

IN THE COURT OF APPEALS OF IOWA

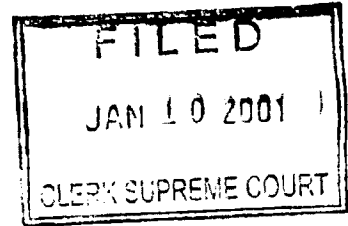
No. 0-674 / 00-627  
Filed January 10, 2001

**BRIAN DAVID MEISINGER,**  
**Petitioner-Appellee,**

**vs.**

**IOWA DEPARTMENT OF TRANSPORTATION,**  
**MOTOR VEHICLE DIVISION,**  
**Respondent-Appellant.**

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Appeal from the Iowa District Court for Dubuque County, Karl D. Briner,  
Judge.

The respondent appeals from the district court's ruling on judicial review  
rescinding the revocation of the petitioner's driver's license for a chemical test  
failure. **AFFIRMED.**

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant  
Attorney General, and Carolyn J. Olson, Assistant Attorney General, for  
appellant.

Thomas J. Straka of law office of Robert L. Day, Jr., Dubuque, for  
appellee.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

**ZIMMER, J.**

The Iowa Department of Transportation appeals from the district court's reversal of Brian Meisinger's driver's license revocation. It claims the district court erred in rescinding the license revocation based on a sheriff's department's failure to keep certain records as required by the Iowa Administrative Code to document proper calibration of a preliminary breath testing device. We affirm.

***I. Background Facts and Proceedings.*** In the early morning of July 26, 1999, a Dubuque County deputy sheriff stopped a vehicle driven by Brian Meisinger after the vehicle crossed the center line. The deputy observed signs that Meisinger had been drinking and determined that Meisinger was under the age of twenty-one. The deputy asked Meisinger to submit to a preliminary breath test (PBT). The test first showed a reading of .10 and then dropped to .09.

After administering the PBT, the deputy subjected Meisinger to a horizontal gaze nystagmus test. Meisinger failed the test. The deputy took Meisinger to the law enforcement center to process him for a "zero tolerance" violation because he was under the legal drinking age. Meisinger was not arrested. At the law enforcement center, the deputy invoked implied consent procedures. The deputy read the implied consent advisory form to Meisinger. Section B of the written request form listed the seven different conditions which support an officer's request for chemical testing. The instructions pertinent to section B directed the deputy to check all grounds that applied. The only ground checked was the following: "[the person] submitted to a preliminary breath screening test (PBT) which indicated an alcohol concentration of ten hundredths (0.10) or more." Meisinger signed the form and submitted to a breath test.

Meisinger had an alcohol concentration of .107. Meisinger was notified that his driver's license would be revoked for 180 days due to the test failure.

Meisinger appealed the revocation. In October 1999, an administrative law judge found that the sheriff's office's calibration records for the PBT device did not include the value or type of standard used as required by the applicable administrative rule. As a result, he concluded the results of the PBT could not be considered. Because no other conditions set out in Iowa Code section 321J.6(1) were satisfied, the ALJ concluded the deputy was not authorized to request a breath specimen from Meisinger at the law enforcement center. The ALJ concluded that there was no basis for the revocation of Meisinger's license.

The DOT appealed. The reviewing officer reversed the ALJ's decision. She determined the PBT device was an approved testing device, it was calibrated within thirty days before its use, the value of the calibration was noted, and a calibration log was kept. She acknowledged the type of standard used was not logged but concluded it was "neither unreasonable nor unfair" to require Meisinger to prove the PBT device was not calibrated using a wet alcohol standard or Nalco standard. She ruled that Meisinger had failed to meet his burden of proof, reversed the decision of the ALJ, and reinstated the license revocation.

Meisinger filed a petition for judicial review challenging the DOT's decision. Following hearing, the district court rescinded the revocation. The court determined that because the calibration of the preliminary testing device was not properly logged by showing the value and type of the standard used for calibration as required by the administrative code, the deputy did not satisfy the

requirements of section 321J.6(1) for requesting the withdrawal of a body specimen on the basis of the results of the PBT. No other issues were addressed by the court. The DOT appeals.

**II. Scope of Review.** DOT license revocation decisions are subject to judicial review under the Iowa Administrative Procedure Act. See Iowa Code §§ 17A.10, 321J.14. Our review of the DOT's decision is limited to the correction of errors of law as to those issues considered at the administrative hearing. See Iowa Code § 17A.19(8)(a); *Furry v. Iowa Dep't of Transp.*, 464 N.W.2d 869, 870 (Iowa 1991).

**III. Burden of Proof.** The licensee bears the burden of proof in a license revocation proceeding to show compliance with the implied consent law and the peace officer's failure to satisfy the procedural requirements. *Peterson v. Iowa Dep't of Transp.*, 508 N.W.2d 689, 691 (Iowa 1993). Consequently, a driver contesting a license revocation has the burden to prove why the license should not be revoked. *Munson v. Iowa Dep't of Transp.*, 513 N.W.2d 722, 723 (Iowa 1994).

**IV. Discussion.** Iowa Code section 321J.5 provides that a peace officer who has reasonable grounds to believe that a motor vehicle operator is operating while intoxicated may request that the operator provide a sample of breath for preliminary screening "using a device approved by the commissioner of public safety for that purpose." In addition, a peace officer who has reasonable grounds to believe a person has been operating while intoxicated may invoke implied consent if at least one of seven separate conditions set forth in Iowa Code section 321J.6(1) exist. Section 321J.6(1)(d), applicable in this case, states that

the officer may request withdrawal of body specimens for testing if the PBT indicates an alcohol concentration equal to or in excess of the level prohibited by section 321J.2 (that is, .10). The results of a PBT test are not sufficiently reliable to be admissible in evidence, but can be used for screening to determine whether a body specimen should be requested. *State v. DeShaw*, 404 N.W.2d 156, 158 (Iowa 1987).

Rules promulgated by the Iowa Department of Public Safety govern the PBT procedure:

Any peace officer using an approved device shall follow the instructions furnished by the manufacturer for use of such a device. Each unit shall be calibrated at least once per month using either a wet alcohol standard or a Nalco Standard (minimum 5 cubic foot volume). The officer or officer's department shall keep a record of each calibration. This record shall include:

- a. The officer performing the calibration
- b. Date.
- c. The value and type of standard used.
- d. Unit type and identification number.

Iowa Admin. Code r. 661-7.5(2). The DOT admits that Meisinger proved the Dubuque County Sheriff's records deviated from the administrative rule's requirements because they did not show the type of standard used. While they did show the model of the PBT, they also failed to show the specific unit type.

The DOT argues that because the recordkeeping requirements derive from an administrative rule and not a statute, the sheriff's failure to comply should not invalidate the test result. The record before us reveals that the DOT has taken the position in other cases that where no log has been maintained on the device used to administer a PBT, the calibration of the preliminary testing device was not properly logged and the requirements of section 321J.6(1)(d) were not met. Like the district court, we perceive no legally significant difference between

not keeping a calibration log and keeping a log that does not contain all of the information mandated by the administrative rules. Since the calibration records of the preliminary breath testing device did not include the type of standard used, the district court properly concluded the result of Meisinger's PBT should be disregarded. Because none of the other alternative conditions set out in section 321J.6(1) were relied upon, the deputy was not authorized to request a breath specimen from Meisinger at the law enforcement center and the result of the breath test at the law enforcement center should also be disregarded. We conclude the district court was correct in rescinding revocation of Meisinger's driver's license.

**AFFIRMED.**