

January 14, 2021

Testimony to the **Senate Transportation Committee**

By Jackson Lofgren on behalf of the ND Association of Criminal Defense Lawyers

Testimony In Opposition to SB 2113

Chairman Clemens and Committee Members:

My name is Jackson Lofgren and I represent the ND Association of Criminal Defense Lawyers. The NDACDL is made up of lawyers who dedicate at least a portion of their practice to criminal defense. The mission of the NDACDL is “to promote justice and due process...” and “...promote the proper and fair administration of criminal justice within the State of North Dakota. We are **opposed** to SB 2113.

During the 2017 legislative session the Department of Transportation (DOT) submitted a similar bill which also would have given the DOT unilateral authority to hold administrative hearings by telephone or other electronic means. That bill, H.B. 1129, received a Do Not Pass recommendation from this Committee and failed in the Senate with a vote of 0 yeas to 45 nays. We ask for a similar Do Not Pass recommendation on this bill.

Due Process requires when the government seeks to deprive a citizen of life, liberty, or property, the individual have an opportunity to be heard at a hearing before an impartial decisionmaker. The United States Supreme Court has stated due process requires a hearing at a meaningful time, in a meaningful manner, with the opportunity to confront adverse witness and present arguments and evidence.

North Dakota’s DOT administrative process is weighted heavily in favor of the agency. A hearing officer gathers and submits evidence on behalf of the DOT, rules on objections, and makes the decision to suspend or revoke. The DOT hearing officer acts as the prosecutor, judge, and jury and is employed by the agency seeking to take the license. By statute virtually anything that makes its way into the DOT’s file is deemed admissible even if it would normally be excluded under the rules of evidence.

This contrasts greatly with what is at stake in these hearings. The ability to drive is vital to most North Dakotans. Losing the ability to drive usually means the loss of employment, the inability to legally perform necessary farm and ranch work, difficulty transporting kids to school, and other significant hurdles. These proceedings should not be treated as a technicality or predetermined formality.

Telephonic and remote hearings lack the reliability of in person hearings. The driver and the hearing officer often cannot see the witness. There is no way to observe if the witness is testifying from memory or simply reading from a report. A witness could be answering questions while reading from a training manual. As stated by the United States Supreme Court “[t]he perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it.” Coy v. Iowa, 487 U.S. 1012, 108 S.

Ct. 2798 (1988). “A witness ‘may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.’” Id. at 1019. “It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back’ and “even if the lie is told, it will often be told less convincingly.” Id.

Technical problems are inevitable with telephonic and remote hearings. Witnesses will invariably lose telephone reception or internet access and portions of the hearing testimony will be missed. It is extremely difficult to examine exhibits and introduce evidence. North Dakota’s rules of civil procedure indicate testimony should be in person unless there is good cause or the parties agree and there are appropriate safeguards. N.D. R. Civ. P. 43. Safeguards could include having a notary present with the witness to administer the oath and verify the witness’s identity. See Lawrence v. Delkamp, 2008 ND 111, 750 N.W.2d 452. The DOT’s present practice of the hearing officer simply reading the perjury statute over the telephone and asking the witness to promise to tell the truth is not sufficient.

Finally, requiring parties to participate by telephone or other electronic means places an unreasonable obstacle on the indigent and individuals who are not proficient with technology and bars them from meaningfully participating in the hearing process.

For these reasons we urge a **DO NOT PASS** on SB 2113.

Thank You,

Jackson J. Lofgren

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