March 19, 2007

No. 8284

This opinion responds to a question from the Department of Transportation (Department) about the meaning of ORS 809.440(1) (d).

QUESTION PRESENTED

ORS 809.440(1) (d) provides:

> This section establishes hearing and administrative review procedures to be followed when the Department of Transportation is required to provide a hearing or an administrative review of an action.
>
> (1) When other procedures described under this section are not applicable to a suspension or revocation under ORS 809.409 to 809.423, the procedures described in this subsection shall be applicable. All of the following apply to this subsection:
>
> * * * * *
>
> (d) Upon such hearing, the department, good cause appearing therefor, may impose, continue, modify or extend the suspension or revocation of the driving privileges.

You ask us to advise you about the Department's range of discretion under that statute and, specifically, whether the Department, or an Administrative Law Judge (ALJ), may elect to modify, extend, or otherwise not impose a suspension or suspension length that is expressly required by either ORS 809.409 to 809.423 or a rule implementing those statutes.

SHORT ANSWER

ORS 809.440(1) (d) does not grant the Department, or an ALJ conducting a hearing on behalf of the Department, discretion either to not impose a suspension that is required under ORS

809.409 to 809.423 or a rule implementing those statutes or to deviate from the suspension periods they mandate. ORS 809.440(1) (d) grants the Department authority, following a hearing, to suspend or revoke driving privileges if there is a sufficient legal reason to do so under ORS 809.409 to 809.423 or the rules implementing those provisions. ORS 809.440(1) (d) is not a freestanding grant of authority to modify, extend or otherwise not impose a suspension or suspension length that is expressly required by ORS 809.409 to 809.423 or a rule implementing those statutes.

ANALYSIS

I. Method for Interpreting Statutes

Your question requires us to interpret ORS 809.440(1) (d). When interpreting a statutory provision, our task is to determine the legislature's intent, and to do so we follow the methodology prescribed by the Oregon Supreme Court in ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 610, 859 P2d 1143 (1993). We begin by reading the text, applying statutory and judicially developed rules of construction that bear directly on how to read the text, such as to give words of common usage "their plain, natural, and ordinary meaning" and "simply to ascertain and declare what is, in terms or substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." *Id.* at 611; ORS 174.010. We do not read the text in isolation, but in context, which includes other provisions of the same statute, related statutes and prior versions of the same statute. *PGE* at 611. If there is only one possible interpretation based on text and context, we inquire no further, but if more than one meaning is possible after examining text and context, we examine the legislative history to determine legislative intent. *Id.* at 611-12.

II. The Statutory Framework

ORS 809.440(1) applies to hearings provided before imposition of suspensions or revocations "under ORS 809.409 to 809.423." "Under," in this context, means: "**8a:** required by: in accordance with: bound by * * *." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 2487 (unabridged 2002). ORS 809.409 to 809.423 are substantive provisions that set out explicitly the grounds for suspension and, as those provisions are critical context for understanding ORS 809.440(1) (d), we discuss them first. The provisions of ORS 809.409 to 809.423 can be divided into two categories: (1) those that require the Department to suspend; and (2) those that permit it to suspend.

ORS 809.409, 809.411, 809.413, 809.415(1) to (4), 809.417(1) to (2), 809.419(1) to (2), and 809.423 fall into the former category and require the Department to suspend driving privileges on certain grounds. All of those statutes provide that the Department either "***shall***" suspend or revoke driving privileges. So, for example, ORS 809.417(2) provides that the Department "*shall* suspend the driving privileges of any person" who is "involved in a motor vehicle accident at any time when the department determines the person has been operating a vehicle in violation of ORS 806.010." (Emphasis added.) "Shall" is a command "used in laws, regulations, or directives to express what is mandatory." ***Preble v. Dep't of Revenue***, 331 Or 320, 324, 14 P3d 613 (2000) (quoting WEBSTER'S). Therefore, by their plain language, the

mandatory suspension statutes allow the Department no discretion; it must suspend or revoke driving privileges if it determines that the factual predicate specified in one of the statutes is satisfied.

Likewise, the mandatory suspension statutes grant the Department no discretion to determine the duration of a suspension; they mandate a specific period of time. For example, ORS 809.417(2) specifies that the period of suspension "shall be" for "one year."

On the other hand, ORS 809.415(5), 809.417(3), 809.419(3), and 809.421 use permissive terminology to characterize the Department's suspension authority. For example, ORS 809.417(3) (a) provides that the Department "may" suspend the driving privileges of a person who, while operating a motor vehicle, causes or contributes to an accident resulting in death to any other person if the department believes that the person's incompetence, recklessness, criminal negligence or unlawful operation of the vehicle caused or contributed to the accident. While those provisions allow, but do not require, the Department to impose a suspension, they limit the Department's discretion to the grounds specified in the statute. Under ORS 809.417(3) (a) for example, the Department may not impose a suspension unless it concludes that (1) at the time a person was operating a motor vehicle; (2) the person caused or contributed to an accident resulting in death to any other person; and (3) the person's incompetence, recklessness, criminal negligence or unlawful operation of the vehicle caused or contributed to the accident. With one exception, the discretionary suspension statutes also give the Department discretion to determine the suspension period by providing that the suspensions "shall continue for a period determined by the department." The exception is ORS 809.415(5), which mandates a one-year suspension period.

Where substantive provisions grant discretion, the Department has promulgated rules prescribing how it will exercise that discretion. *See, e.g.,* OAR 735-070-0130 (providing definitions applicable to suspensions under ORS 809.417(3) and specifying that suspensions under ORS 809.417(3) will be for one year); OAR 735-074-0140 (specifying the standards under which the Department will suspend driving privileges under ORS 809.419(3) and specifying the criteria for ending suspension). Oregon courts repeatedly have held that administrative rules have the authority of statutory law and are binding on the agency. *See, e.g.,* ***Bronson v. Moonen***, 270 Or 469, 476, 528 P2d 82 (1974) ("[a]dministrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute."*);* ***Meltebeke v. Bureau of Labor and Industries***, 322 Or 132, 157, 903 P2d 351 (1995) ("[t]he rules have the effect of statutory law."); ***Georgia-Pacific Corp. v. Knight***, 126 Or App 244, 246, 868 P2d 36 (1994) ("rules are as binding on the agency as if the legislature itself had enacted them"); ***Clausing v. K-Mart Corp.***, 144 Or App 552, 554, 926 P2d 337 (1996) ("[p]roperly promulgated administrative rules have the force of law.").

With that statutory framework in mind, we turn to ORS 809.440(1) (d).

III. ORS 809.440(1) (d)

ORS 809.440 "establishes hearing and administrative review procedures to be followed when the Department of Transportation is required to provide a hearing or an administrative review of

an action." ORS 809.440(1) establishes procedures that apply when a driver makes a written request for a hearing and that hearing is "given before the department imposes a suspension or revocation of driving privileges or continues, modifies or extends a suspension or revocation." ORS 809.440(1) (a). *Compare* ORS 809.440(4) (establishing procedures for post-imposition hearings); ORS 809.440(2) (establishing procedures when driver entitled to administrative review); ORS 809.440(3) (allowing Department to establish procedures for expedited hearings). ORS 809.440(1) (d) governs the disposition of the case following such hearings:

> Upon such hearing, the department, good cause appearing therefor, may impose, continue, modify or extend the suspension or revocation of the driving privileges.

To determine whether ORS 809.440(1) (d) authorizes the Department or an ALJ to modify, extend, or otherwise not impose a suspension or suspension length that is expressly required by either ORS 809.409 to 809.423 or a rule implementing those statutes, we analyze the key terms of the provision in light of the statutory framework set out above.

A. The Department

The "department" means the "Department of Transportation." *See* ORS 809.225 (defining "department" for purposes of the Oregon Vehicle Code of which ORS 809.440(1) (d) is part as "the Department of Transportation"); ORS 809.440 (establishing hearing procedures to be followed by "the Department of Transportation."). Although ORS 809.440(1) (e) and ORS 183.635(4) require an ALJ to conduct the hearing, ORS 183.605(1) (a) specifies that the ALJ does so "on behalf" of the Department. Provided that the Department explains any variance between its final order and the ALJ's recommended findings of fact and conclusions of law, the Department is authorized by law to enter the final order following hearings on suspension or revocation under ORS 809.409 to 809.423. *See* ORS 183.650(2) (agency must identify and explain modifications to the ALJ's recommended form of order); ORS 183.650(2) (to deviate from the ALJ's findings of fact in a recommended form of order, agency must "determine" that the finding is not supported by a preponderance of the evidence in the record.) For purposes of your question, the term "department" as used in ORS 809.440(1) (d) includes an ALJ acting "on behalf of" the Department. An ALJ has no greater or lesser authority than the Department to modify, extend, or otherwise not impose a suspension or suspension length that is expressly required by ORS 809.409 to 809.423 or by rules implementing those statutes.

B. Good Cause

1. Meaning of Good Cause

"Good cause" is "a cause or reason sufficient in law: one that is based on equity or justice or that would motivate a reasonable man under all the circumstances." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 978 (unabridged 2002). Thus the term has two definitions. *See* WEBSTER'S at 17a, § 11.2 (boldface colon signals another definition). If the legislature intended the first definition, "a cause or reason sufficient in law," the statute would mean that, if the evidence produced at the hearing meets a legal standard, the department may impose, continue, modify or extend a suspension. Under that definition "good cause" is not itself a

reason for taking the actions authorized by ORS 809.440(1)(d). Instead, it refers to a legal standard found in some *other* source of law, such as the substantive provisions of ORS 809.409 to 809.423. The second definition of good cause, "[a cause or reason] based on equity or justice or that would motivate a reasonable man under all the circumstances," would seemingly permit the Department, following a hearing, to impose, continue, modify or extend a suspension for any reason it deemed equitable. For the reasons that follow, we conclude that the legislature intended the former, not the latter, meaning of "good cause."

"[G]ood cause" as used in ORS 809.440(1) (d) justifies "impos[ing], continu[ing], modify[ing] or extend[ing]" a suspension or revocation. "Impose" in this context means "to cause to be burdened" with a suspension or revocation. WEBSTER'S at 1136. "Continue" means "to carry onward or extend: keep up or maintain." WEBSTER'S at 493. "Extend" means "to cause to be longer: LENGTHEN, PROLONG, PROTECT." "Modify" can mean either "to make more temperate and less extreme" or merely to "change." WEBSTER'S at 1452.[1/] Regardless of the meaning intended for "modify[ing]," "impos[ing], continu[ing] and extend[ing]," suspensions or revocations clearly are burdens placed on a person's driving privileges that the Department is authorized to impose in order to enforce provisions of the vehicle code. ORS 809.409 to 809.423 and the implementing rules are the provisions of law that specify with particularity the grounds on which the Department may impose those burdens. There is no reason to conclude that the legislature intended ORS 809.440(1) (d) as an independent grant of authority to the Department to disregard those statutes and impose those burdens for any reason that it deemed equitable in a particular case merely because a driver requested a hearing. Instead, ORS 809.440(1) (d) merely authorizes the Department to impose those burdens following a hearing if "good cause," *i.e.*, a basis specified in one of those provisions of law, appears to do so.

ORS 809.440(1) (a) supports interpreting good cause as a reason specified in the ORS 809.409 to 809.423 and the implementing rules. ORS 809.440(1) (a) provides that "[t]he hearing shall be given before the department imposes the suspension or revocation of driving privileges or continues, modifies or extends a suspension or revocation." The options available to the Department in ORS 809.440(1) (a) mirror the options available to the Department in ORS 809.440(1) (d). In other words, the Department is only authorized, following a hearing, to do what it has authority to do if no hearing is requested – impose a new suspension or revocation or continue, modify or extend an existing suspension or revocation. In the absence of a hearing request, the Department can only take those actions for the reasons set out in ORS 809.409 to 809.423 and the implementing rules.

Moreover, if we were to interpret "good cause" as used in ORS 809.440(1) to mean that the Department could impose a suspension or revocation for any reason it deemed equitable following a hearing, it would render irrelevant to hearings the statutory scheme's substantive provisions. The result would be that the sanction for similar conduct would be different for drivers who requested a hearing than for those who did not. The federal Due Process Clause applies to the deprivation of a driver's license and requires an opportunity to be heard at a meaningful time and in a meaningful manner. ***Cole/Dinsmore v. DMV***, 336 Or 565, 588, 87 P3d 1120 (2004). It also prohibits laws, whether criminal or civil, that are vague, i.e., that fail to give fair warning of what is prohibited and that allow *ad hoc* and subjective enforcement. ***Delgado v. Souders***, 334 Or 122, 147, 46 P3d 729 (2002). A statute that sanctioned drivers who exercised

their constitutional right to request a hearing by authorizing the Department to suspend their licenses for any reason it deemed equitable would almost certainly violate the due process clause, and we assume that is not what the legislature intended.

We conclude that, read in context, ORS 809.440(1) (d) authorizes the Department to impose, continue, modify or extend a suspension or revocation following a hearing only if evidence adduced at the hearing shows that the respondent's conduct fell within a substantive provision of ORS 809.409 to 809.423 or the implementing rules.

2. Delegative Term

We recognize that courts have characterized "good cause" as a term used by the legislature to delegate authority to agencies to flesh out policy that is incompletely expressed. We also note, however, the court has done so in the context of construing statutes where the term unquestionably was used to allow an agency to excuse an action or grant a request, rather than to impose a burden. *See, e.g.*, ***In the Matter of the Compensation of Debra L. Lay,*** 142 Or App 469, 921 P2d 1321 (1996) (construing ORS 656.319(1)(b), which allowed claimants to show "good cause" why they should be excused from the timely filing requirements for workers' compensation claims); ***Ponder v. Employment Department,*** 171 Or App 435, 15 P3d 602 (2000) (construing ORS 657.176(2)(c), which allows workers to receive unemployment benefits if they had "good cause" for voluntarily leaving work); ***Ortiz, et us. V. Adult and Family Services,*** 45 Or App 925, 609 P2d 1309 (1980) (construing ORS 418.075, which allows dependent children to receive unemployment assistance when a parent had "good cause" to refuse to accept employment); ***Lombardo v. Warner***, 340 Or 264, 132 P3d 22 (2006) (construing ORS 377.735(2), which allows the Department of Transportation to grant a variance from temporary sign requirements "for good cause shown").

As the Oregon Supreme Court has explained, a "delegative" term "calls for completing a value judgment that the legislature itself has only indicated." ***McPherson v. Employment Division***, 285 Or 541, 550, 591 P2d 1381 (1979) (construing ORS 657.176(2) (c)). The legislature uses a "delegative" term "when it intends to confer discretion on the agency to 'refine and execute a generally expressed legislative policy.'" ***Simplot v. Dept. of Agriculture***, 340 Or 188, 197, 131 P3d 162 (2006) (quoting ***Springfield Education Ass'n v. School Dist.***, 290 Or 217, 228, 621 P2d 547 (1980)).

That is not the case for "good cause" as used in ORS 809.440(1) (d), however. The substantive provisions of ORS 809.409 to 809.423 do not merely "indicate" a "generally expressed legislative policy." Rather, the legislature thoroughly expressed its policy regarding the circumstances under which suspensions and revocations should be imposed and, when it intended to grant the Department discretion whether to suspend, it did so under the substantive provisions in ORS 809.409 to 809.423. The Department further limited its discretion under those substantive provisions by rule and it is bound by those rules. For those reasons, we conclude that "good cause" as used in ORS 809.440(1) (d) is not a delegative term.

Even if we were to construe "good cause" as used in ORS 809.440(1) (d) to be a delegative term, that would not change our conclusion. Oregon courts review an agency's

application of a delegative term to determine "whether the agency's action was within the scope of the authority conferred by statute" and, in making that determination, consider whether other statutes and rules limit the agency's discretion. *See* ***Lombard,*** 340 Or at 270,272 (holding that "[b]ecause the department has limited its own discretion [to determine what reasons are good cause to grant a variance] by enacting [a] rule, it may not disregard the rule while it is in effect."). The scope of authority granted to the Department in ORS 809.440(1) (d) is limited by the substantive provisions of ORS 809.409 to 809.423 and the Department's rules implementing those statutes.

C. May

Finally, ORS 809.440(1)(d) provides that the Department "may" impose, continue, modify or extend a suspension. "May" means "have permission to." WEBSTER'S at 1396. That is to say, the text of ORS 809.440(1)(d) would allow, but not require, the Department to take those actions. The question remains whether the permissive "may" in ORS 809.440(1) (d) means that the Department has discretion not to impose a suspension or revocation even when the applicable statute or rule makes a suspension mandatory. We examine ORS 809.440(1) (d)'s context to answer that question.

IV. Context of ORS 809.440(1)(d)

As discussed above, ORS 809.409, 809.411, 809.413, 809.415(1) to (4), 809.417(1) to (2), 809.419(1) to (2), and 809.423 provide for mandatory suspension for mandatory periods of time. ORS 809.380(1) reinforces the non-discretionary nature of those suspension periods. That statute applies generally to suspensions and provides that "[t]he period of suspension ***shall*** last as long as provided for that particular suspension by law." (Emphasis added.) ORS 809.380(4) further directs that the Department "***may not*** issue driving privileges in contradiction to this section." (Emphasis added.)

The legislature also specified in ORS 809.450 the *only* grounds on which the department is authorized to rescind a suspension under ORS 809.415 or ORS 809.417(2). *See* ORS 809.450(1) (providing that "[t]he department may rescind a suspension only as provided in subsection (3) of this section"); ORS 809.450(3) (providing that "the department shall rescind the suspension if the department determines [that the facts set out in subsections (3) (a) to (3) (e) exist]"). Therefore, if the Department elects to provide a hearing to revisit a suspension, ORS 809.450 grants it no discretion over the resulting decision. The Department *must* rescind the suspension if it makes the factual determinations specified in subsections (3) (a) to (3) (e), but it *may not* rescind otherwise.

The requirements imposed by those statutes are clear and express. If the Department fails to impose suspensions or suspension periods required by one of those statutes it violates the law. As discussed above, any apparent discretion granted by ORS 809.440(1) (d) is circumscribed by other relevant statutes and rules. In any case, nothing in ORS 809.440(1) (d) would prevent the Department from complying with those mandates. That is, to provide that the Department *has permission to* "impose, continue, modify or extend a suspension" does not necessarily imply that it has permission to *not* do so. Therefore, when the Department finds "upon [a] hearing" that a

driver has violated a provision of ORS 809.409 to 809.423 that mandates suspension or revocation, ORS 809.440(1) (d) simply grants it permission to carry out the substantive statute, which avoids any conflict between the statutes. ***Fairbanks v. Bureau of Labor and Industries***, 323 Or 88, 94, 913 P2d 703 (1996) (quoting ***State v. Pearson***, 250 Or 54, 58 440 P2d 229 (1968)) ("statutes should be read together and harmonized, if possible, while giving effect to a consistent legislative policy"). This interpretation harmonizes ORS 809.409 to 809.423 and ORS 809.440(1) (d) and gives effect to a consistent legislative policy in that the potential sanction for violating a substantive provision does not depend on whether a driver receives a hearing.

Even if we could not harmonize the statutes, "the specific statute is considered an exception to the general statute." ***Fairbanks*** at 94 (quoting ***State ex rel Juv. Dept. v. M.T.***, 321 Or 419, 426, 899 P2d 1192 (1995) (citing ***Smith v. Multnomah County Board of Commissioners***, 318 Or 302, 309, 865 P2d 356 (1995)); ORS 174.020. ORS 809.440(1) unquestionably is the general statute and the substantive provisions are the specific ones, which means that, if a mandatory provision could not be harmonized with ORS 809.440(1), the former would control.

We conclude that, if a hearing concerns a statute that makes a suspension mandatory, the Department must impose the suspension if it concludes that the statute applies. The same is true for a statute that mandates a specified suspension period. If a statute requires the Department to impose a mandatory suspension period, the Department must impose the suspension period required by the statute. An ALJ conducting a hearing on behalf of the Department is bound by the same statutory requirements that apply to the Department, and must impose a suspension mandated by statute if the ALJ determines the factual circumstances exist and may not deviate from the suspension periods mandated by statute.

Likewise, as discussed above, when a substantive provision grants the Department discretion to impose a suspension or determine the length of a suspension period, and the Department has adopted a rule limiting that discretion, the Department must follow its own rule in individual cases. The fact that it has limited its discretion under the substantive statutes rather than under ORS 809.440(1) (d) is consistent with the statutory scheme and does not alter the fact that it may not disregard relevant rules when exercising its discretion under ORS 809.440(1) (d). We conclude that the Department's discretion under ORS 809.440(1)(d) is circumscribed by relevant rules limiting the Department's discretion under a substantive provision of ORS 809.409 to 809.423. As with the Department, an ALJ may not disregard an administrative rule and must impose a suspension or a suspension period as prescribed by Department rule.

CONCLUSION

We conclude that ORS 809.440(1)(d) grants the Department authority, following a hearing, to suspend or revoke driving privileges if there is sufficient legal reason to do so under ORS 809.409 to 809.423 or the rules implementing those provisions. In exercising its authority under ORS 809.440(1)(d), the Department or an ALJ conducting a hearing on behalf of the

Department must comply with those statutes and rules and has no discretion either to not impose a suspension that they require or to deviate from suspension periods they mandate.

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[1/] Read in the context of ORS 809.440(1) (a) as interpreted by the Oregon Supreme Court, "modify" appears to mean a change that further burdens driving privileges rather than lessens those burdens. Specifically, ORS 809.440(1) (a) provides that a hearing "shall be given before the department imposes the suspension or revocation of driving privileges or continues, modifies or extends a suspension or revocation." The Oregon Supreme Court concluded that the legislature added the language "continues, modified, or extends" in *former* ORS 486.221, the statutory precursor to ORS 809.440(1) (a) to "provide notice and hearing rights in cases of *further action by the division affecting a license."* ***State v. Tooley,*** 297 Or 602, 606, 687 P2d 1068 (1984) (emphasis added). That interpretation became part of the statute. ***S-W Floor Cover Shop***, 318 Or 614, 622, 872 P2d 1 (1994) (holding that the text of a statute includes prior Oregon Supreme Court interpretations of the words of the statute). That language was incorporated into ORS 809.440(1) (a) without change. ORS 809.440(1) (d) uses exactly the same language, so we give it the same meaning. *See* ***Tharp v. PSRB,*** 338 Or 413, 422, 110 P3d 103 (2005) (when legislature uses same language in related provisions, we assume that the legislature intended the same meaning).