

FORMAL OPINION

August 15, 1977

JOHN A. WADDINGTON, *Director*  
*Division of Motor Vehicles*  
25 South Montgomery Street  
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 19.

Dear Director Waddington:

You have inquired as to whether a motorist who has refused to undergo a breath chemical test prior to the effective date of recent amendments to the Motor Vehicle Act is to be penalized pursuant to the law applicable at the time the refusal occurred or pursuant to the law as amended. This question refers to breath refusal matters pending or initiated before the Division of Motor Vehicles on or after the effective date of the amendatory legislation on May 25, 1977. It does not apply where a final Order of Suspension was issued or became effective prior to that time.

The pertinent amendments to the Motor Vehicle Act provide that in circumstances where a motorist refuses a breath chemical test following an arrest for a violation of the substantive offense of driving while intoxicated, the Director shall revoke such motorist's driving privileges. Laws of 1977, c. 29.\* A revocation:

“shall be for 90 days unless the refusal was in connection with a subsequent offense of this section, in which case the revocation period shall be for one year . . .”\*\*

In addition, a motorist whose license has been revoked under this section must satisfy the requirements of an alcohol education or rehabilitation program. Prior to its amendment, the statute provided for a license suspension of six months. Laws of 1966, c. 142.

The statute, however, does not speak in direct terms to the applicable period of revocation where a breath refusal occurs prior to the effective date of the Act and a period of revocation has not been ordered by the Director prior to that time. Moreover, there is no controlling principle of law whether a civil penalty of this nature should generally be applied in a prospective or retroactive manner. It is therefore necessary to resort to companion provisions of the Act, the legislative purpose underlying these amendments and to general principles of statutory construction.

Although the Act is silent on this issue, it does provide some guidance in a related area dealing with the substantive offense of driving while under the influence. Section 7 of the Act provides:

“In any case pending on or initiated after the effective date of this act involving an offense committed prior to such date, the court, with the consent of the defendant, shall impose sentence under the provisions of this act. If the defendant does not consent to the imposition of sentence under the provisions of the act, the court shall impose sentence under the law which was in effect at the time of the commission of the offense.”

Thus, under the terms of this section the applicable period of revocation for an of-

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fense which occurs prior to the effective date of the Act is in effect entirely at the discretion and with the consent of the defendant.

This statutory section was interpreted by the Appellate Division in *State v. Fahrendorf*, Docket No. A-4673-75 (App. Div. June 6, 1977). The defendant had been convicted of driving while under the influence of narcotic drugs under the statute prior to its amendment. Her driver's license was revoked until her 21st birthday and she was ordered to pay a fine of \$200. The court held that under the provisions of section 7 and the particular circumstances of that case, the matter be remanded to the county court for resentencing under the statute as amended. The amended statute provided for sentencing solely at the discretion of the court.

It is fair to infer that the Legislature intended an administrative proceeding pending before the Director of Motor Vehicles for a breath refusal to be governed by the same general principle. This assumption is buttressed by the general policy underlying the 1977 amendments to the motor vehicle laws to provide for lesser punishment and greater reeducation and rehabilitation of drivers for alcohol related offenses. In the interpretation of a statute to discern legislative intent, primary regard should be given to the overall legislative purpose. *New Jersey Builders, Owners and Managers Association v. Blair*, 60 N.J. 330, 338-339 (1972). As stated by the Appellate Division in *Fahrendorf*:

“ . . . sentencing defendant under the new Act would be more in keeping with the public policy declared by the legislature *in favor of lesser punishment* and greater reeducation and rehabilitation of drivers who operate while under the influence. This legislative policy is evidenced not only by the terms of the new Act but also by the report which led to its passage. Report of the New Jersey Motor Vehicle Study Commission, pp. 133-168 (September 1975).” (Emphasis supplied.)

Accordingly, consistent with this legislative policy and the comparable legislative treatment of the offense of driving while under the influence in Section 7, it is our judgment that the statute should be construed to allow a motorist whose breath refusal matter is administratively pending or initiated before the Division on or after May 25, 1977 for a breath refusal which occurred prior to that date to have the benefit of the lesser period of revocation provided in either the repealed or amended statute.

For these reasons, you are advised that with respect to those unresolved breath refusal matters pending or initiated before the Division on or after May 25, 1977 for breath refusals which have occurred prior to that date, the Director with the consent of the motorist should impose the period of revocation prescribed under the provisions of Laws of 1977, c. 29. If the motorist does not consent to the imposition of a period of revocation provided under the provisions of Laws of 1977, c. 29, the Director should impose the period of revocation under the law (Laws of 1966, c. 142) which was in effect at the time of the commission of the offense. This would not apply in a situation where a final Order of Suspension was issued or became effective prior to May 25, 1977, the effective date of the amendatory act.

Very truly yours,  
WILLIAM F. HYLAND  
*Attorney General*

By: THEODORE I. WINARD  
*Assistant Attorney General*

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\* "If an operator of a motor vehicle, after being arrested for a violation of R.S. 39:4-50, shall refuse to submit to the chemical test provided for in section 2 of this act when requested to do so, the arresting officer shall cause to be delivered to the Director of Motor Vehicles his sworn report of such refusal in which report he shall specify the circumstances surrounding the arrest and the grounds upon which his belief was based that the person was driving or operating a motor vehicle in violation of the provisions of R.S. 39:4-50. Upon receipt of such a report, if the director shall find that the arresting officer acted in accordance with the provisions of this act, he shall, upon written notice, suspend the person's license or permit to drive or operate a motor vehicle, . . . unless such person, within 10 days of the date of such notice, shall have requested, in writing, a hearing before the director. Upon such request, the director shall hold a hearing on the issues of whether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle on the public highways or quasi-public areas of this State while under the influence of intoxicating liquor, whether the person was placed under arrest, and whether he refused to submit to the test upon request of the officer. If no such hearing is requested within the time allowed or if after a hearing the director shall find against the person on such issues, he shall revoke such person's license or permit to drive or operate a motor vehicle, . . . Such revocation shall be independent of any revocation imposed by virtue of a conviction under the provisions of R.S. 39:4-50."

\*\*"[I]n connection with a subsequent offense of this section" requires revocation for one year in connection with a subsequent offense of driving while intoxicated with or without regard to a prior breath refusal. *Attorney General's Formal Opinion No. 13—1977.*

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September 20, 1977

TO THE MEMBERS OF ALL PROFESSIONAL BOARDS

FORMAL OPINION 1977—No. 20.

As you are probably aware, the Supreme Court of the United States has recently decided several cases which have a significant impact upon the authority of the states to regulate advertising by professionals. These decisions represent definitive interpretations of the requirements of the United States Constitution and are binding upon the State of New Jersey. We therefore have concluded that it would be appropriate to set forth our interpretation of these decisions for the benefit of the professional boards.

In *Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council, Inc., et al.*, 425 U.S. 748 (1976) the Court invalidated a Virginia statute which had declared it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs. The Virginia statute which prohibited the dissemination of information concerning the cost and availability of prescription drugs was found to be inconsistent with the First Amendment to the United States Constitution. The Court noted:

“. . . Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large