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Ron Hashman, appellant, v. Beverly Neth, director, State of Nebraska, Department of Motor Vehicles, appellee.

797 N.W.2d 275

Filed May 3, 2011. No. A-10-256.

1. **Administrative Law: Final Orders: Appeal and Error.** Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
5. ____: ____. Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
6. **Administrative Law: Judgments.** Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law.
7. **Statutes: Appeal and Error.** Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
8. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
9. **Jurisdiction: Judgments: Appeal and Error.** When an appeal is dismissed because the lower court lacked jurisdiction to enter the order appealed from, an appellate court may nevertheless enter an order vacating the order issued by the lower court without jurisdiction.

Appeal from the District Court for Box Butte County: Brian C. Silverman, Judge. Vacated and dismissed.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Gregory J. Walklin for appellee.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

CASSEL, Judge.

INTRODUCTION

Ron Hashman appeals from a district court judgment affirming an "automatic" order issued by the director of the Nebraska Department of Motor Vehicles (the Department) revoking his motor vehicle operator's license for 1 year. Although we reject the Department's argument that a continuance ordered by the hearing officer was not chargeable to the director, we conclude that Hashman's subsequent written rest concluded the hearing and that because the rest occurred prior to the expiration of the statutory 30-day temporary license, it operated to terminate the stay resulting from the director's continuance. Because the "automatic" order was not a final, appealable order, the district court lacked jurisdiction of Hashman's petition for review, and accordingly, we lack jurisdiction of this appeal.

BACKGROUND

Hashman was arrested by Alliance police officer Jim Grumbles on March 28, 2009, for driving under the influence of alcohol. After being arrested, Hashman submitted to a blood test that revealed the presence of alcohol in the amount of .219 of a gram of alcohol per 100 milliliters of blood. Hashman subsequently received a notice of administrative license revocation (ALR) dated April 16, 2009, stating that he was receiving a temporary 30-day license, which would expire on May 16. Hashman timely requested an ALR hearing before the Department to determine whether his license should be revoked.

An ALR hearing was held via teleconference on May 6, 2009. At the hearing, Grumbles was called as a witness by the Department. Grumbles testified that he completed a sworn report in regard to Hashman, which he signed in the presence of a notary and submitted to the Department. The hearing officer received the sworn report into evidence. When testifying about the details of Hashman's arrest on cross-examination, Grumbles testified that he used his police report to help refresh

his memory for his testimony. Hashman's counsel requested a copy of Grumbles' report. The following exchange took place in regard to Hashman's counsel's request:

> [Hashman's counsel]: And at this point, Ms. Hearing Officer, I'm going to ask for a copy of the police report be provided to me so I can finish my cross-examination to see if there is anything I have missed based on the police report that [Grumbles] used to base his testimony for this hearing.
>
> HEARING OFFICER . . . : Officer Grumbles, are you anywhere you can fax this to [Hashman's counsel]?
>
> [Grumbles]: I am not.
>
> HEARING OFFICER . . . : Okay. Well, you'll have to get it later, [Hashman's counsel].
>
> [Hashman's counsel]: You're denying my request; is that —
>
> HEARING OFFICER . . . : I can't comply with your request. I'm unable to provide it at this time, so, you know, you can always ask for discovery prior to the hearing.
>
> . . . .
>
> HEARING OFFICER . . . : I'm not denying it to you, but we may have to continue it because of this.
>
> [Hashman's counsel]: Otherwise, I would ask to just strike the officer's testimony, then, if I can't —
>
> HEARING OFFICER . . . : No, I'm not going to do that.
>
> [Hashman's counsel]: I'm asking for some type of remedy here.
>
> [The Department's counsel]: I would have no objection to a continuance so that you can — I will get the officer's report for you and forward it to you if you wish to ask for a continuance.
>
> [Hashman's counsel]: Fine.
>
> [The Department's counsel]: But we can't get it to you right now. There really isn't any choice.
>
> [Hashman's counsel]: I understand that. I didn't hear. Is the [D]epartment asking for a continuance to be able to be allowed to do that?

> HEARING OFFICER . . . : No, it's your continuance.
>
> [Hashman's counsel]: It's not my continuance.
>
> HEARING OFFICER . . . : Yes, it is.
>
> . . . .
>
> HEARING OFFICER . . . : Well, you have got your option: We continue this so that you can get the reports and you may finish . . . cross-examining Officer Grumbles or —
>
> [Hashman's counsel]: If the [D]epartment is asking for a continuance, fine.
>
> HEARING OFFICER . . . : No, it's not the [D]epartment's motion.
>
> [Hashman's counsel]: I'll ask to strike the testimony. Those are the remedies I'm asking for which I think are appropriate under the circumstances.
>
> [The Department's counsel]: You'll just have to make a decision, [hearing officer].
>
> HEARING OFFICER . . . : All right. We'll continue this. It will be rescheduled.

At the conclusion of the hearing, Hashman's counsel told the hearing officer that he "ha[d] no further evidence other than cross-examination."

Following the hearing, the hearing officer issued an order to continue, finding that good cause existed to continue the ALR hearing. The order also stated that the expiration of Hashman's temporary license was not stayed. The hearing was continued to June 5, 2009.

On May 15, 2009, Hashman filed a motion to strike the testimony of Grumbles and then stated in the written motion that he rested his case.

On May 18, 2009, the director issued an "automatic" order of ALR, revoking Hashman's license for 1 year. On May 20, Hashman filed an appeal in the district court for Box Butte County, and the district court affirmed the director's order of revocation. Hashman filed a timely appeal to this court.

ASSIGNMENT OF ERROR

Hashman assigns that the district court erred in affirming the director's order revoking his driver's license for 1 year.

STANDARD OF REVIEW

[1,2] Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record. *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Murray v. Neth, supra.*

[3] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Nothnagel v. Neth*, 276 Neb. 95, 752 N.W.2d 149 (2008).

[4] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *O'Hara v. Department of Motor Vehicles*, 14 Neb. App. 709, 713 N.W.2d 508 (2006).

ANALYSIS

Hashman argues that the "automatic" order of revocation should not have been issued because the director was charged with continuing the ALR hearing, thereby staying the expiration of Hashman's temporary license. The State argues, on the other hand, that the director's "automatic" order of revocation was not a final, appealable order, that the district court was without jurisdiction to hear Hashman's petition for review, and that therefore we do not have jurisdiction of the instant appeal.

[5] We first consider whether the district court had jurisdiction over this matter and, consequently, whether we have jurisdiction. Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Id.*

[6] The State argues that Hashman's appeal is premature in that he should have waited for the director to issue an order

with findings of fact and conclusions of law and appealed from that order. The Administrative Procedure Act, specifically § 84-915, provides in part that "[e]very decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law." Hashman's case became a "contested case," as that term is defined in § 84-901(3), when he requested an ALR hearing. The order that Hashman received was an order revoking his driver's license for 1 year, and it contained no findings of fact or conclusions of law. Thus, the "automatic" order failed to provide the findings of fact and conclusions of law required by § 84-915 in a contested case.

[7] As authority for this argument, the State relies upon Neb. Rev. Stat. § 60-498.01(6)(b) (Reissue 2010) and asserts that this section mandated the issuance of an "automatic and ministerial order." Brief for appellee at 4. Before considering the effect of subsection (6)(b), we note that under subsection (6)(a) where the results of a chemical test are not available to the arresting peace officer while the arrested person is in custody, such person's operator's license shall be "automatically revoked upon the expiration of thirty days after the date of mailing of the notice of revocation by the director." Subsection (6)(a) then authorizes a timely petition for a hearing. The State does not dispute that Hashman's petition was timely filed. Next, subsection (6)(b) states that "[t]he filing of the petition shall not prevent the automatic revocation of the petitioner's operator's license at the expiration of the thirty-day period." According to the State, this language mandated the "automatic" order. However, subsection (6)(b) then continues, stating that "[a] continuance of the hearing to a date beyond the expiration of the temporary operator's license shall stay the expiration of the temporary license when the request for continuance is made by the director." Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning. *Metropolitan Comm. College Area v. City of Omaha*, 277 Neb. 782, 765 N.W.2d 440 (2009). Plainly, if the request for continuance was "made by the director" and continued the hearing to a date "beyond the

expiration of the temporary operator's license," the expiration of Hashman's temporary license was stayed. It would naturally follow that in such circumstances, the automatic order should not be issued.

Hashman argues that the "automatic" order of revocation should not have been issued because the director is charged with continuing the ALR hearing, which stayed the expiration of Hashman's temporary license. In the present case, Hashman received his 30-day temporary license on April 16, 2009, and was told it would expire on May 16. The ALR hearing was initially held on May 6 and was continued to June 5. Thus, the hearing was continued to a date beyond the expiration of the temporary operator's license. However, we must determine if the request for the continuance was made by the director, as Hashman contends.

Under the circumstances of this case, the hearing officer "request[ed]" the continuance. There was a discussion at the ALR hearing, as set forth in the background section of this opinion, about who should be charged with the continuance to allow Hashman's counsel to obtain the police report. Hashman specifically disclaimed making a request for continuance. The Department's counsel also emphasized that he was not requesting a continuance and told the hearing officer, "[y]ou'll just have to make a decision . . . ." The hearing officer then ordered a continuance. We disagree with the Department's argument that Hashman requested the continuance.

The continuance requested by the hearing officer was the equivalent of a continuance requested by the director. Section 60-498.01(6)(b) states that "[t]he director shall conduct the hearing . . . ." Section 60-498.01(7) provides in part that "[t]he director may appoint a hearing officer to preside at the hearing, administer oaths, examine witnesses, take testimony, and report to the director." The statute requires the director to conduct the hearing, but allows the director to appoint a hearing officer to preside at the hearing. Thus, the hearing officer serves as the director's agent. Because the hearing officer acts for the director, who by statute is to conduct the hearing, the continuance was chargeable to the director.

However, the written rest later filed on Hashman's behalf concluded the hearing and ended the stay of the expiration of Hashman's temporary license. As previously stated, the hearing was continued to a date beyond the expiration of Hashman's temporary license. Pursuant to § 60-498.01(6)(b), the director's continuance stayed the expiration of Hashman's temporary license, despite the hearing officer's conclusion to the contrary. However, on May 15, 2009, Hashman's counsel filed a notice of rest. We conclude that such notice of rest effectively concluded the ALR hearing and that the stay of the expiration of the temporary license was also terminated by Hashman's rest. Accordingly, the temporary license expired on May 16—the day Hashman was initially notified it would expire—and the director issued the automatic order revoking Hashman's license on May 18. Because the hearing was concluded prior to the expiration of the 30-day period, the director's continuance did not have the effect of continuing the hearing to a date after the 30-day period. In the absence of such a continuance, § 60-498.01(6) clearly mandated that Hashman's operator's license be automatically revoked at the conclusion of the 30-day period. Thus, the automatic order was properly issued by the director.

Although the automatic order was properly issued, the order did not resolve Hashman's "contested case" because it did not set forth findings of fact and conclusions of law as required by § 84-915. When Hashman rested his case on May 15, 2009, effectively concluding the ALR hearing, the director had 7 days after the conclusion of the hearing to make a determination of the issue. See § 60-498.01(7). Hashman filed his notice of appeal to the district court on May 20. At that time, the 7-day period after the conclusion of the hearing had not expired and the director had not issued an order setting forth the required findings and conclusions. Thus, Hashman's appeal to the district court was premature. Consequently, when the district court reviewed the director's automatic order of revocation and entered its order of affirmance, it was without jurisdiction to do so because of the absence of a final, appealable order. Because the district court lacked jurisdiction to enter its order, we do not have jurisdiction over an appeal from

such order, and we must dismiss the appeal. See *O'Hara v. Department of Motor Vehicles*, 14 Neb. App. 709, 713 N.W.2d 508 (2006).

CONCLUSION

Before disposing of the instant appeal, we summarize the analysis. The continuance was "request[ed]" by the hearing officer. As the hearing officer acted on behalf of the director, the request was chargeable to her. However, Hashman's written notice of rest both concluded the hearing and ended the stay of the termination of the 30-day period before automatic revocation. Because this occurred prior to the expiration of the 30-day period, § 60-498.01(6) mandated that Hashman's license be automatically revoked. The director was thereby required to issue the "automatic" order, even though such order had only temporary effect until a final order—one which included the required findings of fact and conclusions of law—was issued by the director to conclude the contested case. Because of the absence of a final, appealable order, the district court lacked subject matter jurisdiction of Hashman's petition for review under the Administrative Procedure Act. And we therefore lack jurisdiction of this appeal.

[8,9] We dispose of the instant appeal by vacating the district court's judgment and dismissing the instant appeal. Although we lack jurisdiction to adjudicate the merits of the appeal, we do have jurisdiction to vacate the district court's order issued without jurisdiction. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008). However, when an appeal is dismissed because the lower court lacked jurisdiction to enter the order appealed from, an appellate court may nevertheless enter an order vacating the order issued by the lower court without jurisdiction. *Id.* We therefore vacate the judgment of the district court and dismiss the appeal.

VACATED AND DISMISSED.