IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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CHARLES LOUIS FRIEDMAN,

Petitioner-Appellee/
Cross-Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,
MOTOR VEHICLE DIVISION,

Respondent-Appellant/
Cross-Appellee.

8-590
88-849

Appeal from the Iowa District Court for Polk County (AA-1249), Ray A. Fenton, Judge.

Respondent appeals the district court's reversal of its decision to suspend the license of petitioner. **REVERSED.**

Thomas J. Miller, Attorney General, and Carolyn J. Olson, Assistant Attorney General, for the respondent-appellant/cross-appellee.

Roger J. Kuhle, of Kuhle and Sanders, P.C., Des Moines, for the petitioner-appellee/cross-appellant.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

OXBERGER, C.J.

Respondent-appellant and cross-appellee Iowa Department of Transportation (DOT) appeals from the district court's reversal of its decision to suspend the license of petitioner-appellee and cross-appellant Charles Louis Friedman.

The following facts, as found by the DOT hearing officer are not in dispute. DOT adjudicated Mr. Friedman to be a habitual violator pursuant to Iowa Code section 321.210(3) having found he was convicted of three or more moving traffic violations during a twelve-month period. Approximately two months into his probationary period he was convicted for speeding 45 mph in a 35 mph speed zone. The DOT then suspended his license for ninety days pursuant to departmental regulation I.A.C. 820 (07, C) 13.13 (8)(c).

Mr. Friedman appealed the suspension. He contended his speeding violation while on probation could not be considered by the DOT as a basis for suspension under Iowa Code section 321.210(8) paragraph 10 (1987) which states:

> The department shall not consider or assess any points for speeding violations of ten miles per hour or less over the legal speed limit in speed zones that have a legal speed limit greater than thirty-five miles per hour in determining a license suspension under this section. This paragraph shall apply to only the first two such violations which occur within any twelve-month period.

Effective May 12, 1987, this section was amended to read:

> The department shall not consider or assess any points for speeding violations of ten miles per hour or less over the legal speed limit in speed zones that have a legal speed limit equal to or greater than thirty-five miles per hour but not greater than fifty-five miles per hour in determining a license suspension under this section. This paragraph shall apply to only the first two such violations which occur within any twelve-month period.

The DOT reviewing officer affirmed the suspension June 26, 1987.

On judicial review the trial court also rejected Mr. Friedman's contention that section 321.210, amended or otherwise, restricted the DOT's use of his last speeding violation during his probationary period to suspend his license. However, the district court concluded the violation was considered minor, especially in light of this provision, and the DOT abused its discretion in suspending Mr. Friedman's license. The district court reversed the DOT ruling and extended Mr. Friedman's probationary period for an additional three months.

Our scope of review was well set out in Henry v. Iowa Dep't of Transp., M.V.D., 426 N.W.2d 383, 385 (Iowa 1988):

> In reviewing a district court decision on the validity of an agency action, we decide only whether the district court has correctly applied the law. The district court itself acts in an appellate capacity to correct errors of law on the part of the agency. When we review such action by the district court, we merely apply the standards of section 17A.19(8) to determine whether our conclusions are the same as those of the district court. If the conclusions are the same, we affirm; otherwise we reverse. (Citations omitted.)

We agree with the trial court's conclusion that as a matter of law Iowa Code section 321.210, amended or not, did not restrict the DOT's power to use Mr. Friedman's last speeding violation as a basis for revoking his probation and suspending his license. The section at issue lists eight situations in which the DOT is authorized to suspend a driver's license using a point system. Iowa Code § 321.210(1)-(8). Mr. Friedman's present suspension was not based upon any of these situations or by use of the point system discussed. While it is true Mr. Friedman was previously found to be an habitual violator, the speeding violation at issue was not used as a basis for that finding. Mr. Friedman was allowed to attend driver's school, and was to serve a probationary period in lieu of a suspension following this finding. Mr. Friedman's suspension was a result of his conviction for a speeding violation during the period of probation. The DOT has discretion to revoke this probation if the habitual violator is convicted for "a moving traffic violation committed during" the probationary period. I.A.C. 820 (07, C) 13.13 (8)(c). The language of this rule does not restrict what moving violations may be considered in this revocation process. The district court was correct in concluding section 321.210 did not bar the DOT's consideration of Mr. Friedman's speeding violation as grounds for probation revocation.

The district court did conclude the language in the paragraph stating a speeding violation, such as Mr. Friedman's, cannot be considered by the DOT in its point system indicates a legislative determination the violation is a minor one. Therefore, the court found the DOT's revocation of probation and subsequent suspension was an abuse of discretion on the part of the agency. We reverse this finding.

An appellate court is not to interfere with an agency's discretion unless that agency action is carried out in an arbitrary and capricious manner. Stillians v. Iowa State Arts Council, 410 N.W.2d 253, 255 (Iowa 1987). A review of the hearing and reviewing officers' decisions indicates they relied, in part, on Mr. Friedman's past driving record of five moving violations in a nine-month period and eight moving violations since October 1982 when revoking his probation. The record contains no evidence indicating the agency has a policy of always revoking probation and suspending the license in similar situations. Nor does Mr. Friedman suggest his license was suspended for this violation while all others in similar situations were allowed to remain on probation. We find substantial evidence in the record to support the agency's suspension of Mr. Friedman's license and reinstate that decision.

REVERSED.