IN THE COURT OF APPEALS OF IOWA

No. 1999-205 (9-429) / 98-1936
Filed November 10, 1999

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CLERK SUPREME COURT

DOUGLAS J. FUQUA,

Petitioner-Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,

Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

The respondent appeals from the district court's ruling on judicial review reversing the respondent's decision disqualifying the petitioner from operating commercial motor vehicles pursuant to Iowa Code section 321.208 for a chemical test failure. **REVERSED.**

Thomas J. Miller, Attorney General, **David A. Ferree, Special** Assistant Attorney **General, and** Noel C. Hindt, Assistant **Attorney General, for** appellant.

Kermit L. Dunahoo of Dunahoo Law Firm, Des Moines, for appellee.

Considered by Streit, P.J., and Miller, and Vaitheswaran, JJ.

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VAITHESWARAN, J.

The Iowa Department of Transportation (DOT) disqualified Donald J. Fuqua from operating a commercial motor vehicle for one year. On judicial review, the district court reversed, concluding the DOT failed to give Fuqua proper notice of a right to hearing. We reverse.

I. Background Facts and Proceedings

Iowa State patrolman Stuart Christians stopped Fuqua's vehicle on the morning of April 18, 1997. With Fuqua's consent, Christians administered a preliminary breath test which showed an alcohol concentration level of .081. On the same day, Christians personally served Fuqua with a notice stating he would be disqualified from operating a commercial motor vehicle for three years (April 18th notice). The disqualification was to become effective in twenty days. Three days later, Fuqua requested a hearing to challenge this notice.

On May 1, 1997, the DOT mailed Fuqua an amended notice (May 1st notice), reducing his disqualification period to one year and changing the effective date of the disqualification from twenty to thirty days from the date of the stop. The May 1st notice contained contradictory statements concerning Fuqua's right to a hearing. The DOT, however, honored Fuqua's original hearing request. On May 28, 1997, an administrative law judge held a telephone hearing on the notice, as amended.

Apparently unaware of the May 1st notice, counsel for Fuqua challenged the effective date contained in the April 18th notice. The DOT responded by pointing to

its May 1st notice, which cured this defect. In his decision, the administrative law judge made reference to the defect in the April 18th notice, explained that the defect had been corrected, and concluded, "[t]he Appellant has not been prejudiced by the starting date of the disqualification."

On administrative appeal to a reviewing officer, Fuqua did not challenge this finding or pursue any issues relating to the adequacy of either the April 18th or May 1st notice. The DOT issued a final agency ruling affirming the administrative law judge's decision.

Fuqua filed a petition for judicial review, asserting in part that "[t]he officer delivered to the plaintiff improper and/or inadequate notice of the Defendant's intention to suspend the Plaintiff's Commercial Driver's License." The district court adopted Fuqua's view that the original disqualification notice was defective, and ordered the DOT to issue Fuqua a new license, as long as he was otherwise qualified.

II. Scope of Review/Error Preservation

On judicial review, a district court and this court function in an appellate capacity to correct errors of law. *Wiebenga v. Iowa Dep't. of Transp.*, 530 N.W.2d 732, 734 (Iowa 1995). A district court may review and we may consider only those questions considered and decided by the agency. *Soo Line R. Co. v. Iowa Dep't. of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994); *Meads v. Iowa Dep't. of Social Servs.*, 366 N.W.2d 555, 559 (Iowa 1985). The Iowa Supreme Court has viewed this

requirement as an error preservation concept. *See Kash v. Iowa Dep't. of Employment Servs.*, 476 N.W.2d 82, 83 (Iowa 1991).

Fuqua raised but did not pursue an administrative challenge to the April 18th notice and did not raise or pursue an administrative challenge to the May 1st notice. We conclude Fuqua failed to preserve error before the agency on the adequacy of notice issue. *See Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 527 (Iowa 1990) (noting that party who failed to apply for rehearing of contested case decision waived error on appeal). We further conclude this failure deprived the district court of authority to consider Fuqua's challenge to the April 18th notice or decide that the May 1st notice was inadequate. *See Meads*, 453 N.W.2d at 527 (concluding district court exceeded its authority in deciding issues not decided by agency). Accordingly, we reverse the district court's ruling on judicial review.

REVERSED.