

[Alaska Stat. § 28.15.166](#)

Current through the 2014 Second Regular Session of the Twenty-Eighth State Legislature

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Sec. 28.15.166. Administrative review of revocation

- (a) A person who has received a notice under [AS 28.15.165\(a\)](#) may make a written request for administrative review of the department's action under [AS 28.15.165\(c\)](#) or for limited license privileges under [AS 28.15.165\(d\)](#). If the person's driver's license has not been previously surrendered to the department, it shall be surrendered to the department at the time the request for review is made.
- (b) A request for review of the department's action under [AS 28.15.165](#) shall be made within seven days after receipt of the notice under [AS 28.15.165](#) or the right to review is waived and the action of the department under [AS 28.15.165\(c\)](#) is final. If a written request for a review is made after expiration of the seven-day period, and if it is accompanied by the applicant's verified statement explaining the failure to make a timely request for a review, the department shall receive and consider the request. If the department finds that the person was unable to make a timely request because of lack of actual notice of the department's action or because of factors of physical incapacity such as hospitalization or incarceration, the department shall waive the period of limitation, reopen the matter, and grant the review request. An initial request for limited license privileges may be made at any time. Subsequent requests for limited license privileges may not be made unless the applicant demonstrates a significant change in circumstances.
- (c) Upon receipt of a request for review, if it appears that the person holds a valid driver's license and that the driver's license has been surrendered, the department shall issue a temporary driver's permit that is valid until the scheduled date for the review. A person who has requested a review under this section may request, and the department may grant for good cause, a delay in the date of the hearing. If necessary, the department may issue additional temporary permits to stay the effective date of its action under [AS 28.15.165\(c\)](#) until the final order after the review is issued.
- (d) A person who has requested a hearing under this section and who fails to attend or appear at the hearing, for reasons other than lack of actual notice of the hearing or physical incapacity such as hospitalization or incarceration, waives the right to a hearing. The determination of the department that is based upon the enforcement officer's report becomes final.
- (e) The hearing under this section must be held by telephone unless the hearing officer finds that a telephonic hearing would substantially prejudice the rights of the person involved in the hearing or that an in-person hearing is necessary to decide the issues to be presented in the hearing. An in-person hearing must be held at the office of the department nearest to the residence of the person involved in the hearing unless the department and the person agree that the hearing is to be held elsewhere.
- (f) A review under this section shall be held before a hearing officer designated by the commissioner. The hearing officer has authority to
 - (1) administer oaths and affirmations;
 - (2) examine witnesses and take testimony;
 - (3) receive relevant evidence;
 - (4) issue subpoenas, take depositions, or cause depositions or interrogatories to be taken;
 - (5) regulate the course and conduct of the hearing;
 - (6) make a final ruling on the issue.

- (g) The hearing for review of action by the department under [AS 28.15.165](#) shall be limited to the issues of whether the law enforcement officer had probable cause to believe that the person was operating a motor vehicle or commercial motor vehicle that was involved in an accident causing death or serious physical injury to another, or that the person was operating a motor vehicle, commercial motor vehicle, or aircraft while under the influence of an alcoholic beverage, inhalant, or controlled substance in violation of [AS 28.33.030](#) or [AS 28.35.030](#) and whether
- (1) the person refused to submit to a chemical test authorized under [AS 28.33.031\(a\)](#) or [AS 28.35.031\(a\)](#) or (g) after being advised that refusal would result in disqualification or the suspension, revocation, or denial of the person's license, privilege to drive, or privilege to obtain a license, and that the refusal is a misdemeanor;
 - (2) the chemical test administered under [AS 28.33.031\(a\)](#) or [AS 28.35.031\(a\)](#) or (g) produced a result described in [AS 28.35.030\(a\)\(2\)](#); or
 - (3) the chemical test administered under [AS 28.33.031\(a\)](#) produced a result described in [AS 28.33.030\(a\)\(2\)](#).
- (h) The determination of the hearing officer may be based upon the sworn report of a law enforcement officer. The law enforcement officer need not be present at the hearing unless either the person requesting the hearing or the hearing officer requests in writing before the hearing that the officer be present. If in the course of the hearing it becomes apparent that the testimony of the law enforcement officer is necessary to enable the hearing officer to resolve disputed issues of fact, the hearing may be continued to allow the attendance of the law enforcement officer.
- (i) Testimony given by the person at the hearing is not admissible against the person in a criminal trial unless the person's testimony at the trial is inconsistent with that given at the hearing.
- (j) If the issues set out in (g) of this section are determined in the affirmative by a preponderance of the evidence, the hearing officer shall sustain the action of the department. If one or more of the issues is determined in the negative, the department's action shall be rescinded.
- (k) If the action of the department in revoking a nonresident's privilege to drive a motor vehicle is not administratively contested by the nonresident driver or if the departmental action is sustained by the hearing officer, the department shall give written notice of action taken to the motor vehicle administrator of the state of the person's residence and to any state in which that person has a driver's license.
- (l) [Repealed, § 34 [ch 119 SLA 1990](#).]**
- (m) Within 30 days of the issuance of the final determination of the department, a person aggrieved by the determination may file an appeal in superior court for judicial review of the hearing officer's determination. The judicial review shall be on the record, without taking additional testimony. The court may reverse the department's determination if the court finds that the department misinterpreted the law, acted in an arbitrary and capricious manner, or made a determination unsupported by the evidence in the record.
- (n) The filing of an appeal under (m) of this section or a petition for review does not automatically stay the department's order or revocation. The court may grant a stay of the order or revocation only upon a motion and hearing, and upon a finding that there is a reasonable probability that the petitioner will prevail on the merits, that the petitioner will suffer irreparable harm if the order is not stayed, and in a case where the petitioner operates a commercial motor vehicle that the public can be adequately protected by conditions imposed by the court.

History

(§ 3 ch 77 SLA 1983; am §§ 6 -- 10, 34 [ch 119 SLA 1990](#); am § 2 [ch 158 SLA 1990](#); am §§ 3 -- 6 [ch 3 SLA 1992](#); am § 3 [ch 55 SLA 1994](#); am §§ 7 -- 9 ch 6 FSSLA 1996; am § 11 [ch 60 SLA 2002](#))

Annotations

Notes

LEGISLATIVE HISTORY REPORTS. --

For Governor's transmittal letter on HB 445 (from which [ch. 55, SLA 1994](#), which amended (g) of this section, derived), see 1994 House Journal 2262-2263.

Case Notes

NOTES TO DECISIONS

DUE PROCESS CONSIDERATIONS. --Since the same procedural safeguards apply in civil driver's license revocation proceedings for driving while intoxicated as apply in criminal prosecutions for that offense, due process requires consideration of the margin of error inherent in the breath testing procedure used. [Barcott v. State, Dep't of Pub. Safety, 741 P.2d 226 \(Alaska 1987\)](#).

Due process requires that an arrestee who fails the breath test must be afforded the opportunity at an administrative revocation hearing to present evidence that he was not driving in order to make that hearing meaningful and fundamentally fair. [Javed v. Department of Pub. Safety, 921 P.2d 620 \(Alaska 1996\)](#).

Considering the importance of the driving privilege, the greater potential for effective communication in an in-person context, the need for effective communication where the credibility of a party is at issue, and the limited nature of the prejudice that the state would suffer by providing in-person hearings in such cases, such hearings should be provided where requested by the party. [Whitesides v. Dep't of Pub. Safety, DMV, 20 P.3d 1130 \(Alaska 2001\)](#), cert. denied, [534 U.S. 888, 122 S. Ct. 200, 151 L. Ed. 2d 142 \(2001\)](#).

Application of the exclusionary rule would hamper legitimate efforts to keep drunk drivers off the roads and complicate the administration of license revocations while adding minimal deterrence to unlawful police action; in addition, consideration of evidence obtained in violation of the Fourth Amendment did not undermine the procedural fairness of revocation hearings such that the exclusionary rule was inapplicable to license revocation hearings. [Nevers v. State, 123 P.3d 958 \(Alaska 2005\)](#).

Where a driver was arrested for drunk driving, and the criminal charges were dropped because the arresting officer was deployed to Iraq and would not be available to testify at trial for more than a year, but where the administrative proceedings for the suspension/revocation of the driver's operating license were not dismissed, the driver's due process rights were not violated by the suspension of her license for almost three years after her arrest because administrative delay alone, without prejudice, did not violate due process, and any prejudice to the driver was slight because she was issued a permit that allowed her to drive throughout the delay. [Alvarez v. State, 249 P.3d 286 \(Alaska 2011\)](#).

THE STATE'S FAILURE TO PRESERVE A VIDEOTAPE OF FIELD SOBRIETY TESTS taken one hour after arrest violates the due process rights of an accused at an administrative license revocation hearing where the accused is entitled to challenge whether the arresting officer had reasonable grounds at the time of arrest to believe that the suspect was driving while intoxicated. [Thorne v. Department of Pub. Safety, 774 P.2d 1326 \(Alaska 1989\)](#).

The state's failure to preserve a videotape of field sobriety tests taken one hour after arrest did not violate defendant's right to confront and cross-examine the witnesses against him, where the officer who conducted the tests appeared at defendant's license revocation review hearing and was subjected to vigorous cross-examination by defendant's attorney. [Thorne v. Department of Pub. Safety, 774 P.2d 1326 \(Alaska 1989\)](#).

COLLATERAL ESTOPPEL EFFECT OF RULING IN CRIMINAL PROCEEDINGS. --Where defendant in criminal driving while intoxicated proceedings did not testify at a suppression hearing on the question of the legality of the stop, the suppression ruling that the officer's stop was legal should have had no collateral estoppel effect against the defendant in a civil driver's license revocation proceeding. The hearing officer was correct to examine the stop issue de novo, and the superior court incorrectly invoked collateral estoppel in refusing to review this aspect of the hearing officer's decision. [Miller v. State, Dep't of Pub. Safety, 761 P.2d 117 \(Alaska 1988\)](#).

EFFECT OF INCONSISTENT BLOOD AND BREATH TESTS. --Breath test result revealing licensee's alcohol concentration to be .089 was not rendered invalid by subsequent blood test that revealed the alcohol concentration to be .070 because the discrepancy could have resulted simply from lapse of time; breath test alone was sufficient to revoke licensee's driver license because a hearing officer could determine that licensee had been intoxicated while driving by relying upon either the breath test or blood test. [Morris v. State, 186 P.3d 575 \(Alaska 2008\)](#).

EFFECT OF ABSENCE OF WITNESS. --It is not required that a police officer be prohibited from testifying because he failed to appear telephonically at a previously scheduled hearing. The decision to hold a witness in contempt is in the hearing officer's discretion, and the driver also failed to ask that the police officer be subjected to forfeiture or damages for failing to appear. [Alvarez v. State, 249 P.3d 286 \(Alaska 2011\)](#).

STANDARD OF REVIEW OF SUPREME COURT. --The supreme court uses the same standard as set out in subsection (m) for judicial review by the superior court, since it conducts independent review. [Miller v. State, Dep't of Pub. Safety, 761 P.2d 117 \(Alaska 1988\)](#); [Saltz v. State, Dep't of Pub. Safety, 942 P.2d 1151 \(Alaska 1997\)](#).

JUDICIAL REVIEW OF DWI REVOCATIONS. --Subsection (m) governs in cases of driving while intoxicated (DWI) revocations. [Borrego v. State, Dep't of Pub. Safety, 815 P.2d 360 \(Alaska 1991\)](#).

Driver's license revocation hearing officer erred by failing to inform the driver, who was proceeding pro se, of the correct procedures for obtaining the central piece of evidence in the case, a tape recording of the stop and arrest, and therefore the driver was entitled to a new hearing. [Hartman v. State, 152 P.3d 1118 \(Alaska 2007\)](#).

[APPLIED IN Champion v. Department of Pub. Safety, 721 P.2d 131 \(Alaska 1986\)](#); [Barcott v. State, Dep't of Pub. Safety, 741 P.2d 226 \(Alaska 1987\)](#); [McGhee v. State, 951 P.2d 1215 \(Alaska 1998\)](#); [Fraiman v. Dep't of Admin., DMV, 49 P.3d 241 \(Alaska 2002\)](#).

[QUOTED IN State, Dep't of Pub. Safety v. Conley, 754 P.2d 232 \(Alaska 1988\)](#); [Richard B. v. State, 71 P.3d 811 \(Alaska 2003\)](#).

[CITED IN Tulowitzke v. State, Dep't of Pub. Safety, 743 P.2d 368 \(Alaska 1987\)](#); [Williamson v. State, Dep't of Pub. Safety, 779 P.2d 1238 \(Alaska 1989\)](#); [Pasco v. State, 45 P.3d 325 \(Alaska 2002\)](#); [Haywood v. State, 193 P.3d 1203 \(Alaska Ct. App. 2008\)](#).

Research References & Practice Aids

CROSS REFERENCES. --

For effect of the 1990 amendment of (n) of this section on Alaska Rules of Appellate Procedure 603 and 611(d), see § 35, [ch. 119, SLA 1990](#) in the Temporary and Special Acts; for the effect of the 1992 amendment of (n) of this section on Alaska Rule of Appellate Procedure 603, see § 31, [ch. 3, SLA 1992](#) in the Temporary and Special Acts.

ADMINISTRATIVE CODE. --

For hearings, see 2 AAC 93, art. 1.

For definitions, see 2 AAC 93, art. 2.

USER NOTE:

For more generally applicable notes, see notes under the first section of this article, chapter or title.

ALASKA STATUTES

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