IN THE COURT OF APPEALS OF IOWA

No. 7-614 / 96-2277
Filed June 24, 1998

KEVIN GERALD ESSER,
Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,
Appellee.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Kevin Gerald Esser appeals from the district court's judicial review ruling affirming respondent's revocation of his driver's license for a chemical test failure under the implied consent law pursuant to Iowa Code section 321J.8. **AFFIRMED.**

Gerald B. Feuerhelm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, and Noel C. Hindt, Assistant Attorney General, for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

PER CURIAM.

Petitioner, Kevin Esser, appeals from the district court's judicial review ruling affirming the Department of Transportation's revocation of his driver's license for a chemical test failure under the implied consent law pursuant to Iowa Code section 321J.8. Esser claims his substantial rights under the implied consent law were prejudiced because he was misled into consenting to chemical testing after the invoking officer misinformed him of the length of the revocation.

On March 9, 1996, Esser was arrested for operating while intoxicated by a Windsor Heights police officer. The officer invoked the implied consent law and read Esser the implied consent advisory. Esser claimed that the advisory was never given to him. Esser was charged with a first offense operating while intoxicated. Esser asked the officer the length of his revocation. The officer marked the box on the implied consent form for a 180-day revocation on a first offense. The officer told Esser the length of the revocation ultimately would be determined by the Department of Transportation. Esser claims the officer encouraged him to take the test and said the revocation would be for 180 days. Esser consented. The chemical test result was an alcohol concentration of .166. The respondent, Iowa Department of Transportation, notified Esser the revocation length would be one year.

Esser challenged the revocation and contested case proceedings before the Department arguing he was misled into consenting to chemical testing under the implied consent law by the officer's misinformation regarding the length of the

revocation. An administrative law judge determined the arresting officer did not comply with Iowa Code section 321J.8 and rescinded the revocation. The Department's director reversed the decision and upheld the revocation of Esser's license.

Esser timely filed a petition for judicial review challenging the Department's decision. After a hearing, the district court affirmed the Department's decision. The court determined Esser was not prejudiced by the officer's incorrect notation of the revocation's length. The court noted that Esser's license was revoked for one year and that if he had refused to take the test, the revocation would have been 540 days. The court determined Esser was in a better position by taking the test than by refusing.

This case arises out of the Iowa Administrative Procedure Act and our scope of review is limited to the correction of errors of law. Iowa Code § 17A.20; *Carpenter v. Iowa Department of Job Service*, 401 N.W.2d 242, 244 (Iowa App. 1986). In reviewing the district court's decision, we are concerned whether the district court correctly applied the law. That determination is made by applying the standards of section 17A.19(8) to the agency decision to determine if our conclusions are the same as those of the district court. *Carpenter*, 401 N.W.2d at 244 (quoting *Jackson County Public Hospital v. Public Employment Relations Board*, 280 N.W.2d 426, 429-30 (Iowa 1979)). If our conclusions are the same, we must affirm. *Ferguson v.*

State Dep't of Transportation, 424 N.W.2d 464, 465 (Iowa 1988). If our conclusions disagree with those of the district court, we may be required to reverse. *Id.*

We, like the district court, are bound by the agency's fact findings if those findings are supported by substantial evidence. *Short v. Iowa Dept. of Transp., Motor Vehicle Div.*, 447 N.W.2d 576, 577 (Iowa App. 1989). Evidence is substantial if a reasonable person would find it adequate for reaching a decision. *Peoples Memorial Hospital v. Iowa Civil Rights Comm'n*, 322 N.W.2d 87, 91 (Iowa 1982). We do not ask whether the evidence could support different findings, but whether the evidence supports the findings actually made. *Ward v. Iowa Dep't of Trans.*, 304 N.W.2d 236, 237-238 (Iowa 1981).

On appeal, Esser asserts the officer engaged in "deceptive and unfair actions or statements which are clearly untrue and yet have a huge bearing on the decision" to submit to the test. The State responds the requirements of the implied consent statute, Iowa Code section 321J.8, are fulfilled by reading the implied consent advisory form to the driver. The State also asserts the officer's statements were not deceptive or unfair, but rather merely informed Esser the ultimate decision on the period of revocation was made by the Department of Transportation, not the officer.

Both parties cite *Smith v. Dept. of Transp., Motor Vehicle Div.*, 523 N.W.2d 607 (Iowa App. 1994), as supporting their position. In *Smith,* as here, the officer marked an incorrect choice on the implied consent form. *Id.* at 608. However, in *Smith*, the defendant already had refused to submit to testing before the officer

completed the form. On appeal, we held Smith was not prejudiced by the mistake on the form. *Id.* at 610. In the case before us, Esser argues the statements of the and the revocation period marked on the form caused him to agree to submit to testing and he was prejudiced thereby. Iowa Code section 321J.9 sets the revocation periods for refusing testing at 240 days with no prior revocation within six years and 540 days with one or more prior revocations within six years.[1] Iowa Code section 321J.12 sets the revocations periods for test failure at 180 days with no prior revocation within six years and one year with one or more prior revocations within six years. Under the circumstances of this case, Esser was subject to a one-year revocation for failing the test and would have been subject to a 540-day revocation for refusing the test. Esser cannot credibly claim his consent to the test would not have been given if he had been correctly informed the penalty for refusal was one year rather than 180 days. He was not prejudiced.[2]

Our conclusions are the same as those of the district court. Therefore we must affirm. *Miedema v. Dial Corp.*, 551 N.W.2d 309, 310 (Iowa 1996).

AFFIRMED.

Streit and Vogel, JJ., concur; Sackett, P.J., specially concurs without opinion.

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[1] Esser had a previous test-result revocation but a deferred judgment had been entered in the related criminal case.

[2] Esser claims the officer made deceptive statements concerning his ability to obtain a temporary restricted license ("work permit"), which was a concern to him since he was a self-employed contractor and needed to drive. Since Iowa Code sections 321J.9 and 321J.12 both require a one-year period before applying for a work permit, the result for Esser would be the same whether he refused the test or failed the test. There was no prejudice.