FILED
APR 23 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DAVID PATRICK WALSTON,

Plaintiff-Appellant,

vs.

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

Defendants-Appellees.

Filed April 23, 1986

210

6-16
85-520

Appeal from the Iowa District Court for Black Hawk County (No. 65677) - Roger F. Peterson, Judge.

Plaintiff appeals from the district court's affirmance of the Department of Transportation's revocation of his license and denial of a work permit. **AFFIRMED.**

Gary J. Boveia, of Boveia Law Offices, Waverly, for plaintiff-appellant.

Thomas J. Miller, Attorney General, and Robin G. Formaker, Assistant Attorney General, for defendants-appellees.

Heard by Donielson, P.J., and Snell, and Sackett, JJ.

SACKETT, J.

Plaintiff Walston refused to submit to a breath test when he was arrested for operating while under the influence (OWI) in September 1983. Walston subsequently pled guilty to OWI in violation of Iowa Code section 321.281 and was given notice that his driver's license would be revoked for one year. Walston requested an administrative hearing with the Department of Transportation (DOT) on his license revocation. The DOT hearing officer's order stated Walston failed to appear for his hearing. The hearing officer concluded that this failure to appear was a withdrawal of Walston's request for hearing and a waiver of his rights under Iowa Code chapter 17A and Iowa Code chapter 321B.

Walston appealed the decision of the hearing officer alleging the hearing officer's decision was unreasonable, arbitrary, capricious and characterized by an abuse in discretion. Walston claimed he and his attorney had a conference telephone call with the hearing officer and the DOT representative at the time set for hearing and it was agreed by the parties that Walston need not appear in person, that the hearing officer would rule on the request for a shorter revocation period and request for temporary restricted license, and that Walston would stipulate to the facts incident to probable cause, invocation of implied consent, and refusal to test. The reviewing officer in his appeal ruling stated:

> The hearing was scheduled for 2:45 p.m. on February 7, 1984, at 5455 Kirkwod Blvd., Cedar Rapids. There is no dispute that the plaintiff did not appear. It is not known when the conference call occurred, but it is unlikely that the hearing officer had telephone recording equipment present. Since hearings are required under 17A to be recorded in some manner the hearing officer could and should determine that the conference call did not constitute a hearing.

The reviewing officer ruled on the issues submitted by Walston even though the issues were not properly presented at the hearing level and determined the work permit request was properly denied and Walston's one-year suspension was proper since the section 321B.13 revocation periods were not discretionary.

Walston filed a petition for judicial review attacking the hearing officer's determination and claiming Iowa Code section 321B.13 and corresponding administrative rules concerning the period of revocation and denial of work permits violated equal protection and due process. Defendants' argued that Walston's failure to appear at the DOT hearing constituted a waiver of his rights under Iowa Code chapter 17A and 321B. Walston filed a motion to submit additional evidence concerning the issue of whether he waived his rights under chapters 17A and 321B. The evidence consisted of affidavits from Walston and his attorney which indicated the hearing officer agreed by stipulation that Walston need not appear at hearing. The district court overruled this motion finding there were no facts in the record which could support the allegation that the DOT action was unreasonable, arbitrary, capricious, or characterized by an abuse of discretion. The court further found Walston failed to make his equal protection arguments before the DOT, and even if he had, section 321B.13 did not violate equal protection.

From the district court ruling, Walston[1] has appealed contending: (1) the district court erred in refusing to allow evidence concerning the hearing officer's conduct; (2) the DOT's action was arbitrary, capricious, and characterized by an abuse of discretion or a clearly unwarranted exercise of discretion; (3) the district court erred in affirming the DOT's denial of a work permit or a lesser period of revocation for plaintiff, in violation of equal protection; (4) the district court erred in affirming the DOT's denial for a temporary restricted license for the limited purpose of attending alcoholic rehabilitation meetings.

---

[1] We refer appellant's counsel to Iowa Rule of Appellate Procedure 16(a) which provides: "The appendix and brief shall be printed or duplicated on both sides of the sheet."

We review the decision of the district court, also rendered in an appellate capacity, and determine 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 those of the district court." Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429-30 (Iowa 1979).

Iowa Code section 17A.19(8)(f) provides that in a contested case the court shall grant relief from an agency decision which is "unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole." Evidence is substantial when a reasonable person would accept it as adequate to reach a conclusion. Peoples Memorial Hospital v. Iowa Civil Rights Commission, 322 N.W.2d 87, 91 (Iowa 1982). The question is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. Ward v. Iowa Department of Transportation, 304 N.W.2d 236, 237-38 (Iowa 1981). The fact that two inconsistent conclusions can be drawn from the evidence does not permit us to make a finding inconsistent with the agency's findings so long as there is substantial evidence to support the agency's decision. Peoples, 322 N.W.2d at 91.

Walston argues the district court erred in refusing Walston's motion to present additional evidence on the alleged telephone conference call. In reviewing agency decisions involving contested case proceedings, the district court may not consider additional evidence, its review being limited to the record made before the agency. Maschino v. Geo. A. Hormel & Co., 372 N.W.2d 256, 258 (Iowa 1985). However, Iowa Code section 17A.19(7) provides:

> In proceedings for judicial review of agency action a court may hear and consider such evidence as it deems appropriate. In proceedings for judicial review of agency action in a contested case, however, a court shall not

> itself hear any further evidence with respect to those issues of fact whose determination was entrusted by Constitution or statute to the agency in that contested case proceeding. Before the date set for hearing a petition for judicial review of agency action in a contested case, application may be made to the court for leave to present evidence in addition to that found in the record of the case. If it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the contested case proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision in the case by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court and mail copies of the new findings or decisions to all parties.[emphasis added]

Iowa Code §17A.19(7); see Cedar Valley Leasing v. Iowa Department of Revenue, 274 N.W.2d 357, 362 (Iowa 1979).

We find there was sufficient disputed facts surrounding the alleged telephone conference call to warrant the presentation of additional evidence at the agency level on the issue of waiver. However, Walston is not prejudiced since the agency reviewing officer ruled on the two issues submitted by Walston despite the hearing officer's order. The reviewing officer ruled the work permit was properly denied and the one-year license suspension was proper. Since there is substantial evidence in the record to support the agency decision on the work permit and license suspension, we find no error.

We also dismiss Walston's argument that Iowa Code section 321B.13 violates equal protection in light of Veach v. Iowa Department of Transportation, 374 N.W.2d 248 (Iowa 1985). The court in Veach upheld the DOT rule denying work permits to those persons who refused chemical testing stating:

> We conclude that the State's interest in obtaining reliable evidence of intoxication or sobriety, and in facilitating citizen cooperation in the enforcement of highway safety, justified the DOT rule denying work permits to those persons who refused chemical testing. The

> rule did not deprive petitioner of his right to equal protection of the law under the fourteenth amendment to the Constitution.

Veach 374 N.W.2d at 250.

Walston also contends the DOT should not have denied his application for a temporary restricted license since the purpose for such license was to attend alcoholic rehabilitation meetings. He claims this violates equal protection. Under Iowa Code section 321.283(2), the court may order that a defendant, who is convicted or has pled guilty to Iowa Code section 321.281, attend a drinking drivers course or that the defendant attend evaluation, treatment, or rehabilitation services. As provided for in section 321.283(6), a temporary driving permit may be obtained to allow the defendant to drive to and from the location of the required evaluation, treatment, or rehabilitation services. Walston argues just because he was not ordered to go to these services, he should not be denied a temporary license in order to drive to these meetings.

We find, as did the district court, that Walston failed to make his equal protection argument before the DOT and therefore it is not properly before us.

We affirm the district court.

AFFIRMED.