

**OPINION
73-293**

September 11, 1973 (OPINION)

Mr. Marshall T. Bergerud
State's Attorney
Dunn County
Killdeer, ND 58640

Dear Mr. Bergerud:

This is in reply to your letter of August 23, 1973, wherein you request an opinion relating to the effect of chapter 39-06. I upon that portion of section 39-08-01 which prohibits a person from being in "actual physical control of any vehicle upon a highway . . . if . . . he is under the influence of intoxicating liquor."

You point out that throughout chapter 39-06.1, the various sections dealing with the suspension of operator's licenses speak of "driving while under the influence". Your specific question being "will a person convicted of being in actual physical control of a vehicle while under the influence automatically have his operator's licenses suspended under chapter 39-06.1 upon such conviction?"

Chapter 39-06.1 classified traffic offenses as criminal or noncriminal and further defined the noncriminal offenses as nonmoving or moving. It would appear, from the language in sections 39-06.1-02 and 39-06.1-05 (1), that a charge under section 39-08-01 of driving while under the influence of intoxicating liquor is classified as a criminal offense and that pursuant to the provisions of section 39-06.1-10 subsection 3b. (5), fifteen points are assigned upon a conviction. This results in a license suspension of twenty-eight days.

Being in actual physical control of a vehicle while under the influence of intoxicating liquor or drugs has always been and presently is a violation of law. Even though it may be classified as a nonmoving offense, it is nevertheless a criminal offense. The legislature has not reclassified it as noncriminal.

In our opinion the offense of being in actual physical control as provided for in section 39-08-01 has not been changed and has not been reclassified as noncriminal. No points have been assigned for this violation which is in harmony with the basic concept that it is still considered a criminal offense.

The authority to suspend or revoke a driver's license, on the grounds of being in actual physical control has not been changed and is substantially the same as it existed under prior law. There is no provision for an automatic suspension or revocation solely for having been found guilty of being in actual physical control of any motor vehicle upon the highway while under the influence of intoxicating liquor or drugs. Any suspension or revocation that may result therefrom would have to be based upon a competent finding that the individual is incompetent to drive a motor vehicle pursuant to the provision in section 39-06-32 (2).

I trust this answers your inquiry.

Sincerely yours,

Allen I. Olson

Attorney General