunity for a person to request an interview before the department. Based upon the record before this Court it does not appear DOL has taken steps, either via rule-making or procedures, to advise drivers how to obtain that interview before the department. Because this is a facial challenge to the statute, this court does not have to reach the question of whether the statute as applied is unconstitutional. Furthermore, there is no evidence any of these defendants availed themselves of the administrative review process provided by the statute.

DOL error. If there was an error made by a court, the driver can seek an administrative review from DOL, advise DOL what the problem is, automatically obtain a stay of the DOL suspension action pending review, and take the necessary steps to address the issue with the appropriate court. For these reasons the court finds the statutory provisions of RCW 46.20.245 provide drivers the opportunity to be heard in a meaningful time and in a meaningful manner.

## V. CONCLUSION

The defendants challenge the constitutionality of RCW 46.20.245 and therefore bear the burden of establishing beyond a reasonable doubt the statute is unconstitutional. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003). Defendants' facial challenge of the statute must be denied if there are any circumstances where the statute can be constitutionally applied. *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282, n.14.4 P.3d 808 (2000). For the reasons set forth herein, the defendants have failed to meet their burden. Therefore, the defendants' Motion to Dismiss for Due Process Violation is DENIED.

DATED this 31<sup>st</sup> day of December, 2006.

  
\_\_\_\_\_  
Judge Janet E. Garrow

**APPENDIX D**

**FILED**  
KING COUNTY, WASHINGTON

MAR 31 2008  
SUPERIOR COURT CLERK  
BY JOSEPH MASON  
DEPUTY

COPIES MAILED TO  
PARTIES/COUNSEL ON MAR 31 2008

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF KING

SHIN H. LEE, ET. AL.,	)	
	)	NO. 07-1-03641-1SEA
Appellant,	)	
	)	ORDER ON RALJ MOTION
V.	)	<del>(PROPOSED)</del>
	)	
CITY OF BELLEVUE,	)	
Respondent.	)	[CLERK'S ACTION REQUIRED]
_____	)	

THIS MATTER having come on for oral argument on March 25, 2008 before the undersigned Judge of the above entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the court holds the following:

RCW 46.20.245 fails to comply with due process and is therefore unconstitutional. This statute fails to provide for a meaningful due process administrative review; providing only an "interview" in writing. There is no opportunity for cross examination or any other due process protections as a matter of right. The decision to conduct a hearing and what form that hearing will take rests solely with the Department of Licensing. No witnesses can be subpoenaed and no live testimony can be taken. The procedures, therefore, as set forth in RCW 46.20.245 fail to comply with both substantive and procedural

ORIGINAL

due process and fail to address the due process concerns raised in *Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004).

IT IS HEREBY ORDERED that the above cause is reversed and remanded back to the King County District Court, Bellevue Division for further proceedings in accordance with the above decision.

3/31/08  
Date

  
\_\_\_\_\_  
Judge

\_\_\_\_\_  
Attorney for Appellant WSBA # \_\_\_\_\_

\_\_\_\_\_  
Attorney for Respondent WSBA #91037

## **APPENDIX E**

FILED

08 APR 11 PM 3:05

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA. ✓

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

CITY OF BELLEVUE,

Plaintiff,

v.

SHIN H. LEE, ET. AL.

Defendants.

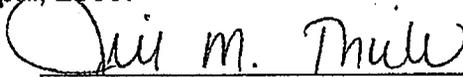
NO. 07-1-03641-1 (SEA)

NOTICE FOR DIRECT  
DISCRETIONARY REVIEW TO THE  
WASHINGTON SUPREME COURT

[CLERK'S ACTION REQUIRED]

COMES NOW the Plaintiff City of Bellevue, by and through its attorney of record, Jill M. Thiele, and seeks direct review by the Washington State Supreme Court of the Order on RALJ Appeal, Cause No. 07-1-03641-1, that was entered on March 31, 2008 by the Honorable Michael J. Fox of the King County Superior Court. A copy of the order is attached to this notice.

DATED this 9<sup>th</sup> day of April, 2008.



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David E. Means  
Fady Nasiem  
George Piekarski  
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