

DRIVERS LICENSE: The only appeal from the revocation of a  
DRIVERS LICENSE REVOCATION: person's drivers license pursuant to  
DRIVING WHILE INTOXICATED: Section 564.444, RSMo Cum. Supp., for  
MOTOR VEHICLES: refusing to submit to the chemical  
breath test provided therein, is as  
provided by paragraph 2 of that section.

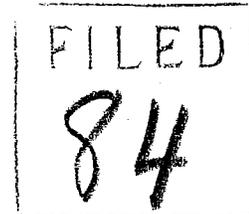
In such appeal the burden is upon the state, acting through the local prosecuting attorney, to show by a preponderance of the evidence that: (1) The person was arrested; (2) The arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated condition; and (3) The person refused to submit to the test.

If that burden of proof is sustained by the state, then the court should affirm the order of the Director of Revenue.

October 27, 1966

OPINION NO. 84 (1966)  
456 (1965)

Honorable Thomas A. David, Director  
Department of Revenue  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. David:

This is in answer to your request for an opinion of this office as to the procedure and scope of judicial review of an order of the Department of Revenue suspending or revoking a driver's license under Section 564.444, RSMo Supp. 1965, because of his refusal to submit to a chemical breath test.

The scope of judicial review of an order of revocation under this section is stated specifically in paragraph 2 thereof as follows:

"If a person's license has been revoked because of his refusal to submit to a chemical test, he may request a hearing before a court of record in the county in which he resides or in the county in which the arrest occurred. Upon his request the clerk of the court shall notify the prosecuting attorney of the county and the prosecutor shall appear at the hearing on behalf of the arresting officer. At the hearing the judge shall determine only:

- (1) Whether or not the person was arrested;
- (2) Whether or not the arresting officer had reasonable grounds to believe

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that the person was driving a motor vehicle while in an intoxicated condition; and,

(3) Whether or not the person refused to submit to the test."

In your letter you ask whether or not courts have jurisdiction other than that provided by this paragraph to accept appeals and grant relief in the case of revocations resulting from the refusal to submit to the chemical test.

The answer to this question is no. A petition for review under the provisions of Chapter 536, RSMo, the Administrative Procedure Act, would not be proper inasmuch as the decision of the Director of Revenue to revoke the license did not result from a "contested case" as that term is used therein.

You raised the question of the applicability of Section 302.309 and 564.440. Review does not lie under the provisions either of Section 302.309, RSMo Cum. Supp. or 564.440, RSMo Cum. Supp. These sections pertain only to the granting of "hardship" or "limited" driving privileges.

The only procedure for review of the revocation of a person's drivers license under Section 564.444 is by direct appeal as provided by paragraph 2 thereof.

While the scope of review is provided by Section 564.444-2, the proper pleading required to institute such review is not specifically provided.

You state that your office has received petitions for review which require the Director of Revenue to "show cause" why his order of revocation should not be rendered null and void or in the alternative, a request for the granting of limited driving privileges.

In our opinion whatever the method of pleading may be, the state has the burden to show by a preponderance of evidence that the questions to be determined must be answered in the affirmative.

This burden is placed upon the state because the revocation of a driver's license for refusal to take a chemical breath test (or for any other reason) is an affirmative action by the state which must be justified under the enabling statute. To justify a valid revocation under Section 564.444, the state must show the person was arrested, that the officer had reasonable grounds to believe the person was driving a motor vehicle while intoxicated and that the person refused to submit to the test.

In most cases when a person's drivers license has been revoked, the facts necessary to authorize the revocation have been established

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by a hearing before either a judicial or administrative body prior to the hearing on review. In such cases the court on review decides only if the evidence supports the finding of the hearing body.

But when a person's license has been revoked for failure to take a chemical breath test, the necessary facts have not been judicially passed upon. It is at the hearing on review that for the first time the facts which the state must show to justify the revocation are subject to judicial scrutiny. The burden of the state to establish these facts may be required by a request for a "show-cause" order or by any other proper pleading. If the state, acting through the proper prosecuting attorney, does not sustain this burden, the court would be correct in enjoining or otherwise preventing the Director of Revenue from enforcing his order of revocation.

The hearing on review may be initiated by a simple petition for review, a request for a "show-cause" order or by other proper pleading. However, whatever the form of pleading, the Department of Revenue should immediately contact the proper prosecuting attorney and request him to appear at the hearing and by use of the testimony of the arresting officer and such other pertinent evidence as may be available, represent the state's position. If any new or novel question is presented, the Attorney General should be notified.

#### CONCLUSION

The only appeal from the revocation of a person's drivers license pursuant to Section 564.444, RSMo Cum. Supp., for refusing to submit to the chemical breath test provided therein, is as provided by paragraph 2 of that section.

In such an appeal the burden is upon the state, acting through the local prosecuting attorney, to show by a preponderance of the evidence that:

- (1) The person was arrested;
- (2) The arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated condition; and

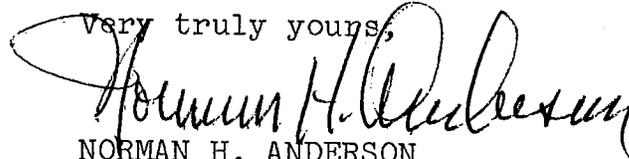
Honorable Thomas A. David, Director

(3) The person refused to submit to the test.

If that burden of proof is sustained by the state, then the court should affirm the order of the Director of Revenue.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman

Very truly yours,

A handwritten signature in cursive script, appearing to read "Norman H. Anderson". The signature is written in dark ink and is positioned above the typed name.

NORMAN H. ANDERSON  
Attorney General