

Can You Fire an Employee Whose Off-duty DWI Charge Results in a Temporary Suspension of Driving Privileges?

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Thomas tried being a corporate attorney before turning to public service. He really did. Maybe it was his inherent incompatibility with large numbers that caused him to turn his back on transactional practice, and maybe it was his nonconfrontational manner that made him so uncomfortable in litigation. More likely, Thomas felt he could do more good, help more people, by representing clients who had dedicated their lives to serving others.

Thomas has represented the City in numerous real estate transactions (including the purchase of property for a proposed wastewater treatment plant), a few successful economic development projects (including the final assembly plant for large yellow-and-black hydraulic excavators), and exactly zero criminal indictments (zero and counting).

Thomas was previously staff attorney at the Texas Association of School Boards, where he enjoyed both travelling the state teaching school board members why they couldn't fire the football coach, and coming home to a small house in the Texas hill country filled to the brim with five wonderful children and a strong Texas woman.

Thomas has also represented large corporate clients in transactions involving too many zeroes between the dollar-sign and the decimal.

Due to the eight years he spent teaching high school English to reluctant teenagers, Thomas eschews obfuscation whenever possible, and delights in reducing complex, convoluted Texas law to practical paradigms.

Outside of the office, Thomas maintains his sanity by riding a bicycle as fast as possible. Thomas has been signing his email messages with his initials since before Al Gore invented the internet, and he contains his mild exasperation that no one has yet started calling him Tag.

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John Jones should have been in Davey's locker.

It was clear to him that he was lucky to survive when his car slid off the road and slammed into the pines. It was clear to the deputy who pulled him from the car and sent him to the County to dry out. And it was clear to the court-appointed attorney who was defending him against criminal charges for drunk driving.

But it wasn't clear – to his boss, at least – whether John should be allowed to return to work. Each weekday morning, John continued to report to work, sat down behind a rickety desk, and began entering time-card information into an outdated, rarely used computer. His boss hated John's work. John hated his work, and quite frankly, John wasn't very good at it.

He was much better at driving a backhoe. For the last seven years, John had driven a backhoe every day. He repaired water lines, he dug ditches; he fixed potholes. Whatever needed doing – and could be done with a Cat 420 – he enjoyed doing, and did well. He'd show up at the shed each morning before dawn, check his work orders, hitch up the trailer to the dump truck he used to haul his backhoe around town, and get to work.

But with his license suspended, John couldn't drive the dump truck, so he couldn't take his backhoe out in the field. Bob Smith was driving it today, probably making a mess of some old woman's geraniums.

The car crash was bad news, sure. But he hadn't been drinking. At least not enough to be "driving under the influence," or whatever they were calling it. One beer. One lousy, flat, warm beer. The worst beer of his life, it was turning out to be. He didn't even get to finish it before his girlfriend called, sending him rushing out the door and down the road in a fit of anger. The only good news was that his lawyer thought he could get off.

1. Administrative Suspension of Driver's License for Failure to Pass Test for Intoxication.
 - a. A Peace Officer shall serve notice of driver's license suspension by delivering the notice to the arrested person, take possession of any driver's license issued by this state and held by the person arrested, and issue a temporary driving permit to the person if¹
 - i. the person is arrested for Driving While Intoxicated, DWI with a Child Passenger, or Boating While Intoxicated, or Intoxication Assault or Manslaughter, and the person submits to the taking of a specimen of breath or blood and an analysis of the specimen shows the person had an alcohol concentration of 0.08 or more²; or
 - ii. the person is a minor arrested for any of the same offenses or Driving or Operating a Watercraft Under the Influence of Alcohol by a Minor³ and:
 1. the minor is not requested to submit to the taking of a specimen; or
 2. the minor submits to the taking of a specimen and an analysis of the specimen shows that the minor had an alcohol concentration of greater than .00 but less than the level specified by Section 49.01(2)(B), Penal Code.
 - b. If a person refuses to submit to the taking of a specimen, whether expressly or because of an intentional failure of the person to give the specimen, the peace officer shall: serve notice of license suspension or denial on the person; take possession of any license issued by this state and held by the person arrested; issue a temporary driving permit to the person unless department records show or the officer otherwise determines that the person does not hold a license to operate a motor vehicle in this state; and make a written report of the refusal to the director of the department.⁴
 - c. A temporary driving permit expires on the 41st day after the date of issuance. If the person was driving a commercial motor vehicle, a temporary driving permit that authorizes the person to drive a commercial motor vehicle is not effective until 24 hours after the time of arrest.
 - d. The Department shall determine from the information submitted by the arresting officer whether to suspend the person's driver's license. The department shall suspend the license if the adult driver had an alcohol concentration level greater than 0.08, or if the minor driver had any detectable amount of alcohol in the minor's system. These determinations are final unless a hearing is requested.

¹ Tex. Transp. Code Ann. § 524.011(b)

² Tex. Transp. Code Ann. § 524.011(a)(1)

³ Tex. Transp. Code Ann. § 524.011(a)(2)

⁴ Tex. Transp. Code Ann. § 724.032 (a)

- i. The license-suspension statute serves the remedial purpose of protecting public safety by quickly removing drunk drivers from the road.⁵
 - ii. The suspension of a driver's license is a remedial civil sanction and does not constitute “punishment.” The Double Jeopardy Clause of the Texas and United States Constitutions are not implicated unless a driver's license suspension constitutes punishment. Therefore, the doctrine of collateral estoppel emanating from state and federal constitutional double jeopardy protections does not apply to bar the relitigation of findings made at an administrative license revocation hearing.⁶
- e. If the department suspends a person's driver's license, the department shall send a notice of suspension by first class mail to the person's address: in the records of the department; or in the peace officer's report if it is different from the address in the department's records. Notice is considered received on the fifth day after the date the notice is mailed.⁷
- i. A notice of suspension under Section 524.013 must state:(1) the reason and statutory grounds for the suspension;(2) the effective date of the suspension;(3) the right of the person to a hearing;(4) how to request a hearing; and(5) the period in which the person must request a hearing.⁸
- f. A suspension may not be imposed on a person who is acquitted of a criminal charge arising from the occurrence that was the basis for the suspension. If a suspension was imposed before the acquittal, the department shall rescind the suspension and shall remove any reference to the suspension from the person's computerized driving record.⁹
- i. The disposition of a criminal charge does not affect an administrative driver's license suspension unless the person is acquitted of the charge. If the criminal charge results in an acquittal, the Department is required to rescind the suspension and remove all references to the suspension from the individual's driving record.¹⁰
 - ii. The dismissal or abandonment of a criminal accusation is tantamount to an acquittal only after jeopardy attaches. *Lewis v. State*, 889 S.W.2d 403, 406 (Tex.App.—Austin 1994, pet. ref'd).

⁵ *Mireles v. Texas Dep't of Pub. Safety*, 9 S.W.3d 128, 130 (Tex. 1999)

⁶ *Ex parte Gregerman*, 974 S.W.2d 800, 803 (Tex. App. 1998)

⁷ Tex. Transp. Code Ann. § 524.013

⁸ Tex. Transp. Code Ann. § 524.014

⁹ Tex. Transp. Code Ann. § 524.015

¹⁰ *Texas Dep't of Pub. Safety v. Scott*, No. 11-02-00367-CV, 2003 WL 22103208, at *1 (Tex. App. Sept. 11, 2003)

Jeopardy attaches when both sides have announced ready and the defendant has pled to the charging instrument.¹¹

iii. Since jeopardy did not attach to the criminal proceedings, the dismissal of the criminal charge did not constitute an acquittal under the Transportation Code.¹²

g. A driver's license suspension under this chapter takes effect on the 40th day after the date the person receives a notice of suspension.¹³

h. A period of suspension under this chapter for an adult is 90 days if the person's driving record shows no alcohol-related or drug-related enforcement contact during the 10 years preceding the date of the person's arrest; or one year if the person's driving record shows one or more alcohol-related or drug-related enforcement contacts during the 10 years preceding the date of the person's arrest.¹⁴

2. Hearings on the Suspension:

a. If, not later than the 15th day after the date on which the person receives notice of suspension under Section 524.011 or is presumed to have received notice under Section 524.013, the department receives at its headquarters in Austin, in writing, including a facsimile transmission, or by another manner prescribed by the department, a request that a hearing be held, a hearing shall be held as provided by this subchapter.¹⁵

i. A hearing requested under this subchapter shall be held not earlier than the 11th day after the date on which the person requesting the hearing is notified of the hearing unless the parties agree to waive this requirement. The hearing shall be held before the effective date of the suspension.¹⁶

ii. Requirement that hearing for suspension of drivers' license for failure to pass test for intoxication be held within 40 days of suspension notice was directory, not mandatory; other provisions of Transportation Code suggested hearings could be held outside 40 days, Department of Public Safety's scheduling of hearings was subject to State Office of Administrative Hearings' (SOAH) timetable, Code contained no consequences for hearings held outside 40 days, and Code contained safeguards for drivers when hearing was held outside 40 days.¹⁷

¹¹ *Texas Dep't of Pub. Safety v. Stacy*, 954 S.W.2d 80, 81-82 (Tex. App. 1997)

¹² *Texas Dep't of Pub. Safety v. Scott*, No. 11-02-00367-CV, 2003 WL 22103208, at *4 (Tex. App. Sept. 11, 2003)

¹³ Tex. Transp. Code Ann. § 524.021

¹⁴ Tex. Transp. Code Ann. § 524.022

¹⁵ Tex. Transp. Code Ann. § 524.031

¹⁶ Tex. Transp. Code Ann. § 524.032

¹⁷ *Texas Dept. of Public Safety v. Guerra* (App. 3 Dist. 1998) 970 S.W.2d 645

- iii. Department of Public Safety must show good cause for holding hearing for suspension of drivers' license for failure to pass test for intoxication more than 40 days after notice of suspension.
 - 1. Mistake in driver's hearing request was good cause for holding hearing for suspension of drivers' license for failure to pass test for intoxication more than 40 days after date of notice of suspension, and therefore, Department of Public Safety was not precluded from suspending license.
 - 2. Closing of courthouse for holidays on two previous designated dates prior to driver's suspension hearing provided good cause for delay in hearing beyond required forty-day period following notice of suspension, and thus, the delay did not invalidate the suspension.¹⁸
- b. A hearing shall be rescheduled if, before the fifth day before the date scheduled for the hearing, a request for a continuance from the person who requested the hearing is received in accordance with the memorandum of understanding adopted under Section 524.033(c). Unless both parties agree otherwise, the hearing shall be rescheduled for a date not earlier than the fifth day after the date the request for continuance is received. A person who requests a hearing may obtain only one continuance under this section unless the person shows that a medical condition prevents the person from attending the rescheduled hearing, in which event one additional continuance may be granted for a period not to exceed 10 days.¹⁹
 - i. A continuance stays the suspension of a driver's license until the date of the final decision of the administrative law judge.²⁰
 - ii. If the person's driver's license was taken by a peace officer under Section 524.011(b), the department shall notify the person of the effect of the continuance on the suspension of the person's license before the expiration of any temporary driving permit issued to the person, if the person is otherwise eligible, in a manner that will permit the person to establish to a peace officer that the person's driver's license is not suspended.²¹
- c. A hearing under this subchapter shall be heard by an administrative law judge employed by the State Office of Administrative Hearings.²²
 - i. A hearing under this subchapter shall be held at a location designated by the State Office of Administrative Hearings: (A) in the county of arrest if the arrest occurred in a county with a

¹⁸ *Texas Dept. of Public Safety v. Whitefield* (App. 10 Dist. 2001) 59 S.W.3d 294

¹⁹ Tex. Transp. Code Ann. § 524.032

²⁰ Tex. Transp. Code Ann. § 524.037

²¹ *Id.*

²² Tex. Transp. Code Ann. § 524.033

population of 300,000 or more; or (B) in the county in which the person is alleged to have committed the offense for which the person was arrested or not more than 75 miles from the county seat of the county in which the person was arrested; or with the consent of the person and the department, by telephone conference call.²³

- ii. At the hearing, administrative law judge will sustain the suspension if it is proved by a preponderance of the evidence that²⁴
 1. the person had an alcohol concentration of 0.08 while operating a motor vehicle in a public place or while operating a watercraft; or
 - a. Determination that licensee had requisite alcohol concentration while driving to warrant suspension of driver's license was supported by evidence that breath tests administered about one and one-half hours after licensee's arrest indicated she had alcohol concentration of almost twice legal limit and by officer's testimony that he saw licensee driving recklessly, that licensee smelled of alcohol and that licensee failed several field sobriety tests.²⁵
 2. the person was a minor on the date that the breath or blood specimen was obtained and had any detectable amount of alcohol in the minor's system while operating a motor vehicle in a public place or while operating a watercraft; and
 3. whether reasonable suspicion to stop or probable cause to arrest the person existed.
 - a. The Department of Public Safety (DPS) was not required to prove that motorist had been arrested in order to suspend his driver's license for being a minor driving under the influence of alcohol; DPS only had to prove that motorist had a detectable amount of alcohol in his system while operating a motor vehicle in a public place, that he was a minor, and that officer had a reasonable suspicion to stop or probable cause to arrest him.²⁶
 - b. Administrative law judge's decision, including additional findings of fact, contained concise and explicit statement of underlying facts sufficient to support finding that driver's alcohol concentration

²³ Tex. Transp. Code Ann. § 524.034

²⁴ Tex. Transp. Code Ann. § 524.035

²⁵ *Martin v. Department of Public Safety* (App. 3 Dist. 1998) 964 S.W.2d 772.

²⁶ *Texas Dept. of Public Safety v. Harris* (App. 2 Dist. 2000) 33 S.W.3d 406.

exceeded statutory maximum, warranting license suspension; decision included findings that when stopped by police officers for erratic driving, defendant had red, watery eyes, odor of alcohol on her breath, swayed while standing unsupported, admitted to having had “several” drinks, and failed horizontal gaze nystagmus test, and defendant submitted to preliminary breath test indicating .179 alcohol concentration.²⁷

3. Appeals from Administrative Hearings:
 - a. A person whose driver's license suspension is sustained may appeal the decision by filing a petition in a county court at law in the county in which the person was arrested not later than the 30th day after the date the administrative law judge's decision is final. The administrative law judge's final decision is immediately appealable without the requirement of a motion for rehearing.²⁸
 - i. The department's right to appeal is limited to issues of law.²⁹
 - ii. Despite several opinions to the contrary, drivers may appeal from the county courts to the appellate courts. “Fees of \$24 for issuing or renewing a driver's license and of \$100 for reinstating a license established an amount in controversy in excess of \$100, and, thus, the Court of Appeals had jurisdiction over appeal from county court at law in license suspension case arising from a driver's refusal to submit to a blood alcohol concentration test; the fees represented a minimum value that the driver would pay for the privilege of driving.”³⁰
 - b. A suspension of a driver's license under this chapter is stayed on the filing of an appeal petition if:
 - i. the person's driver's license has not been suspended as a result of an alcohol-related or drug-related enforcement contact during the five years preceding the date of the person's arrest; and
 - ii. the person has not been convicted during the 10 years preceding the date of the person's arrest of an offense under: (A) Article 67011-1, Revised Statutes, as that law existed before September 1, 1994; (B) Section 19.05(a)(2), Penal Code, as that law existed before September 1, 1994; (C) Section 49.04, 49.045, or 49.06, Penal Code; (D) Section 49.07 or 49.08, Penal Code, if the offense involved the operation of a motor vehicle or a watercraft; or (E) Section 106.041, Alcoholic Beverage Code.³¹

²⁷ *Texas Dept. of Public Safety v. Nunez* (App. 2 Dist. 1997) 956 S.W.2d 603, rehearing overruled, review denied.

²⁸ Tex. Transp. Code Ann. § 524.041

²⁹ Tex. Transp. Code Ann. § 524.041

³⁰ *Texas Dep't of Pub. Safety v. Barlow*, 48 S.W.3d 174 (Tex. 2001); *Texas Dep't of Pub. Safety v. Callender*, 51 S.W.3d 296 (Tex. 2001)

³¹ Tex. Transp. Code Ann. § 524.042

- c. A stay under this section is effective for not more than 90 days after the date the appeal petition is filed. On the expiration of the stay, the department shall impose the suspension. The department or court may not grant an extension of the stay or an additional stay.³²
- 4. Reinstatement of suspended license:
 - a. A driver's license suspended under this chapter may not be reinstated or another driver's license issued to the person until the person pays the department a fee of \$125 in addition to any other fee required by law.³³

³² Tex. Transp. Code Ann. § 524.042

³³ Tex. Transp. Code Ann. § 524.051