Iowa Department of Inspections and Appeals
Administrative Hearings Division
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

Brenden Lee Baker [redacted], Appellant, v. Iowa Department of Transportation, Respondent.	)	Case No. 18DOTOT0452 **PROPOSED DECISION**

Brenden Baker appeals from a decision of the Iowa Department of Transportation suspending his driver's license for thirty days because of his unlawful use of a driver's license. Although Baker did unlawfully use another person's driver's license, section 321.210 of the Iowa Code does not authorize the Department to suspend Baker's license because Baker did not unlawfully or fraudulently use *his own* driver's license. Accordingly, the Department's decision must be rescinded.

A telephone hearing was conducted pursuant to rule 761-615.38 of the Iowa Administrative Code on April 9, 2018. Baker appeared, represented himself, and testified. The Department did not participate in the hearing but submitted documents that were admitted into evidence without objection.

FINDINGS OF FACT

On June 25, 2017, Brenden Baker displayed the driver's license of another person as his own license to show that he was of the legal drinking age at the Sports Column bar in Iowa City. Baker eventually came into contact with an Iowa City police officer. The officer confiscated the other person's driver's license and eventually reported Baker's conduct to the Iowa Department of Transportation. Baker was charged with a violation of section 321.216 of the Iowa Code related to this conduct, but the charge was dismissed.

On December 21, 2017, the Department issued an official notice that Baker's driver's license would be suspended for thirty days effective January 25, 2018. The Notice stated, "This action is being taken due to Unlawful Use of License" and that the suspension was "under the provisions of Section(s) 321.210(1)(a)(4) of the Code of Iowa." The official notice cited no administrative rule. Baker filed a timely appeal of the suspension.

The Department upheld the suspension in an informal appeal decision, which explained:

> The file/record shows a completed CONFISCATED DL/ID FORM from the Iowa City Police Department showing his possession of a valid DL/ID of another and to show legal drinking age. Attached to the form is the driver's license of another person showing a legal drinking age.

The Department then issued an amended official notice that Baker's driver's license would be suspended for thirty days effective March 23, 2018. Again, this notice cited section 321.210(1)(a)(4) of the Iowa Code and did not cite any administrative rule.

Baker then filed this timely appeal requesting a contested case hearing. The Notice of Hearing again cited section 321.210(1)(a)(4). It also provided Baker notice—for the first time—that the Department was also relying on section 321.216 of the Iowa Code and its administrative rule 761-615.15 as a basis for the suspension.

CONCLUSIONS OF LAW

The Iowa Department of Transportation "is authorized to establish rules providing for the suspension of the license of an operator" based upon evidence that "the licensee . . . [h]as permitted an unlawful or fraudulent use of the license." Iowa Code § 321.210(1)(a)(4). Relying on this statutory authority, the Department has adopted an administrative rule providing that the Department "may suspend a person's license when the person has been convicted of unlawful or fraudulent use of the license or if the department has received other evidence that the person has violated Iowa Code section 321.216, 321.216A or 321.216B." Iowa Admin. Code r. 761-615.15(1); *see also* Iowa Admin. Code r. 761-615.15 implementation sentence ("This rule is intended to implement Iowa Code sections 321.210, 321.212, 321.216, 321.216A and 321.216B.").

The referenced statutory sections define several criminal violations related to the improper use of a driver's license. As relevant here, section 321.216 prohibits a person from "display[ing] or represent[ing] as one's own a driver's license or nonoperator's identification card not issued to that person." Iowa Code § 321.216(3). Violating that statute "is a simple misdemeanor punishable as a scheduled violation under section 805.8A, subsection 4." Iowa Code § 321.216. Neither section 321.216 nor section 805.8A require or authorize the suspension of a person's driver's license.

Here, the evidence in the record establishes that Baker displayed or represented as his own a driver's license that was not issued to him. The Department thus has evidence that Baker has violated section 321.216 of the Iowa Code. And consequently, the Department's administrative rule would authorize the Department to suspend his driver's license. *See* Iowa Admin. Code r. 761-615.15(1).

But an agency may not adopt an administrative rule that exceeds its statutory authority. *See* Iowa Code § 17A.23(3) ("An agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency. Unless otherwise specifically provided in statute, a grant of rulemaking authority shall be construed narrowly."). And rule 761-615.15(1), which purports to authorize this suspension, substantially exceeds the authority of its authorizing statute, section 321.210. The statute must control.

Section 321.210 authorizes the Department to adopt rules permitting "the suspension of *the license* of an operator" based upon evidence that "the licensee . . . [h]as permitted an unlawful or fraudulent use of *the license*." Iowa Code § 321.210(1)(a)(4) (emphases added). The statute uses the definitive article "the" twice—in describing the license that may be suspended and the license that must be unlawfully or fraudulently used. It thus unambiguously states that a person must permit an unlawful or fraudulent use of the license that the Department is suspending. In other words, the license being suspended must be the same license that has been used unlawfully or fraudulently.

This interpretation of the statute is further supported by the fact that the section authorizes a suspension not merely when the person uses the license unlawfully or fraudulently, but when the person "[h]as *permitted* an unlawful or fraudulent use of the license." Iowa Code § 321.210(1)(a)(4) (emphasis added). One can only permit the use of something over which one exercises control and has the authority to grant permission for the use. Thus, it makes sense that "the license" that the licensee is permitting to be used is the licensee's license rather than some other person's license.

The Legislature could have drafted the statute to apply more broadly to the "unlawful or fraudulent use of *a* license" or "*any* license." But it did not. It could have authorized a suspension for any violation of section 321.216, like the Department's rulemaking. But it did not. When interpreting a statute, one must look to "the words chosen by the legislature, not what it should or might have said." *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004). Those words only authorize a suspension when a licensee permits his or her license to be used unlawfully or fraudulently.

Despite this narrow statutory authorization, the Department's administrative rule 761-615.15(1) authorizes a suspension in broader circumstances, including, where, as here, the licensee uses someone else's driver's license as one's own in violation of section 321.216. This rule exceeds the statutory authority of section 321.210(1)(a)(4). And no other provision in section 321.210, or any of the other statutes cited as authority for the administrative rule, authorizes this rule. *See* Iowa Admin. Code r. 761-615.15 implementation sentence; *see also* Iowa Code §§ 321.210, 321.212, 321.216, 321.216A, 321.216B. Therefore, even though the Department's suspension of Baker's license would be permissible under rule 761-615.15(1), it is not authorized by statute and must be rescinded.

Krueger v. Iowa Department of Transportation, 493 N.W.2d 844 (Iowa 1992), does not compel a different result. In *Krueger*, the Iowa Supreme Court held that the Department was authorized to suspend the license of a person who possessed a fictitious license from another state. *Krueger*, 493 N.W.2d at 846. In so holding, the Court rejected the licensee's argument—and the district court's ruling—that mere possession did not satisfy the statutory requirement of "use." *See id.* at 845.

But the Court did not consider, and there is no indication that the parties argued, whether the statute requires that the license used must be the same license suspended. Because this issue was not considered and ruled on by the Court, *Krueger* is not binding precedent the issue. *See State v. Foster*, 356 N.W.2d 548, 550 (Iowa 1984) ("To sustain a claim of binding precedent a case must be interpreted in reference to an involved question which necessarily must be decided.")*; State v. Brookhart*, 84 N.W. 1064, 1066 (Iowa 1901) (explaining that dicta is not binding precedent because "the court can only adjudicate questions which are before it, and that, as the question was not before the court, what is said must be understood as having been said without the advantage of argument."); Bryan A. Garner et al., *The Law of Judicial Precedent* 84 (2016) ("A decision's authority as precedent is limited to the points of law raised by the record, considered by the court, and determined by the outcome.").

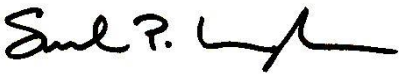
Admittedly, this conclusion is in tension with *Krueger*. If section 321.210 only authorizes a suspension when a licensee permits his or her own license to be used unlawfully or fraudulently, the suspension affirmed in *Krueger* would also be unauthorized. But the Court in *Krueger* was not presented with this question and the conflicting result or reasoning thus does not mandate a different conclusion here. The statute is clear. The rule exceeds the statute. And it would thus be inappropriate to extend *Krueger* to authorize this suspension.

For these reasons, the Department's suspension of Baker's license for his unlawful use of another person's license is not authorized by section 321.210. And because the suspension is not authorized by statute, it must be rescinded.

DECISION

The Iowa Department of Transportation's suspension of Brenden Baker's driver's license is rescinded.

Dated this April 18, 2018.



Samuel P. Langholz
Administrative Law Judge

cc: Brenden Lee Baker
Iowa Department of Transportation General Counsel

APPEAL RIGHTS

This decision shall be final agency action unless the Appellant or the Iowa Department of Transportation appeals this decision to the Director of the Department of Transportation within 20 days of the date of this decision. *See* Iowa Admin. Code r. 761-615.38(4), 761-13.7. An appeal must be in writing and must state the specific issues presented for review and the precise ruling or relief request. The original appeal and one copy must be submitted by mail, fax, or personal delivery to:

Director of the Office of Driver Services
Iowa Department of Transportation
P.O. Box 9204
Des Moines, Iowa 50306-9204
Fax: (515) 237-3071
Physical Address for Personal Delivery: 6310 SE Convenience Blvd., Ankeny, Iowa

NOTICE

If the sanction is currently stayed, the Iowa Department of Transportation will send an official notice, which will indicate the dates on which the sanction will start and end. This notice will be mailed to the same address as this decision. The sanction will start even if the Appellant does not receive the official notice sent by the Iowa Department of Transportation. Any questions concerning the sanction or the Appellant's license should be directed to the Iowa Department of Transportation Office of Driver Services. Contact and other information is available online at http://www.iowadot.gov/mvd.

Iowa Department of Inspections and Appeals
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Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

Craig Christofferson, Appellant, v. Dubuque County Sheriff, Respondent.	)	Case No. 17WP012 **DECISION**

Craig Christofferson filed this appeal pursuant to section 724.21A of the Iowa Code, challenging the decision of the Dubuque County Sheriff to suspend his permit to carry weapons on account of Christofferson's arrest for public intoxication. Christofferson argues that an arrest for public intoxication is insufficient standing alone to justify the suspension of his permit. Because there is not clear and convincing evidence that Christofferson's arrest for public intoxication constitutes probable cause to suspend his permit to carry weapons, the suspension must be rescinded.

A telephone hearing was conducted on July 24, 2017, pursuant to section 724.21A of the Iowa Code and rule 481-11.5 of the Iowa Administrative Code. Christofferson appeared and was represented by his attorney Cory Thein, but did not personally testify. Dubuque County Sheriff Joseph Kennedy appeared, represented himself, and testified. Christofferson's notice of appeal with the suspension notice attached was admitted into evidence without objection.

FINDINGS OF FACT

Craig Christofferson was issued a non-professional permit to carry weapons by the Dubuque County Sheriff on November 30, 2015.

On the early morning hours of May 28, 2017, Christofferson was arrested for public intoxication by the Dubuque Police Department. Dubuque County Sheriff Joseph Kennedy received notice of this arrest a couple days later. Sheriff Kennedy was informed that the arrest involved a situation at a local establishment that revolved around a broken piece of furniture. He was also informed that Dubuque police officers encountered Christofferson and arrested him based on their observations, and that Christofferson refused to take a preliminary breath test.

Based on this information, on May 30, 2017, the Dubuque County Sheriff suspended Christofferson's permit to carry weapons. The suspension notice stated that the permit was suspended "[d]ue to your arrest for public intoxication on 5/28/17. Elligible [sic] to reapply 1 year from arrest." The notice was served on Christofferson on June 6, 2017.

On June 13, 2017, Christofferson filed this timely appeal. In his notice of appeal, he argued that "[a] single arrest for Public Intoxication does not give rise to a suspension, as set forth in the criteria of Iowa Administrative Code Section 661-91.1" and that "[n]one of the other factors set forth in Admin. Code Section 661-91.1 are applicable." As of the date of the hearing, Christofferson's public intoxication charge was still pending.

CONCLUSIONS OF LAW

County sheriffs are responsible for issuing, suspending, and revoking nonprofessional permits to carry weapons for persons residing in their respective counties. *See* Iowa Code §§ 724.11, 724.13 (2017). Chapter 724 of the Iowa Code authorizes a sheriff to suspend a permit to carry weapons only when the Sheriff "finds that a person issued a permit to carry weapons under this chapter has been arrested for a disqualifying offense or is the subject of proceedings that could lead to the person's ineligibility for such permit." Iowa Code § 724.13(1). A suspension is only temporary, remaining in place while the criminal or other proceeding is pending. "If the arrest leads to a disqualifying conviction or the proceedings to a disqualifying finding, the issuing officer shall revoke the permit." *Id.* Conversely, "[i]f the suspension is based on an arrest or a proceeding that does not result in a disqualifying conviction or finding against the permit holder, the [sheriff] shall immediately reinstate the permit upon receipt of proof of the matter's final disposition." *Id.*

A permit holder whose permit to carry weapons is suspended has a right to appeal the suspension to the Iowa Department of Inspections and Appeals. *See* Iowa Code §§ 724.13(1), 724.21A(1). In such an appeal, the administrative law judge must consider whether there is "clear and convincing evidence that the [Sheriff's] written statement of the reasons for the . . . suspension . . . constituted probable cause to . . . suspend . . . a permit." Iowa Code § 724.21A(5).

The Department of Inspections and Appeals is required to adopt administrative rules necessary to implement the statute. *See* Iowa Code § 724.21A(6). Pursuant to this authority, the Department has defined "clear and convincing evidence" to mean that "there is no serious or substantial doubt about the correctness of the conclusion drawn from the evidence." Iowa Admin. Code r. 481-11.13. And the Department has defined "probable cause . . . to suspend . . . a permit to carry weapons" to mean that "a reasonable ground exists for supposing that the basis for the . . . suspension . . . is well-founded." Iowa Admin. Code r. 481-11.12; *see also Lebeck v. Marion County Sheriff*, No. 14-0875, 2015 WL 3624111, at *5 (Iowa App. June 10, 2015) (discussing the two-layered standard of review under section 724.21A(5) and the administrative rules).

Here, the Sheriff's written statement of the reasons for the suspension of Christofferson's permit to carry weapons said only that the permit was suspended "[d]ue to your arrest for public intoxication on 5/28/17. Elligible [sic] to reapply 1 year from arrest." Christofferson does not dispute that he was in fact arrested for public intoxication. He argues, however, that an arrest for public intoxication is not a valid basis for suspending his permit to carry weapons. The Sheriff contends that the suspension was well-founded because the arrest for public intoxication showed that Christofferson was addicted to the use of alcohol.

Alcohol addiction is a basis for a Sheriff to deny a permit to carry weapons. Section 724.8 of the Iowa Code provides that "[n]o professional or nonprofessional permit to carry weapons shall be issued to a person who is . . . addicted to the use of alcohol." Iowa Code § 724.8(2).

The Commissioner of Public Safety has adopted administrative rules regarding the issuance and regulation of certain professional permits to carry weapons that fall under the authority of the Commissioner rather than the county sheriffs. *See* Iowa Code § 724.11(1); Iowa Admin. Code ch. 661-91. In its rules, the Commissioner has adopted an extensive definition of the phrase "addicted to the use of alcohol" for purposes of its rules:

> "*Addicted to the use of alcohol*" means physiological or psychological dependence on the continued use of alcohol, or a maladaptive pattern of alcohol use leading to significant occupational, educational, familial, social, legal, or health-related problems.
>
> Alcohol addiction does not mean nonpathological alcohol use, such as social drinking or occasional or periodic intoxication not accompanied by disruption in social and family relationships, vocational or financial difficulties, or legal problems. Alcohol addiction also does not mean alcohol dependence with sustained full remission, as evidenced by a period of at least 12 months without instances or indicators of alcohol dependence or alcohol abuse. One or more instances of alcohol intoxication alone shall not constitute alcohol addiction, unless accompanied by alcohol dependence or a maladaptive pattern of alcohol use leading to significant occupational, educational, familial, social, legal, or health-related problems.

Iowa Admin. Code r. 661-91.1. The definition continues on to specify ten conditions that "shall create a presumption that a person is addicted to the use of alcohol," including as relevant here:

> 4. Two or more arrests, at least one of which resulted in a conviction, for unlawful use or possession of alcohol or other criminal act committed while under the influence of alcohol in the past 12 months; [and]
> . . . .

> 9. A test of the person's breath, blood, urine, or other bodily fluid which indicates that the person has engaged in unlawful acts involving alcohol, provided that the test was administered within the past 12 months . . . .

Id.

The parties both contend that the definition of "addicted to the use of alcohol" in the Commissioner's administrative rules governs this appeal and focus their arguments on whether Christofferson's arrest for public intoxication satisfy the definition. The Sheriff acknowledges that the arrest is only one instance of alcohol intoxication, which would ordinarily be insufficient to constitute addiction. But he argues that the arrest indicates that the intoxication was accompanied by a significant legal problem, thus placing it within the definition. He also contends that the observations by certified peace officers leading to the arrest were sufficiently similar to a "test of the person's breath, blood, urine, or other bodily fluid which indicates that the person has engaged in unlawful acts" to raise a presumption of intoxication under the rule.

Christofferson emphasizes that the only reason given by the Sheriff for the suspension was the arrest for public intoxication, which is merely a single instance of intoxication. He also points to the specific provision in the rule dealing with arrests for "unlawful use or possession of alcohol or other criminal act committed while under influence of alcohol," which requires "[t]wo or more arrests, at least one of which resulted in a conviction" to presume addiction. Iowa Admin. Code r. 661-91.1 He contends that this provision supports his argument that a single arrest is insufficient to conclude that he is addicted to the use of alcohol.

The Commissioner's rule 661-91.1 defining "addicted to the use of alcohol" does not govern this proceeding. The rule itself states that the definition "appp[ies] to rules in this chapter," Iowa Admin. Code r. 661-91.1, which is chapter 91, "Weapons and Iowa Professional Permits to Carry Weapons." Chapter 91 contains rules that govern the Commissioner's own issuance and regulation of professional permits to carry weapon. *See, e.g.,* Iowa Admin Code r. 661-91.4, 661-91.5, 661-91.6. And with the exception of a rule specifying the uniform forms provided to the sheriffs and one requiring sheriffs to report on their permits and remit fees, no rule in the chapter purports to govern the conduct of sheriffs or appeals of sheriffs' decisions related to weapons permits. *See* Iowa Admin. Code r. 661-91.2 (forms), 661-91.8 (reports and fees). Likewise, no provision in chapter 724 of the Iowa Code authorizes or requires the Commissioner to adopt rules that govern such decisions or appeals. *Cf.* Iowa Code § 724.21A(6) (authorizing Department of Inspections and Appeals to adopt rules necessary to carry out the appeals statute); Iowa Code § 724.17 (requiring the Department of Public Safety to adopt rule related to identification card); Iowa Code § 724.1(2)(b) (requiring Commissioner to adopt rule designating firearms that are collector's items)

Nevertheless, the Commissioner's definition can certainly be persuasive and useful in interpreting the statutory term "addicted to the use of alcohol." It is a reasoned interpretation—by a state agency

with expertise in public safety and adopted through the rulemaking process—of the very same statutory provision at issue here.

Ultimately, whether considering the definition set forth in the rule or just the statutory text, the result is the same. The mere fact that Christofferson was arrested for public intoxication does not provide a reasonable ground for supposing that Christofferson was "addicted to the use of alcohol." Applying the definition in rule 661-91.1, a single public intoxication arrest does not establish a presumption of addiction. Although such an arrest is for unlawful use of alcohol, it is only a single arrest, and the arrest has not resulted in a conviction, thus failing to meet the requirements for presumption of addiction under paragraph four of the definition. The arrest also cannot meet the requirements for a presumption under paragraph nine, because as even the Sheriff admits, there was no test of Christofferson's breath, blood, urine, or other bodily fluid.

Likewise, there is no basis to conclude from the single public intoxication arrest that Christofferson had "physiological or psychological dependence on the continued use of alcohol, or a maladaptive pattern of alcohol use leading to significant occupational, educational, familial, social, legal, or health-related problems." Iowa Admin. Code r. 661-91.1. Certainly the arrest is a "legal . . . problem," but a single arrest does not provide reasonable ground to conclude that the arrest was the result of a "maladaptive pattern of alcohol use," or that Christofferson was alcohol-dependent. Neither of these facts, nor any other proof of addiction, is a required element of the public intoxication offense. *See* Iowa Code § 123.146(2). The Sheriff thus did not have a reasonable ground for supposing that Christofferson was addicted to the use of alcohol.

But the Sheriff's suspension of Christofferson's license for the public intoxication arrest has a more fundamental defect. Section 724.13(1) of the Iowa Code only authorizes suspensions upon an arrest "for a disqualifying offense" or when "the subject of proceedings that could lead to the person's ineligibility for such permit." Public intoxication is not a "disqualifying offense." No provision of chapter 724 identifies the offense of public intoxication as disqualifying for a permit, and the Sheriff has relied only upon the offense's tenuous connection to addiction to alcohol discussed above. While being "addicted to the use of alcohol" does make an applicant ineligible for a weapons permit, that too is not a "disqualifying offense" because it is not an offense at all. Iowa does not criminalize addiction to alcohol. Moreover, if public intoxication were somehow construed to be a disqualifying offense, the suspension could not be for one year as attempted here. The suspension is only authorized to extend during the pending criminal proceeding and upon conviction for that offense, the Sheriff would be required to revoke Christofferson's license indefinitely. *See* Iowa Code § 724.13(1). That would be absurd. Simply put, there is no statutory basis for the one-year suspension that the Sheriff issued here.

For these reasons, there is not clear and convincing evidence that Christofferson's arrest for public intoxication constitutes probable cause to suspend his permit to carry weapons. The suspension must be rescinded.

Because the Sheriff suspended Christofferson's permit to carry weapons and Christofferson is eligible to possess the permit, it is necessary to consider whether Christofferson is entitled to an award of reasonable attorneys pursuant to section 724.21A(8) of the Iowa Code. This provision was enacted into law, effective July 1, 2017, and provides:

> If an applicant or permit holder appeals the decision by the sheriff or commissioner to deny an application for or suspend or revoke a permit to carry weapons or a permit to acquire pistols or revolvers, and it is later determined on appeal the applicant or permit holder is eligible to be issued or possess a permit to carry weapons or a permit to acquire pistols or revolvers, the applicant or permit holder shall be awarded court costs and reasonable attorney fees. If the decision of the sheriff or commissioner to deny an application for or suspend or revoke a permit to carry weapons or a permit to acquire pistols or revolvers is upheld on appeal, or the applicant or permit holder withdraws or dismisses the appeal, the political subdivision of the state representing the sheriff or the state department representing the commissioner shall be awarded court costs and reasonable attorney fees.

Iowa Code § 724.21A(8), as amended by 2017 Iowa Acts, House File 517, sec. 27.

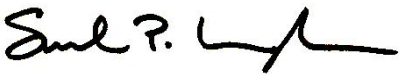
The provision does not specify whether it applies to a weapons permit appeal, like this one, that was filed prior to the effective date of July 1, 2017, but is still pending after that date. At hearing, neither Christofferson nor the Sheriff took a position as to whether the provision should apply to this case.

"A statute is presumed to be prospective in its operation unless expressly made retrospective." Iowa Code § 4.5. But the Iowa Supreme Court has recognized an exception to this presumption, and retroactively applies statutes that are remedial or procedural, rather than substantive. *See Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 563 (Iowa 2015). "When a statute creates new rights or obligations, it is substantive rather than procedural or remedial." *Id.* Subsection 8 authorizing the award of attorney fees creates new rights and obligations of the parties to this case and are best considered substantive. This is consistent with the statutory presumption of prospective operation as well as the conclusions of a majority of courts in other jurisdictions considering new attorney fees statutes. *See, e.g., Bouldin v. Turek*, 607 P.2d 954, 955 (Ariz. 1979); *Zaik/Miller v. Hedrick*, 695 P.2d 88, 90 (Or. App. 2010); *Love v. Jacobson*, 390 So.2d 782, 783 (Fla. App. 3 Dist. 1980). *But see, e.g., Vloedman v. Cornell*, 984 P.2d 906, 908-09 (Or. App. 1999). Accordingly, section 724.21A(8) of the Iowa Code does not apply to this case, and Christofferson is not entitled to an award of attorney fees.

ORDER

The Dubuque County Sheriff's suspension of Craig Christofferson's permit to carry weapons is rescinded. The Dubuque County Sheriff shall take any action necessary to implement this decision.

Dated this August 25, 2017.



Samuel P. Langholz
Administrative Law Judge

cc: Cory R. Thein, Appellant's Attorney (By Mail)
Dubuque County Sheriff Joseph Kennedy (By Mail)

APPEAL RIGHTS

This decision is final agency action under 724.21A and any party may seek judicial review pursuant to Chapter 17A of the Iowa Code. Alternatively, an aggrieved party may first seek rehearing before the administrative law judge by filing an application for rehearing under Rule 481-11.14 and section 17A.16 of the Iowa Code within twenty days of the date of this decision. An application for rehearing must be submitted by mail, fax, email, or personal delivery to:

Administrative Hearings Division
Wallace State Office Building, Third Floor
502 East Ninth Street
Des Moines, Iowa 50319
(515) 281-4477 (fax)
adminhearings@dia.iowa.gov

Iowa Department of Inspections and Appeals
Administrative Hearings Division
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

Bradley Clinton Page [redacted], Appellant, v. Iowa Department of Transportation, Respondent.	)	Case No. 18DOTOW1249 **PROPOSED DECISION**

Bradley Page appeals from a decision of the Iowa Department of Transportation revoking his driver's license for 180 days because of a chemical test showing the presence of a controlled substance. Page argues that the revocation should be rescinded because the peace officer lacked reasonable grounds to believe that he had been operating a motor vehicle while intoxicated, the toxicology reports do not establish a sufficient presence of a controlled substance, and the prescription drug defense applies. Page's arguments fail. The officer had sufficient reasonable grounds, the toxicology reports establish that Page had the requisite presence of some amount of a controlled substance, and the prescription drug defense cannot apply because Page also consumed alcohol. Accordingly, the Department's decision must be sustained.

A telephone hearing was conducted pursuant to section 321J.13 of the Iowa Code on February 5, 2018. Page appeared, but did not testify, and was represented by his attorney, David Hosack. The Department was represented by Stephen Stark. Officer Ryan Dahm of the University Heights Police Department and Doctor Thomas Pattee also appeared and testified at the hearing. The documents submitted by the Department were all admitted into evidence.[1]

[1] Page objected to the admission of the toxicology reports from the Iowa Department of Public Safety DCI Criminalistics Laboratory because he contended that the reports failed to properly indicate the levels at which controlled substances were found in Page's urine. The objection was overruled, and the toxicology reports were admitted, because the reports are relevant to the proceeding and are sufficiently reliable that a reasonably prudent person would be accustomed to rely on them for the conduct of serious affairs. *See* Iowa Code § 17A.14(1). Page retained the ability to, and did in fact, argue that the reports failed to provide the necessary evidence to sustain the revocation. All other documents submitted by the Department were admitted without objection.

FINDINGS OF FACT

On the afternoon of Saturday, September 16, 2017, around the start of an afternoon Hawkeye football game, Bradley Page was stopped by Chief Kris Lyon of the University Heights Police Department for failing to wear a seatbelt. Chief Lyon spoke with Page and conducted a brief field sobriety test, on which Page showed some signs of impairment. Chief Lyon then requested the assistance of Officer Ryan Dahm to conduct a further investigation.

When Officer Dahm arrived on the scene, he spoke with Page. Page said that he was heading home and that he had consumed "a beer or a beer and a half." Officer Dahm also asked whether Page was under the care of a doctor or dentist or taking any medications. Page responded that he was not. During his conversation with Page, Officer Dahm observed that Page had slurred speech.

Officer Dahm asked Page to perform the three standard field sobriety tests, and Page agreed. Page failed the horizontal gaze nystagmus test with 4 out of 6 possible clues. He failed the walk-and-turn test with 7 out of 8 possible clues. And he failed the one-legged-stand test with 2 out of 4 possible clues. Page decided to wear his sandals while performing these tests, and he suggested to Officer Dahm that he had difficulty with the one-legged-stand test because of a prior knee surgery.

Officer Dahm requested that Page take a preliminary breath test, and Page refused. Officer Dahm then arrested Page for operating while intoxicated, in violation of section 321J.2 of the Iowa Code. When inventorying the contents of Page's vehicle, four types of prescription drugs were found: hydrocodone in two different forms, phentermine, and another drug that is not a controlled substance and not at issue in this proceeding.

After transporting Page away from the scene of the arrest to a testing room, Officer Dahm read Page the implied consent advisory, and Page submitted to a chemical test on a DataMaster. The chemical test showed an alcohol concentration of 0.059.

At some point during this encounter, Officer Dahm also administered two additional tests for signs of impairment caused by drug use—the lack-of-convergence test and the modified Romberg test. Officer Dahm observed clues indicating possible drug use on both tests.

Page also consented to a chemical test of his urine, and his sample was eventually tested by the Iowa Department of Public Safety DCI Criminalistics Laboratory. The initial toxicology report showed positive results for amphetamines and opiates. The report stated that "[a] positive screen indicates the possible presence of a substance and/or its metabolites at a level that meets or exceeds the levels established by the Iowa Administrative Code 661-157.7." The report also included the following notation with respect to the positive screen for opiates:

> The opiates result was below Iowa Administrative Code 661-157.7(1)(321J), which states the "Initial test requirements based upon standards adopted by federal Substance Abuse and Mental Health Services Administration in "Mandatory Guidelines for Federal Workplace Drug Testing Programs, "73 FR 71858". The opiates specified in the above guidelines include morphine, codeine, and 6-acetylmorphine. The sample will be analyzed for prescription drugs such as hydrocodone, hydromorphone, oxycodone and oxymorphone and drugs not specified in the above guidelines.

Subsequent toxicology reports confirmed the presence of phentermine, hydrocodone, dihydrocodeine, and hydromorphone. These reports did not indicate the precise levels at which the substances were found in the urine sample.

Page was prescribed phentermine and two different forms of hydrocodone by his doctor, Thomas Pattee. These prescribed drugs account for the presence of all the confirmed controlled substances identified in the toxicology reports because dihydrocodeine and hydromorphone are both metabolites of hydrocodone. Although Page's prescription drugs do have a risk of impairment when taken alone or in combination, Doctor Pattee believed that Page was safely taking the drugs without causing impairment. And Doctor Pattee did not direct Page to refrain from driving or to refrain from consuming alcohol while taking the prescription drugs.

Doctor Pattee had never known Page not to follow his directions with respect to the prescriptions or to seek out more drugs than Doctor Pattee prescribed. Doctor Pattee engaged in a number of measures to prevent and detect such behavior, including random drug testing and a physician monitoring program to ensure that Page was only receiving prescriptions from Doctor Pattee and typically filling them at a single pharmacy.

Doctor Pattee also personally observed Page shortly before Page was stopped and arrested. Page had been assisting Doctor Pattee with a tailgate prior to the Hawkeye football game. And Page drove Doctor Pattee and dropped him off to watch the football game about five or ten minutes prior to being stopped by Chief Lyon. Doctor Pattee does not specifically recall Page consuming alcohol, but acknowledges that such consumption would have been typical at their tailgates. Doctor Pattee did not believe that Page was impaired when he observed him.

Page's driver's license had not previously been revoked under chapter 321J of the Iowa Code. Accordingly, upon receiving Officer Dahm's certification that Page's driver's license should be revoked, the Iowa Department of Transportation provided Page notice of a 180-day revocation of his driver's license. Page then filed this timely appeal.

CONCLUSIONS OF LAW

Section 321J.12 of the Iowa Code requires the Iowa Department of Transportation to revoke a person's driver's license when a peace officer certifies under penalty of perjury that (1) there was reasonable grounds to believe that the person had been operating a motor vehicle while intoxicated in violation of section 321J.2 of the Iowa Code; (2) one or more of the necessary conditions authorizing a request for a chemical test under section 321J.6 of the Iowa Code exists; and (3) the person submitted to the chemical test and the results indicated the presence of a controlled substance or other drug. The revocation is required to be for a period of 180 days if the person has not previously had a revocation under chapter 321J and a period of one year if the person has had a previous revocation. Iowa Code § 321J.12(1)(a)-(b).

When the third requirement is met by a chemical test indicating the presence of a controlled substance or other drug, the Department may not revoke the person's license if the person proves that the statutory prescription drug defense applies. *See Bearinger v. Iowa Dep't of Transp.*, 844 N.W.2d 104, 110 (Iowa 2014); *see also* Iowa Code § 321J.2(11). The prescription drug defense applies when the person proves "that the controlled substance present in the person's blood or urine was prescribed or dispensed for the person and was taken in accordance with the directions of a

practitioner and the directions of the pharmacy." Iowa Code § 321J.2(11)(b). The person must also prove that "there is no evidence of the consumption of alcohol and the medical practitioner or pharmacist had not directed the person to refrain from operating a motor vehicle." Iowa Code § 321J.2(11)(a).

In a license revocation proceeding, the appellant "has the burden to prove why the license should not be revoked." *Reed v. Iowa Dep't of Transp.*, 478 N.W.2d 844, 846 (Iowa 1992). This burden applies to the prescription drug defense as well, and thus an appellant seeking to use the defense must prove that the defense applies by a preponderance of the evidence. *See Bearinger*, 844 N.W.2d at 111.

Page first argues that Officer Dahm did not have reasonable grounds to believe he was operating a motor vehicle while intoxicated. A person operates a motor vehicle while intoxicated in violation of section 321J.2 of the Iowa Code

> if the person operates a motor vehicle in this state in any of the following conditions:
>
> a. While under the influence of an alcoholic beverage or other drug or a combination of such substances.
> b. While having an alcohol concentration of 0.08 or more
> c. While any amount of a controlled substance is present in the person, as measured in the person's blood or urine.

Iowa Code § 321J.2(1). A peace officer has reasonable grounds to believe a person was operating a motor vehicle in violation of this section, "when the facts and circumstances known to the officer at the time action was required would have warranted a prudent person's belief that an offense was being committed." *Pointer v. Iowa Dep't of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996). And when determining reasonable grounds in a case where multiple peace officers "are acting in concert, the knowledge of one is presumed shared by all." *State v. Owens*, 418 N.W.2d 340, 342 (Iowa 1988). The prescription-drug defense is irrelevant to this reasonable-grounds analysis because "[t]he defense cannot be used to retroactively determine the officer lacked grounds to ask the driver to submit to testing." *Bearinger*, 844 N.W.2d at 109 n.2.

At the time that Officer Dahm requested the preliminary breath test and subsequent chemical tests, he knew that Chief Lyon had stopped Page while Page was driving a motor vehicle, had performed a field sobriety test, and had observed signs of impairment during his interaction with Page. Officer Dahm also personally observed Page's slurred speech and heard him admit to consuming one or more beers. And Officer Dahm administered the three standard field sobriety tests and observed Page fail all three. These facts would have warranted a prudent person to conclude that Page had operated a motor vehicle while intoxicated in violation of section 321J.2.

Page now points to Doctor Pattee's belief that Page was not impaired based upon his observations of Page shortly before Officer Dahm interacted with Page. But the question here is not whether Page was actually impaired—only whether Office Dahm had reasonable grounds to believe that he was impaired. Officer Dahm was not aware of Doctor Pattee's observations at the time he requested the preliminary breath test or chemical tests. Thus, the observations cannot be considered as a part of the facts and circumstances known to Officer Dahm at that time. And since Doctor Pattee was not present when Officer Dahm did interact with Page, the observations do not undermine Officer Dahm's credible testimony about the signs of impairment that Officer Dahm personally observed.

Officer Dahm thus properly requested a preliminary breath test. And Page's refusal of that test and subsequent arrest for operating a motor vehicle while intoxicated each provided a sufficient condition to authorize Officer Dahm's requests for chemical testing under section 321J.6.

By the time that Officer Dahm requested the chemical urine test, in addition to all these facts and circumstances, he had also learned the results of Page's chemical breath test—showing an alcohol concentration of only 0.059. He observed clues indicating possible drug use on the lack-of-convergence test and modified Romberg test. And he was aware that prescription drugs had been found in Page's vehicle after Page had denied taking medications and denied being under the care of a doctor or dentist. These facts would have warranted a prudent person to conclude that Page was under the influence of a controlled substance, a drug other than alcohol, or some combination of alcohol and controlled substances or drugs. Officer Dahm thus properly requested the chemical urine test. *See* Iowa Code § 321J.6(3).

Page next argues that the toxicology reports from his chemical urine test do not establish a sufficient presence of a controlled substance to support a revocation because they do not indicate the precise levels at which the substances were found in his urine sample. Page relies upon administrative rule 661-157.7. He contends that the rule sets a minimum detectable level of a controlled substance that must be found in order to use the chemical test as evidence of the presence of the substance.

Rule 661-157.7 was adopted by the Department of Public Safety pursuant to a statutory mandate to "adopt nationally accepted standards for determining detectable levels of controlled substances in the division of criminal investigation's initial screening test for controlled substances." Iowa Code § 321J.2(12)(c). Consistent with is statutory authorization, the rule provides, before setting out the precise minimum levels for each substance:

> Initial test requirements based upon standards adopted by the federal Substance Abuse and Health Services Administration in "Mandatory Guidelines for Federal Workplace Drug Testing Programs," 73 FR 71858, and displayed in the following table are hereby adopted as standards for determining detectable levels of controlled substances in the division of criminal investigation criminalistics laboratory initial screening for controlled substances detected by the presence of the following: marijuana metabolites, cocaine metabolites, opiate metabolites, acetylmorphine, phencyclidine, and amphetamines.

Iowa Admin. Code r. 661-157.7(1). This rule thus applies only to "initial screening," and not to confirmatory tests. *See State v. Comried*, 693 N.W.2d 773, 776 (Iowa 2005). For that reason, the initial toxicology report included documentation that the "positive screen indicates the possible presence of a substance and/or its metabolites at a level that meets or exceeds the levels established by the Iowa Administrative Code 661-157.7." And the subsequent confirmatory reports do not—because the threshold levels of the rule do not apply to those reports. Therefore, the toxicology reports admitted into evidence do not violate rule 661-157.7.

True, the confirmatory reports confirm only *some* presence of phentermine, hydrocodone, dihydrocodeine, and hydromorphone in Page's urine sample. And they do not provide any information as to the levels at which those substances were found. But to support a revocation, the chemical test results need only "indicate[] the presence of a controlled substance or other drug." Iowa Code § 321J.12(1); *see also Loder v. Iowa Dep't of Transp.*, 622 N.W.2d 513, 515-16 (Iowa Ct. App.

2000) (affirming a revocation based upon the presence of a controlled substance and rejecting a constitutional challenge to the statute). The initial screening requirement in rule 661-157.7 does not alter this requirement. *Cf. Comried*, 693 N.W.2d at 776 (rejecting the argument that a prior version of the initial screening rule modified the text of section 321J.2 criminalizing operating a motor vehicle "[w]hile any amount of a controlled substance is present in the person"); *see also State v. Child*, 898 N.W.2d 177, 182-87 (Iowa 2017) (reaffirming *Comried*'s interpretation of section 321J.2 and favorably citing *Loder*).

Because the toxicology reports from Page's chemical urine test confirmed the presence of phentermine, hydrocodone, dihydrocodeine, and hydromorphone, and it is uncontested that those are all controlled substances or drugs, the third and final element for revocation under section 321J.12(1) is established. No further evidence of the precise levels of those substances is required.

Page's last argument—that the prescription drug defense applies—also fails. To succeed at the prescription drug defense, Page must prove that "there is no evidence of the consumption of alcohol and the medical practitioner or pharmacist had not directed the person to refrain from operating a motor vehicle." Iowa Code § 321J.2(11)(a); *see also Bearinger*, 844 N.W.2d at 110-11. Here, Page admitted to drinking one or more beers. And his chemical breath test showed an alcohol concentration of 0.059. With this evidence of his consumption of alcohol, Page has failed to prove a necessary, statutory element of the prescription drug defense.

Page nevertheless argues that he should be able to avail himself of this defense because his doctor did not direct him to refrain from the consumption of alcohol while taking his prescription drugs. Page's doctor did testify that Page was not required to refrain from consuming alcohol while taking the drugs. But unlike a doctor's direction regarding operation of a motor vehicle, a doctor's direction regarding alcohol consumption is irrelevant to the availability of the prescription drug defense. Section 321J.2(11) expressly limits the availability of the defense if there is any "evidence of the consumption of alcohol." Iowa Code § 321J.2(11)(a). And there is no exception to this limitation based upon a doctor's permission or for any other reason. *See State v. Wolfe*, 369 N.W.2d 458, 460 (Iowa Ct. App. 1985) (rejecting argument that the defense should be available "when there is evidence of alcohol, as long as it is not a significant factor" because the statute is "unambiguous and the intent of the legislature is clear" that "there be *no evidence* of alcohol").

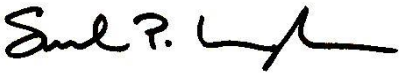
Indeed, the unavailability of the prescription drug offense whenever there is evidence of any consumption of alcohol exposes a range of potentially innocuous conduct to severe consequences. This is particularly so given the wide breadth of the revocation statute. *See Bearinger*, 844 N.W.2d at 110 n.4. And chapter 321J must be interpreted to avoid absurd results. *Id.* at 110. But one cannot "interpret" an exception out of whole cloth without any basis in the statutory text. Page's argument that the prescription drug defense should be extended beyond its current statutory scope is more appropriately addressed to the Legislature than this administrative agency.

Because Page has failed to prove that the prescription drug defense applies or that any of the requirements for license revocation under section 321J.12 have not been met, and because Page has had no previous revocation under chapter 321J, the Department properly revoked Page's license for a period of 180 days.

DECISION

The Iowa Department of Transportation's revocation of Bradley Page's license is sustained.

Dated this February 9, 2018.



Samuel P. Langholz
Administrative Law Judge

cc: Iowa Department of Transportation General Counsel
David Hosack, Attorney for Appellant

APPEAL RIGHTS

This decision shall be final agency action unless the Appellant or the Iowa Department of Transportation appeals this decision to the Director of the Department of Transportation within 10 days of the date of this decision. *See* Iowa Admin. Code r. 761-620.4(2). An appeal must be in writing and must state the specific issues presented for review and the precise ruling or relief request. The original appeal and one copy must be submitted by mail, fax, or personal delivery to:

Director of the Office of Driver Services
Iowa Department of Transportation
P.O. Box 9204
Des Moines, Iowa 50306-9204
Fax: (515) 237-3071
Physical Address for Personal Delivery: 6310 SE Convenience Blvd., Ankeny, Iowa

NOTICE

If the administrative law judge sustained the sanction and it is currently stayed, the Iowa Department of Transportation will send an official notice, which will indicate the dates on which the sanction will start and end. This notice will be mailed to the same address as this decision. The sanction will start even if the Appellant does not receive the official notice sent by the Iowa Department of Transportation. Any questions concerning the sanction or the Appellant's license should be directed to the Iowa Department of Transportation Office of Driver Services. Contact and other information is available online at http://www.iowadot.gov/mvd.