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Wanner v. State, Dept. of Transportation Appellant's Reply Brief Dckt. 37059

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STEVE M. WANNER,)
)
 Petitioner/Respondent,)
)
 vs.)
)
 STATE OF IDAHO,)
 DEPARTMENT OF)
 TRANSPORTATION,)
)
 Respondent/Appellant.)
 _____)

Case No. 37059-2009

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Sixth Judicial District
of the State of Idaho, in and for the County of Franklin

Honorable David C. Nye, District Judge

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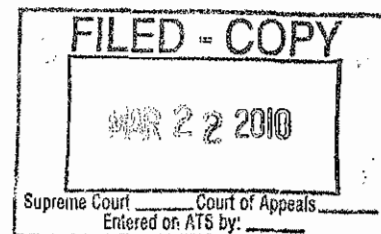


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I.
ARGUMENT IN REPLY

A. WANNER IS NOT ENTITLED TO AN ADMINISTRATIVE HEARING PURSUANT TO I.C. § 18-8002A.

In his Response Brief, Wanner expressly adopts, without alteration, the “Statement of Facts” and the “Course of Proceedings Below” as detailed in IDOT’s opening brief. *Respondent’s Brief* at 1. This means Wanner freely admits that the Notice of Suspension form was read, explained and personally served upon him as required by I.C. §§ 18-8002 and 18-8002A. More specific, this means Wanner knew he had seven (7) days to request an administrative hearing pursuant to I.C. §18-8002A, following his failure of evidentiary/toxicology testing, and he made the deliberate decision to not make such a request. In Wanner’s Response Brief, he then alludes to an alleged fact, not in the record, that he received a notice from IDOT, advising him that his commercial driving privileges were being be suspended for one (1) year. *Respondent’s Brief* at 3. In response to this alleged notification from IDOT, Wanner then submitted his untimely request for an administrative license suspension hearing pursuant to I.C. §18-8002A. *R.*, pp. 5-6; *Respondent’s Brief* at 3. After receiving Wanner’s request for an administrative hearing pursuant to I.C. §18-8002A, IDOT then sent notice to Wanner that he would not be provided a hearing pursuant to I.C. §18-8002A due to his untimely request. *R.*, p. 4.

As addressed in IDOT’s opening brief, Idaho Code § 67-5279(3) mandates that courts performing judicial reviews of agency decisions:

shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

IDAHO CODE § 67-5279(3).

In the instant case, it is uncontested that Wanner failed to timely request an administrative hearing pursuant to I.C. §18-8002A. It is also undisputed that all of the prerequisites mandated by I.C. §§ 18-8002 and 18-8002A were complied with. Wanner makes no complaint of any procedural errors performed by either the arresting officer or by IDOT. Said otherwise, the law was complied with. Idaho Code §18-8002A(4)(a)(ii), which pertains to drivers license suspensions arising from the failure of evidentiary/toxicology testing, expressly requires:

The person may request an administrative hearing on the suspension as provided in subsection (7) of this section. ***Any right to contest the suspension shall be waived if a hearing is not requested as therein provided.***

...

(7) Administrative Hearing on Suspension.

A person who has been served with a notice of suspension after submitting to an evidentiary test may request an administrative hearing on the suspension before a hearing officer designated by the department. ***The request for a hearing shall be in writing and must be received by the department within seven (7) calendar days of the date of service upon the person of the notice of suspension,*** and shall include what issue or issues shall be raised at the hearing. The day on which the request was received shall be noted on the face of the request.

IDAHO CODE § 18-8002A (emphasis added).

Due to the statutory requisites of I.C. § 18-8002A, as followed by IDOT, it cannot be said that IDOT's determination was made: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Because the arresting officer followed the law by reading, explaining and providing the Notice of Suspension form to Wanner, and IDOT followed the law by not providing Wanner a hearing pursuant to I.C. § 18-8002A, then IDOT's decision should be affirmed by this Court.

In Wanner's Response Brief he makes much to do about IDOT's assertion that he is not entitled to an administrative hearing pursuant to I.C. § 18-8002A and IDOT's argument that the district court lacks jurisdiction to provide him an administrative hearing pursuant to I.C. § 18-8002A. *Respondent's Brief* at 4-6. Wanner's arguments that IDOT takes the position that since Wanner missed the cutoff to submit his request for an administrative hearing, that he is subsequently precluded from obtaining judicial review, is misplaced and in error.

IDOT does not argue that the district court lacks subject matter jurisdiction to hear a timely, properly filed petition for judicial review of an administrative decision. In fact, hypothetically speaking, judicial review arising from an untimely request for an administrative hearing due to an arresting officer not following the procedural prerequisites of I.C. § 18-8002A would be a prime example of when judicial review is appropriate. IDOT would expect the district court to order IDOT to give the requesting party an administrative hearing if such procedural error was discovered by the district court. However, such is not the case in this matter. In this case, Wanner simply and

purposefully failed to timely request an administrative hearing pursuant to I.C. § 18-8002A. There are no arguments made that the arresting officer or IDOT failed in following and applying the statutory mandates as required. Because the law was followed, the authority to not provide Wanner a hearing pursuant to I.C. § 18-8002A is statutory and jurisdictional, for which the district court cannot circumvent and subsequently allow Wanner to have an administrative hearing pursuant to I.C. § 18-8002A. The statutory requirements were all complied with, thus Wanner was not entitled to further relief, no more and no less.

Wanner had additional administrative remedies available to him pursuant to I.C. § 49-326(4) which he failed, and continues to fail to exhaust, prior to seeking relief from the district court.

The doctrine of exhaustion requires that where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act. No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. Furthermore, the doctrine of exhaustion generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered. If a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted.

Regan v. Kootenai County, 140 Idaho 721, 724, 100 P.3d 615, 619 (2004)(internal citations omitted).

Wanner failed to exhaust his administrative remedies by failing to request a timely hearing pursuant to I.C. § 18-8002A. Additionally, Wanner failed to exhaust the full gamut of his administrative remedies. Wanner asserts that he has received notice of his commercial driving privileges being suspended pursuant to I.C. § 49-335(2) (the thrust of why he is seeking administrative review due to his commercial driving privileges being suspended), yet he has failed

and continues to fail to request an administrative hearing on the suspension of his commercial driving privileges as allowed by I.C. § 49-326(4).

Idaho Code § 49-335(2), which relates to disqualifications and penalties of commercial driver's licenses, provides:

(2) Any person who operates a commercial motor vehicle or who holds a class A, B or C driver's license is disqualified from operating a commercial motor vehicle for a period of not less than one (1) year if the person refuses to submit to or submits to and fails a test to determine the driver's alcohol, drug or other intoxicating substances concentration while operating a motor vehicle.

IDAHO CODE § 49-335(2).

When a suspension on commercial driving privileges is imposed, I.C. § 49-326(4) requires IDOT to provide notice and an opportunity to the license holder to have an administrative hearing:

Notification of suspension, revocation, cancellation or disqualification. Upon suspending, revoking, canceling or disqualifying the driver's license or driving privileges of any person, the department shall immediately notify the applicant or licensee in writing, at the licensee's address on file with the department pursuant to section 49-320, Idaho Code. Upon his request the department shall afford him an opportunity for a hearing before a hearing officer appointed by the director. The hearing may be held by telephone within twenty (20) days after receipt of the request, unless this period is for good cause shown, extended by the hearing officer for one ten-day period. The notice and hearing shall be required prior to the imposition of additional suspension or disqualification periods beyond the periods as set forth in this section. Upon a hearing the hearing officer may administer oaths, may issue subpoenas for the attendance of witnesses and the production of relevant books and papers, and may require a reexamination of the licensee. Upon the hearing the department shall either rescind its order or, with good cause, may affirm or extend the suspension or disqualification of the driver's license or revoke the driver's license.

Whenever a driver's license, permit or driving privilege has been suspended or revoked by the department as provided in this section, other than as set forth in

subsection (1)(c), (d), (g), (h), (m), (n) or (o) of this section, the department may issue a temporary restricted permit restricting the time, area and purpose of use. The application, eligibility requirements and form of the temporary restricted permit shall be provided by administrative rule. A temporary restricted permit may be issued to grant noncommercial driving privileges, but no temporary restricted permit shall be issued which grants driving privileges to operate a commercial motor vehicle.

IDAHO CODE § 49-326(4).

Pursuant to I.C. § 49-330, a petition for judicial review of IDOT's decision, too, may be filed.

It is interesting to note that not only did Wanner fail to exhaust his administrative remedies by not timely requesting an administrative hearing pursuant to I.C. § 18-8002A, and has failed to request a hearing pursuant to I.C. § 49-326(4), which pertains to his commercial driving privileges, *but Wanner has failed, too, to request an administrative hearing pursuant to the Amended Decision on Appeal from Administrative Hearing.*

In the concluding, last sentence of the district court's Amended Decision on Appeal from Administrative Hearing, the court wrote, "*[Wanner] has seven days from the date of this Amended Decision to file proper notice of his appeal under I.C. § 18-8002, I.C. § 18-8002A, and I.C. § 49-326(4). R., p. 121.* Wanner did not request a hearing pursuant to this order, either!

B. WANNER'S DUE PROCESS RIGHTS HAVE NOT BEEN VIOLATED.

In IDOT's opening brief, IDOT provided this Court with the language of the Notice of Suspension form and articulated why I.C. § 18-8002A does not pertain in whole to drivers who have commercial driving privileges. Specifically, IDOT provided that a close reading of the Notice of Suspension Form read/played to Wanner reveals first, in paragraph 4(B) that if an individual refuses

to submit to evidentiary testing, the temporary permit that is given (if eligible) does not provide for commercial driving privileges of any kind. *R.*, pp. 14-15. A temporary permit cannot be given because the separate laws controlling commercial driver's licenses, i.e., I.C. §§ 49-335(2) and 49-326(4), do not allow for it and this statement clarifies any ambiguity that may be raised because of the controlling, mandatory language of I.C. §§ 49-335(2) and 49-326(4). Second, in paragraph 5(A), the individual who submits to evidentiary testing is told that any temporary permits given do not allow an individual to operate a commercial vehicle. *R.*, pp. 14-15. Once again, this is due to the controlling language of I.C. §§ 49-335(2) and 49-326(4) as they pertain to commercial driving privileges suspensions. In paragraph 5(B), the individual who submits to evidentiary testing and later requests and obtains restricted driving privileges is told, yet once again, that the restricted driving privileges do not allow for the operation of a commercial motor vehicle. *R.*, pp. 14-15. As previously stated, this is due to the controlling language in I.C. §§ 49-335(2) and 49-326(4) which already cover the notice requirements for commercially licensed drivers regarding evidentiary testing and the potential ramifications of either refusing to submit to or failing evidentiary testing.

In I.C. § 18-8002A(9) it provides in its concluding sentence, "Any person whose driving privileges are suspended under the provisions of this chapter may be granted privileges to drive a non-commercial vehicle but shall not be granted privileges to operate a commercial motor vehicle." IDAHO CODE § 18-8002A(9). The express language of this provision provides that I.C. § 18-8002A cannot be used as an end run around the mandatory suspension language of I.C. §§ 49-335(2) and 49-326(4) as previously described herein above.

“Procedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions.” *Cowan v. Board of Comm'rs.*, 143 Idaho 501, 510, 148 P.3d 1247 (2006). Wanner’s contention in this matter lies with the suspension of his commercial driving privileges for one (1) year. Wanner’s commercial driving privileges are not being arbitrarily taken away and there does exist a process to ensure that they aren’t arbitrarily being taken away.

Wanner has both commercial and non-commercial driving privileges as provided by his CDL. Because he has a CDL, Idaho law has provided him the opportunity to have administrative hearings regarding the suspension of his driving privileges pursuant to I.C. § 18-8002, I.C. § 18-8002A and I.C. § 49-326(4). As detailed above, Idaho Code § 49-326(4) provides for administrative hearings to be made available to those whose commercial driving privileges have been disqualified or suspended pursuant to I.C. § 49-335(2). In this case, the record is void, aside from Wanner’s representation that he has received notice from IDOT, of any notifications to Wanner from IDOT regarding the suspension of his commercial driving privileges because this case arises from Wanner’s request for an administrative hearing pursuant to I.C. § 18-8002A, which pertains to non-commercial driving privileges. *R.*, pp. 5-6. Any license suspension imposed on Wanner’s commercial driving privileges would be handled in a I.C. § 49-326(4) administrative hearing, should he request it, which, as discussed previously, is separate and apart from the I.C. § 18-8002A suspension.

Wanner was provided notice of the I.C. § 18-8002A suspension, and he chose not to request an administrative hearing on said suspension. Should Wanner's commercial driving privileges be suspended or disqualified, then IDOT is required to provide him notice of said suspension or disqualification. Pursuant to said notice, Wanner is then provided the opportunity for an administrative hearing pursuant to I.C. § 49-326(4).

Because Wanner is required to receive notice pursuant to I.C. § 49-326(4) relative to a suspension or disqualification of his commercial driving privileges arising from I.C. § 49-335(2), and he is given the opportunity for a hearing relative to the suspension of his commercial driving privileges, his due process rights have not been violated relative to the Notice of Suspension Form failing to advise him of the I.C. § 49-335(2) consequences. Wanner has been provided a mechanism to ensure that his commercial driving privileges are not arbitrarily taken away.

II. **CONCLUSION**

Wanner has failed to exhaust his administrative remedies and the Notice of Suspension form read to, explained to, and provided to Wanner does not deprive him of his due process rights. Wanner was provided all of the information that was required, no more and no less. Wanner is not entitled to an administrative hearing on his non-commercial driving privileges pursuant to I.C. § 18-8002A and the stay imposed on the suspension of Wanner's driving privileges should be *lifted and the suspension imposed.*

DATED this 18 day of March, 2010.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: 
STEPHEN J. MUHONEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of March, 2010, I served two (2) true and correct copies of the above and foregoing document to the following person(s) as follows:

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Aaron N. Thompson
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STEPHEN J. MUHONEN