

IN THE COURT OF APPEALS OF IOWA

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No. 2-098 / 91-1255

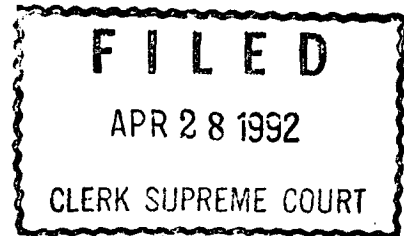
TIMOTHY CHARLES BOWERS,

Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,

Appellee.



Appeal from the Iowa District Court for Page County,
J. C. Irvin, Judge.

Bowers appeals the district court's order affirming the revocation of his driver's license on the ground that the arresting officer was not a "peace officer" as defined in the Iowa Code. **AFFIRMED.**

G. Rawson Stevens, Shenandoah, for appellant.

Bonnie J. Campbell, Attorney General; David A. Ferree, Special Assistant Attorney General; and Kerry Anderson, Assistant Attorney General, for appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ., but decided by Oxberger, C.J., Donielson and Habhab, JJ. Sackett, J., takes no part.

HABHAB, J.

On June 16, 1990, after administering three field sobriety tests, Arnolds Park police officer, Stan Oostra, arrested Timothy Bowers for operating a motor vehicle while intoxicated. Bowers was then transported to the county sheriff's office, where an intoxilyzer test showed a blood alcohol content of .187.

The Iowa Department of Transportation later notified Bowers that his driver's license would be revoked for violation of Iowa Code section 321J.2. Bowers requested an administrative hearing. After the hearing, an administrative law judge (ALJ) issued a decision rescinding the revocation. However, following the DOT's administrative appeal, a reviewing officer reversed the ALJ's decision and reinstated the license revocation. This reinstatement became the final agency action.

Bowers then sought judicial review to challenge the revocation of his license. The district court upheld the revocation, and Bowers has appealed.

Bowers first contends the revocation is invalid because officer Oostra, who initiated the chapter 321J procedures which led to the revocation, lacks the proper training and certification to fall within the definition of "peace officer" found in Iowa Code section 321J.1(7). The State responds, among other things, that Oostra was a de facto law enforcement officer whose participation in the early

stages of the proceeding did not invalidate the subsequent revocation.

Bowers also contends the administrative proceedings against him were fatally flawed. He argues there is no authorization in statutes or administrative rules for the DOT to appeal from the adverse decision of an administrative law judge (ALJ). In the alternative, he argues that even if the statutes implicitly authorize some form of review of the ALJ's decision, the administrative reviewing officer nonetheless exceeded the proper scope of such a review by making additional findings of fact and by allegedly substituting her judgment for that of the ALJ. Finally, Bowers argues that the administrative appeal included various technical procedural errors.

SCOPE OF REVIEW

The scope of review in cases arising out of the Iowa Administrative Procedures Act is limited to the corrections of errors at law. Budding v. Iowa Dept. of Job Service, 337 N.W.2d 219, 221 (Iowa App. 1983). A district court decision rendered in an appellate capacity is reviewed to determine whether the district court correctly applied the law. Id. To make that determination this court applies the standards of section 17A.19(8) to the agency action to determine whether our conclusions are the same as the district court's. Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429-30 (Iowa

1979). The scope of review encompasses a review of the entire record and is not limited to the agency's findings. Higgins v. Iowa Dept. of Job Service, 350 N.W.2d 187, 191 (Iowa 1984).

Iowa Code section 17A.19(8)(f) provides in a contested case the court shall grant relief from an agency decision which is unsupported by substantial evidence made before the agency when that record is viewed as a whole. Eaton v. Iowa Dept. of Job Service, 376 N.W.2d 915, 916-17 (Iowa App. 1985). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion. Id. at 917. The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made. Henry v. Iowa Dept. of Job Service, 391 N.W.2d 731, 734 (Iowa App. 1986). The fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. Id.

ANALYSIS

I. Definition of "Peace Officer." Iowa Code section 321J.5 states:

When a peace officer has reasonable grounds to believe that a motor vehicle operator may be violating or has violated section 321J.2, or the operator has been involved in a motor vehicle collision resulting in injury or death, the peace officer may request the operator to provide a sample of the operator's breath for a preliminary screening test using a device approved by the commissioner of public safety for that purpose.

Iowa Code § 321J.5 (1991).

The appellant argues the district court's order affirming the revocation of appellant's driver's license should be reversed because Officer Oostra does not qualify as a "peace officer" under the statute. Iowa Code section 321J.1(7) sets out five categories, only one of which must be met in order to qualify as a "peace officer". Iowa Code section 321J.1(7) states the following:

"Peace officer" means:

- a. A member of the highway patrol.
- b. A police officer under civil service as provided in chapter 400.
- c. A sheriff.
- d. A regular deputy sheriff who has had formal police training.
- e. Any other law enforcement officer who has satisfactorily completed an approved course relating to motor vehicle operators under the influence of alcoholic beverages at the Iowa law enforcement academy or a law enforcement training program approved by the department of public safety.

(Emphasis added). Iowa Code § 321J.1(7) (1991).

It is clear Oostra did not qualify as a peace officer under subsections (a)-(d). There is a question as to whether Oostra qualified as a peace officer under subsection (e). The record evidence reflects that Oostra is not certified as a law enforcement officer although he has applied for such certification and successfully completed the tests attendant to certification. The evidence also shows that Oostra has not completed any courses at the law enforcement academy.

The State argues that Oostra was a de facto law enforcement officer on June 16, 1990. In this regard:

The theory of the doctrine of officers de facto and the principles sustaining the validity of their acts are that, though wrongfully in office, justice and necessity require that their acts, done within the scope of official authority and duty, be sustained, to the end that the rights and interests of third person be protected and preserved.

State v. Driscoll, 455 N.W.2d 916, 917 (Iowa 1990)(quoting Buck v. Hawley & Hoops, 129 Iowa 406, 409, 105 N.W. 688, 689 (1906)). In Buck, the court held that to establish a claim of de facto authority in the absence of appointment or election, the officer

must have acted as such under such circumstances of reputation or acquiescence as are calculated to induce people, without inquiry, to submit to or invoke his action in the supposition that he is in fact the officer he assumes to be.

Buck, 129 Iowa at 409, 105 N.W. at 689.

In the case at bar, Chief of Police Reekers clearly thought of Oostra as a law enforcement officer. He was in the employ of the Arnolds Park Police Department as a policeman at the time in question. In addition, he had worked as an intern police officer in Emmetsburg for some two and one-half years.

It is without dispute that appellant submitted to field sobriety tests administered by Oostra without objection. It is clear that at the time the tests were administered that Oostra was acting as a law enforcement officer under circumstances "calculated to induce people, without inquiry, to submit to . . . his action in the supposition that he is in fact the officer he assumes to be." Buck, 129 Iowa at 409, 105 N.W. at 689 (quoted with approval in

Driscoll, 455 N.W.2d at 918). Under the definition of de facto authority, we find Officer Oostra was a de facto law enforcement officer at the time of appellant's arrest.

Now that we have determined Oostra was a law enforcement officer, we must address the issue of whether the record evidence is insufficient to support Bowers' argument that Oostra was not a peace officer under Iowa Code 321J.1(7)(e). Officer Oostra testified he had completed two years of criminal justice classes at Iowa Lakes Community College and an internship with the Emmetsburg Police Department. Oostra further testified that during his internship he had training in recognizing the indicia of intoxication, specifically drunk drivers. The record is void as to any evidence indicating Oostra's training program was not approved by the department of public safety as required by Iowa Code section 321J.1(7)(e).

In administrative proceedings for driver's license revocation, the driver has the burden of proving by a preponderance of the evidence that the peace officers had not satisfied the procedural requirements thereof. Mary v. Iowa Dep't of Trans., 382 N.W.2d 128, 132 (1986) (citation omitted). Appellant had the burden of proving by a preponderance of the evidence that Oostra did not successfully complete a training program approved by the department of public safety. Appellant failed to produce evidence that Oostra's training lacked the necessary

approval. Therefore, we conclude Officer Oostra qualified as a peace officer under Iowa Code section 321J.1(7)(e) and that the revocation of appellant's license was valid.

II. Administrative Appeal. Appellant argues the reviewing officer's ruling is illegal, invalid and unenforceable. Appellee argues appellant did not properly raise this issue prior to submitting his brief and, therefore, appellant did not preserve error and is prohibited from raising the issue before this court. The facts are not entirely clear as to whether appellant properly preserved error on this issue. Although we believe appellant did not preserve error, we will address the issue due to the uncertainty in facts.

Appellant argues Iowa Code section 321J.13 does not allow the agency to appeal a decision of an ALJ. This interpretation is incorrect. Iowa Administrative Code section 761--620.4(2) addresses this issue and states in pertinent part:

A decision by an administrative law judge shall become the final decision of the department and shall be binding on the department and the person who requested the hearing unless either appeals the decision to the director of transportation within ten days after receipt of the decision.

Iowa Admin. Code r.761--620.4(2) (1992) (emphasis added). It is clear either party may appeal the decision of an ALJ. Therefore, it was proper for appellee to appeal the decision of the ALJ. Appellant's argument is unfounded.

Appellant next argues the reviewing officer exceeded her scope of review and acted arbitrarily and capriciously in making additional findings of fact. Appellant fails to indicate these alleged additional findings of fact. We agree with the district court's decision that the opinions of the director of transportation and the ALJ merely differ as to the application of Iowa Code section 321J.1(7). We hold, the reviewing officer properly limited her review to conclusions of law as required by Iowa Administrative Code section 761--620.4(2)(a). We find appellant's argument unpersuasive.

CONCLUSION

We find the agency's final decision to revoke appellant's license is supported by substantial evidence. As to the remaining issues, we find each of them to be either lacking in merit or not to have been properly preserved for appellate purposes.

We affirm the district court on all issues. Costs of this appeal are assessed to the appellant.

AFFIRMED.