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INTER-DEPARTMENT COMMUNICATION

TO: Curtis N. Duclos, Administrator and Bureau Personnel

DATE August 16, 2007

FROM: John J. Barthelmes, Commissioner

SUBJECT: Technical Advice Memorandum **BOH-2007-01**

HISTORY

In 2006, the New Hampshire legislature re-codified the statutes regarding DWI as RSA chapter 265-A, and repealed the older corresponding statutes. The re-codification became effective on January 1, 2007. The intent of the legislature in creating RSA chapter 265-A was simply to compile the statutes regarding alcohol and drugs into a single chapter to make it easier for law enforcement, prosecutors, and the general public to locate the relevant statutes. However, as part of the re-codification, RSA 259:39, the definition section for habitual offender offenses, was amended to reflect the change in the DWI statutes which are habitual offender offenses. The consolidation eliminated the references to the former statutes and substituted the new statutes as follows.

" **259:39 Habitual Offender. –** ""Habitual offender" means any resident or nonresident person whose record, as maintained in the office of the division, shows that such person has accumulated convictions in the number provided in paragraph I, II or III of this section for those offenses listed therein and committed within a 5-year period, based on the date of the offense...

...A person who meets the requirements of one of the following three paragraphs shall be certified as an habitual offender:

I. Three or more convictions, singularly or in combination, of the following offenses:

(a) Conviction of any offense specified in RSA 261:73;
(b) Conviction of any offense specified in RSA 262:1, I;
(c) Conviction of any offense specified in RSA 262:8;
(d) Conviction of any offense specified in RSA 262:12;
(e) Conviction of any offense specified in RSA 262:13;

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(f) Conviction of any offense specified in RSA 263:12, V;
(g) Conviction of any offense specified in RSA 263:64;
(h) Conviction of any offense specified in RSA 264:25;
(i) Conviction of any offense specified in RSA 265:4;
(j) Conviction of any offense specified in RSA 265:79;

[Paragraph I(k) effective until January 1, 2007; see also paragraph I(k) set out below.]
(k) Conviction of any offense specified in RSA 265:82;

[Paragraph I(k) effective January 1, 2007; see also paragraph I(k) set out above.]

(k) Conviction of any offense involving a vehicle specified in RSA 265-A:2, I;

[Paragraph I(l) effective until January 1, 2007; see also paragraph I(l) set out below.]

(l) Conviction of any offense specified in RSA 265:82-a;

[Paragraph I(l) effective January 1, 2007; see also paragraph I(l) set out above.]

(l) Conviction of any offense involving a vehicle specified in RSA 265-A:3;..."

Based solely on the plain language of the new statutes, the issue is whether a person may be certified as an habitual offender using a conviction based on RSA 265:82 or RSA 265:82a. The argument which may be raised is that the plain language of the statute governs when it is clear and unambiguous and in this case no longer specifies RSA 265:82 and RSA 265:82a. Additionally, the argument would go on to say that the legislature knew what it was doing and neither the Executive Branch nor the Judiciary should do anything but enforce the law as written with the remedy being an amendment to the statute by the legislature. Numerous NH Supreme Court decisions have ruled in this way. (The Attorney General's Office is working with the sponsor of the bill to amend the legislation to fix this situation as quickly as possible).

However, the New Hampshire Supreme Court rejected a similar argument in *State v. Callahan*, 126 N.H. 161 (1985). There, the defendant was arrested for driving after revocation under RSA 263:64 (Supp. 1983) after he lost his license for a DWI conviction under RSA 262-A:62 (Supp. 1979). *Callahan*, 126 N.H. at 162, 165. The driving while intoxicated statute had been recodified from RSA 262-A:62 to RSA 265:82. *Id.* at 165. The OAS statute reflected that change and did not include any reference to the prior DWI statute, RSA 262-A:62. *Id.* at 165. Nonetheless, the Court found that:

> [t]he conduct for which [the defendant] was convicted is the same as that prohibited in the present drunk driving statute. Indeed, the statutory definition of the offense of driving while intoxicated did not change when the offense was recodified in 1982.
>
> The conduct for which [the defendant] was most recently convicted, driving while his license was revoked for driving under the influence, is the exact conduct which RSA 263:64, IV (Supp. 1983) seeks to punish. To excuse [the defendant] from punishment under that statute merely because the particular DWI statute under which he was convicted is not specifically named in RSA 263:64, IV (Supp. 1983), would be elevating form over substance. *Id.*

Similarly, in this situation, the conduct for which respondents are now being screened for and sanctioned for, driving while under the influence in violation of RSA 265-A:2, is the same conduct that was prohibited and for which the defendant was previously convicted under RSA 265:82 or 82a. As in *Callahan*, to excuse respondents from certification as habitual offender under the habitual offender statutory scheme, RSA 262:18 et seq., just because the prior DWI statutes are not explicitly mentioned "would be elevating form over substance." *Id.* Therefore, the habitual offender screening and processing based on DWI offenses should still stand in light of the current wording of the statute.

Part of the problem is practical and part is a question of equal protection under the law. Respondents with New Hampshire DWI convictions under the now repealed statutes would escape certification based on a technicality. Respondents with out of state DWI convictions would not. The practical aspect is that habitual offender certification is based on offenses committed within five years based on date of violation. That extends the screening process for a four and a half year period before the recodification while RSA 265:82 and 82a was the law of DWI.

The reason the Technical Advice Memorandum is necessary is to clarify that this is the Head of the Agency's implementation of the law for all concerned, administrators of the law and the public.

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Convictions for Driving While Intoxicated offenses under RSA 265:82 and RSA 265:82a which are not currently specified in RSA 259:39 (k) and (l), may be included for review of the driving records of persons being screened for certification as habitual offender. Convictions for Driving While Intoxicated offenses under RSA 265:82 and RSA 265:82a shall not be excluded from the screening and certification process simply because they are not listed under RSA 259:39 (k) and (l).

This Technical Advice Memorandum (TAM) is issued pursuant to Saf-C 102.061, and is binding upon all members of the bureau of hearings. Pursuant to RSA 541-A: 16 H (a), it shall be made available to the public and should be filed within your Saf-C 200 series rules or in a separate file for reference.

Approved on August 16, 2007

John J. Barthelmes, Commissioner