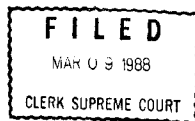


IN THE COURT OF APPEALS OF IOWA



JOHN JOSEPH HARTVIGSEN,)
Petitioner-Appellee,)
vs.)
IOWA DEPARTMENT OF TRANSPORTA-)
TION; MOTOR VEHICLE DIVISION,)
Respondent-Appellant.)

Filed March 9, 1988

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7-368
87-420

Appeal from the Iowa District Court for Scott County (72301 & 72303),
David J. Sohr, Judge.

The Iowa Department of Transportation appeals the district court's order
rescinding the agency's revocations of the petitioner's driving privileges in two
separate cases due to the agency's failure to timely file an administrative record.
AFFIRMED.

Thomas J. Miller, Attorney General of Iowa, and Mark Hunacek, Assistant
Attorney General, for respondent-appellant.

Dennis D. Jasper of Stafne, Lewis & Jasper, Bettendorf, for petitioner-
appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

The Iowa Department of Transportation (IDOT) appeals the district court's order rescinding the agency's revocations of the petitioner's *driving privileges* in two separate cases due to the agency's failure to timely file an administrative record. The IDOT contends that: (1) the district court had no authority to enter a default against an administrative agency in a contested case proceeding under Iowa Code chapter 17A; and (2) even if such authority exists, the district court abused its discretion in rescinding the license revocation orders where the agency's failure to file the transcripts on time was inadvertent.

On August 28, 1986, the petitioner, John Joseph Hartvigsen, filed three petitions for judicial review challenging three separate license revocation orders by the IDOT. These petitions were numbered 72301, 72302, and 72303. The IDOT filed an answer in case 72302 on September 10. The district court subsequently granted the IDOT's motion for extension of time in which to file the administrative record in case 72302. The agency alleges that due to a clerical error, it mistakenly treated the three petitions as one. The agency failed to request extensions in cases 72301 and 72303, and the administrative records in those cases were not timely filed pursuant to Iowa Code section 17A.19(6).

On January 22, 1987, Hartvigsen filed a "Motion to Dismiss or, in the Alternative, to Consolidate" in all three cases. Hartvigsen claimed that since the IDOT only filed one of three required transcripts, cases 72301 and 72303 should either be dismissed or else consolidated. The IDOT responded, resisting dismissal and asserting that the missing transcripts would soon be filed. On February 18, the district court filed an order in all three cases granting the motion for default as to cases 72301 and 72303, but denying default in case 72302.

On February 24 the IDOT filed motions to set aside the default judgments in cases 72301 and 72303. The IDOT filed the missing transcripts that same day. On February 25 the district court entered judgment in cases 72301 and 72303, rescinding the IDOT's revocation orders for operating while intoxicated. This appeal followed. We affirm.

The IDOT initially argues that the district court lacks authority to enter a default against an administrative agency in a contested case proceeding under Iowa Code chapter 17A. The IDOT contends that although Iowa Code section 17A.19(6) requires the agency to file the entire record within a specified time (thirty days), that statute does not specify the possible penalties for noncompliance. Furthermore, the IDOT claims, the rule of civil procedure providing authority to a court for granting default judgments is not applicable in a judicial review proceeding if the rule conflicts with a particular provision in chapter 17A. Iowa R. Civ. P. 331. The IDOT contends that since Iowa Code section 17A.19(8) does not specify default judgments as a form of available relief, the granting of such defaults would be in conflict with chapter 17A and therefore are not applicable in judicial review proceedings.

The issue of whether a district court may grant default judgments against an administrative agency in a chapter 17A judicial review proceeding has never been directly addressed by the Iowa Supreme Court. But see Maurer v. Weaver, 213 Neb. 157, 328 N.W.2d 747 (1982) (failure of agency to prepare and transmit to court a certified transcript of proceedings within statutory period does not entitle party seeking review to have agency's order set aside). We do not believe that default judgments against an administrative agency are inconsistent with chapter 17A where, as in this case, the agency has failed to follow the statutory guideline established for filing the transcripts of the agency's proceedings. The filing rule is clearly stated in Iowa Code section 17A.19(6). Although that

section does not directly specify that its violation may result in the entry of a default judgment, we find nothing in the statute to preclude such a result. We therefore hold that the district court had the authority to grant a default judgment against the IDOT upon the agency's failure to make a timely filing of the transcript pursuant to Iowa Code section 17A.19(6).

Regarding the granting of a default judgment, it appears there was no supporting evidence presented to show abuse of discretion, and although the representation of inadvertent clerical error was made by the IDOT's resistance, the district court was *not required* to find that the failure to file was by reason of inadvertence. As a consequence, the court entered default, as a sanction for failure to comply with the filing statute.

Following entry of the defaults, the IDOT filed motions to set them aside, alleging that failure to timely file the administrative records in cases 72301 and 72303 was the result of inadvertent clerical error. Iowa Rule of Civil Procedure 236, which is relevant to this case, provides in part:

On motion and for good cause shown, and upon such terms as the court prescribes, but not *ex parte*, the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty [Emphasis added.]

It appears that the IDOT's motions to set aside the default judgments alleged conduct which would qualify as either mistake, inadvertence, or excusable neglect.

Our problem with the procedure followed here, however, has nothing to do with the propriety of the filing of the motions to set aside the defaults. Here, the record is silent as to the disposition of those motions in the district court. There is no showing that any action was taken to present those motions for hearing, or that any evidence, by way of affidavit or verification of the motions was offered in support of the allegation of "inadvertent clerical error"

that was contained in each of the motions. The order entered by the court on the day following the filing of the motions to set aside the defaults appears to relate to the completion of the defaults, rather than a ruling upon the motions. The record indicates an immediate notice of appeal, rather than an effort to obtain a hearing upon the motions to set aside the default judgments.

The court cannot be found to have abused its discretion when there is no showing that it had an opportunity to exercise that discretion. Thus, we cannot here find that the district court abused its discretion in failing to set the defaults aside. Iowa Rule of Civil Procedure 236 is the proper rule under which the propriety of defaults or judgments thereon is determined. Since no evidence of "good cause" was shown for setting aside the default judgments, we are left with nothing to decide on the issue of the court's abuse of discretion in failing to set the defaults aside.

AFFIRMED.