

IN THE COURT OF APPEALS OF IOWA

No. 9-085 / 98-0185
Filed August 27, 1999

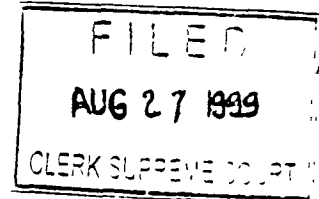
JOHN F. TIFFANY,

Appellant,

vs.

**IOWA DEPARTMENT OF TRANSPORTATION,
MOTOR VEHICLE DIVISION,**

Appellee.



Appeal from the Iowa District Court for Story County, Carl E. Peterson, Judge.

Petitioner appeals from the district court's ruling on judicial review affirming respondent's decision suspending petitioner's driving privileges. **AFFIRMED IN PART; SET ASIDE IN PART; RESULT AFFIRMED.**

John F. Tiffany, Dana, pro se.

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

Considered by Huitink, P.J., Streit, J., and Habhab, S.J.* Vogel, J., takes no part.

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

HABHAB, S.J.

The petitioner-appellant, John Tiffany, appeals the district court's ruling on judicial review affirming the agency decision suspending his driving privileges for failure to post financial security following a traffic accident¹ and imposing a \$200 civil penalty.² Tiffany claims the agency improperly placed the burden of proof on him under Iowa Code section 17A.18(3) to establish his challenge of the amount of the bond. He also claims the district court erred in refusing to consider his constitutional challenges to the administrative proceedings, determining such challenges were not preserved for review because they were not raised before the agency. He argues there was no evidentiary basis for the amount of the bond imposed and the imposition of a civil penalty under section 321A.32A constitutes improper double jeopardy and is an ex post facto law. We affirm the district court.

On September 18, 1996, the petitioner, John Tiffany, was involved in an automobile accident when his vehicle collided with another vehicle while he was making a left-hand turn. The investigating officer issued Tiffany a traffic citation for failure to yield for a left turn. Neither Tiffany nor the vehicle owner had insurance. The Iowa Department of Transportation notified Tiffany his driving privileges would be suspended until he deposited security in the amount of \$18,705 as required by Iowa Code section 321A.5. The agency determined the amount on the basis of

¹ Iowa Code § 321A.5 (1997).

² Iowa Code § 321A.32A (Supp. 1997).

findings there could be approximately \$7,000 in property damage and \$11,705 in personal injury costs. Tiffany's challenge to the deposit led to contested case proceedings. During the proceedings, Tiffany claimed he was not at fault. The agency entered a final decision upholding the suspension and made the suspension effective on August 14, 1997. The department also imposed a civil penalty of \$200 in connection with the suspension under a newly enacted Iowa Code section, 321A.32A (Supp. 1997).

Tiffany filed a petition for judicial review challenging the agency's decision. Tiffany also requested a stay. For the first time, Tiffany challenged certain administrative procedures by the department. These challenges included state and federal due process attacks regarding the department's imposition of the burden of proof on him, the conducting of administrative procedures by officers who are not legally trained and the failure to automatically extend the stay period for the imposition of the suspension during judicial review proceedings. Tiffany also challenged the imposition of the \$200 civil penalty based on a statute which became effective July 1, 1997 because the accident occurred in September 1996.

The district court denied the stay. The agency filed a motion to dismiss alleging that Tiffany's constitutional issues were not raised before the agency and thus not preserved for judicial review. The agency also alleged the license suspension

issue was moot because Tiffany's suspension had already ended one year after the accident when no party to the accident filed an action for damages.³

On December 24, 1997, the district court entered a ruling affirming the agency's decision. The court concluded Tiffany failed to preserve his constitutional claims for judicial review by not raising them before the agency. The court also concluded the suspension of Tiffany's license and the posting of security were moot because the period for posting the security had passed and the resulting suspension had been lifted. The court also concluded the imposition of a civil penalty did not constitute an illegal ex post facto application of law because the suspension was imposed effective August 14, 1997 after the civil penalty requirement became law. Tiffany appeals.

The district court, when exercising the power of judicial review conferred by section 17A.19, is itself functioning in an appellate capacity to correct errors of law, as specified in section 17A.19(8). *Jackson County Public Hospital v. Public Employment Relations Board*, 280 N.W.2d 426, 429 (Iowa 1979); *Iowa Public Service Co. v. Iowa State Commerce Commission*, 263 N.W.2d 766, 768 (Iowa 1978). When we review a decision of the district court rendered pursuant to section 17A.19, the sole question for us is whether the district court correctly applied the law. In order to make that determination, this court applies the standards of section 17A.19(8) to the agency action to determine whether this court's conclusions are the same as

³ Iowa Code section 321A.7(2)

those of the district court." *Jackson County Public Hospital*, 280 N.W.2d at 429-30. Our review is for the correction of errors of law, not de novo. *Henkel Corp. v. Iowa Civil Rights Comm'n*, 471 N.W.2d 806, 809 (Iowa 1991). The agency -- not the court -- weighs the evidence, and we are obliged to apply those findings broadly and liberally to uphold rather than defeat the agency's decision. *Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 237 (Iowa 1981).

On appeal, Tiffany first claims the agency erred in placing the burden of proof on him to show the amount of the security deposit was erroneous. Iowa Code section 321A.2 gives the agency rulemaking authority concerning chapter 321A and provides for hearings upon request of an aggrieved person. *Id.* The administrative rule implementing code section 321A.2 provides in part, the administrative law judge "may conduct any investigation deemed necessary to" determine "if there is any reasonable possibility that judgment could be rendered against the person" or "if the security required following an accident is reasonable. . . ." Iowa Admin. Code § 761-640.2(321A) (1998). The Iowa Supreme Court has repeatedly placed the burden of proof on the aggrieved person, not the agency:

We note also that the section 17A.18(3) burden of showing compliance is consistent with the burden of proof allocation placed on the driver's licensee in cases such as this prior to the enactment of chapter 17A. *Cf., Buda v. Fulton*, 261 Iowa 981, 985, 157 N.W.2d 336, 339 (1968) (burden of proof on licensee appealing revocation of license under implied consent statute); *see also* Iowa R. App. P. 14(f)(5) ("Ordinarily the burden of proof on an issue is upon the party who would suffer loss if the issue were not established.").

McCrea v. Iowa Dept. of Transp., 336 N.W.2d 427, 429 (Iowa 1983); *see, e.g., Gaskey v. Iowa Dept. of Transp., Motor Vehicle Div.*, 537 N.W.2d 695, 697 (Iowa 1995); *Office of Consumer Advocate v. Iowa Util. Bd.*, 454 N.W.2d 883, 886 (Iowa 1990) (holding that the burden of proof in a utility rate case is on the party challenging the rates to show that they are unreasonable, "and if the challenger fails to produce evidence that the rate is not just and reasonable, the [agency] should be affirmed even if it produces no evidence of justness or reasonableness"). We conclude the burden of proof properly fell upon Tiffany.

The district court found the agency decision to be supported by substantial evidence, but concluded the issues of the amount of the security deposit and the suspension of Tiffany's license were moot. Tiffany argues "claims for deprivation of rights remain justiciable even though the deprivation of those rights has been discontinued" and cites generally to *Roe v. Wade*, 410 U.S. 113 (1973). The Supreme Court has recognized there are some issues which are "capable of repetition, yet evading review." *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147, ___ (1973) (quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310, ___ (1911)). The Court determined the normal 266-day human gestation period was so short it justified a conclusion of nonmootness because it would be over so quickly appellate review would be effectively denied. *Id.* The circumstances of Tiffany's suspension under Iowa Code section 321A.5 reasonably justify a conclusion of nonmootness in that the possible suspension ends only one year after the accident unless a suit for damages is filed. It is not unlikely

other persons would receive suspensions under the same code section, which suspensions also would expire before appellate review. We determine the district court erred in ruling Tiffany's claims concerning the license suspension and amount of the security deposit were moot. Accordingly, we set aside that portion of the district court's ruling and will address those claims in this appeal.

At the hearing, Tiffany presented his account of the accident. He stated he was not at fault in the accident. He offered no challenge to the amount of the security deposit required. The administrative law judge determined there was a reasonable possibility judgment could be rendered against Tiffany. With respect to factual questions, our review is limited to whether the decision appealed from is "without substantial supporting evidence." *Dickinson County v. City Dev. Comm.*, 521 N.W.2d 466, 468 (Iowa 1994). The court must not reassess the weight of the evidence because the weight of the evidence remains within the agency's exclusive domain. *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 234 (Iowa 1996); *Burns v. Board of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993). Tiffany did not meet his burden to prove there was no reasonable possibility of judgment against him or that the amount of the security deposit required was unreasonable. Substantial evidence supports the agency's decision. In this respect we affirm the agency's decision and having addressed the question of mootness, we now set aside that portion of the court's decision that held otherwise. However, we affirm the result reached by the district court.

On appeal, Tiffany also attempts to raise the same constitutional issues he raised in the district court. Tiffany did not raise these claims before the agency. They are not preserved for our review. There are two reasons for the rule of error preservation. First, fairness requires an issue be raised while one's opponent still has an opportunity to respond to the issue. *Peterson v. Iowa Dep't of Transp.*, 508 N.W.2d 689, 692 (Iowa 1993). Second, the agency should have an opportunity to consider and rule on the issue. *Soo Line R. Co. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994); *Chicago & N.W. Transp. Co. v. Iowa Transp. Regulation Bd.*, 322 N.W.2d 273, 276 (Iowa 1982). Because Tiffany failed to preserve his constitutional claims for review, we, like the district court, do not address them.

Finally, Tiffany argues the imposition of the \$200 civil penalty violates constitutional protection against ex post facto laws because the accident occurred in September 1996 and the civil penalty law did not go into effect until July 1, 1997. The district court concluded, and we agree, that since the agency did not act to impose the fine until after the statute went into effect, there is no ex post facto violation. His claim a civil penalty constitutes double jeopardy has been addressed in other contexts and is without merit. See e.g., *State v. Hill*, 555 N.W.2d 697, 701-02 (Iowa 1996) (civil penalty is remedial in compensating the State for its costs) (citing *United States v. Halper*, 490 U.S. 435, 448, 109 S.Ct. 1892, 1901, 104 L.Ed.2d 487, 502 (1989); *State v. Kocher*, 542 N.W.2d 556, 558 (Iowa 1996); *State v. Funke*, 531 N.W.2d 124, 126 (Iowa 1995)).

For the reasons set forth we affirm the decision of the district court in part; set aside the decision in part; but affirm the result reached by the court.

AFFIRMED IN PART; SET ASIDE IN PART; RESULT AFFIRMED.