FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GREGORY LUTE PORATH,

Petitioner-Appellee,

vs.

GORDON A. SWEITZER, DIRECTOR OF THE MOTOR VEHICLE DIVISION OF THE DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,

Respondents-Appellants.

Filed February 26, 1986

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85-821

Appeal from the Iowa District Court for Bremer County (22740) - B. C. Sullivan, Judge.

Respondent appeals from an adverse final judgment granting a work permit arising out of a petition for judicial review of agency action, a driver's license revocation. **REVERSED.**

Thomas J. Miller, Attorney General of Iowa, and Richard E. Mull, Assistant Attorney General, for respondents-appellants.

Gary J. Boveia of the Boveia Law Firm, Waverly, Iowa, for petitioner-appellee.

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

This appeal results from a driver's license revocation and denial of a work permit by the Department of Transportation (DOT). On judicial review, the district court determined that the DOT's decision not to grant the work permit was unreasonable, arbitrary and capricious, and characterized by an abuse of discretion. The DOT has appealed this result. We revise.

Petitioner Gregory Porath was arrested on October 28, 1983, for operating a motor vehicle while under the influence of alcohol. He submitted to a breath test which showed a blood alcohol level of .167. The record indicates that this was Porath's second offense; he had previously been convicted of OWI in February 1978 and had his license revoked at that time.

Following his 1983 arrest, petitioner was notified of a driver's license revocation pursuant to Iowa Code chapter 321B. He requested a hearing which was held in February 1984. The hearing officer sustained the revocation. He also refused to grant a work permit, apparently due to the fact that it was Porath's second offense.

Petitioner requested a review of the hearing officer's decision on the ground he was entitled to the work permit. He contended because his prior revocation was more than six years old, it should not preclude him from obtaining a work permit.

The reviewing officer held that the prior revocation was a proper consideration. He cited to an agency rule which provides that a temporary license or work permit "shall not be issued to any person who . . . [h]as previously had a revocation for a violation of Iowa Code section 321.281." 820 Iowa Admin. Code (07,C) 11.3(4). On judicial review, the district court ruled in petitioner's favor indicating that Rule 11.3(4) was beyond the agency's delegated power. Respondent has appealed.

The scope of review in this case is governed by the Administrative Procedures Act. Iowa Code § 321B.27 (1985). Our duty is to correct errors of law made by the district court. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa Ct. App. 1984). In doing so, we apply the standards set forth in Iowa Code section 17A.19(8) to the agency action and determine whether our conclusions are the same as the district court's. Gipson v. Iowa Dept. of Job Service, 315 N.W.2d 834, 836 (Iowa Ct. App. 1981). Findings of fact are considered binding; however, questions of law are not conclusive and are subject to review. Thomas, 349 N.W.2d at 125.

In its reasoning, the district court indicated that the Rule 11.3(4) violated Iowa Code sections 321B.16 and 321.281 in allowing consideration of any prior revocation no matter how old. The court interpreted these sections as having "an obvious intent to treat a second violation as a first violation when the prior violation was over six years ago." We cannot agree with this conclusion.

Iowa Code section 321B.16 provides in relevant part:

> Upon certification by the peace officer that there existed reasonable grounds to believe the person to have been operating a motor vehicle in violation of section 321.281 and that the person submitted to chemical testing and the test results indicate ten hundredths or more of one percent by weight of alcohol in the person's blood, the department shall revoke the person's license or permit to drive or nonresident operating privilege for a period of one hundred twenty days if the person has no revocation within the previous six years under section 321.209, subsection 2, section 321.281 or this chapter, two hundred forty days if the person has one previous revocation under those provisions, and one year if the person has two or more revocations under those provisions arising from separate occurrences.

The final paragraph of this section relates to issuance of work permits or temporary restricted licenses:

> The department may, on application, issue a temporary restricted license to a person whose license has been revoked under this section when the person's regular employment includes the operation of a motor vehicle

> or who cannot perform his or her regular occupation without the use of a motor vehicle, or when the person's use of a motor vehicle is necessary to attend evaluation, treatment or educational services for alcohol or drug dependency, but the person shall not operate a vehicle for pleasure while holding a restricted license. However, this paragraph does not apply to a person whose license is suspended or revoked for another reason.

The first paragraph quoted above does have a six-year limitation on the use of a prior revocation for the purpose of determining the length of the current revocation. However, no similar limitation is imposed in the paragraph concerning temporary restricted licenses. Instead, the statutory provision indicates that once the need criteria is satisfied, it is within the discretion of the agency to determine whether a particular applicant shall be granted a temporary restricted license. See Lenning v. Iowa Dep't. of Transportation, 368 N.W.2d 98, 100-01 (Iowa 1985).

In essence, for the purpose of issuing work permits, 321B.16 does not preclude consideration of revocations older than six years. The district court erred as a matter of law in concluding that the Department's rule violated this statutory provision.

We also find that the district court erred in concluding that the agency rule is inconsistent with Iowa Code section 321.281(2)(c). This section provides, in part:

> No conviction for, or plea of guilty to, a violation of this section which occurred more than 6 years prior to the date of the violation charged shall be considered in determining that the violation charged is a second, third, or subsequent offense.

We agree with respondent's contention that this provision is not relevant to the work permit issue. The section only addresses the imposition of criminal penalties for OWI convictions.

We recognize certain provisions impose restrictions upon the consideration of revocations older than six years. These provisions, however, are not applicable

to the issuance of work permits. Certainly, if the legislature intended to impose such a restriction they could have so provided in the final paragraph of 321B.16. We will not infer an overall statutory scheme to forbid consideration of revocations older than six years for any purpose. The language of 321B would not support this result.

Accordingly, we hold that the district court erred in voiding Rule 11.3(4). It was within the Department's discretion to deny petitioner a work permit based on this rule. As the supreme court indicated in Lenning, "[t]he criteria adopted in the challenged agency rule do not appear to be an irrational basis for denial of a temporary restricted license. These criteria foster both protection of the public and deterence to the offender, each of which is consistent with the responsibilities imposed upon the agency by law." 368 N.W.2d at 101.

REVERSED.