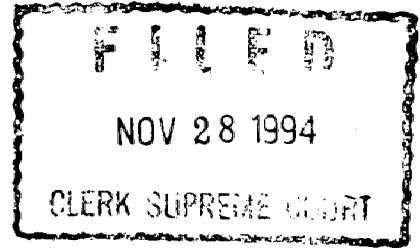


IN THE COURT OF APPEALS OF IOWA

No. 4-369 / 94-0355



PATRICK H. PAYTON,

Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,
MOTOR VEHICLE DIVISION,

Appellant.

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

The Iowa Department of Transportation appeals from the district court order affirming in part and modifying in part the agency decision revoking Payton's driver's license. **REVERSED.**

Bonnie J. Campbell, Attorney General, and Carolyn J. Olson, Assistant Attorney General, for appellant.

Charles A. Crook, III, Des Moines, for appellee.

Heard by Donielson, C.J., and Cady and Huitink, JJ.

HUITINK, J.

The Iowa Department of Transportation (DOT) appeals a district court order affirming in part and modifying in part the agency decision revoking Payton's driver's license. We reverse and reinstate the agency's decision.

On June 10, 1993, Patrick Payton was stopped for driving fifty-seven miles per hour in a thirty-five-mile-per-hour zone. Officer Charles Negrete observed Payton had slurred speech, a strong odor of alcohol coming from his mouth, and difficulty removing his driver's license from his wallet. Officer Negrete administered various field sobriety tests, and Payton failed each test.

Officer Negrete requested Payton perform a preliminary breath test (PBT). When told to exhale into the PBT unit Payton inhaled, then he blew over the machine and not into it. When informed he was under arrest, Payton attempted to walk away. Negrete forcibly detained and handcuffed him.

Upon arriving at the police department, Payton contacted and consulted an attorney before agreeing to take a breath test. However, when Negrete attempted to perform the test, Payton did not supply a sufficient breath sample. Negrete explained Payton needed to blow more air and gave him two more opportunities but he continued to provide an inadequate sample. Negrete told Payton his behavior was deemed a refusal and served him with a notice of revocation of his privileges to operate a motor vehicle for 240 days. Iowa Code § 321J.9 (1993).

Payton made two requests for an in-person hearing on his revocation, but the administrative law judge (ALJ) denied both requests. After a telephonic hearing, the ALJ issued a proposed decision revoking Payton's license for refusing the chemical test. The DOT affirmed on appeal. Payton filed a request to admit the Intoxilyzer operational checklist as "newly discovered evidence," but the agency denied the request.

Payton sought judicial review. The district court found the checklist had been unavailable to Payton because of flooding and the shut down of city services and if it was included in the evidence, Payton had met his burden of proof as a matter of law. The court found the DOT's failure to admit the checklist an abuse of discretion.

Although the court found evidence supporting revocation, it rescinded the revocation pursuant to section 321J.9. Taking judicial notice of Payton's criminal conviction and deferred judgment arising from the same incident, the court ordered the DOT to revoke Payton's license for a period of ninety days pursuant to Iowa Code section 321J.4(2).

Our review of the district court's decision is limited to corrections of errors at law. Roberts v. Iowa Dep't of Job Serv., 356 N.W.2d 218, 221 (Iowa 1984). The review function of the district court under section 17A.19 is to correct errors of law which are specified in section 17A.19(8). The district court is not empowered to

substitute its own judgment for that of the agency. Hainey v. Protein Blenders, Inc., 445 N.W.2d 398, 399 (Iowa App. 1989).

When we review decisions of the district court which were rendered in its capacity as an appellate body under section 17A.19, the issue for our determination is whether the district court correctly applied the law. Id. at 165. We apply the standards of section 17A.19(8) to the agency action to determine whether this court's conclusions are the same as those of the district court. Jackson County Pub. Hosp. v. Public Employment Relations Bd., 280 N.W.2d 426, 429-30 (Iowa 1979). If the conclusions are the same, we affirm; otherwise we reverse. Henry v. Iowa Dep't of Transp., 426 N.W.2d 383, 385 (Iowa 1988).

The DOT contends the district court erred in ruling that the agency abused its discretion on procedural matters. It argues (1) the administrative law judge did not act arbitrarily in refusing Payton's requests for an in-person hearing; and (2) the agency did not abuse its discretion in denying Payton's request to reopen the hearing and his request for a rehearing. We agree.

Whether a contested case hearing is held in person or by telephone conference is within the discretion of the agency holding the hearing. Iowa Code § 321J.13(2) (1993). Payton's reasons for making the request were (1) because he had three witnesses, plus himself, who would testify, a telephone conference would be "cumbersome and

difficult" and (2) he had an independent court reporter to record the hearing and he felt this "would be best done by an in-person hearing."

Payton presented each witness he wanted to testify, and the court reporter recorded the hearing. The same evidence would have been presented at an in-person hearing. Based on these facts, we determine the ALJ's decision denying Payton's request was neither unreasonable or arbitrary and did not constitute an abuse of discretion.

We also fail to find an abuse of discretion in the agency's refusal of Payton's request to reopen the hearing. Payton claimed the operational checklist for the Intoxilyzer was "newly discovered evidence" not available to him prior to the July 15, 1993, administrative hearing. He argues this required the hearing be reopened.

From our review of the agency record it is clear Payton had ample time to discover the operational checklist prior to the hearing. He failed to request the checklist either through a subpoena duces tecum for Officer Negrete's records or through discovery pursuant to section 17A.13. Having failed to timely discover the operational checklist, Payton was not entitled to present this evidence, either in a reopened hearing or a rehearing. Hollensbe v. Iowa Dept. of Job Serv., 418 N.W.2d 77, 80 (Iowa App. 1987).¹

1. Even if the district court had been correct in finding Payton provided valid reasons for failing to present the checklist in the agency proceedings, section 17A.19(7) requires the court to remand the case to the agency to present the additional evidence. The court

The DOT also contends the district court erred in failing to find the decision of the DOT to revoke Payton's license, based on a finding he refused to submit to chemical testing to determine the alcohol content of his blood, is supported by substantial evidence in the record.

Payton bears the burden of proving he complied with the implied consent law. McCrea v. Iowa Dept. of Transp., 336 N.W.2d 427, 428-29 (Iowa 1983). A licensee's words, acts, overall conduct, and other manifestations of a willingness or unwillingness to take the test are objective standards considered in determining compliance. Id. at 430 (citation omitted). Absent evidence sufficient to convince a fact finder of a licensee's inability to provide a sufficient breath specimen, compliance with the statute requires successful completion of the test. Id. (citation omitted).

Payton claims he successfully complied because he was able to blow enough to "light the green light on the Intoxilyzer." However, the agency record shows Payton inhaled rather than exhaled when asked to give a PBT; he blew over the testing tube, rather than placing his lips on the tube; and he only blew a small puff of air into the PBT machine.

exceeded its authority by making its own factual findings and substituting its own judgment for that of the agency. See Hainey v. Protein Blenders, Inc., 445 N.W.2d 398, 399 (Iowa App. 1989).

Furthermore, Payton failed three opportunities to provide a correct breath sample on the Intoxilyzer. He puffed his cheeks, giving the impression he was blowing hard enough, but again he blew over the tube. The lack of cooperation, coupled with Payton's contentious behavior during the initial stop and later at the police station, amounted to a refusal to take the test. See id. at 430-31 (citations omitted).

We conclude there is substantial evidence in the agency record to support the decision of the DOT to revoke Payton's license. Accordingly, we reverse the decision of the district court in its entirety and reinstate the decision of the department of transportation.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit. Both parties shall be responsible for their respective costs.

REVERSED.