

NOT DESIGNATED FOR PUBLICATION

No. 125,818

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CANDI ZAHRADKA,  
*Appellant,*

v.

KANSAS DEPARTMENT OF REVENUE,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Thomas District Court; KEVIN BERENS, judge. Opinion filed August 4, 2023.  
Affirmed.

*Charles A. Peckham*, of Brown, Creighton & Peckham, of Atwood, for appellant.

*Charles P. Bradley*, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before COBLE, P.J., GARDNER and CLINE, JJ.

PER CURIAM: After law enforcement arrested Candi Zahradka for driving under the influence (DUI) of alcohol in October 2019, the Kansas Department of Revenue (KDR) issued a DC-27 notice of suspension because she refused a breathalyzer test. Zahradka appealed the suspension and requested an in-person hearing on the matter. The hearing was originally scheduled for March 2020 but, because of the COVID-19 pandemic, it was delayed until October 2021.

Zahradka's license suspension was upheld by both the hearing officer and the district court. She now appeals to us to find the two-year hearing delay violated K.S.A.

2019 Supp. 8-1020(d)(1)'s requirement to set the matter for hearing "forthwith" upon receipt of Zahradka's timely request for a hearing. After reviewing the record, we find Zahradka has not met her burden to show KDR unnecessarily delayed her hearing or that she suffered prejudice from the delay. We therefore affirm the district court's decision to uphold her license suspension.

#### FACTS AND PROCEDURAL BACKGROUND

The facts underlying Zahradka's DUI arrest and driver's license suspension are largely irrelevant since the only issue she raises on appeal is the timeliness of her suspension hearing. Suffice it to say, Zahradka was arrested in October 2019 for DUI. She received a certification and notice of the suspension of her driver's license at that time, which advised that her driving privileges would be automatically suspended within 30 days unless she timely requested an administrative hearing to contest the suspension. The notice advised Zahradka that the hearing would be scheduled by telephone but she could request that it be held in person.

Zahradka retained counsel who then timely requested an in-person hearing on the matter. KDR notified Zahradka that her hearing was scheduled for March 17, 2020, and that her driving privileges would remain valid until this hearing was held and a restriction, suspension, or revocation notice was issued. Zahradka entered into a diversion agreement to address the underlying criminal charges, but her administrative hearing was delayed due to the COVID-19 pandemic. The hearing was eventually rescheduled for October 21, 2021.

After the hearing, Zahradka's driving privileges were suspended. She unsuccessfully appealed the suspension to the district court, where she disputed both the merits of the suspension and the two-year delay in scheduling the hearing. The district court heard the matter in August 2022. It upheld the suspension and found the delay in

setting the hearing was not unreasonable and Zahradka had not established prejudice from the delay.

#### ANALYSIS

As noted above, the only issue on appeal is the timeliness of Zahradka's hearing. She argues that KDR failed to "forthwith" set a hearing, thus violating K.S.A. 2019 Supp. 8-1020(d)(1). KDR maintains that it acted with due diligence, the delay was necessary under the circumstances, and Zahradka fails to show prejudice.

#### *Standard of Review*

On appeal, the burden of proving the invalidity of the agency action rests on the party asserting the invalidity. K.S.A. 77-621(a)(1).

Whether KDR complied with K.S.A. 8-1020(d)(1)'s "forthwith" requirement is a mixed question of fact and law. While appellate review "is unlimited in interpreting a statute," whether KDR set the hearing forthwith is a judicial determination that must be supported by the requisite factual findings. *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 371, 377, 130 P.3d 560 (2006). We review factual issues under a substantial competent evidence standard. *Poteet v. Kansas Dept. of Revenue*, 43 Kan. App. 2d 412, 414, 233 P.3d 286 (2010). "Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion." *Gannon v. State*, 298 Kan. 1107, 1175, 319 P.3d 1196 (2014). In determining whether substantial competent evidence supports the district court's findings, we must accept as true the evidence and all the reasonable inferences drawn from the evidence which support the district court's findings and must disregard any conflicting evidence or other inferences that might be drawn from it. 298 Kan. at 1175-76 (citing *Unruh v. Purina Mills*, 289 Kan. 1185, 1195-96, 221 P.3d 1130 [2009]).

### *Zahradka's Burden on Appeal*

As noted by the parties, K.S.A. 2019 Supp. 8-1020 sets out certain hearing requirements. Because Zahradka timely requested an in-person hearing, KDR needed to "forthwith" set such a hearing. K.S.A. 2019 Supp. 8-1020(d)(1).

In *Foster*, our Supreme Court interpreted K.S.A. 8-1020(d)(1). It held that KDR must timely *schedule* a hearing, not necessarily timely *hold* a hearing. 281 Kan. at 375. And "[i]f the delay in setting the hearing was necessary and did not result from a lack of due diligence or reasonable exertion on its part, then [KDR has] complie[d] with the statute." 281 Kan. at 377. Indeed, "forthwith" does not mean immediately. 281 Kan. at 376.

Thus, to succeed on her claim, Zahradka must show there was (1) unnecessary delay in scheduling her hearing which resulted from a lack of due diligence or reasonable exertion by KDR and (2) that she was prejudiced by the delay. 281 Kan. at 377.

### *Due Diligence*

Zahradka solely relies on the fact that the record did not specify a reason for the delay in holding her hearing to support her argument that the delay was unnecessary and caused by KDR's lack of due diligence. She points out that there is nothing in the record between the February 2020 letter—scheduling her hearing in March 2020—and the September 2021 letter—rescheduling her hearing in October 2021, and that KDR offered no evidence at the hearing to explain the delay. She also notes that Kansas Supreme Court Administrative Order 2020-PR-047, effective May 1, 2020, which halted government functions because of the COVID-19 pandemic, only halted "judicial proceedings," not administrative proceedings.

Although Zahradka is correct that KDR offered no evidence to explain the delay, its counsel did offer an explanation at the hearing which Zahradka does not challenge. KDR's counsel explained that the delay stemmed directly from Zahradka's request for an in-person hearing and the Kansas Supreme Court COVID-19 orders which closed the courthouses. He noted that while it could hold some telephone hearings—which is its preferred method—the closure of the Colby courthouse suspended its ability to conduct in-person proceedings during the pandemic. Counsel also noted that the required travel for the in-person hearing complicated matters because its hearing officers were in Topeka while both Zahradka and the officer were in Colby. Because Colby is one of the westernmost cities in Kansas, he contended that Zahradka's in-person hearing took longer to schedule once restrictions were lifted. Zahradka did not dispute this explanation at the hearing nor does she on appeal.

While not ideal, under the circumstances, we cannot say the district court's finding that it was apparent the delay was necessitated by the pandemic was unreasonable. As the district court observed, "the world changed in March of 2020." The COVID-19 pandemic obviously disrupted the normal pace of activity, to include governmental activities. As the district court explained when making its ruling, not only did the Kansas Supreme Court halt proceedings, but Governor Laura Kelly also halted many government functions in March 2020 as well. See Kansas Governor Executive Order Nos. 20-03, effective March 16, 2020, and 20-04, effective March 17, 2020.

Zahradka offered no evidence that KDR lacked diligence in rescheduling her hearing, nor did she challenge the explanation provided by KDR for the delay. She has the burden to prove that her hearing was delayed because of KDR's lack of due diligence or that the delay was unnecessary, and we find she has not met that burden under the circumstances.

## *Prejudice*

Even if we found that Zahradka met her burden to show KDR failed to act with due diligence or that the delay was unnecessary, she must still demonstrate she was prejudiced by the delay. But she has failed to meet this burden as well.

KDR correctly asserts that a long delay does not create per se prejudice—evidence must be brought forth demonstrating prejudice. See *Jones v. The Grain Club*, 227 Kan. 148, 150, 605 P.2d 142 (1980) (finding 39-month delay did not warrant dismissal absent prejudice). Prejudice may be shown, for example, when an ability to present relevant evidence is compromised. Or by presenting evidence of "some kind of tangible extrajudicial burden or prejudice attendant to the pendency of the revocation proceedings." *Witthuhn v. Kansas Dept. of Revenue*, No. 115,220, 2017 WL 947271, at \*2 (Kan. App. 2017) (unpublished opinion).

But Zahradka offers no such evidence. She does not claim her ability to present evidence at her October 2021 hearing was compromised, and she retained her driving privileges, although temporarily, throughout the administrative and judicial process.

On appeal, Zahradka argues that the delay prejudiced both her "business and personal life." She first claims that she had to switch lawyers three times during the delay period, but she does not explain why the delay caused this decision. At the hearing, she mentioned her first lawyer was conflicted out and the second just filled in for the hearing. But she did not explain how this impacted the outcome of her case or relate it to the delay period.

Next, Zahradka claims the suspension of her license now will cause her to suffer negative consequences in her personal and business life which she would not have suffered in March 2020. She testified that her children would have to either switch

schools or live with their father if her driving privileges were suspended. And she claimed that her daycare clients would have to find someone else and that obtaining groceries would pose a problem for her without driving privileges. Essentially, during the two-year delay, Zahradka apparently started a daycare business and acquired custody of her children. Because of this, "what was workable" in March 2020 became "much less" workable by October 2021.

As KDR points out, "[t]he detrimental impact that a license suspension could have on . . . family, work, or life is a consequence of a test refusal, not of delayed administrative proceedings." Furthermore, KDR argues that the delay was beneficial to Zahradka because now she will not face a "hard" suspension. It pointed out that Kansas House Bill 2377 became effective July 1, 2022, which permits drivers suspended under K.S.A. 8-1001 et seq., to immediately apply for restricted driving privileges that allow suspended drivers to operate vehicles with an ignition interlock device. KDR contends Zahradka could benefit from this new law and be able to drive to work, transport children, and maintain her livelihood. Again, Zahradka does not dispute the application of the changed legal landscape upon her claim of prejudice. Because Zahradka has failed to show she suffered prejudice from KDR's delay in setting her hearing, we find she has failed to carry her burden to justify a vacation of her driver's license suspension.

Affirmed.