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Automobiles - Operator's License - Appeal from Commissioner's Order

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RECENT CASES

AUTOMOBILES — OPERATOR'S LICENSE — APPEAL FROM COMMISSIONER'S ORDER. — The State Highway Commissioner ordered suspension of the license of a driver for operating a motor vehicle while under the influence of intoxicating liquor. The trial court modified the suspension by reducing it from sixty to thirty days. The highway commissioner then instituted this appeal contending that although the trial court may, under statutory authority, determine whether the license should or should not be suspended, it has no discretion to determine the length of suspension. The Supreme Court of North Dakota, with one justice dissenting, affirmed the decision of the trial court and *held* that the hearing before the trial court was a trial de novo of the case, and that the court had discretion to determine how long the license should be suspended, the length of suspension being but an incident of the power to suspend which the court already had. *Conway v. Thompson*, 78 N.W.2d 400 (N. D. 1956).

Operating a motor vehicle is a privilege subject to state control,¹ and a license to drive once issued remains subject to suspension or revocation.² However, a license to drive cannot be taken from a licensee arbitrarily or capriciously,³ but only in the manner and on the grounds provided by law.⁴

The legislature has full authority to designate the agency through which a license will be suspended or revoked.⁵ In North Dakota this power has been delegated to the State Highway Commissioner by statute.⁶ Other courts have held statutes of similar import not invalid as a delegation of judicial authority to an executive officer.⁷ However, such delegation may be invalid if the legislature should fail to establish standards to control the administrator's discretion.⁸ The authorized agency has the sole power to revoke or suspend the operator's license;⁹ and unless authorized by statute the courts cannot exercise such power.¹⁰

In North Dakota the Commissioner is authorized to suspend the license of an operator without a preliminary hearing upon a showing by records or other sufficient evidence that the licensee has committed certain offenses.¹¹ Statutes

1. See *e. g.*, *Commonwealth v. Harris*, 278 Ky. 218, 128 S.W.2d 579 (1939).

2. See *e. g.*, *Thompson v. Thompson*, 78 N.W.2d 395 (N. D. 1956).

3. *Wall v. Registrar of Motor Vehicles*, 329 Mass. 70, 106 N.E.2d 425, 427 (1952) (dictum); *South Carolina State Highway Department v. Harbin*, 226 S. C. 585, 86 S.E.2d 466, 470 (1955) (dictum); *Thompson v. Smith*, 155 Va. 367, 154 S.E. 579, 583 (1930) (dictum).

4. *Carnegie v. Department of Public Safety*, 60 So.2d 728, 730 (Fla. 1952) (dictum); *Sleeper v. Woodmansee*, 11 Cal. App.2d 595, 54 P.2d 519, 521 (1930) (dictum).

5. *State v. McDaniels*, 219 N. C. 763, 14 S.E.2d 793 (1941).

6. See N. D. Sess. Laws 1955, c. 251, §§ 30, 31.

7. See *Keck v. Superior Court*, 109 Cal. App. 251, 293 Pac. 128 (1930); *State v. Stehlek*, 262 Wis. 642, 56 N.W.2d 514 (1953).

8. See *Thompson v. Smith*, 155 Va. 367, 154 S.E. 579 (1930).

9. See *State v. Cole*, 241 N. C. 576, 86 S.E.2d 203 (1955); *State v. McDaniels*, 219 N. C. 763, 14 S.E.2d 793 (1941); *Ashcraft v. State*, 62 Okla. Cr. 308, 98 P.2d 60 (1940); *Prichard v. Battle*, 178 Va. 403, 17 S.E.2d 393 (1941) (Suspension or revocation of driver's license is civil and not criminal in nature.)

10. See *State v. Warren*, 230 N. C. 299, 52 S.E.2d 279 (1949); See note 9 *supra*.

11. N. D. Sess. Laws 1955, c. 251, § 31. (The enumerated offenses include driving while under influence of liquor or drugs, permitting unlawful or fraudulent use of license; incompetency to drive a motor vehicle; habitual recklessness or negligence; conviction of serious offenses against traffic regulations with such frequency as to indicate a disrespect for traffic laws and a disregard for safety of other persons; and commission of an offense for which mandatory revocation of license is required upon conviction.) See N. D. Sess. Laws 1955, c. 251, § 30 regarding provisions for mandatory revocation. See N. D. Sess. Laws 1955, c. 251 §34 for statutory limits as to length of suspension.

authorizing suspension of a license without a hearing have been sustained against constitutional objection where they give the licensee a right to a trial *de novo* on appeal from such suspension.¹² The North Dakota legislature has provided the licensee with an opportunity for a hearing before the commissioner following suspension, and "upon such hearing the commissioner may either rescind his order of suspension or, good cause appearing therefor, may continue, modify, or extend the suspension of such license or revoke such license."¹³ Thereafter, the licensee has the right of appeal to the courts to ". . . examine into the facts of the case and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation, or revocation of license . . ."¹⁴ The instant case indicates that the hearing before the court takes the form of a trial *de novo* of the case.¹⁵

The problem presented by the instant case is one of "separation of powers". Authority to suspend the license was validly delegated to the Commissioner and not to the courts.¹⁶ The provision for trial *de novo* in the district court is not a criminal proceeding in which case the court would have discretion in imposing sentence.¹⁷ Thus it is arguable that the hearing on appeal should be concerned with whether the Commissioner's order has been reasonable and not an abuse of the discretion vested in him by the legislature.¹⁸ For the court to modify the Commissioner's order as to length of suspension where substantial grounds for suspension exist and there has been no abuse of discretion is in effect to exercise his discretion for him, thereby nullifying the legislative delegation of authority.

CECIL E. REINKE.

CONSTITUTIONAL LAW — REVIEW OF EXECUTIVE ORDER — SUMMARY DISMISSAL OF GOVERNMENT EMPLOYEES. — Petitioner, an inspector for the Food and Drug Administration, was summarily dismissed from his employment under authority of Public Law 733¹ (hereinafter referred to as the "Act") as extended by Executive Order 10450, April, 1953.² Petitioner's appeal to the Civil Service Commission under authority of the Veteran's Preference Act³ was declined. Petitioner then filed a complaint in the federal district court and

12. See *Commonwealth v. Cronin*, 336 Pa. 469, 9 A.2d 408 (1939).

13. N. D. Sess. Laws 1955, c. 251, § 52.

14. N. D. Sess. Laws 1955, c. 251, § 38.

15. Cf. *In re Wright*, 228 N. C. 301, 45 S.E.2d 370 (1947). *clarified on rehearing* 228 N. C. 584, 46 S.E.2d 696 (1948); *Commonwealth v. Herzog*, 359 Pa. 641, 60 A.2d 37 (1948).

16. See note 11, *supra*.

17. See *Prichard v. Battle*, 178 Va. 403, 17 S.E.2d 393 (1941) (Suspension or revocation of drivers license is civil and not criminal in nature.)

18. See *in re Wright*, 228 N. C. 584, 46 S.E.2d 696, 700 (1948) (dictum) ("It must be noted, however, that the discretion to suspend or revoke, or not to suspend or revoke, is vested in the department, subject to a judicial review of the facts upon which its action is based. No discretionary power is conferred upon the Superior Court. Hence, if the judge, upon the hearing, finds and concludes that the license of the petitioner is in fact subject to suspension or revocation under the provisions of the statute, the order of the department entered in conformity with the facts found must be affirmed.")

1. 64 Stat. 476 (1950), 5 U. S. C. §§ 22-1, 22-3 (Supp. 1952).

2. Exec. Order No. 10405, 18 Fed. Reg. 2489 (1953) (The Order extends the Act to all government employees and supplies a negative test which is more stringent than that prescribed by the Act, i. e., the Order uses "clearly consistent with the interests of national security" as the test; the Act uses "in the best interest of national security" as the test.)

3. 58 Stat. 387, 5 U. S. C. 851-69 (1944), as amended; 66 Stat. 626, 5 U. S. C. § 851-69 (Cum. Supp. 1956).