CHAPTER 6

ADMINISTRATIVE PER SE

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CHAPTER 6

ADMINISTRATIVE PER SE

1. PURPOSE. The purpose of this chapter is to establish guidelines and procedures for enforcing the provisions of the Administrative Per Se (APS) laws.

2. BACKGROUND.

a. Administrative Per Se is the prompt administrative suspension or revocation of a person's driving privilege for any one of the following reasons:

(1) The person was driving a motor vehicle and had a blood alcohol concentration (BAC) of 0.08 percent or greater.

(2) The person was driving a vehicle that requires a commercial driver's license when the person had a BAC of 0.04 percent or greater.

(3) The person was arrested for Section 23140, 23152, or 23153 of the California Vehicle Code (CVC) and refused to submit to a chemical test upon the request of a peace officer pursuant to Sections 13353 and 23612 CVC, Implied Consent law (drivers under the age of 21 will be handled according to the procedures set forth in Chapter 4, Driving Under the Influence Policy and Procedures, of this manual.

(4) The person was under age 21 and had a BAC of 0.05 percent or greater while driving a motor vehicle.

(5) The person was under age 21 and had a BAC of 0.01 percent or greater, as measured by a preliminary alcohol screening (PAS) device, or other chemical test, while driving a motor vehicle.

(6) The person was under age 21 and was suspected of violating Section 23136 CVC and refused to submit to a PAS test or other chemical test.

(7) The person was on probation for Driving Under the Influence (DUI) and had a BAC of 0.01 percent or greater as measured by a PAS device, or other chemical test, while driving a motor vehicle.

b. Administrative Per Se applies to any person who drives a motor vehicle, whether or not the driver is a California resident. However, a peace officer shall only seize California driver licenses and, in all instances, immediately complete the California Department of Motor Vehicles (DMV) form DS 367, Age 21 and Older

Officer's Statement; or DS 367M, Under Age 21 Officer's Statement; and issue both pages of the pink copy (driver's copy of the Administrative Per Se Suspension/Revocation Order and Temporary Driver License) of the DS 367 or DS 367M to the driver.

c. Consequences. If the driver takes a chemical test and the results are a BAC of 0.08 percent or more, the driver license suspension will be for a period of four months or one year for one or more prior DUI convictions within ten years. For drivers under 21 years of age, or on probation for DUI, refer to Chapter 4 of this manual. If the driver refuses to take a chemical test, the driver license suspension will be for one year (or two years for two or more DUI convictions, or three years for three or more DUI convictions within ten years).

d. The driver may request a DMV hearing within 30 days of the issuance of the driver license Suspension/Revocation Order to show that the suspension or revocation is not justified.

(1) Stay of Suspension. A request for a hearing will not stay the suspension of a driver's privilege to operate a motor vehicle unless the driver requests a hearing within ten days from the issue date of the order and DMV cannot provide a hearing before the effective date of the suspension or revocation.

(2) Petition for Review. If DMV upholds the driver license Suspension/Revocation Order, the driver has 30 days to file a petition for judicial review of the order in Superior Court. A reissue fee of $125 and proof of insurance are required before DMV will reinstate the driver's driving privilege.

3. PROCEDURES. The following procedures shall be adhered to when applying the provisions of APS. (Refer to Chapter 4 of this manual for procedures on completing APS documentation for drivers under 21 years of age or on probation for DUI):

a. Drivers arrested for DUI pursuant to Section 23152 or 23153 CVC are subject to APS regulations when one of the following circumstances occurs:

(1) The subject refuses to submit to or fails to complete the chemical test pursuant to Section 23612 CVC (officers shall also follow the procedures regarding refusals as outlined in Chapter 5, Chemical Tests – Implied Consent Law, of this manual).

(2) The subject submits to a breath test which shows a BAC of 0.08 percent or greater, for both breath samples.

(3) The subject submits to a breath test which shows a BAC of 0.04 percent or greater, for both breath samples, and the subject was driving a vehicle requiring a commercial driver's license, or while driving a vehicle for hire.

(4) The subject submits to a blood or (if the offense is drug-related and/or the breath and blood tests are unavailable) urine test and the officer believes the BAC is 0.08 percent or greater. If the test results later show a BAC of less than 0.08 percent, the suspension action will be set aside.

(a) If the subject is arrested for DUI of a combination of alcohol and drugs, the arresting officer must believe the BAC is 0.08 percent or greater. The APS provisions only apply to BAC levels or refusals; they do not apply to DUI of drugs. Therefore, if the subject is arrested solely for DUI of drugs, then APS proceedings cannot be instituted, unless:

1 The subject refuses to submit to a chemical test to determine their blood alcohol content; or

2 Upon consenting to a breath test, the subject refuses a blood test or urine test as required by the drug admonition contained on the DS 367 or DS 367M.

(b) Drug and/or Alcohol DUI Arrests Below a Specific BAC. Regardless of an arrestee's BAC, Section 13380 CVC requires an officer to submit a sworn report to DMV for every DUI arrest. Thus, the DS 367 or DS 367M shall be completed for all DUI arrests. This includes instances where a person age 21 or older is arrested for DUI and their BAC is below 0.08 percent; when any person is arrested for DUI of drugs only; and when a person age 21 or older is arrested for DUI of a combination of drugs and alcohol and their BAC is below 0.08 percent. Since an APS action may not be applicable, only the Officer's Statement (first page of the DS 367 or DS 367M and the second page, the Probable Cause Narrative) should be forwarded (with relevant reports) to DMV. The subject's license shall not be confiscated, nor shall the pink copies of the DS 367 or DS 367M (i.e., the driver's copy of the Administrative Per Se Suspension/Revocation Order) be served. Department of Motor Vehicles regulations permit reexamination of drivers believed to have a drug problem. The Officer's Statement provides a basis for this re-examination.

b. The arresting officer shall complete a DS 367 or DS 367M (for persons under the age of 21) as described in Chapter 4 of this manual.

c. The arresting officer shall issue both pink copies of the DS 367 or DS 367M in all cases involving APS regardless of the violator's driving privilege status and whether or not the driver has a California driver license. The Temporary Driver

License serves as the 30-day temporary driver license endorsement which clearly specifies the terms and conditions under which the license is valid.

d. The arresting officer shall confiscate the violator's California driver license and attach it to DMV's copy of the Officer's Statement.

e. Area offices shall photocopy the first page of the DS 367 or DS 367M Officer's Statement page, retain the law enforcement (yellow) copy (Administrative Per Se Suspension/Revocation Order and Temporary Driver License), and maintain these documents in the Area files.

f. The Area commander shall ensure the original DS 367 or DS 367M Officer's Statement page, DMV's copy (white) of the DS 367 or DS 367M Administrative Per Se Suspension/Revocation and Temporary Driver License, the violator's California driver license (if available), and a copy of the breath test results are forwarded to DMV within five business days. If the violator submitted to a blood or urine test, the chemical test results shall be forwarded to DMV using the DS 367A, Supplement to Officer's Statement Blood/Urine Test Results, or the Department of Justice or County Forensics Chemical Test Results Certification within 15 calendar days.

g. **Regardless of the blood/urine chemical test results, all test results shall be forwarded to DMV.**

4. RESPONSIBILITIES.

a. Areas shall ensure that all documents are carefully reviewed for completeness before mailing to DMV.

b. Areas shall establish a standard operating procedure (SOP) for implementing APS regulations. The SOP is intended to ensure the proper documents are completed and forwarded to DMV within the specified time frames, and that a procedure is in place to provide DMV with arrest and/or accident reports needed for APS hearings (paragraph 6 of this chapter).

c. Areas shall ensure that blood and urine samples are delivered to the forensic laboratories in a timely manner in order to provide sufficient time for laboratory analysis. The Area commander shall coordinate with the local prosecutors and forensic laboratories to ensure the chemical test results are obtained in a timely manner and that the chemical test results are forwarded to DMV within 15 calendar days.

d. In the event documents are returned to the Area by DMV for corrections/omissions, the corrected documents must be returned to DMV immediately.

e. The Area commander shall assign either a uniformed member (preferably the court liaison officer) or the custodian of records, to complete the DS 367A and forward it to DMV within the required time frame.

5. ADMINISTRATIVE PER SE ADVISEMENT.

a. There is no statutory requirement that the arresting officer verbally admonish the violator regarding APS procedures. Rather, notice of an order of suspension must be served through the issuance of a DS 367 or DS 367M. Generally (unless the suspension is set aside pursuant to an administrative review), DMV does not provide a subsequent notice to the offender. Accordingly, the offender's license will, in most cases, be suspended without further notice of the suspension. Therefore, the following shall apply:

(1) The arresting officer shall advise the violator their California driver license will be confiscated, and they will be issued a temporary driver license endorsement.

(2) The violator should be told to call the telephone number listed on the second pink copy of the DS 367 or DS 367M if they have any questions regarding the APS action.

b. The arresting officer is still required to provide the implied consent chemical test admonishment for individuals who refuse to submit to or fail to complete a chemical test to determine their BAC, as described in Chapter 5 of this manual.

6. ADMINISTRATIVE PER SE HEARINGS.

a. General. The DMV will automatically conduct an administrative review of all APS Suspension/Revocation Orders to determine, by a preponderance of evidence submitted to DMV by the arresting officer's agency, whether to update the Order of Suspension/Revocation or set it aside and return or reissue the person's driver license.

b. If the suspension order is upheld, no further notice is provided to the offender. Thus, the only notice provided to the offender are the pink copies of the DS 367 or DS 367M.

c. Request for a Hearing. The violator may request a hearing within 30 days of receipt of the APS Suspension/Revocation Order to show the suspension or revocation is not justified. In order to receive an APS hearing before the effective date of the action, the violator must request a hearing within **ten days** of the date of service.

d. The hearing shall be held at a place designated by DMV as close as practicable to the place where the arrest occurred unless the parties agree to a different location. The arresting officer will not be routinely subpoenaed by DMV. However, the violator may subpoena the arresting officer and is also responsible for payment of fees and service of documents.

e. Policy.

(1) Providing Arrest and/or Traffic Crash Report(s) to DMV. Because DMV will not routinely subpoena the arresting officer, a DMV representative may telephone the Area office to obtain a copy of the arrest and/or traffic crash report(s) for the hearing. The Area shall provide DMV with a copy of the arrest and/or traffic crash report(s) upon request.

(2) Subpoena DS 501 Form. The DS 501 is used by DMV when subpoenaing an officer for a hearing. This form is used by both DMV and the defendant. Therefore, it is incumbent upon the supervisor accepting the subpoena to ensure which entity is serving the subpoena. This can be accomplished by verifying the on behalf of section of the form. If the subpoena is being served by DMV, it will be documented as such in the on behalf of section. If the subpoena is served by the defendant, it will be so documented.

(3) Reimbursement – Subpoenaed by Defendant. The Department is reimbursed for an officer's time spent at a DMV hearing only when subpoenaed by the defendant in the case. A witness fee of $150 must be deposited at the appropriate CHP office for each officer's appearance (refer to HPM 11.1, Administrative Procedures Manual, Chapter 10, Subpoenas/Subpoenas Duces Tecum Compliance Criminal/Civil Appearances, for specific details). In addition, an officer shall complete a CHP 90, Report of Court Appearance – Civil Action, when subpoenaed by the defendant. The officer shall record their time in the Activity Tracking System (ATS). If overtime is accrued, this time shall also be recorded using the Overtime Duty Code of 51.

(4) Reimbursement – Subpoenaed by DMV. The Department is not reimbursed for an officer's time when DMV is the subpoenaing authority. The Department shall accept subpoenas from DMV and will absorb any costs associated with these hearings. A CHP 90 is not required for these subpoenas. The officer shall record their time spent at the hearing in ATS. When overtime is accrued, the officer shall record this time using Overtime Duty Code 02. Refer to the monthly MIS printout of Special Project Overtime Codes for specific details.

f. Scope of Hearing. The purpose of APS hearings is to allow the hearing officer to resolve the issues involving reasonable cause, lawful arrest, chemical test results

or refusal, and to determine whether the action should be upheld based on the preponderance of evidence or set aside for lack of evidence.

(1) According to Section 13558 CVC, the only issues to be determined at a hearing on an order of suspension or revocation pursuant to Section 13353 or 13353.1 CVC (chemical test or PAS test refusal) are outlined in Section 13557 CVC, as follows:

(a) That the peace officer had reasonable cause to believe the person had been driving a motor vehicle in violation of Section 23136, 23140, 23152, or 23153 CVC.

(b) That the person was placed under arrest or, if the alleged violation was of Section 23136, that the person was lawfully detained.

(c) That the person refused or failed to complete the chemical test or tests after being requested by a peace officer.

(d) That, except for the persons described in Section 23612 CVC who are incapable of refusing, the person had been told that their driving privilege to operate a motor vehicle will be suspended or revoked if they refused to submit to, and complete, the required testing.

(2) According to Section 13558(c) CVC, the only issues to be determined at a hearing on an order of suspension or revocation pursuant to Section 13353.2 CVC (immediate driver license suspension) are as follows:

(a) That the peace officer had reasonable cause to believe the person had been driving a motor vehicle in violation of Section 23136, 23140, 23152, 23153, or 23154 CVC.

(b) That the person was placed under arrest or, if the alleged violation was of Section 23136 CVC, that the person was lawfully detained.

(c) That the person was driving a motor vehicle under any of the following circumstances:

1 When the person had 0.08 percent or more, by weight, of alcohol in their blood.

2 When the person was under 21 years of age and had 0.05 percent or more, by weight, of alcohol in their blood.

3 When the person was under 21 years of age and had a BAC of 0.01 percent or greater as measured by a PAS test or other chemical test.

4 When the person was driving a vehicle that requires a commercial driver's license and the person had 0.04 percent or more, by weight, of alcohol in their blood.

5 When the person was on probation for a violation of Section 23152 or 23153 CVC and had a blood-alcohol concentration of 0.01 percent or greater, as measured by a PAS test or other chemical test.

g. Relevant vs. Irrelevant Questions. While the scope of the APS hearing may appear limited, in reality the questions may be quite broad. The defense's cross examination may exceed the scope and depth of the DMV hearing officer's initial questions. Moreover, the relevancy of a question is based upon the circumstances surrounding the case. Thus, a question may be relevant in one case and irrelevant in another. For example:

(1) When field sobriety tests (FST) are administered, they are relevant in establishing reasonable cause to believe the defendant was in violation of a DUI-related offense. If FSTs were not administered (due to injuries), such questions are not relevant. If FSTs are relevant, merely offering an opinion that the defendant failed to satisfactorily perform is insufficient. If questioned extensively regarding FST performance, officers should refer (refresh their memory) to the information contained in the arrest report. The description of the defendant's performance of the FSTs which are contained in the arrest report will normally be sufficient.

(2) Officers may be asked questions which are designed to determine competency. Thus, questions pertaining to an officer's training and experience (DUI and/or PAS device) are relevant. Competency also includes the ability to perceive (observe) the incident. Therefore, questions pertaining to physical impairment (e.g., vision acuity, color blindness, fatigue) or obstructions (distance between the officer and the incident, visual obscurities) which may have affected perception are relevant. Competency also includes the ability to recall (accuracy of the memory). Thus, questions regarding the time frame for completion of the report and/or memory of other details may be relevant.

(3) Witness credibility is also a relevant issue. Accordingly, officers may be questioned regarding possible bias. Highly personal questions designed to embarrass or humiliate a witness or repetitive or hostile questioning (badgering), however, are generally inappropriate and beyond the scope of the hearing.

(4) In 1998, Senate Bill 1890 substantially revised Implied Consent procedures by eliminating the urine test option for alcohol-only DUI arrestees except where **both** the blood and breath test are unavailable. Procedures for drug-related DUI arrests remain unchanged. Accordingly, the availability of a test(s) may be at issue during the hearing process.

h. Handling Inappropriate or Irrelevant Questioning.

(1) Should an officer believe a particular question or line of questioning has exceeded the scope of the hearing, they should object to the question on the record on the basis of relevancy.

(2) If the hearing officer overrules the objection and the officer still believes the question(s) are inappropriate or irrelevant, the officer should respectfully request the hearing officer provide clarification of their decision to overrule for the record.

(3) If after the hearing officer's explanation or ruling the officer continues to believe the question is inappropriate, the officer should respectfully request a recess. During the recess, officers should contact an Area supervisor for further guidance. In turn, Area supervisors may contact Impaired Driving Section (IDS), via telephone, at (916) 843-4360 and/or the Office of Legal Affairs, at (916) 843-3110, for clarification.

(4) Thereafter, officers shall request a taped copy of the hearing and submit the tape to their Area command for resolution. If an Area is unable to resolve the issue at their level, a copy of the tape and a memorandum describing the circumstances surrounding the APS hearing and subsequent efforts to resolve the matter should be forwarded to IDS through appropriate channels.

7. ENFORCEMENT OF TEMPORARY DRIVER LICENSE, DS 367/DS 367M (DRIVERS UNDER AGE 21).

a. In order for the temporary driver license to be valid, the violator must have a valid California driving privilege at the time of arrest. If the violator does not have a valid California driver license or their license is expired, suspended, revoked, canceled, or denied for any reason, the temporary license endorsement is invalid.

(1) The pink copies of the DS 367 or DS 367M serve as the temporary driver license endorsement. It is subject to the same class(es) and all the restrictions as on the violator's permanent license.

(2) The temporary driver license is valid for 30 days from date of issuance (arrest), at which time the Suspension/Revocation Order takes effect and the

violator's driving privilege is suspended. Unless the order is set-aside by the automatic administrative review, the offender will not receive a subsequent notice of the suspension.

b. The following enforcement provisions are contingent upon local courts and district attorney's procedures for handling license violations. Area commanders shall coordinate with the local courts and district attorneys to ensure proper procedures are followed:

(1) Section 12951 CVC should be used as the punitive statute when citing individuals whose driving privilege is valid but do not have a permanent driver license or a temporary driver license endorsement (DS 367 or DS 367M) in possession.

(2) If an officer stops a driver who presents a DS 367 or DS 367M as a temporary driver license endorsement and the officer has reasonable suspicion to believe that the person's driving privilege is suspended, the officer should proceed as follows:

(a) Obtain the driver's record to determine if the violator's driving privilege has been suspended, revoked, canceled, or denied. If so, the officer should take appropriate enforcement action.

(b) If the driver's record is not available or the driver's record indicates that the driving privilege is valid, the officer should not take any enforcement action.

(3) Section 14601.5 CVC should be used as the punitive statute for an individual whose temporary driver license endorsement has expired, and the Suspension/Revocation Order has taken effect, or the individual's driving privilege was suspended by DMV as a result of an APS or Implied Consent action.