IN THE COURT OF APPEALS OF IOWA

No. 4-546 / 94-514

FILED
MAR 30 1995
CLERK SUPREME COURT

GARY RICHARD GASKEY,

Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,

Appellant.

Appeal from the Iowa District Court for Muscatine County, Edward D. Desilva, Judge.

The Iowa Department of Transportation appeals the district court's reversal of the Department's revocation of a driver's license pursuant to Iowa's implied consent law. **AFFIRMED.**

Bonnie Campbell, Attorney General, and Mark Hunacek, Assistant Attorney General, for appellant.

David Scieszinski, Wilton, for appellee.

Considered by Donielson, C.J., and Hayden and Habhab, JJ.

DONIELSON, C.J.

The Iowa Department of Transportation ("Department") appeals the district court's reversal of its revocation of Gary Gaskey's license. We have reviewed the parties' arguments and applicable law, and affirm the decision of the district court.

BACKGROUND

Gaskey was stopped by Deputy Burmeister on August 22, 1993, for operating a motor vehicle while under the influence of alcohol or a drug in violation of Iowa Code section 321J.2. Pursuant to Iowa Code section 321J.9, Gaskey's license was revoked. Gaskey requested a hearing to contest the revocation. Iowa Code §§ 17A.18(3), 321J.13(1).

Despite being subpoenaed, Deputy Burmeister did not appear for the hearing. Gaskey was not present for the hearing and presented no evidence. Gaskey's attorney used the hearing to point out alleged deficiencies or discrepancies in the revocation notice and citation given to Gaskey. The administrative law judge left the record open for a week following the hearing to allow the Department to later move to reopen to offer the deputy's testimony. However, the Department did not take advantage of that opportunity to supplement the record.

An administrative law judge sustained the revocation. On appeal to the director of the Department, the decision

of the administrative law judge was affirmed. Gaskey sought judicial review of the Department's action, and the revocation was reversed. The Department now seeks appellate review.

SCOPE OF REVIEW

Section 321J.14 provides for judicial review of an action of the Department in accordance with the provisions of chapter 17A, the Iowa Administrative Procedures Act. Tripp v. Iowa Dept. of Transp., 474 N.W.2d 812, 814 (Iowa App. 1991). Our scope of review is limited to the corrections of errors of law. Id. A district court decision rendered in an appellate capacity is reviewed to determine whether the district court correctly applied the law. Id.

IOWA CODE SECTION 321J.9

When a license is revoked for failure to submit to chemical testing, the arresting officer has the responsibility of preparing a "sworn report" or certification concerning the arrest and the refusal to submit to chemical testing. See Tyler v. Iowa Dept. of Transp., 420 N.W.2d 442, 442 (Iowa 1988). The officer is responsible for submitting this report to the Department. Id.; Iowa Code § 321J.9. The officer must certify: 1) there were reasonable grounds to believe the person to have been operating a motor vehicle in violation of section

321J.2; 2) specified conditions existed for chemical testing pursuant to section 321J.6; and 3) the person refused to submit to the chemical testing. Iowa Code § 321J.9.

The Iowa Code provides a hearing to contest a section 321J.9 revocation shall be limited to the issues of whether a peace officer had reasonable grounds to believe the person was operating a motor vehicle while under the influence and whether the person refused to submit to a chemical test. Iowa Code 321J.13(2). It is well established that in a civil administrative driver's license revocation proceeding, the burden of proof is on the licensee to show compliance with the implied consent law and that law enforcement officers had not satisfied the procedural requirements thereof. See Furry v. Iowa Dept. of Transp., 464 N.W.2d 869, 872 (Iowa 1991); Mary v. Iowa Dept. of Transp., 382 N.W.2d 128, 132 (Iowa 1986); Anson v. Iowa Dept. of Transp., 477 N.W.2d 695, 696 (Iowa App. 1991).

The Department argues when a licensee offers no evidence at a revocation hearing he has failed to satisfy his burden of proof as a matter of law, and the certified implied consent form constitutes substantial evidence supporting the revocation. Despite the fact the licensee bears the burden of proof, this court has previously held a certified implied consent form, without more, will not necessarily constitute substantial evidence to support an

agency's action. See Nieman v. Iowa Dept. of Transp., 452 N.W.2d 203, 206 (Iowa App. 1989). In this case we must reconcile our holding in Nieman with the burden of proof a licensee is required to bear in revocation proceedings.

In Nieman this court held there was not substantial evidence to sustain a license revocation where the only evidence presented by the Department was an officer's signature on the implied consent form. Id. at 206. In Nieman the arresting officer did not appear for the revocation hearing. In lieu of his testimony, the administrative judge took notice of the implied consent form on which the officer had certified he had reasonable grounds to believe the licensee had been operating while intoxicated. Id. at 205. We addressed the hearsay nature of the form and found it, alone, did not constitute substantial evidence.

> We find the hearsay evidence offered in this case, the implied consent form, did not have sufficient probative force to support the agency action. The officer's signature on a preprinted statement was not adequate to show why he had reasonable grounds to believe plaintiff was operating while intoxicated. Accepting this signature alone as proof of the officer's having had reasonable grounds amounts to allowing a peace officer to conclusively decide, by signing a form, that his actions were taken within the bounds prescribed by law. Such a legal conclusion cannot be made by one whose actions the statute guides.

Id. at 206 (emphasis in original).

Under our law, an arresting officer may immediately revoke a person's license upon his or her refusal to submit to chemical testing. Iowa Code § 321J.9. A driver is

entitled to an evidentiary revocation hearing to ensure all statutory prerequisites were met to warrant the revocation. Iowa Code 17A.18(3); Nieman, 452 N.W.2d at 206. We addressed the importance of this evidentiary hearing in Nieman

> The legislature, however, has set down a specific procedure to be followed in license revocation cases. Drivers whose licenses have been revoked are entitled to a hearing to ensure this procedure has been properly followed. If the department does not require the submission of evidence, at hearings, to show the facts upon which arresting officers base their actions, the hearings will become merely a "rubber stamp" for the department's actions.

Nieman, 452 N.W.2d at 206.

While the licensee bears the burden to establish his compliance with the implied consent law, there must be substantial evidence of the "reasonable grounds" upon which the officer based his actions. Our decision in Nieman did not foreclose the possibility that an implied consent form may, under some circumstances, constitute substantial evidence without an officer's testimony. However, we conclude this was not such a case.

We concur with the district court's reasoning that the licensee's burden of proof does not eviscerate the Department's need to present some evidence on why the arresting officer had reasonable grounds to believe the driver was under the influence. The only evidence on this matter was the implied consent form which was hearsay and did not provide the reasons why the the officer believed he

had reasonable grounds. The district court was correct in that this was not substantial evidence as a matter of law, and we affirm the reversal of the revocation of Gaskey's license.

AFFIRMED.