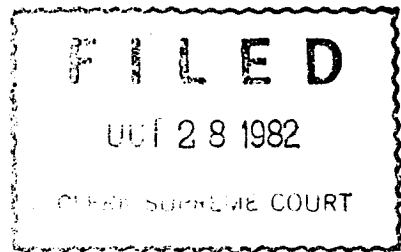


IN THE COURT OF APPEALS OF IOWA



DALLAS LEROY HERRING,)
Plaintiff-Appellee,)
vs.)
IOWA LAW ENFORCEMENT ACADEMY,)
Defendant-Appellant.)

Filed October 28, 1982

2-268
2-67479

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Appeal from Adams District Court, Thomas S. Bown, Judge.

Defendant agency appeals from the district court decision on judicial review reversing its expulsion of plaintiff from the Iowa Law Enforcement Academy.
REVERSED AND REMANDED.

Thomas J. Miller, Attorney General of Iowa, and Gary L. Hayward, Assistant Attorney General, for defendant-appellant.

Jeffrey B. Millhollin of Mullin & Millhollin, Corning, for plaintiff-appellee.

Considered en banc.

Defendant appeals from the decision of the Adams county district court reversing its administrative decision to dismiss plaintiff from the Iowa law enforcement academy.

After the academy's decision to dismiss him, Herring appealed to the Adams county district court, alleging that the decision was not based on substantial evidence and was arbitrary and capricious. On September 14, 1981, without receiving either written or oral arguments from the academy, the district court reversed the decision of the academy saying that it was not supported by substantial evidence. Herring waived oral and written argument. The academy moved that the district court reconsider its decision, because it had not been given an opportunity to present its case. This motion was not resisted by Herring. Two weeks later, the district court, without any argument or presentation from the academy, issued Ruling on Reconsideration which again reversed the academy's decision to dismiss Herring from the academy. This ruling stated that the academy improperly admitted polygraph examinations into evidence without a stipulation of the parties and that the decision was not supported by substantial evidence.

The academy argued that it was denied due process of law because the court ruled against the academy without giving it an opportunity to be heard in oral argument on the merits. We agree.

According to Iowa rule of civil procedure 331, "Except to the extent that they are inconsistent with any provision of the Iowa Administrative Procedure Act, . . . or with the rule specifically set forth in this decision, the Rules of Civil Procedure shall be as applicable to proceedings for judicial review of agency action brought under that Act."

Rule 181.2 provides that procedure for assigning civil matters for trial. The trial court did not comply with this rule. In addition, Iowa Code Section 17A.19(7) contemplates that a hearing will be set on a decision for judicial review of agency action. Such a hearing was never held in this case.

Rule 336b provides the court may establish a schedule for the conduct of the proceeding. We do not consider this as authority for eliminating the proceeding. We do not hold that the proceeding must include oral argument. We do hold that due process and our rules require that the parties be given an opportunity to state their positions on the issues in dispute.

The plaintiff's letter to the trial judge gave the judge a misimpression that the defendant did not desire to present arguments. However, after the court had ruled, the defendant requested the opportunity to present arguments on the merits. The written arguments presented with the motion to reconsider were in support of the proposition that reconsideration was appropriate because the defendant had desired to be heard, had not had the opportunity to be heard and that they had a meritorious cause. The trial court should have granted the motion to reconsider for failure to provide the defendant an opportunity to present his position on the merits of the dispute. After granting the motion to reconsider the trial court should have scheduled a proceeding to permit the defendant to present his arguments.

Elementary considerations of due process require that the parties be given a proper hearing. In this case, there was no hearing at all. Consequently, we reverse and remand to the trial court for a proceeding where the parties may have an opportunity to present their positions on the issues in dispute.

REVERSED.

DONIELSON, J. (dissenting)

I dissent.

It is clear from the record before us that plaintiff's attorney did mail a letter to the State's attorney before the initial ruling was made. In that letter he indicated that the record would be submitted to Judge Bown for ruling without oral argument unless the State requested a different procedure. The letter was sent on September 4, 1981, and stated as follows:

Pursuant to the court administrator's instructions I have sent the file of Budd Herring vs. Iowa Law Enforcement Academy to Judge Thomas Bown for ruling. It is my understanding that neither party wishes to present any additional oral evidence as there are no requests on file and as such Judge Bown will go ahead and apparently make a ruling based upon the record itself.

If you have some other concept of how this is to be done or other thoughts, give me a call at your earliest convenience.

The State took no action to contact plaintiff's attorney or the court to express a desire to be heard in oral argument. Indeed, an affidavit from plaintiff's attorney states that the defendant's attorney sent a letter indicating that defendant wished to be heard orally but such letter was not postmarked until September 15th, though dated the 11th, and was not received by plaintiff until the 16th—two days after the court made its ruling.

The language of 17A.19(7) is subject to two interpretations: (1) that an oral hearing is contemplated, although not precisely stated in .19(7) or any other section of chapter 17A.1 or (2) that the court "may" hear and consider oral arguments in its discretion. It goes on to say "before the date set for hearing Petition for Judicial Review or Agency Action in a contested case, . . ." which refers only to those situations where the court, in its discretion, does grant a hearing. But, as in other proceedings which are appellate in nature, oral argument

obviously may be waived and the case decided on the basis of the record as a whole, which is the situation before us.

The majority cites Iowa Rule of Civil Procedure 181.2, which deals with assigning civil matters for trial, and concludes that the trial court did not comply with this rule. I do not believe rule 181.2 governs the scheduling of judicial review proceedings. Rule 333 was recently adopted and provides, in part, that:

Contested case proceedings—intervention, schedule, applicability of R.C.P. 179^b". In proceedings for judicial review of agency action in a contested case pursuant to section 17A.19, The Code:

...

(b) Upon request of any party the reviewing court shall, or upon its own motion may, establish a schedule for the conduct of the proceeding.

The Iowa State Bar Association Administrative Law Committee submitted the proposed rules and comments thereto on October 27, 1979. With relation to rule 333(b), the comment is as follows:

Since the Rules of Appellate Procedure are not applicable to the district courts, and IAPA proceedings for judicial review of agency action are appellate in nature, see Iowa Public Service v. Iowa State Commerce Comm., 263 N.W.2d 766 (Iowa 1978), there is some confusion as to the manner of scheduling in such a proceeding where a formal record is made before the agency in a contested case and certified to the court pursuant to IAPA section 17A.19(6). Proposed Rule 3(b) seeks to cure this problem by explicitly stating that the district court shall, on request of any party, or may, on its own motion, establish a schedule for the conduct of the proceeding. This, of course, leaves the schedule to the discretion of the court based on the circumstances of the case.

(emphasis added).

The proposed rules and comments thereto can be found in A. Bonfield, Iowa State Administration Law: Cases and Materials, Iowa Law School Continuing Legal Education Program (March 1982), vol. II at 1285-86.

I believe that the trial court made its initial ruling under the assumption that the parties had waived their right to present oral arguments. It was not until the unfavorable ruling was filed that defendant requested a hearing in its motion to reconsider. When the record demonstrates to the court that oral argument has been waived, the court cannot be faulted for deciding the case on the record before it.

When the defendant then moved for reconsideration I believe it was within the court's discretion to refuse to hear oral arguments. This is especially true where, as here, there was no additional evidence introduced and the defendant's arguments were extensively treated in its brief submitted in support of the motion to reconsider. The court reconsidered the case with all of the arguments before it; plaintiff complained that the agency's decision was not supported by substantial evidence and defendant countered that charge extensively in its brief supporting the motion to reconsider. The case having been decided in this manner, I believe defendant's rights were adequately protected and that it was not denied due process of law.

I disagree with one other aspect of the majority's opinion. The majority states that the "ruling stated that the academy improperly admitted polygraph examinations into evidence without a stipulation of the parties. . . ." But this statement suggests a misconception of the court's ruling. It is important to note initially that the actual test results were not introduced into evidence at the hearing; there was only testimony referring to the results and suggesting that the results demonstrated that plaintiff was not being truthful. No objection was made to the polygraph references and no issue made of their consideration during the hearing. Indeed, defendant raises these issues on appeal based on the court's remarks in its ruling upon motion to reconsider. In the ruling the court noted that "[t]he 'substantial evidence' which defendant claims supports its action is made up

in part of the results of three polygraph examinations." The court then discussed the reliability of the polygraph test, relying on statements made by the Iowa Supreme Court in State v. Conner, 241 N.W.2d 447 (Iowa 1976), and on its own experience. The court's discussion was not focused on whether or not evidence of the polygraph tests were or were not admissible, but whether the test results were sufficiently reliable to constitute "substantial evidence" to support the agency's decision.

Quoting Conner, the court noted that

... the validity of the polygraph result depends on the qualifications, skill and integrity of the polygraph operator. The instrument by its nature is subject to abuse. We have vivid recollection of cases in which the polygraph has been used oppressively in custodial interrogation It has not been demonstrated that this field has been subjected to the standards, policing and discipline which are necessary in a science involving such pretentious and awesome subject matter.

Id. at 459 (citations omitted). In a more recent case the Iowa Supreme Court discussed the reliability of the polygraph test when an employee successfully challenged his dismissal for failure to submit to polygraph examinations. In Matter of Fairbanks, 287 N.W.2d 579 (Iowa 1980), the court stated that

[t]he limited scientific reliability of the polygraph process, see Scholnick, Scientific Theory and Scientific Evidence: An Analysis of Lie Detection, 70 Yale L.J. 694 (1961), has caused this court to place strictures upon the admissibility of polygraphic evidence. See, e.g., State v. Conners, 241 N.W.2d 447, 457-59 (Iowa 1977); see also, Swope v. Florida Industrial Commission Unemployment Compensation Board of Review, 159 So.2d 653, 654 (Fla. Dist. Ct. App. 1964). While the results of polygraph examination are of some value, see 3A J. Wigmore, Evidence in Trials at Common Law § 999 (Chadbourn rev. 1970), the potential for error and resulting implication of the innocent remain as grounds for continued judicial distrust of the polygraph until such time as scientific data establishes its reliability.

Id. at 582. Justice Uhlenhopp, with Justice McCormick joining him, concurred

specially in that

[t]his court holds that polygraph test results have not been shown to be sufficiently reliable to be admissible in evidence in court over objection. *State v. Conner*, 241 N.W.2d 447, 459 (Iowa 1976). Literature on the subject supports that holding. E.g., Craver, The Inquisitorial Process in Private Employment, 63 Cornell L.Rev. 1, 40 (1977). This being so, I would simply rest the present decision on the undemonstrated reliability of polygraph tests, and hold that civil service employees cannot be discharged for refusal to take such tests.

Id. at 583.

I believe that the trial court was correct to consider the extent to which the polygraph tests have been found unreliable in determining whether the test results in the instant case could be the basis for a finding of 'substantial evidence to support the agency's actions.' I also agree with the court's failure to find that "the results of the polygraph examination in this case furnishes one iota at that time of 'substantial evidence.' "

This conclusion is consistent with the administrative code rule requiring that "[a] finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs" Iowa Code § 17A.14 (1981). I stress again that the actual results were never introduced at the hearing, only testimony referring to them. Without additional, or more substantial evidence in the record, these references alone are insufficient to support the agency's finding.

For these reasons, I believe the court acted properly in deciding the case without oral arguments and in holding that the decision was not supported by substantial evidence. Accordingly, I dissent.