FILED
FEB - 5 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SECURITY SAVINGS BANK,

Petitioner-Appellee,

vs.

THOMAS H. HUSTON, Iowa Superintendent of Banking,

Respondent-Appellant.

Filed February 5,1980

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2-63059

Appeal from Polk District Court - Gibson C. Holliday, Judge.

Respondent appeals from reversal of administrative decision denying petitioner's application to establish a bank office in Albion, Iowa. AFFIRMED IN PART; REVERSED IN PART.

Thomas J. Miller, Attorney general of Iowa, and Howard O. Hagen, Assistant Attorney General, for respondent-appellant.

Harry Druker of Cartwright, Druker & Ryden, Marshalltown, for petitioner-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Respondent, Superintendent of Banking, appeals from reversal of administrative decision denying petitioner's application to establish a bank office in Albion, Iowa.

Petitioner, Security Savings Bank (hereinafter Security), and Fidelity Brenton Bank and Trust each filed applications pursuant to sections 524.1201-02, The Code 1975, and 140 I.A.C. §2.4, with respondent to establish a banking office in Albion. Under the applicable statutes, only one of the applications could be granted. Respondent conducted hearings on both applications on December 16, 1976. The State Banking Board acting in its statutory advisory capacity subsequently recommended to respondent that both applications be denied. On February 28, 1977 respondent denied both applications stating:

> [T]he facts presented at the hearing of December 16, 1976 along with additional data provided subsequent to the hearing did not demonstrate the existence of need for establishment of a banking office in the City of Albion .... The facts furnished at the hearing indicated the financial needs of the residents of Albion are now being accommodated adequately.

Petitioner filed a timely petition for judicial review pursuant to section 17A.19, The Code 1977. Fidelity did not appeal.

The district court, at the hearing on the petition for judicial review, received additional evidence not offered before the agency. Following said hearing, it entered an order reversing the decision of the respondent and ordering that Security be issued a certificate for the establishment and operation of a bank office in the City of Albion, Iowa, within thirty days of said order. This order has been stayed pending appeal.

I. The respondent first asserts that the district court erred in permitting Security to introduce additional evidence which had not been offered before the agency. Security counters this argument by contending that this was not a contested case and, therefore, the district court was authorized to receive additional evidence under the provisions of section 17A.19(7), The Code. Security further urges that the review of agency action, other than in a contested case, is **de novo** in the district court. Because respondent concedes in his brief and argument that the agency action here involved was not a contested case,[1] we must agree that section 17A.19(7) applies so as to permit the

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[1] By accepting respondent's concession that the agency action in the present proceeding was not a contested case, we are not indicating our agreement on that point. Whether this is a contested case under the definition contained in § 17A.2(2) depends upon whether Security had a constitutional right to a hearing on its application. This presents an extremely difficult and close issue. See Bonfield, The Definition of Formal Agency Adjudication, 63 Iowa Law Rev. 285, 322-25 (1977).

district court, in reviewing the challenged agency action, to "hear and consider such evidence as it deems appropriate." See Community Action Research Group v. Iowa State Commerce Commission, 275 N.W.2d 217, 219 (Iowa 1979). We do not agree, however, that the scope of review of the agency action is **de novo.** In reviewing agency action under chapter 17A, the district court has no original authority to declare the rights of the parties. Public Employment Relations Board v. Stohr, 279 N.W.2d 286, 290 (Iowa 1979). This principle applies to all agency action, including that where no contested case is presented. Id. The fact that this was not a contested case at the agency level is significant on the present appeal only with respect to the resulting applicability of section 17A.19(7) and the nonapplicability of section 17A.19(8)(f).

II. Although additional evidence was properly received by the district court, we agree with respondent's contention that much of the evidence thus adduced was not material to the issue of whether the agency acted properly and within its authority. We therefore decline to consider evidence presented as to actions taken by respondent and the State Banking Board subsequent to the decision under review. We do consider, however, respondent's own statement at the hearing before the district court as to the reasons for his order of February 28, 1977, denying Security's application.

The issue presented on this appeal is whether the district court was correct in determining that the latter order was "unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion."[2] The terms "arbitrary and capricious" when applied to test the propriety of agency action mean that the action complained of was without regard to established rules or standards. Churchill Truck Lines v. Trans. Reg. Board, 274 N.W.2d 295, 299 (Iowa 1979). The arbitrary and capricious standard of section 17A.19(8)(g) is similar to the standard contained in the Federal Administrative Procedures Act, 5 U.S.C. § 706(2)(A). In applying that standard, the Supreme Court stated in Bowman Transportation, Inc. v. Arkansas Best Freight, 419 U.S. 281, 285 95 S.Ct. 436, 442, 42 L.Ed.2d 447, 455 (1974): "Under the arbitrary and capricious standard, the scope of review is a narrow one. A reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear

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[2] This is the ground for disturbing agency action provided in § 17A.19(8)(g), The Code, which was the basis for the district court's reversal of the agency action in the present case. It is the only ground relied upon on appeal to sustain the action of the district court.

error of judgment'. . . . Citizens to Preserve Overton Park v. Volpe, [401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136, 153 (1971)]. The agency must articulate a 'rational connection between the facts found and the choice made.' Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207, 216 (1962)." An agency which declines to apply prior policies and standards must supply a reasoned analysis for so doing. Greater Boston Television Corporation v. Federal Communications Commission, 444 F.2d 841, 852 (D.C. Cir. 1970).

The record in the present case indicates that Albion is about seven miles northwest of Marshalltown, which has three banks of which Security is the largest. Albion has never had any bank facilities. It is a town of approximately 800 population. It is the third largest community in Marshall County. There are six communities in Marshall County smaller than Albion, all of which have banking facilities. They range in size down to a population of 245. It is further undisputed in the evidence that there are 108 cities in Iowa in Albion's population range of 700-999. Seven of these cities have federal banking facilities. Of the 101 cities under state banking supervision, only two are without any banking facilities, Albion and Dakota City. It appears, however, that Dakota City is geographically contiguous to Humboldt, which has its own bank and that it has never made an application for a banking facility. In his trial testimony, the respondent conceded that he had not compared Albion's need for banking facilities with the other towns in Marshall County or with the other towns in a similar population range which had banking facilities. He offered no reason or suggestion why Albion should be treated differently from these other communities with regard to the location of a banking office.

We fail to find wherein respondent has articulated a rational connection between the facts found (as illuminated by his district court testimony) and the choice made in the February 28, 1977 order. Nor does that order comport to any established standard which can be ascertained from the record. We believe the record, and particularly the evidence just referred to, sustains that portion of the district court's order which reversed the agency action pursuant to section 17A.19(8)(g), The Code.

III. The respondent asserts that even if his order is deemed to be the subject of reversal, the district court went too far in ordering him to grant Security a certificate for the establishment and operation of a bank office in Albion. We agree. Security's application for a bank office in Albion was heard simultaneously with a similar

application by another bank. The respondent determined (based upon what we have deemed to be insufficient reasons) that no bank office should be authorized in Albion. Respondent, in making such determination, did not reach the issue of the relative merits of the competing applicants. It is undisputed in the record that only one bank office could be authorized for Albion. As noted in the first division of this opinion, the district court, under chapter 17A, has no original authority to declare the rights of the parties in a matter entrusted in the first instance to an administrative agency. If a bank office is approved for Albion, it is up to respondent to determine which , if any, of the applicants may supply it. The district court erred in making such determination in the first instance. Stohr, 279 N.W.2d at 290.

For the reasons herein stated, that portion fo the district court's order reversing the agency action on the basis that respondent acted contrary to section 17A.19(8)(g), The Code, is affirmed. That portion of the order requiring respondent to grant a certificate to Security is reversed. The matter is remanded to the district court for an order in keeping with this decision.

AFFIRMED IN PART; REVERSED IN PART.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J. (dissenting)

The majority rejects the superintendent's decision because he "offered no reason or suggestion why Albion should be treated differently from these other communities with regard to the location of a banking office."

I would hold superintendent Huston's answer was satisfactory. He said, "I think I would have to look at the application, look the situation over to the best of my ability. . . . That (statistical comparison) would be important Mr. Druker, but it would not necessarily bring about an automatic yes." A computer could calculate the population of Albion and determine whether other towns of similar population had banks, so as to require the granting of a bank to Albion. However, I find the superintendent's policy of looking at the needs of the community as a better policy.

Also, I find his discussion of the differences between "bedroom communities" and similarly sized towns that have industry as satisfactory explanation for the action here. In bedroom communities the residents commute daily to the core city where banking is available. In this case, Albion, a community of 800 persons, is nine miles from Marshalltown, a city with several banks. Albion is a bedroom community to Marshalltown; it has few retail stores and no industry. Its people work in Marshalltown and bank there.

Based on those factors, I cannot say the superintendent's judgment was unreasonable. I would affirm the agency decision.