

**IN THE COURT OF APPEALS OF IOWA**

No. 0-367 / 10-0126  
Filed June 16, 2010

**DUSTIN J. DICKERSON,**  
Petitioner-Appellee,

**vs.**

**IOWA DEPARTMENT OF  
TRANSPORTATION, MOTOR  
VEHICLE DIVISION,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Polk County, Robert B. Hanson,  
Judge.

The Iowa Department of Transportation appeals the district court order reversing the Department's decision revoking petitioner's driver's license due to his refusal of chemical testing. **AFFIRMED.**

Thomas J. Miller, Attorney General, and Mark Hunacek, Assistant Attorney General, for appellant.

Robert G. Rehkemper of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

**TABOR, J.**

This appeal poses the question whether the Iowa Department of Transportation (IDOT) may revoke the driver's license of a motorist, who was driving a personal vehicle but held a commercial driver's license (CDL), when the motorist refused chemical testing without being advised as to the consequences of the refusal on his CDL. We conclude that failure to give the complete implied consent advisory precluded revocation of his ordinary driver's license, as well as disqualification of his CDL.

**I. Background Facts & Proceedings**

On January 28, 2009, a Newton police officer arrested Dustin Dickerson for operating while intoxicated.<sup>1</sup> Dickerson held a CDL in addition to his ordinary driver's license. The officer read an implied consent advisory to Dickerson that did not include the provisions in Iowa Code section 321J.8(1)(c)(2) (2009), regarding the consequences of a chemical test failure or refusal on a CDL. Dickerson refused chemical testing. The IDOT suspended and revoked his ordinary driver's license.<sup>2</sup>

Dickerson contested the revocation of his driver's license. After a hearing an administrative law judge (ALJ) concluded, "[t]he advisory given to the

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<sup>1</sup> The criminal case against Dickerson was later dismissed. He had a previous conviction for operating while intoxicated.

<sup>2</sup> The IDOT conceded at the administrative hearing that because of the officer's error Dickerson's CDL could not be disqualified. Generally, the IDOT would revoke a person's CDL for one year for either refusal to submit to chemical testing or for taking the test and being found to be over the legal limit. Iowa Code § 321.208(2)(a), (b). Because Dickerson had a previous conviction for operating while intoxicated, he could have been subject to a lifetime disqualification from having a CDL for operating under the influence or for refusing chemical testing a second time. See *id.* § 321.208(4).

appellant did not comply with Iowa Code section 321J.8 in that it did not include information about disqualification from operating a commercial motor vehicle.” The ALJ found the implied consent advisory in section 321J.8 was directory, not mandatory, but concluded Dickerson suffered prejudice from the incomplete advisory. The ALJ concluded Dickerson’s driver’s license revocation should be rescinded. The ALJ determined it was not necessary to address a separate issue on due process.

The IDOT filed an intra-agency appeal. The agency found, “[t]he appellant has not met his burden of proof to show how the incomplete implied consent advisory affected his decision to refuse the chemical test.” The agency also pointed out that it lacked the authority to address constitutional questions, and thus it was not addressing the due process issue. The agency reversed the ALJ’s decision and reinstated the revocation of Dickerson’s license.

Dickerson filed a petition for judicial review. The district court found section 321J.8 imposed a mandatory duty on an officer to inform a person about the consequences to both his or her ordinary driver’s license and CDL. Because the officer did not follow this mandatory duty, the court concluded Dickerson’s ordinary driver’s license should not be revoked. The court also found the failure to read the full implied consent advisory deprived Dickerson of his due process rights. The court reversed the decision of the agency. The IDOT appeals.

## **II. Standard of Review**

Our review of the IDOT’s decision to revoke a driver’s license is governed by Iowa Code chapter 17A. *Voss v. Iowa Dep’t of Transp.*, 621 N.W.2d 208, 210

(Iowa 2001). We review the district court's decision by applying the standards of section 17A.19 to the agency's decision to determine if our conclusions are the same as those reached by the district court. *Scott v. Iowa Dep't of Transp.*, 604 N.W.2d 617, 619 (Iowa 2000). In administrative proceedings, the driver has the burden to prove why the license should not be revoked. *Lee v. Iowa Dep't of Transp.*, 693 N.W.2d 342, 344 (Iowa 2005).

### **III. Implied Consent Advisory**

In 2007, the Iowa General Assembly amended Iowa Code section 321J.8 to expand the implied consent advisory to include information regarding the potential for CDL disqualification when a person is operating a noncommercial vehicle. This amendment ensured that the advisory reflected the 2005 amendments to Iowa Code section 321.208 which provided for a one year CDL disqualification for an individual who refused or failed chemical testing regardless of whether the individual was operating a commercial or noncommercial vehicle. The 2005 amendments also imposed a lifetime CDL disqualification for second-time offenders who were driving a noncommercial vehicle but held a CDL.

In *State v. Massengale*, 745 N.W.2d 499 (Iowa 2008), the Iowa Supreme Court considered the exclusion of breath test results in a criminal prosecution for operating while intoxicated based on an implied consent advisory which predated the 2007 amendments to 321J.8 and failed to inform the defendant regarding the consequences of the test failure on his CDL. The court found the advisory to be misleading and concluded the district court correctly granted Massengale's motion to suppress the breath test results. *Massengale*, 745 N.W.2d at 503-04.

*Massengale* does not address the question whether an administrative license revocation must be rescinded if the implied consent advisory did not comply with sections 321.208 and 321J.8(1)(c)(2).

Section 321J.8 provides:

1. A person who has been requested to submit to a chemical test *shall* be advised by a peace officer of the following:

...

c. ....

(2) If the person is operating a noncommercial motor vehicle and holding a commercial driver's license as defined in section 321.1 and either refuses to submit to the test or operates a motor vehicle while under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances, the person is disqualified from operating a commercial motor vehicle for the applicable period under section 321.208 in addition to any revocation of the person's driver's license or nonresident operating privilege which may be applicable under this chapter.

(Emphasis added). The officer omitted this information when he read the implied consent advisory to Dickerson.

Generally, the word "shall" imposes a duty. See Iowa Code § 4.1(30)(a). In license revocation proceedings under chapter 321J, however, the duty imposed by the word "shall" may be either "directory" or "mandatory." *Downing v. Iowa Dep't of Transp.*, 415 N.W.2d 625, 628 (Iowa 1987). We look to legislative intent to determine whether a statute is mandatory or directory. *Taylor v. Iowa Dep't of Transp.*, 260 N.W.2d 521, 522 (Iowa 1977).

If the duty imposed by a statutory provision is "essential to the main objective of the whole statute, the provision is mandatory, and failure to perform the duty will invalidate subsequent proceedings under the statute." *Downing*, 415 N.W.2d at 628. On the other hand, when a statutory duty is not essential, "the

provision is directory, and failure to perform the duty under it will not affect the validity of subsequent proceedings unless prejudice is shown.” *Id.* If a statutory duty “is designed to assure order and promptness in the proceeding, the statute ordinarily is directory . . . .” *Taylor*, 260 N.W.2d at 523.

Section 321J.8 applies when a person has been asked to submit to chemical testing; “the officer must advise the person of the consequences of refusing to submit to the test and the consequences of not passing the test, including potential periods of license revocation.” *State v. Garcia*, 756 N.W.2d 216, 221 (Iowa 2008). A driver’s decision whether to submit to testing or refuse may be considered involuntary if the driver is not reasonably informed of the consequences of refusal or test failure. *Id.* at 220. While the overall purpose of the implied consent statute is “to help reduce the appalling number of highway deaths resulting in part at least from intoxicated drivers,” *id.*, the specific purpose of section 321J.8 is to provide a person who has been asked to submit to a chemical test “a basis for evaluation and decision-making in regard to either submitting or not submitting to the test.” *Voss*, 621 N.W.2d at 212. The purpose of the implied consent advisory is to give information to allow a person to make a reasoned and informed decision. *Massengale*, 745 N.W.2d at 504.

The district court determined the duty imposed by section 321J.8 was mandatory. The court stated:

The fact is that the information section 321J.8 requires to be conveyed (“shall”) is, in the legislature’s wisdom, information of the very sort one needs to make an intelligent and informed decision as to whether to submit to chemical testing—a decision which impacts directly on certain of that person’s rights and/or privileges. Neither this court’s speculation nor that of the DOT as to what role, in a

given instance, that information could play or actually plays in a person's decision-making process should be permitted to excuse the failure to convey same. The purpose of the statute is, amongst other things, to fully inform the arrested individual of the impact of refusal to submit to testing on his driver's license and CDL. If one is not fully informed, one cannot make a reasoned and well-informed decision.

We concur in the district court's reasoning. The duty imposed by section 321J.8 is essential to the specific purpose of that statutory provision—to give drivers a basis for evaluating whether to submit to a chemical test.

The IDOT argues that to the extent section 321J.8 was designed to give information to a licensee that would assist him in reaching a judgment concerning the revocation of his ordinary driver's license, "that goal was entirely satisfied by telling the licensee everything he needs to know about what will happen to *that* license if he refuses, or fails, chemical testing." Contrary to the IDOT's argument, it is not so easy to decouple the consequences to Dickerson's ordinary driver's license from the consequences to his CDL. Dickerson was faced with one decision: either submit to chemical testing or refuse. That one decision affected both his ordinary driver's license and his CDL. The IDOT argues that Dickerson cannot logically assert his decision would have been different had he received information concerning his CDL because the length of CDL disqualification would have been the same whether he provided a breath sample and tested over the limit or refused to provide a sample. However, the IDOT's argument overlooks the possibility that had the officer advised Dickerson about the CDL consequences, especially the lifetime disqualification for second offenders, Dickerson may have been motivated to submit a sample with the hope

of testing under the limit and, thus, bearing no loss of driving privileges, either personal or commercial. Not fully informing Dickerson about the CDL consequences rendered his refusal involuntary and not a viable basis for either disqualifying his CDL or revoking his ordinary driver's license.

In other instances, where courts have found a statute is directory, generally the statute provides for order and promptness in proceedings. See, e.g., *Tyler v. Iowa Dep't of Transp.*, 420 N.W.2d 442, 443 (Iowa 1988) (finding requirement in section 321J.9 that an officer provide a "sworn report" a driver had refused to submit to testing was directory because the affirmation of the report before a notary was not essential to the purpose of the statute); *Downing*, 415 N.W.2d at 628 (holding section 321B.13 providing an officer "shall" issue a temporary license was directory because the duty was not essential to the main purpose of the statute, which was to promote public safety); *Taylor*, 260 N.W.2d at 523 (noting a requirement in section 321B.8 that a hearing be held within twenty days of a driver's request for a hearing was directory because the timing of the hearing was not essential to the purpose of the statute).

We conclude the duty to provide the information found in section 321J.8 is mandatory. The failure to provide the required information invalidates subsequent proceedings under the statute. See *Downing*, 415 N.W.2d at 628. We determine Dickerson's license should not be revoked because the officer failed to provide the information required by section 321J.8(1)(c)(2).

#### **IV. Due Process**



The IDOT contends Dickerson's due process rights were not implicated by the officer's failure to read the entire implied consent advisory. Because we have determined the revocation of Dickerson's license should be rescinded due to the officer's failure to read the entire advisory, we need not address the due process issue.

We affirm the decision of the district court regarding section 321J.8.

**AFFIRMED.**