

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2021-0014

DIANNA RUDDER

v.

DIRECTOR, NEW HAMPSHIRE DIVISION OF MOTOR VEHICLES

Appeal from Administrative License Suspension

APPELLANT'S BRIEF

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For Brief and Oral Argument

TABLE OF CONTENTS

Table of Cases 2

Table of Statutes 2

Question for Review 3

Statement of Case 3

Argument 5

Conclusion 7

Request for Oral Argument 8

Certification of Written Decisions 8

Appendix 8

TABLE OF CASES

State v. Bulcroft, 166 N.H. 612 (2014) 5, 7

In re Beal, 153 N.H. 349 (2006) 6-7

State v. Lathrop, 164 N.H. 468 (2012) 7

TABLE OF STATUTES

R.S.A. 259:125 *passim*

R.S.A. 265-A:2, I 6

R.S.A. 265-A:3 6

R.S.A. 265-A:31 *passim*

R.S.A. 265:71, IV 6

R.S.A. 265:79 6

QUESTION FOR REVIEW

The issue presented is which statutory definition of “way” under R.S.A. 259:125 applies to Administrative License Suspension procedures under R.S.A. 265-A:31. This issue was raised, argued, and preserved in the Department of Safety administrative hearing and in the Superior Court appeal. Appendix, Page 15.

STATEMENT OF CASE

This case involves an Administrative License Suspension (“ALS”) proceeding pursuant to R.S.A. 265-A:31. The facts of the case, as determined by the New Hampshire Department of Safety hearings examiner, are not in dispute.

On April 19, 2020, Appellant Dianna Rudder was sitting in the driver’s seat of her vehicle with her engine running in a church parking lot in Enfield, New Hampshire.¹ After a police officer observed Ms. Rudder retrieve an alcohol bottle from the trunk of her vehicle, he made contact with Ms. Rudder, and she subsequently submitted to an evidentiary breath test which was over the statutory limit. Appendix, Page 10.

The church parking lot in which Ms. Rudder was parked is separated from the road. One must drive off the road to access the parking lot. The parking lot is not owned or maintained by the town. It is not used by the town, and was not laid out at the direction of the government or with public funds. The church itself is a religious establishment - not a business - and does not have paying customers. The officer never observed Ms. Rudder driving the vehicle at any point. Appendix, Page 10.

¹ Although not included in the hearings examiner’s findings, there was evidence introduced at the ALS hearing that at the time of the incident, Ms. Rudder was in the middle of separating from her husband, was having a mental health crisis, and was contemplating suicide.

At the ALS hearing on July 16, 2020, Ms. Rudder stipulated that the officer had reasonable grounds to request a breath test, that the officer properly read Ms. Rudder her implied consent rights, and that the test result was over the legal limit. R.S.A. 265-A:31, II (a)-(f). Ms. Rudder's only challenges to the ALS were whether she was actually operating her vehicle,² and whether the private church parking lot was a "way" as defined by R.S.A. 259:125. Appendix, Page 9.

Regarding the definition of way, Ms. Rudder pointed out that there are two definitions of "way" under R.S.A. 259:125. Subsection I defines "way" to include public roads, private roads laid out under authority of statute or maintained by public funds, and commercial parking lots that are maintained for "paying customers." This definition does not include a private church parking lot. Section II is broader and applies to private roads and parking lots that are open to "public use," This would include a private church parking lot, however, Section II is limited to four specific statutes - not including ALS proceedings. Thus, Ms. Rudder argued that neither definition of "way" applied to the ALS proceeding and the evidence did not support a finding that Ms. Rudder was on a "way" as required by R.S.A. 265-A:31.

The hearings examiner issued a written decision on July 31, 2020. In the decision, the hearings examiner concluded that "any roadway that allows public access, even if a private road, unless access is blocked by a bar or gate, is a public way. Moreover, RSA 259:125, II includes any privately owned and maintained way open for public use. Since an administrative license suspension is intertwined with, and closely related to, and in fact, is based on an arrest for DWI, the definition contained in RSA 259:125-II may reasonably be inferred to apply to this hearing." Thus, the hearings examiner clearly applied the definition of "way" under subsection II to Ms. Rudder's ALS proceeding.

² This appeal is limited to the definition and application of a "way." Ms. Rudder concedes that sitting in the driver's seat of a running vehicle is sufficient to support a finding of "operation" or "control" under New Hampshire caselaw.

Appendix, Page 11.

Ms. Rudder appealed this decision to the Superior Court. Appendix, Pages 14-17. The Superior Court also applied the definition of “way” under subsection II, and affirmed Ms. Rudder’s suspension. Appendix, Pages 18-19. This appeal follows.

ARGUMENT

This is an extremely simple case in fact and in law. There is no dispute as to the facts. The sole issue on appeal is which definition of “way” under R.S.A. 259:125 applies to ALS proceedings under R.S.A. 265-A:31. The plain language of the statute and rules of statutory construction are clear that the definition under subsection I applies.

The interpretation of a statute is a question of law which is reviewed *de novo*. State v. Bulcroft, 166 N.H. 612, 614 (2014).

For an administrative license suspension under RSA 265-A:31, the State must establish that an officer “had reasonable grounds to believe the arrested person had been driving, attempting to drive, or was in actual physical control of a vehicle *upon the ways of this state* ... while under the influence of intoxicating liquor, narcotics, or drugs.” (Emphasis added). Thus, the State must prove the element of a “way” in order to support an administrative license suspension.

The term “way” is specifically defined under R.S.A. 259:125 as follows:

- I. Except as provided in paragraph II, the entire width between the boundary lines of any public highway, street, avenue, road, alley, park or parkway, or any private way laid out under authority of statute, or any such way provided and maintained by a public institution to which state funds are appropriated for public use, or any such way which has been used for public travel thereon, other than to and from a toll bridge or ferry, for 20 years, or

any public or private parking lot which is maintained primarily for the benefit of paying customers;

- II. For the purposes of RSA 265:71, IV, RSA 265:79, RSA 265-A:2, I, and RSA 265-A:3, any public highway, street, avenue, road, alley, park, parking lot or parkway; any private way laid out under authority of statute; ways provided and maintained by public institutions to which state funds are appropriated for public use; any privately owned and maintained way open for public use; and any private parking lots, including parking lots and other out-of-door areas of commercial establishments which are generally maintained for the benefit of the public.

Under subsection I, the term “way” includes public roads, publicly maintained roads, roads laid out under public authority, private roads that have been used for public travel for at least 20 years, and a “public or private parking lot which is maintained primarily for the benefit of paying customers.” A private parking lot that is not maintained for a commercial establishment is not a “way” under subsection I.

Subsection II provides a broader definition of a “way” which extends to “*private parking lots*, including parking lots and other out-of-door areas of commercial establishments which are generally maintained for the benefit of the public.” (emphasis added). This definition could include a church parking lot, however, subsection II expressly only applies to four specific statutes:

1. Parking Regulations under R.S.A. 265:71, IV
2. Reckless Driving charge under R.S.A. 265:79
3. Criminal DWI charge under R.S.A. 265-A:2, I Driving or Operating Under Influence of Drugs or Liquor
4. Criminal Aggravated DWI charge under R.S.A. 265-A:3

Thus, the legislature specifically and intentionally restricted this broader definition of a “way” to four statutes, and an ALS proceeding under R.S.A. 265-A:30 is not one of them. Had the legislature intended the broader definition of “way” to apply to ALS proceedings, it would have done so in statute, but the Court should not add language that the general assembly has not included. See In re Beal, 153 N.H. 349, 350 (2006) (“We

interpret legislative intent from the statute as written and will not consider what the legislature might have said or add words that the legislature did not include”).

At the administrative level, the hearing examiner concluded that the definition of “way” under subsection II applied because DWI and ALS cases are “related.” Appendix, Page 11. While the hearing examiner cited State v. Lathrop, 164 N.H. 468 (2012) in concluding that subsection II applies, this reliance was misguided. The Lathrop case involved a *criminal* DWI charge under R.S.A. 265-A:2 which is specifically referenced in subsection II, and did not involve an ALS proceeding. In fact, the Lathrop Court held that “[t]he application of the definition of “way” in RSA 259:125, II is *specifically* limited to four statutes” and does not therefore apply to other situations. Lathrop, at 471 (emphasis added). Lathrop therefore contradicts - rather than supports - the examiner’s reasoning and conclusion.

The plain and logical reading of R.S.A. 259:125 makes clear that subsection II does not apply to ALS proceedings. Basic canons of statutory construction require the same conclusion. *Expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others) means that the legislature meant for subsection II to apply only to the four enumerated statutes and not to others. Because they were not included in subsection II, ALS proceedings under R.S.A. 265-A:31 are governed by subsection I.

Moreover, *Casus omissus pro omisso habendus est* (nothing is to be added to what the text states) means that the Court should not read into the statute language that the legislature did not include. *See also State v. Bulcroft*, 166 N.H. 612, 617 (2014) (“[W]e decline to expand the scope of the statute, and we will not add language that the legislature did not include.”). If the legislature should intend for subsection II’s definition of “way” to apply to ALS proceedings, it is the legislature - not the judiciary - that should make that change.

CONCLUSION

The definition of “way” under R.S.A. 259:125, I applies to administrative license suspension proceedings. It was error for the Department of Safety and the Superior Court to apply subsection II to Ms. Rudder’s ALS proceeding, and it is undisputed that the private church parking lot in question is not a way under subsection I. The State therefore failed to establish sufficient evidence of a “way” as required by RSA 265-A:31, and Ms. Rudder’s administrative license suspension must be vacated.

REQUEST FOR ORAL ARGUMENT

Ms. Rudder hereby requests oral argument before the full court in this matter should oral argument aid the court in its consideration of this case.

CERTIFICATION OF WRITTEN DECISIONS

I hereby certify that each appealed decision that is in writing is being submitted at the time of brief filing, and is included in the Appendix below.

Respectfully submitted on March 16, 2021

/s/ Cabot Teachout
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APPENDIX

Department of Safety Report of Hearings Examiner (July 31, 2020)	9
Dianna Rudder Superior Court Appeal (September 21, 2020)	14
Superior Court Written Decision (December 14, 2020)	18



State of New Hampshire

DEPARTMENT OF SAFETY

BUREAU OF HEARINGS

James H. Hayes Safety Building, 33 Hazen Drive, Concord, NH 03305

REPORT OF HEARINGS EXAMINER

RESPONDENT: Dianna Rudder
DOB: 03/18/76
HEARING DATE: 07/16/2020
HEARING LOCATION: Concord by video conference
DMV FILE #: NHI13996990
DOS HEARING #: HR20206487
REFERENCE: ADMINISTRATIVE LICENSE SUSPENSION
PRESIDING HEARING EXAMINER: Christopher Casco, Esq.
RESPONDENT REPRESENTED BY: Cabot Teachout, Esq.
STATE REPRESENTED BY: Prosecutor Christopher O'Connor
OTHER PERSONS PRESENT: Officer Michael Crate

Both parties waived the Examiner advising on the scope and purpose of the hearing, the right to a copy of the audio recording and appeal rights. Under oath, the law enforcement officer, Officer Crate, testified to having appeared before a Justice of the Peace, Notary Public, or Commissioner of Deeds and swearing to the accuracy of the information contained in the Administrative License Suspension Rights/Violations and Misdemeanors form (ALS DSMV 426 form #422595) submitted to the division.

STIPULATIONS:

All statutory criteria under RSA 265-A:31-II-(a) through (f) except the portion of paragraph (a) as to whether Officer Crate had reasonable grounds to believe that the respondent had been driving or was in actual physical control of a vehicle on a way. She stipulated to reasonable grounds to believe impairment.

EXHIBITS:

1. ALS form

SYNOPSIS OF TESTIMONY:

Officer Michael Crate:

He is a properly trained and certified New Hampshire Police Officer. He received training on enforcing driving while intoxicated laws including proper administration of field sobriety tests. He has been an Enfield Police Officer for 11 years.

On or about April 19, 2020 at 10:00 p.m. he was on duty. He went to the parking lot of the Lutheran Church off of Main Street in Enfield. This lot is open to the public and only accessible by driving on Main Street and into the lot. As he talked with some fisherman who were there, he saw a woman, later identified as the respondent, get out of the driver's seat of a vehicle, walk to the trunk, get a bottle appearing to be an alcohol container from the trunk, and walk back to the driver's seat.

He approached the black car and saw the respondent sitting in the driver's seat with the engine running. She stated that she was not having a good night. She was obviously impaired. The respondent said that she was trying to stay warm. She did not plan on leaving. She said that she knew that she was impaired and shouldn't be driving. She planned on waiting until she was ok to drive before leaving. She said that she would not leave until she was ready.

She failed field sobriety test, was arrested, and submitted to a breath test with a result of .15.

Cross Examination

The Lutheran Church parking lot is separate from the road. The shoulder of Main Street and the lot are the same area. One must drive off of the road to get there. Many fisherman park in the lot. It is not owned or maintained by the town. It is not used by the town. It is not laid out at the direction of the state or with state funds.

Moreover, the church is a religious establishment, not a business, and it does not have paying customers. There were 30 cars in the lot. He saw the respondent in and around the car but did not witness her driving. He is not sure how long the respondent has been there before he arrived. It may have been approximately 15 minutes.

The respondent did not try to hide and was open and honest with him. She did not hide the bottle of tequila. She had the vehicle on to stay warm because it was cold and she did not have on long pants. The respondent said that she had not driven for an hour and he did not have any information to contradict that statement. The respondent said that she was sober when she drove to the lot and that she would call for a ride if she needed to.

LEGAL ANALYSIS:

The respondent argues that the evidence is insufficient for a finding of reasonable grounds to believe that she was in physical control of a vehicle on a way.

Pursuant to RSA 265-A:31-II(a), the State must prove by a preponderance of the evidence that the officer had reasonable grounds to believe that the respondent had been driving or was in

actual physical control of a vehicle upon the ways of this State while under the influence of liquor. In the case of State v. Lathrop, 164 N.H. 468 (2012), our Supreme Court defined public way in a case of driving while under the influence of liquor. Also relevant is the definition contained in RSA 259:125, II.

Lathrop stands for the legal proposition that any roadway that allows public access, even if a private road, unless access is blocked by a bar or a gate, is a public way. Moreover, RSA 259:125, II includes any privately owned and maintained way open for public use. Since an administrative license suspension is intertwined with, and closely related to, and in fact, is based on an arrest for DWI, the definition contained in RSA 259:125-II may reasonably be inferred to apply to this hearing. Therefore, under the definition of way in Lathrop and in the statute, there is sufficient evidence that the respondent was in a vehicle on a public way.

Moreover, Officer Crate saw the respondent, while clearly impaired and admittedly after having drunk alcoholic beverages, behind the wheel of a running vehicle. The respondent argues that she had no intent to drive while impaired. Her subjective intent, however, is not controlling. Since she was in actual physical control while impaired when Officer Crate saw her, he had sufficient reasonable grounds that she was in actual physical control of the vehicle. At any point, while still impaired, she could have operated. Therefore, Officer Crate had reasonable grounds of actual physical control.

OPINION:

I find that the State has proven by a preponderance of the evidence that Officer Crate had reasonable grounds to believe that the respondent had been driving or was in actual physical control of a vehicle upon the ways of this state while under the influence of intoxicating liquor and that she submitted to a chemical test above the legal limit.

FINDINGS OF FACT:

1. Officer Crate had reasonable grounds to believe that the respondent had been operating or was in actual physical control of a vehicle on a public way, the Lutheran Church parking lot off of Main Street in Enfield, while under the influence of intoxicating liquor.
2. The facts that the reasonable grounds are based are as follows: The respondent was behind the wheel of her running vehicle while impaired to any degree, in the Lutheran Church parking lot, a private parking lot off of Main Street the does not have a bar, gate, or any other barrier to block public access. In fact, fisherman regularly use the parking lot.
3. Officer Crate properly arrested the respondent.
4. Officer Crate read the Administrative License Suspension Rights, form DSMV 426 #422595 to the respondent.

5. The respondent submitted to a properly conducted breath test above the legal limit.
6. The respondent had a .15 breath test result.
7. Officer Crate advised the Respondent of the right to have a similar test or tests conducted by a person of her choosing.
8. Officer Crate informed the Respondent that refusal to permit the test would result in suspension of the respondent's license/operating privilege and that testing above the alcohol concentration level specified in RSA 265-A:30 would also result in suspension.

CONCLUSION OF LAW:

The State proved by a preponderance of the evidence that Officer Crate had reasonable grounds to believe that the respondent had been driving or was in actual physical control of a vehicle upon the ways of this state while under the influence of intoxicating liquor as required by RSA 265-A:31 and that after being advised of her rights, she submitted to a chemical test above the legal limit.

DISPOSITION:

The Confirmation of a Notice of Suspension/Revocation Action letter issued by the Director confirming the **Order of Suspension**, is **SUSTAINED**.

DIRECTOR'S REVIEW

Pursuant to RSA 265-A:33, the person whose license has been suspended or the law enforcement officer may petition the director of motor vehicles for a review of the recommendation. Such a petition **MUST** be filed within 10 days of the hearings examiners **written recommendation**. It will **NOT** be accepted unless it:

- Is on 8 ½ x 11 inch white paper;
- Is double spaced with one inch margins;
- Is in black image writing or type of at least 12 point font;
- Is no more than two pages in length; and
- Specifically identifies the:
 - *Error of law, including a citation to the relevant law or rule; and/or
 - *factual error, including a concise explanation of why the recommendation cannot be sustained by the facts presented at the hearing.

It **MUST** also include a certification that the law enforcement officer or the person whose license has been suspended, as appropriate, has been notified that the petition has been filed.

A copy of the hearings examiner's recommendation **MUST** accompany the petition. **NO** other evidence shall be submitted.

All petitions **MUST** be addressed as follows

ATTN DIRECTOR'S REVIEW
DEPARTMENT OF SAFETY
DIVISION OF MOTOR VEHICLES
23 HAZEN DRIVE
CONCORD, NH 03305

A person (the licensee) aggrieved by the recommendation is NOT required to file for a director's review in order to preserve his or her right to a superior court appeal pursuant to RSA 263:75. You (the licensee) can by-pass this review and file your appeal, WITHIN 30 DAYS FROM THE DATE OF THE WRITTEN RECOMMENDATION, with the superior court in the county where the arrest took place. Please refer to the following for additional information on this process.

SUPERIOR COURT APPEAL PROCEDURE

Pursuant to RSA 265-A:34, if the suspension is sustained after hearing, you may appeal this by filing a petition in the superior court in the county in which you were arrested. This petition must be filed in the court within 30 days of the date of the final order. In the petition for appeal you must raise all the grounds upon which you seek to overturn this order. Issues not raised by you before the hearings examiner cannot be raised before the superior court.

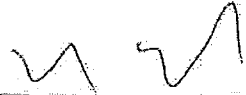
If you file this appeal, the court will issue an order of notice which will notify the Department of Safety of the appeal. When the department is served with the order of notice, The Department will forward to the court a copy of this order together with any other documents which were received into evidence in your hearing. If you wish the court to also review a written transcript of the hearing YOU MUST NOTIFY THE BUREAU OF HEARINGS AT 271-6517.

The bureau will inform you of transcript costs and, upon receipt of payment from you, the bureau will forward the tape of the hearing to a court approved transcriptionist. When the transcript is completed it will be sent to you for filing with the court.

Please note that if you do NOT DESIRE THE COURT TO REVIEW A TRANSCRIPT, YOU MUST NOTIFY THE COURT OF THIS FACT IN YOUR APPEAL PETITION. This will allow the court to begin its review of your case in a speedier fashion because the court will NOT be required to postpone its review pending receipt of the transcript. It will also be helpful to the court if you include in your petition the date on which you were arrested. You should review RSA 263:75 for specific and complete details.

Date of Order: July 31, 2020

A copy of this report was sent by email to both parties this date.



Christopher Casco, Esq.
Administrator

STATE OF NEW HAMPSHIRE
GRAFTON COUNTY, SS. SUPERIOR COURT

215-2020-CV-00236

DIANNA RUDDER :
 :
v. :
 :
ELIZABETH BIELECKI, DIRECTOR OF :
NEW HAMPSHIRE DIVISION OF MOTOR :
VEHICLES :
 :

Appeal from Administrative License Suspension
Dept. of Safety Hearing #HR20206487

SUPERIOR COURT APPEAL OF ADMINISTRATIVE LICENSE SUSPENSION

NOW COMES Dianna Rudder, through counsel, and hereby appeals the July 31, 2020 "Report of Hearings Examiner" to the Grafton County Superior Court regarding Ms. Rudder's Administrative License Suspension (hereinafter "ALS").

1. This action is brought pursuant to statutory authority under R.S.A. 265-A:34 to appeal an Administrative License Suspension sustained by the Director of the New Hampshire Division of Motor Vehicles. Jurisdiction in the Grafton County Superior Court is proper under R.S.A. 265-A:34 because the underlying driving incident occurred in Grafton County in Enfield, New Hampshire. Appellant Dianna Rudder is presently homeless. Appellee Elizabeth Bielecki, Director of New Hampshire Division of Motor Vehicles has an address of 23 Hazen Drive, Concord, NH 03305.

PROCEDURAL POSTURE

2. The original traffic incident leading to this ALS case on April 19, 2020. Ms. Rudder made a timely request for an ALS hearing at the Department of Safety, and a hearing was held on July 16, 2020. On July 31, 2020, the Hearings Examiner issued a decision upholding Ms. Rudder's license suspension.
3. On August 10, 2020, Ms. Rudder filed a Petition for Director's Review pursuant to R.S.A. 265-A:33. That petition was denied by the Director's office in a written order on August 31, 2020 - alleging incorrect spacing in the petition for review.¹ Ms. Rudder submitted an amended petition on September 2, 2020 with different spacing. Counsel for Ms. Rudder

¹ The Director's response to the petition was beyond the 20 days allowed for a response under Saf-C 2804.10.

received a subsequent denial from the Director on September 10, 2020, whereby the Director's order became final. This appeal is taken within 30 days of the Director's final order, and is therefore timely under R.S.A. 265-A:34, II.

ISSUE ON APPEAL

4. This appeal is limited to the discrete legal question of whether a private church parking lot is a "way" for purposes of an Administrative License Suspension under RSA 265-A:30. The Report of the Hearings Examiner concluded that a private church parking lot is a way, and accordingly sustained Ms. Rudder's license suspension. This conclusion is incorrect as a matter of law, and Ms. Rudder's suspension must be vacated.

FACTUAL FINDINGS

5. The facts of the case are not in dispute. The hearings examiner found the following facts, and they are not challenged on appeal:
 - Ms. Rudder was parked in her vehicle in a private church parking lot in Enfield, New Hampshire when she was approached by a law enforcement officer.
 - While Ms. Rudder's engine was on, she was not driving the vehicle at the time, and the officer never observed her driving the vehicle.
 - The officer subsequently arrested Ms. Rudder for DWI and initiated an ALS proceeding.
 - The church parking lot is separated from the road.
 - The church parking lot is not owned or maintained by the town.
 - The church parking lot is not used by the town.
 - The church parking lot is not used for public travel.
 - The church parking lot was not laid out at the direction of the state or with public funds.
 - The church is a religious establishment, not a business, and it does not have paying customers.

ANALYSIS

6. For an administrative license suspension under RSA 265-A:31, the State must establish that "the officer had reasonable grounds to believe the arrested person had been driving, attempting to drive, or was in actual physical control of a vehicle *upon the ways of this state* ... while under the influence of intoxicating liquor, narcotics, or drugs." (Emphasis added).
7. The term "way" has a specific legal definition under New Hampshire law. Under R.S.A. 259:125, "Way" shall mean:
 - I. Except as provided in paragraph II, the entire width between the boundary lines of any public highway, street, avenue, road, alley, park or parkway, or any private way laid out under authority of statute, or any such way provided and maintained by a

public institution to which state funds are appropriated for public use, or any such way which has been used for public travel thereon, other than to and from a toll bridge or ferry, for 20 years, or any public or private parking lot which is maintained primarily for the benefit of paying customers;

- II. For the purposes of RSA 265:71, IV, RSA 265:79, RSA 265-A:2, I, and RSA 265-A:3, any public highway, street, avenue, road, alley, park, parking lot or parkway; any private way laid out under authority of statute; ways provided and maintained by public institutions to which state funds are appropriated for public use; any privately owned and maintained way open for public use; and any private parking lots, including parking lots and other out-of-door areas of commercial establishments which are generally maintained for the benefit of the public.
8. Under subsection I, the term “way” includes public roads, publicly maintained roads, roads laid out under public authority, private roads that have been used for public travel for at least 20 years, and a “public or private parking lot which is maintained primarily for the benefit of paying customers.” A private parking lot that is *not* maintained for a commercial establishment is not a “way” under subsection I.
9. Subsection II provides a broader definition of a “way” to include “private parking lots, including parking lots and other out-of-door areas of commercial establishments which are generally maintained for the benefit of the public.” This definition would include a church parking lot, however, this broader definition only applies to four specific statutes:
- 265:71, IV Additional Parking Regulations (*i.e.*, parking sign enforceability)
 - 265:79 Reckless Driving
 - 265-A:2, I Driving or Operating Under Influence of Drugs or Liquor
 - 265-A:3 Aggravated Driving While Intoxicated.
10. Thus, the New Hampshire legislature created only four specific situations where the definition of a “way” includes private roads and driveways such as a church parking lot. The ALS statute under RSA 265-A:30 is not included in these exceptions.
11. In this case, the Hearing Examiner concluded that the definition of way under subsection II applies because DWI and ALS cases are closely “related.” While the Hearing Examiner in this case cited State v. Lathrop, 164 N.H. 468 (2012) in concluding that subsection II applies, the Lathrop case involved a *criminal* DWI charge under R.S.A. 265-A:2 (which is specifically referenced in subsection II), and did not involve an ALS proceeding. In fact, the Lathrop Court held that “The application of the definition of “way” in RSA 259:125, II is *specifically* limited to four statutes” and does not therefore apply to other situations (emphasis added). Lathrop therefore contradicts - rather than supports - the Examiner’s reasoning and conclusion.
12. Basic canons of statutory construction confirm the conclusion that the definition of way under 259:125, II does not apply to ALS proceedings. *Expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others). The fact that the legislature

included four statutes in subsection II but did not include the ALS statute means that ALS statutes are not governed by subsection II. The plain language and interpretation of the statute make it clear that ALS proceedings are governed by subsection I. *Casus omissus pro omissio habendus est* (nothing is to be added to what the text states).

CONCLUSION

13. A private church parking lot is not a way under the plain language of R.S.A. 259:125, I, which applies to all motor vehicle proceedings except for those listed in R.S.A. 259:125, II. A private church parking lot is only considered a way under four specific statutes listed in subsection II, however, the ALS statute under R.S.A. 265-A:30 is not one of them. For these reasons, Ms. Rudder's suspension must be vacated.

Respectfully submitted on September 21, 2020

/s/ Cabot Teachout
Cabot Teachout, Esq.
DesMeules Olmstead & Ostler
NH Bar ID No. 266619
802-649-2001
Cteachout@doolaw.com

CERTIFICATE OF SERVICE

I hereby Certify that on September 21, 2020 I have sent copies of this APPEAL TO SUPERIOR COURT to Elizabeth Bielecki, Director, New Hampshire Department of Safety, Division of Motor Vehicles, 23 Hazen Drive, Concord, NH 03305

/s/ Cabot Teachout

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

No. 215-2020-CV-00236

Dianna Rudder

v.

Elizabeth Bielecki, Director
Division of Motor Vehicles New Hampshire Department of Safety

ORDER

Having carefully reviewed the record and the pleadings on file, the Court makes the following rulings:

1. The petitioner's appeal may properly "be determined upon the record and the evidence transferred." RSA 265-A:34, IV;
2. RSA 265-A:34, III provides that the "burden of proof shall be upon the appellant to show that the decision of the director or agent was clearly unreasonable or unlawful, and all findings of the director or agent upon all questions of fact properly before him or her shall be deemed to be *prima facie*, lawful and reasonable." Proulx v. Dir., N.H. Div. Of Motor Vehicles, 154 N.H., 350, 351 (2006);
3. RSA 265-A:34, III further provides that the "order or decision appealed from shall not be set aside or vacated except for errors of law, unless the Court is satisfied, by a clear preponderance of the evidence before it, that the order is unjust or unreasonable." See Proulx, 154 N.H at 351-52;
4. There is evidence in the record to support the hearing examiner's finding that

18

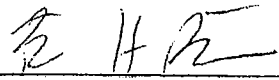
the area in which the petitioner's vehicle was located at the time of her arrest under RSA 265-A:2, I was a "way" within the meaning of RSA 259:125, II; and

5. The petitioner has not satisfied her burden of proving that the order from which she appeals is unjust, unreasonable or unlawful.

Accordingly, the Court AFFIRMS the July 31, 2020 order from which the petitioner appeals.

So Ordered.

Dated: 12/14/2020



Peter H. Bornstein
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 12/14/2020