OPINION
78-119

May 2, 1978 (OPINION)

Mr. F. John Marshall
Grand Forks City Attorney
P. O. Box 216
Grand Forks, ND 58201

Dear Mr. Marshall:

This is in reply to your letter of December 21, 1977, requesting the opinion of this office on four questions relating to motor vehicle operator's license revocation hearings conducted pursuant to Chapter 39-20, N.D.C.C. Your question are as follows:

1. May a municipal prosecutor attend an Implied Consent Administrative hearing to represent policemen and their witnesses?

2. May a police officer at an Implied Consent Administrative hearing have an attorney of his choice represent him and question witnesses testifying at the hearing?

3. May a municipal prosecutor question the person whose driving privileges have been revoked if that person makes at a statement at the hearing?

4. May the city in which the arrest occurred intervene, either as a matter of right or as a permissive intervenor, in a subsequent Implied Consent Administrative hearing?

A police officer making an arrest for driving or being in physical control of a vehicle while under the influence of intoxicating liquor and requesting to driver to submit to a chemical test for intoxication is an employee of the city and carrying out duties which at least in part are pursuant to the "police power" exercised by the city, even though he may be exercising his authority in that particular instance pursuant a specific state statute. As such, the city has a direct interest in those subsequent proceedings that derive from that arrest, as it is, in essence, responsible for the arrest and matters that are collateral thereto. One such collateral subsequent proceeding would be a license revocation hearing for refusal of the arrested party to consent to a chemical test.

At issue in such a hearing are questions of fact concerning whether (1) the officer "had reasonable grounds to believe the person had been driving or was i actual physical control of the vehicle upon the public highways while under the influence of intoxicating liquor," (2) "whether the person was placed under arrest," and (3) "whether he refused to submit to the test or tests." If the highway commissioner, through his hearing examiner, should find that one or more of these facts did not exist, such finding of fact would be contrary to that of the arresting officer and would, insofar as the issues of reasonable grounds to believe the driver was driving while

intoxicated and proper arrest are concerned be making the same factual determinations that are also involved in a collateral prosecution under either a city ordinance or state law. Thus, the arresting officer and the city have a very real interest in insuring that the testimony presented at the license revocation hearing is presented as fairly and vigorously from the city's perspective as it is from the defendant driver's. Where the driver is permitted to have legal counsel present to assist in presenting his defense and is allowed to cross-examine the arresting officer within the latitude permitted by the rules of civil procedure (or possibly more liberally, if allowed by the hearing examiner), then the city's interest would not be, in our opinion, adequately represented.

The fact that the arresting officer and the city would not be adequately represented in such a proceeding would possibly not be significantly important if it were not for the fact that the hearing examiner's (and, hence, the highway commissioner's) findings of fact may be contrary to the court's findings in the collateral criminal or quasi-criminal prosecution. While we recognize that the degree of proof needed in the administrative hearing is less than for a criminal or quasi-criminal proceeding, it is, nevertheless, important that every reasonable effort be made to insure that the facts are presented to the hearing examiner in as even-handed manner as possible under such circumstances, for the possibility of an action for damages against the arresting officer or the city for a violation of the defendant's civil rights, etc., always exists (regardless of the chances of success) where the record of an administrative agency reflects, in its findings, that insufficient proof was presented to satisfy the hearing examiner that the police officer had "reasonable grounds to believe" a driver was intoxicated or that such person was properly placed "under arrest."

Consequently, the arresting officer and the city are directly interested in the proceedings before the highway commissioner and they may be factually aggrieved by his decision. As such, we believe that they are "parties" to the proceeding. As our Supreme Court observed in Application of Bank of Rhame, 231 N.W.2d. 801:

> We believe that any person who is directly interested in the proceedings before an administrative agency who may be factually aggrieved by the decision of the agency, and who participates in the proceeding before such agency, is a "party" to any proceedings for the purposes of taking an appeal from the decision.

While we do not necessarily conclude that the city may appeal a decision of the highway commissioner arising from a hearing under Section 39-20-05, N.D.C.C. as the specific statute (Section 39-20-06) pertaining to such appeals indicates that only the defendant driver may do so, it is our opinion that the city and the arresting officer have a sufficiently significant interest in the hearing so as to confer upon them the status of "parties" with the requisite standing to permit them to be represented by legal counsel during the course of the hearing, to present evidence in support of the facts alleged, and to cross-examine witnesses presented by the defendant driver. Therefore, we answer your questions in the affirmative, with the qualification that, as to your second question, a police officer

should be required to provide convincing reasons why private legal counsel, rather than the city attorney, should be allowed to represent him.

Sincerely,

ALLEN I. OLSON

Attorney General