

a. In *McGuire v. Department of Motor Vehicles*, 253 Neb. 92, 96, ___ N.W.2d ___ (1997), the Court stated that “[a] prerequisite to the validity of a breath test made under § 60-6,197(3), and consequently a prerequisite to the validity of an arrest, is that the test must be performed in accordance with the procedures approved by the Department of Health and ‘by an individual *possessing a valid permit issued by such department* for such purpose,’ (emphasis supplied) § 60-6,201(3).”

b. However, unlike *McGuire*, in this case, the department adduced specific evidence regarding the permit and procedures, and the plaintiff failed to adduce any evidence at the hearing before the director. The arresting officer testified:

Q And was the purpose in there in having him submit to a chemical test for the presence of alcohol?

A Yes, I read him the implied consent, had him sign it and tested him on the intoxilyzer.

Q And you administered that test, sir?

A Yes, I did.

Q And you possess a Class B permit to administer tests on an intoxilyzer device?

A Yes, I do.

Q And that was valid on the night that you had contact with Mr. Matthews?

A Yes.

Q Did you follow the appropriate checklist for the device that you were using?

A Yes, I did.

Q And did the machine then register a valid sample?

A Yes, it did.

Q And what was the result of that test?

MR. PLACKE: Object on foundation.

THE HEARING OFFICER: So noted. Overruled.

Q (By the Hearing officer) What was the result?

A .190.

(Exhibit 2, 13:18-14:14)

c. The testimony clearly reflected that the arresting officer held a “valid permit” as required by statute. Further, the testimony that he “follow[ed] the appropriate checklist” raises a clear inference that the test was performed in accordance with the

procedures approved by the Department of Health. The plaintiff did not call any of this testimony into question on cross-examination, and offered no evidence of his own. Unlike *McGuire*, the plaintiff failed to meet his burden of proof to disprove the truth of the arresting officer's sworn report. See *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995).

4. The plaintiff's second argument requires little discussion. The court finds that sufficient foundation was adduced to support the introduction into evidence of the field sobriety test results.

5. The plaintiff's third argument concerns the role of the hearing officer.

a. In formal agency adjudications, due process requires a neutral, or unbiased, adjudicatory decision maker. *Central Platte Nat. Resources Dist. v. State of Wyo.*, 245 Neb. 439, 513 N.W.2d 847 (1994). Combining investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias in an administrative adjudication. *Van Fossen v. Board of Governors*, 228 Neb. 579, 423 N.W.2d 458 (1988); *Dieter v. State*, 228 Neb. 368, 422 N.W.2d 560 (1988).

b. However, this was an informal hearing. The plaintiff did not request a formal hearing utilizing the rules of evidence. Moreover, the regulations promulgated by the director support the roles played by the hearing officer in an informal hearing. This court can find no appellate authority in Nebraska to proscribe the dual roles (prosecutor and adjudicator) played by the hearing officer in this informal hearing.

c. It does not appear from the record that the plaintiff properly preserved any objection regarding the roles played by the hearing officer. This court declines to determine that such was outside the authority of the hearing officer.

d. Nevertheless, this court is not comfortable with the dual role played by the hearing officer, even in an informal hearing setting. It flunks the "smell" test. As has been more subtly stated, it would be in closer accord with traditional notions of justice and fair play for a quasi-judicial administrative board to designate one person to act as its legal advisor and a different person to act as its prosecutor in a public hearing than for one person

to perform both functions. *Ford v. Bay County School Bd.*, 246 So.2d 119 (Fla. App. ___) (cited in 73A C.J.S. *Public Administrative Law and Procedure* § 138, at 89). But this court cannot hold, as a matter of law, that the procedure violated due process.

6. Finally, the plaintiff complains regarding the use of a telephone conference hearing.

a. The court first recognizes the recent decision of the Nebraska Supreme Court in *Kimball v. Nebraska Dept. Of Motor Vehicles*, 255 Neb. 430, ___ N.W.2d ___ (1998), in which the Court held that telephonic hearings are permitted in proceedings under the Administrative Procedures Act (NEB. REV. STAT. § 84-901 *et seq.* (Reissue 1994 & Cum. Supp. 1998)) when a formal “rules of evidence” hearing is requested. This court remembers that “fools rush in where angels fear to tread.” A. Pope, *An Essay on Criticism*.

b. However, in this case, the plaintiff preserved and argued a different question. At all times relevant to this case, NEB. REV. STAT. § 60-6,205(6)(a) required that the hearing by the director “*shall be conducted in the county in which the arrest occurred or in any other county agreed to by the parties.*” NEB. REV. STAT. § 60-6,205(6)(a) (Reissue 1998) (emphasis supplied). Although the Legislature substantially modified the administrative license revocation statutes in 1998, this language remained unchanged. The plaintiff asserts that the telephonic hearing procedure used in this case violated § 60-6,205(6)(a). In *Kimball*, the Supreme Court did not address the interplay of § 60-6,205(6)(a) with § 84-913.03.

7. The record clearly shows that the hearing officer was situated in Lincoln. The hearing officer stated: “This is the administrative license revocation hearing for Charles D. Matthews. It’s taking place by teleconference from Lincoln, Nebraska.” (Exhibit 2, 1:6-8) The record does not expressly show the location of either of the other participants.

8. At the outset of the hearing conducted, the plaintiff’s attorney specifically objected to a telephonic hearing. He requested and obtained a continuing objection for that purpose. The court concludes that the objection was properly preserved and was not waived by the plaintiff. For the same reason, the court concludes that the plaintiff did not

“agree” to a hearing in any other county than that in which the arrest occurred, i.e. Cherry County.

9. The director promulgated a regulation stating:

Informal hearings shall be held either by telephone or in person, at the discretion of the Director, in the county in which the arrest occurred. The parties may agree to another venue.

247 Neb. Admin. Code, ch. 1, § 022.01 (1996).

a. The statutory scheme gives the director authority to “adopt and promulgate rules and regulations to govern the conduct of the hearing and insure that the hearing will proceed in an orderly manner.” NEB. REV. STAT. § 60-6,205(7) (Reissue 1998).

(1) Ordinarily, deference is accorded to an agency’s interpretation of its own regulations unless plainly erroneous or inconsistent. *Sunrise Ctry. v. Nebraska Dep’t, Soc. Serv.*, 246 Neb. 726, 523 N.W.2d 499 (1994); *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). However, in this case the record does not show, nor does the director argue before this court, that it has interpreted the regulation in any particular way.

(2) Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *Sunrise Ctry. v. Nebraska Dep’t, Soc. Serv.*, *supra*; *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994); *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989).

(3) The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency. *Sunrise Ctry. v. Nebraska Dep’t, Soc. Serv.*, *supra*; *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994).

b. A legislative enactment may properly confer general powers upon an administrative agency and delegate to the agency the power to make rules and regulations

concerning the details of the legislative purpose. *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996); *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979). However, an administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which they are to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute. *County Cork v. Nebraska Liquor Control Comm.*, *supra*; *Bond v. Nebraska Liquor Control Comm.*, 210 Neb. 663, 316 N.W.2d 600 (1982).

c. The regulation does not specifically address the issue of where a telephone conference “hearing” is deemed to have been “conducted” within the meaning of the statute. Certainly, the director lacks authority to promulgate a regulation modifying or altering the statutory language. Thus this court must interpret the statute.

10. This court has searched for, and been unable to find, any other instance in which the Legislature has provided for an administrative hearing before a state agency and also directed that the hearing be conducted “in the county” The Legislature must have meant something when it adopted this language. The Legislature presumably knew of the existence of the general administrative hearing statute authorizing telephone hearings. The primary question facing this court is: what did the Legislature intend regarding telephone hearings in administrative license revocation proceedings.

11. In *Hoiengs v. County of Adams*, 254 Neb. 64, 71, ___ N.W.2d ___, ___ (1998), the Supreme Court reiterated the long-established law:

It is true that in accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions of the same statute, or in different statutes, the last in point of time or order of arrangement prevails. *Sidney Education Assn. v. School Dist. Of Sidney*, 189 Neb. 540, 203 N.W.2d 762 (1973); *Stoller v. State*, 171 Neb. 93, 105 N.W.2d 852 (1960); *Markel v. Glassmeyer*, 137 Neb. 243, 288 N.W. 821 (1939); *Chilen v. Commercial Casualty Ins. Co.*, 135 Neb. 619, 283 N.W. 366 (1939). However, the fundamental rule in construing statutes is that they shall be construed in *pari materia* and from their language as a whole to determine the intent of the Legislature. All subordinate rules are mere aids in reaching this

fundamental determination. *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987); *Malone v. Benson*, 219 Neb. 28, 361 N.W.2d 184 (1985). It is the duty of a court, as far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it so that they are consistent, harmonious, and sensible. *Smith v. Smith*, 242 Neb. 812, 497 N.W.2d 44 (1993); *Malone, supra*. Where it is possible to harmonize apparently conflicting statutes, such is to be done. See *Sidney Education Assn., supra*.

Moreover, as stated in *Sanitary & Imp. Dist. No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 922, ___ N.W.2d ___, ___ (1998):

Specifically, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Omaha World-Herald v. Dernier*, ante p. 215, 570 N.W.2d 508 (1997); *Loup City Pub. Sch. v. Nebraska Dept. of Rev.*, 252 Neb. 387, 562 N.W.2d 551 (1997); *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

The Court further observed that:

In general, a court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. See, *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997); *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996); *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). However, to the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *SID No. 2 v. County of Stanton*, 252 Neb. 731, 567 N.W.2d 115 (1997); *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996).

Id. at 922-23, ___ N.W.2d at ___.

12. At the beginning, this court must inquire where a telephone conference is deemed to have been held. This court can find no Nebraska authority on this issue. However, the issue has been considered in other jurisdictions.

a. In *Sleeth v. Department of Public Aid*, 125 Ill. App. 3d 847, 852, 466 N.E.2d 703, ___ (1984) (emphasis in original), the court reasoned:

The essence of a hearing is the opportunity to be heard by the listener. One can be heard by written affidavit, by closed circuit television, by video

tape recording, by telephone or by actual appearance. Each method offers an opportunity to be heard, but only with the last mentioned method is the *situs* of the hearing — is the place where the listener hears — in the actual presence of the speaker. [Footnote omitted.] In the instant case, the listener was not one of the local office personnel in Peoria, but the officer or officers located in Chicago. The speakers were the plaintiffs, and under the procedures followed by the IDPA, the plaintiffs were not present at the *situs* of the hearing. It follows then that the hearing was not conducted in the county of the plaintiffs' residence.

b. In *Detroit Base Coalition for the Human Rights of the Handicapped v. Department of Social Services*, 431 Mich. 172, 428 N.W.2d 335 (1988) (en banc), the Michigan Supreme Court interpreted an administrative rule providing for a hearing “in the county where a claimant resides.” The court rejected the department’s interpretation that a telephone hearing takes place at both the place where the claimant is present and the place where the hearing referee is present. The court adopted the reasoning of the Illinois court. After extensively quoting the Illinois court’s opinion, the Michigan Supreme Court determined that the language

contemplates a hearing at which the plaintiffs are present at the place where the decisionmaker is observing, considering, and evaluating the evidence. . . . [W]e reject defendants’ argument that the location of the telephone hearing is in two places simultaneously and hold that the hearing is considered and conducted at the place where the hearing referee is present. . . .

A policy mandating telephone hearing procedures would mean that as a rule the hearings will *not* take place in the county in which the claimant resides, and therefore does not meet the statutory requirement . . . that the hearing be held at “a reasonable time, date, and place which normally shall be in the county where a claimant resides.”

Id. at 182, 428 N.W.2d at 340 (emphasis in original).

c. The Supreme Court of Appeals of West Virginia applied similar reasoning in *Parks v. Board of Review of Dep’t of Employment Security*, 188 W. Va. 447, 425 S.E.2d 123 (1992). See also, Annot., *Propriety of Telephone Testimony or Hearings in Prison Proceedings*, 9 A.L.R.5th 451 *et seq.* (1993); Annot., *Propriety of Telephone Testimony or Hearings in Unemployment Compensation Proceedings*, 90 A.L.R.4th 532

et seq. (1991); Annot., *Propriety of Telephone Testimony or Hearings in Public Welfare Proceedings*, 88 A.L.R.4th 1094 *et seq.* (1991).

d. In the administrative license revocation context, the New Mexico Court of Appeals similarly held that the statute did not authorize telephonic revocation hearings and that New Mexico law required the hearings to be held in person in one place in the relevant county. *Evans v. State, Taxation & Rev. Dep't*, 122 N.M. 216, 922 P.2d 1212 (1996). In addition to similarity of the applicable statute to other New Mexico statutes, the court identified other common elements of the types of statutes: serious consequences to the parties involved (loss of permission to drive a motor vehicle), and the importance of determination of credibility at such hearings, whether the credibility of the accused or of the accuser. The court expanded upon this rationale, stating at some length:

In DMV license revocation proceedings, the credibility of the police officer and the driver is not infrequently at issue. By statute, the hearing officer shall decide, in part: “whether the law enforcement officer had reasonable grounds to believe that the person had been driving a motor vehicle within this state while under the influence of intoxicating liquor.” [citation omitted] Resolving whether the law enforcement officer had “reasonable grounds” to stop the motorist and then had “reasonable grounds” to test the motorist for impairment can be intensely factual determinations in which credibility may become the determining factor. [citation omitted] Additional factual issues may easily arise, including whether the driver declined to submit to a breath or blood test, whether the officer advised the motorist of the consequences of refusal, whether an initially recalcitrant driver recanted, or whether his change of mind was timely. [citations omitted]

Traditionally, our legal system has depended upon personal contact between the fact finder and the witness to allow the fact finder to observe the demeanor of the witness as a means of assessing credibility. A long line of New Mexico cases reserves the determination of witness credibility to the fact finder, in this case the hearing officer. [citations omitted] In license revocation proceedings, the initial hearing with the Department hearing officer provides the driver his or her only opportunity to have a fact finder make this credibility assessment.

Existing case law confirms the importance of in-person hearings when critical credibility determinations are at stake. . . . [O]ur Supreme Court held that the Department of Human Services did not violate due process by using telephonic hearings in disability termination proceedings. [citation omitted]

However, the Court noted that hearings of this nature frequently relied on documentary medical evidence with witness credibility being only “a minimal factor.” [citation omitted]

Further it may not be just the credibility of the parties that is at stake in these hearings. “Justice should not only be done, but should manifestly and undoubtedly be seen to be done.” [citations omitted] In license revocation proceedings, the presence of the hearing officer may be necessary for the participants to have a sense of fair play — that the Department has fairly considered the evidence, regardless of whether they agree with the result.

Id. at 218-19, 922 P.2d at 1214-15.

13. This court, after review of the statutory language, the regulation, and the case law, is persuaded that a telephone hearing was not authorized in this case.

a. The court adopts the reasoning of the Illinois and Michigan courts that a telephone hearing occurs where the listener, i.e. the hearing officer, is situated.

b. The Legislature elected to impose a special hearing requirement in license revocation proceedings. That special requirement compels the director to conduct the hearing in the county of arrest unless the parties otherwise agree. Obviously, the plaintiff did not agree. The hearing officer was situated in Lincoln. The hearing occurred, for purposes of § 60-6,205(6)(a), in Lancaster County, not in Cherry County.

c. The specific requirement of an “in the county” hearing in the license revocation statute prevails over the general authorization for telephone hearings in the Administrative Procedures Act, to the extent of a conflict.

d. Through the “in the county” requirement, the Legislature balanced costs and benefits. It recognized the important benefits of personal hearings so eloquently explained by the New Mexico Court of Appeals. Yet, it also strove to conserve resources. The Legislature placed control over this balance with the motorist. The director always has the fiscal incentive to agree to a telephone hearing. Where credibility determinations are vital, the motorist may choose to require a hearing in the county. If not, the motorist may have equal or greater incentive to agree to a telephone conference. Such agreement could save the motorist substantial attorney fees by allowing an attorney to appear telephonically

from his office rather than travel to a hearing location. In this instance, a telephone hearing represents enormous potential savings to the motorist. His Alliance-based attorney might otherwise be required to travel to Valentine for a brief hearing, dramatically increasing the expense.

e. The director exceeds his statutory authority by requiring an “out-of-county” hearing by telephone without the agreement and over the objection of the motorist. In so doing, the director effectively modifies or alters the statute. Such change constitutes the prerogative of the Legislature. Neither the director nor this court possesses the power to effect such a modification.

f. Obviously, the director might persuade the Legislature that the fiscal savings of telephone hearings outweighs the benefits conferred by “in the county” hearings. The Legislature could amend the statute. But the director may not unilaterally modify the statutory requirement.

14. Because the hearing was not conducted in compliance with the statutory requirement for a hearing “in the county,” the matter should be remanded to the director for a new hearing in compliance therewith.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED
that:

1. The Order of Revocation entered against the plaintiff on August 17, 1998, is reversed and the proceeding remanded to the director for a new hearing in compliance with this judgment.

2. Costs on appeal in the amount of \$123.77 are taxed to the defendant, and judgment is entered in favor of the plaintiff and against the defendant for such costs. The judgment shall bear interest at the rate of 5.513% per annum from date of judgment until paid. Implied request for attorney fees is denied.

Entered: January 14, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties, including the Cherry County Attorney and the Attorney General.
Done on _____, 19____ by _____.
- : Enter judgment on the judgment record.
Done on _____, 19____ by _____.
- : Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 19____ by _____.
- : Note the decision on the trial docket as: Signed "Judgment on Appeal" entered reversing order of revocation and remanding for new hearing, and taxing costs to defendant.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel, District Judge