

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 4 1986

CLERK SUPREME COURT

JULIE KRISTIN CONNER,)

Plaintiff-Appellant,)

vs)

FILED JUNE 4, 1986

IOWA DEPARTMENT OF)

TRANSPORTATION, MOTOR VEHICLE)

DIVISION, OFFICE OF DRIVER'S)

LICENSE,)

Defendant-Appellee.)

6-80
85-833

62

Appeal from the Iowa District Court for Linn County (No. LA 12826) -

August F. Honsell, Jr., Judge.

Plaintiff appeals the district court's affirmance of the department of transportation (DOT) order suspending her license for ninety days for being an habitual violator under Iowa Code sections 321.210(3) and 321A.17.

REMANDED FOR FURTHER PROCEEDINGS.

Kenneth F. Dolezal of Hickok, Dolezal & Miller, Cedar Rapids, for plaintiff-appellant.

Thomas J. Miller, Attorney General, and Mark Hunacek, Assistant Attorney General, for defendant-appellee.

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

SCHLEGEL, J.

The Iowa Department of Transportation (IDOT) ordered the suspension of plaintiff Conner's driver's license for ninety days, upon a finding that she was an habitual violator under Iowa Code sections 321.210(3) and 321A.17. After exhausting her administrative remedies, Conner filed her petition for judicial review. The suspension ordered by IDOT was affirmed by the district court. Conner appeals that ruling.

The decision of the IDOT hearing officer upon which Conner based her petition for judicial review stated, in relevant part, the following:

FINDINGS OF FACT

1 ..

2 Plaintiff was convicted of four moving violations committed within a 12 month period of time.

CONCLUSIONS OF LAW

1 IOWA CODE sec. 321.210(3) states in part: "The department is hereby authorized to establish rules . . . for the suspension of the license of an operator or chauffeur without preliminary hearing upon a showing by its records or other sufficient evidence that under the rules adopted by the department the licensee: Is an habitual violator of the traffic laws.

2 Departmental Rule Sec. 820--[07,C] 13.13(3) states in part: "The department of transportation may suspend: When the department's records show that such person is an habitual violator of the traffic laws ('habitual violator' shall mean one who has accumulated three or more convictions of moving traffic violations committed within a twelve-month period.) A suspension under this subrule shall be for ninety days."

3 Departmental Rule 820--[07,C] 13.13(8) states in part: "In lieu of a suspension under subrule 13.13(3) of this chapter, the department may require a person to attend an approved driver improvement school or may take other appropriate remedial action in accord with the following driver improvement program."

ORDER

The suspension is sustained. Plaintiff shall be entitled to apply for a work permit.

Following a request by Conner for a further hearing, a review by the department of transportation was set and conducted, resulting in the decision of the hearing officer being affirmed. That appeal was carried out under appropriate rules for review, on the record, with reference to Conner's request for leniency, based upon her past driving record.

I. Conner's first complaint is that the IDOT failed to follow the dictates of section 321.210, Code of Iowa. Specifically, she contends that it failed to give her credit for her prior good driving history.

Conner argues that it is the clear intent of the legislature, as evidenced by that statute, to give drivers credit for good driving years. For that point, she directs our attention to the provision in the statute where it is stated, " . . licensee shall receive a credit of one point for each year in which the licensee had in continuous effect a valid operator's or chauffeur's license and during which no points were assessed against such licensee" The thrust of her argument is: The department has an obligation under the statute, to create a point system which gives a licensee credit for a good record in the past.

At the outset, it should be observed that Conner does not contest the finding by the administrative hearing officer that she was convicted of speeding four times within twelve months. She claims that her prior driving record should have caused her to be required to attend an approved driver improvement school, rather than to have her license suspended for ninety days.

We shall first deal with the question likewise addressed by the trial court as to whether the legislature intended that the past driving record of the licensee must be considered by adopting a point system to assist in determining whether a suspension of license or attendance at a driver improvement school should be ordered.

The statute provides, in relevant part:

321.210. The Department is hereby authorized to establish rules under the provisions of chapter 17A providing for the suspension of the license of an operator or chauffeur without preliminary hearing upon a showing by its records or other sufficient evidence that under the rules adopted by the department the licensee:

* * *

3 Is an habitual violator of the traffic laws.

* * *

For the purpose of determining when to suspend a license under this section the director may, in accordance with the provisions of chapter 17A, promulgate a point system for the purpose of weighing traffic convictions, or offenses by their seriousness and may change such weighted scale from time to time as experience or the accident frequency in the State makes necessary or desirable.

Prior to a suspension taking effect under subsection 2, 3, 4, 5 or 7, the licensee shall have received twenty days' advance notice of the suspension

If the department assesses any points against an operator or chauffeur of a motor vehicle under any point system devised by the department for the purposes of suspending operator's or chauffeur's licenses, the licensee shall receive a credit of one point for each year in which the licensee had in continuous effect a valid operator's or chauffeur's license and during which no points were assessed against such licensee, but such credit of points shall not exceed five points at any one time. Credit points shall be subtracted from the total points assessed against the licensee in determining when to suspend a license.

The Iowa Department of Transportation has adopted departmental rule 820—[07,C] 13.13(3), as quoted in the hearing officer's ruling above, appropos of section 321.210(3).

Conner argues that the statute requires IDOT to consider a driver's prior driving record, and that for such purpose, the legislature required the agency to adopt a point system. In considering this argument, it is necessary for us to construe the statute in order to determine the legislative intent.

The polestar of statutory construction is said to be "the search for the true intention of the legislature." Iowa National Industrial Loan Co. v. Iowa State Department of Revenue, 224 N.W.2d 437 (Iowa 1974).

Ordinarily, the usual and ordinary meaning is to be given the language used but the manifest intent of the legislature will prevail over the literal import of the words used.

Where language is clear and plain, there is no room for construction.

We should look to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.

All parts of the enactment should be considered together and undue importance should not be given to any single or isolated portion. Id. at page 440; Wollenzien v. Board of Education of Manson, 287 N.W.2d 215 (Iowa 1980).

Northern Natl. Gas v. Forst, 205 N.W.2d 692, 695 (Iowa 1973), states:

We examine both the language used and the purpose for which the legislation was enacted. In seeking the meaning of a law, the entire act should be considered. Each section must be construed with the act as a whole and all parts of the act considered, compared and construed together. (Citations omitted).

Additionally, the subject matter, effect, consequence, and the reason and spirit of the statute must be considered as well as words, in interpreting and construing it. (Citations omitted).

Further, as to an administrative agency's interpretation of a statute, Iowa National Industrial Loan Co., 224 N.W.2d at 440, states:

We give weight to the administrative interpretation of statutes, particularly when they are of longstanding. (Citations omitted).

While "may" is ordinarily a permissive word, there are many circumstances under which it may be given a mandatory meaning.

With these rules in mind, we must examine section 321.210, to determine the legislative intent concerning the adoption of a point system, or the consideration of Conner's prior driving record.

The trend of authority is to uphold a considerable vesting of discretion in such departments for the purposes of promoting public safety. "The use of motor vehicles on the highways is so patently and proven dangerous that we should be slow to strike down any legislation designed to alleviate at least some of the attendant hazards." Danner v. Haas, 257 Iowa 654, 662, 134 N.W.2d 534, 540 (1965).

Conner's contention that section 321.210 requires IDOT to adopt a point system to assist in the determination of when to suspend a license is countered by the contention by IDOT that the provision for such point system is permissive only, and that the statute does not mandate the creation of such a point system. (No such point system was adopted by IDOT.)

The grant or revocation of licenses to operate vehicles on the public highways is clearly within the police power of the state. Danner v. Haas, *supra*.

Conner asks us to interpret the provisions of section 321.210 as requiring the IDOT to adopt a point system, even though the language states:

For the purpose of determining when to suspend a license under this section the director may, in accordance with the provisions of chapter 17A, promulgate a point system for the purpose of weighing traffic convictions, or offenses by their seriousness and may change such weighted scale from time to time as experience or the accident frequency in the state makes necessary or desirable. (Emphasis added)

In considering the legislative intent, we do not believe that such language creates a mandatory duty to promulgate and use a point system. As desirable as such a system might be, the legislature directed that the IDOT "may" create such a system, and "may change" the system from time to time. This direction is without legislatively-enacted guidelines. The legislature has placed upon the IDOT the duty of *enhancing* the safety of the public roads and highways. The legislature has invested IDOT with discretion to carry out those duties. Such investiture has been upheld by cases that require a finding that the language of the statute is permissive and not mandatory.

II. Conner also suggests in argument that the agency has exceeded its authority in defining the term, "habitual violator" as being one who has been convicted of three or more moving traffic law violations. In Danner v. Haas, *supra*, a challenge to the same section was made on grounds that the term "serious violation" did not set up a sufficient or intelligible standard, and that to permit the department to place its own interpretation on the phrase would constitute an unconstitutional delegation of legislative power. In upholding the suspension, the court stated:

In Noble v. English, (183 Iowa 893, 126 N.W. 629 (1918)) is found this pertinent language: "It is manifest that the Legislature, in seeking to control the management of businesses subject to its control and management, and the manner of exercising rights conferred, cannot always anticipate and foresee all the conditions that may arise affecting the conduct of the business or the exercise of the right which may affect the public interest. It, therefore, may delegate to the ministerial officers certain powers, somewhat judicial in their nature, the exercise of which is essential to the proper and effectual carrying out of the purpose and object to the law itself

257 Iowa 662, 663, 134 N.W.2d at 540.

The court also quoted with approval, the following:

The delegation, when correctly understood, is confined to the right to take proper safeguards for the protection of life and limb through reasonable rules regulating traffic in the District, and the right to revoke or suspend the permit is limited to those cases in which there has been a breach, by the holder, of these reasonable rules. Considered in this aspect, it cannot be properly urged that Congress may not delegate a reasonable discretion to the Commissioners in carrying out the legislative intent expressed in the act. La Forest v. Board of Commissioners, 67 App. D.C. 396, 92 F.2d 547. (The validity of an act was upheld which was couched in these terms: "Except where for any violation of this Act . . . revocation of the operator's permit is mandatory, the commissioners or their designated agent may with or without a prior hearing revoke or suspend an operator's permit for any cause which they or their agent may deem sufficient.

257 Iowa 663, 134 N.W.2d at 541.

There is a division of authority as to the validity of traffic and licensing laws using the words "habitual violator." Sueppel v. Eads, 261 Iowa 926, 927, 156 N.W.2d 115, 117 (1968). In that case, operator's licenses of three persons were suspended on a finding that they were habitual violators. In reversing the trial court's finding that the term "habitual violator" was without statutory standards or departmental definition and was vague and uncertain to stand as a lawful basis for suspension of an operator's license by an administrative officer, the supreme court noted that some states had ruled the phrase to be an inadequate standard. It further pointed out that Texas, Missouri, and Florida had by legislative specification defined an habitual violator by the number of his offenses, and the legislatures of North and South Carolina, did, by legislative enactment, establish a point system for guidance of the commissioner in determining the status of a licensee as an habitual violator. Sueppel v. Eads, 261 Iowa 927, 156 N.W.2d at 117. In that case, the court quoted with approval from the case of Anderson v. Commissioner of Highways, 267 Minn. 308, 126 N.W.2d 778, 9 A.L.R. 3d 746, as follows:

The sufficiency of the standard expressed by the term "habitual violator" must be viewed in light of the purpose for which the statute was enacted. It should be realistically conceded that in carrying out the objects of the statute the commissioner is required to make judgments based upon many and varied factors involving a great amount of detail. It is not unreasonable to assume that the legislature may well have considered that to prescribe a more specific standard would only place the commissioner in a straitjacket and interfere with the fair and efficient administration of this duties.... In dealing with this vast area of administrative action, a flexible and practical guide is necessary.

Quoting further:

Permission to operate a motor vehicle upon the public highways is not embraced within the term, "civil rights" and is in the nature of a license or privilege. While the privilege is a valuable one, and may not be unreasonably or arbitrarily taken away, its enjoyment depends upon compliance with conditions prescribed by law and is

always subject to such regulation and control as public authority may see fit to impose under the police power in the interest of public safety and welfare.

The court also stated that it was of considerable significance that an habitual offender act under which punishment for crime may be imposed was not there involved. The court stated: "This being a matter standing in the field of administrative law, we confine ourselves accordingly." 261 Iowa at 928, 156 N.W.2d at 118.

It is thus quite apparent that the statutory scheme of section 321.210 should be considered in the light of the interpretations of it and its forerunner. It is clear that prior decisions of the supreme court have determined that the legislative intent in the regulation of licensing of operators of motor vehicles is to provide flexibility in the making of rules for the determinations to be made under section 321.210, and to clothe the Iowa Department of Transportation with discretion in the administration of that section. Accordingly, in addition to our holding that the department is not required to promulgate a point system under the provisions of 321.210, Code of Iowa, we hold that the department acted within its discretion in defining the term "habitual violator."

III. Conner claims that the hearing officer failed to develop the record or advise appellant of the importance of counsel. To the extent that Conner challenges the notice provisions of the law, or the notice given to her, her claims are without merit. She was accorded due process to the extent required in this matter, and she points out no authority that requires the IDOT or its agent to advise more than her right to be represented by counsel.

Conner does allude to one element of the decision of the department which causes us concern. In addition to the rule defining an habitual violator, the hearing officer stated an additional rule, adopted by the department, which read, in part, as follows:

In lieu of a suspension under subrule 13.13(3) of this chapter, the department may require a person to attend an approved

driver improvement school or may take other appropriate remedial action in accord with the following driver improvement program. (That rule is followed by certain requirements pertaining to driving school.)

Departmental Rule 820--[07,C] 13.13(8), Iowa Admin. Code. Conner makes no challenge to the validity of that rule, but argues that we must remand for further specific findings since the agency's ruling does not clearly disclose a sound, factual and legal basis for its decision.

Our previous determination that the agency is clothed with reasonable discretion to carry out the provisions of the statute leads us to hold that the agency has discretion to promulgate the rule just quoted, and that it has discretion, through its hearing officers to apply that rule on a case-by-case basis. The department has not promulgated a rule for the application of subrule 13.13(8). This lack of rule requires that a hearing officer who seeks to apply that rule in lieu of subrule 13.13(3) must do so on a case-by-case basis. Since the department has formulated no policy for the selection of the alternative disposition by way of its rulemaking authority, there is no choice for disposition except for the hearing officer and the department to exercise the reasonable discretion with which the agency is clothed, as each case is decided. Under the provisions of section 17A.16, this process requires findings of fact and conclusions of law. The failure to make such findings subjects the decision of the agency to the provisions of section 17A.19(8). Once the finding has been made that the licensee is an habitual violator, and that finding is supported by substantial evidence (as is apparent in this case), the courts do not have authority to overrule the agency's decision to order suspension or to order driver improvement school. That decision must be left to the discretion of the agency, unless there are no findings, supported by substantial evidence, that support the disposition selected. Such a procedure is required, it is apparent, because there being no policy of the agency as to when the one disposition should be

utilized over the other, that determination must be made on a case-by-case basis and must be supported by substantial evidence.

This case is unlike the case of Cruise v. Iowa Department of Transportation, Iowa App. #6-50/85-1270, ___ N.W.2d ___ (Iowa App. 1986), filed this date, where the agency had adopted a rule that was held, by the district court to exceed the department's authority and was ultra vires. In that case, in supporting the authority of the department to make that rule, we relied upon Lenning v. Iowa Dept. of Trans., 368 N.W.2d 98, 103 (Iowa 1985). In Lenning, the supreme court approved the department's adoption of a rule prohibiting a work permit for one who had a previous revocation for violation of Iowa Code section 321.281. In that case, the supreme court quoted with approval from Dixon v. Love, 431 U. S. 105, 115, 97 S.Ct. 1723, 1729, 52 L.Ed.2d 172, 179 (1977) as follows:

The present case is a good illustration of the fact that procedural due process in the administrative setting does not always require application of the judicial model. When a government official is given the power to make discretionary decisions under a broad statutory standard, case-by-case decision-making may not be the best way to assure fairness. Here the Secretary commendably sought to define the statutory standard narrowly by use of his rule-making authority. The decision to use objective rules in this case provides drivers with more precise notice of what conduct will be sanctioned and promotes equality of treatment among similarly situated drivers.

In this case, there is no policy, set by specific rule, to guide the disposition, upon a finding of habitual violation. Consequently, the selection of one disposition (e.g. suspension) over the other required findings of fact, based upon evidence, that support that disposition. There being none apparent in the record of this case, the decision of the hearing officer, affirmed by the reviewing authority is deficient.

Section 17A,19(B) Iowa Code, provides, in part..

The court may affirm the agency action or remand to the agency for further proceedings.

The findings in support of the disposition chosen are essential. Section 174.16, Code of Iowa; Brown v. PERB, 345 N.W.2d 88 (Iowa 1984). In Brown, the court found that no findings had been made on the issue of timeliness of a complaint against one of the parties. After observing that although the supreme court "might infer from its decision for Brown on the merits of the complaint that the PER Board found the complaint had been timely filed", it went on to state: "the parties, the district court, and we are entitled to a reasoned opinion on that issue. Iowa Code section 174.16 (1979)..." The court went on to state: "We have consistently required such findings as a necessary prerequisite to judicial review. (Citations omitted). The court went on to quote from 2 K. Davis Administrative Law Treatise Sec. 16.05 (1958), as follows:

The practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement. The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdiction.

Where, as here there are alternative dispositions upon a finding that a driver is an habitual violator, the only means by which judicial review can determine whether the decision was arbitrary or capricious, or an appropriate exercise of the reasonable discretion held by the agency, is upon an examination of the findings and conclusions, including the reasons for imposing the disposition ordered. Under the reasoning of Brown, supra., these reasons provide additional impetus for requiring such findings.

In this case, there is ample evidence to support the finding that Conner was an habitual violator. As discussed above, the department acted within

its reasonable discretion in defining an habitual violator. As a consequence, the agency's finding that Conner was an habitual violator cannot be claimed to be without factual and legal support. The agency possesses the discretion to impose alternative dispositions, including "or may take other appropriate remedial action..." Because of these alternatives, the admonition of Brown v. PERB, supra, becomes apparent.

Because the findings and conclusions of the agency, *both those of the hearing officer, and of the reviewing authority within the agency*, are deficient on the matter of the disposition ordered, *this case must be remanded to the agency. Such remand shall be for the sole purpose of a determination of the disposition selected, with findings and conclusions set out that require that disposition or formulate the policy of the agency in this case, in the absence of a fixed rule, that requires that disposition.*

We do not require that this matter be remanded for the acceptance of additional evidence or the making of additional record on the issue of the licensee's past driving record. We find that her record was adequately considered, upon the basis of the information furnished by her in the hearing.

We remand this case to the agency for further findings and conclusions as stated above.

REMANDED FOR FURTHER PROCEEDINGS.