

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

ALLEN W. HANSEN,
Plaintiff,

vs.

NEBRASKA DEPARTMENT OF MOTOR
VEHICLES,
Defendant.

Case No. 6832

JUDGMENT ON APPEAL

DATE OF HEARING: July 14, 1999.

DATE OF DECISION: July 21, 1999.

APPEARANCES:

For plaintiff: Rodney J. Palmer without plaintiff.
For defendant: David M. Streich, Brown County Attorney, on behalf of the Attorney General.

SUBJECT OF ORDER: Petition for review pursuant to Administrative Procedures Act.

FINDINGS: The court finds and concludes that:

1. This court determines the action after de novo review upon the record of the agency. For the court's convenience in drafting this judgment, the court incorporates by reference certain factual findings of the director. However, the court reaches such factual findings independently following its own de novo review.

2. The petition for review asserts numerous grounds. Some will require more discussion than others.

3. The department employs both the hearing officer and the attorney representing the department in a capacity similar to that of a prosecutor. The plaintiff asserts that this constitutes actual impropriety or gives the appearance of impropriety. The plaintiff asserted the objection "to the hearing officer," which the court construes as a motion to disqualify the hearing officer. (6:10-22)

a. The plaintiff failed to show any respect in which the hearing officer was biased against him. The Nebraska Supreme Court stated that administrative adjudicators serve with the presumption of honesty and integrity. *Dieter v. State*, 228 Neb. 368, 422 N.W.2d 560 (1988).

b. The combination of investigative and adjudicative functions in the department does not necessarily create an unconstitutional risk of bias in an administrative agency. *Id.* The plaintiff's complaint attacks a fundamental component of administrative adjudication which has been settled law, at the state and federal levels, for more than half a century. The director's employment of both individuals changes nothing in the analysis.

c. Although not decided in the administrative context, a ruling denying a motion to disqualify a trial judge is immaterial on appeal where the matter is triable de novo. *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995). If this rule applies in the administrative context, the hearing officer's ruling was immaterial even if erroneous because of this court's standard of review.

d. Although not expressly alleged in the petition, the plaintiff complained during argument, in effect, that the same person may be a hearing officer in one proceeding and represent the department as prosecutor in another proceeding.

(1) There is no evidence in the record supporting that contention.

(2) Even if true, the plaintiff cites no authority suggesting that such constitutes a violation of due process. The only cases familiar to this court relate to the same person fulfilling both functions (hearing officer and prosecutor) in the *same* proceeding.

(3) Because it is the director's ultimate responsibility both to provide a hearing and to assure enforcement of the operator's license revocation statute, the same person bears ultimate responsibility for both functions. As noted above, the courts have rejected due process challenges based on that situation.

4. The plaintiff next claims that the department failed to hold the administrative hearing in the county in which the arrest occurred, as mandated by NEB. REV. STAT. § 60-6,205 (6)(a) (Reissue 1998). In *Matthews v. Abramson*, District Court of Cherry County, Nebraska, Case No. 10693 (Jan. 14, 1999), this court reversed an administrative revocation and remanded for a new hearing because, over the motorist's objection to a telephone conference hearing, the telephonic hearing was not held in the county in which the arrest occurred.

a. In *Kimball v. Nebraska Dept. Of Motor Vehicles*, 255 Neb. 430, ___ N.W.2d ___ (1998), the Nebraska Supreme 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. The Supreme Court did not, however, address the interplay of § 84-913.03 with § 60-6,205(6)(a).

b. NEB. REV. STAT. § 60-6,205(6)(a) requires that the director’s hearing “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).

c. In *Matthews*, this court determined that a telephonic hearing occurs in the county in which the hearing officer was located. *Sleeth v. Department of Public Aid*, 125 Ill. App. 3d 847, 852, 466 N.E.2d 703, ___ (1984); *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); *Evans v. State, Taxation & Rev. Dep’t*, 122 N.M. 216, 922 P.2d 1212 (Ct. App. 1996).

d. The director’s order states that “[s]o far as the hearing officer knows, no case in Nebraska which has precedent holds that a video conference hearing is a violation of statute.” (T10.)

(1) The *Matthews* case is not directly on point, having considered a telephone conference hearing rather than a video conference hearing.

(2) However, the director’s order seems to be stating that a state district court decision is not binding precedent. If that was the intended conclusion, the director misunderstands the law in this area.

(3) A decision of a state district court in Nebraska obviously does not bind a higher court, whether the Nebraska Court of Appeals or the Nebraska Supreme Court, although it would undoubtedly be accorded due consideration by either court. Similarly, a state district court decision does not bind other courts of coordinate jurisdiction, i.e. other state district courts, although it may constitute persuasive authority to another district court.

(4) However, a state district court decision is binding precedent on courts and tribunals inferior to the district court. Thus, to the extent of appeals from administrative tribunals in the Northern Division of the Eighth Judicial District, the decision in *Matthews* constitutes binding precedent unless a higher court reaches a contrary result.

(5) Of course, a contrary decision by one of the higher appellate courts would require this court to follow that precedent. The hierarchy of decisional validity promotes stability and predictability in the law; any contrary system invites anarchy.

e. In this case, the hearing was by video conference rather than telephone conference. The court need not consider, however, whether the difference between a video conference and a telephone conference is significant to the *Matthews* analysis.

f. Although the plaintiff in this case did object to a video conference hearing and to the location of the hearing, he participated in the proceeding by waiving the reading of issues before raising the objection, he failed to request a continuing objection, and he thereafter participated in the video conference hearing provided by the director. In so doing, the plaintiff has either waived the requirement by his participation or “agreed” to a hearing in another county within the meaning of the statute. 73A C.J.S. *Public Administrative Law and Procedure* § 142 (1983).

5. The plaintiff claims that the hearing officer “admitted Title 247 and Exhibit 8-1 over proper and timely objection as unconstitutional, lacking in due process, [constituting a] violation of separation of powers clauses in U.S. and Nebraska Constitutions, [and constituting an] unlawful delegation of powers to an administrative agency reserved to the judiciary under the Nebraska Rules of Evidence.” Essentially, the plaintiff challenges the regulation allowing receipt of the sworn report as prima facie evidence that the operator’s license should be revoked. See *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995).

a. The Nebraska Supreme Court recently rejected constitutional challenges to administrative licence revocation based on equal protection and upon cruel and unusual punishment. *Schindler v. Department of Motor Vehicles*, 256 Neb. 782, ___ N.W.2d ___ (1999). This decision casts doubt on likelihood of a successful due process challenge.

(1) In another context, the Supreme Court of Montana rejected a due process challenge to an administrative license revocation proceeding. *In re Vinberg*, 216 Mont. 29, 699 P.2d 91 (1985). The U.S. Supreme Court has also considered what process was due. In *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979), the Supreme Court held that a Massachusetts statute mandating suspension of a driver’s license for refusal to submit to breath test analysis, without providing for a presuspension hearing, did not violate the due process clause of the Fourteenth Amendment. The Supreme Court utilized the factors from *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), finding that: (1) the prompt availability of a postsuspension hearing easily initiated by the driver significantly reduced any impact upon the driver’s private interest; (2) the risk

of erroneous observation or deliberate misrepresentation of the facts by a police officer reporting a refusal to take a breath test was insubstantial; and, (3) the state's interest in public safety was substantially served by the summary suspension of licenses of those who refuse to take a breath analysis test upon arrest.

(2) Although it has not considered the specific issue, in *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996) and *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996), the Nebraska Supreme Court emphasized that the important remedial purpose of the administrative license revocation statute is to protect the public from the health and safety hazards of drunk driving by quickly getting DUI offenders off the road. This recognition of an important state interest suggests that the Supreme Court would weigh the *Mathews v. Eldridge* factors consistently with this analysis. This court concludes that the due process challenge to the regulation lacks merit.

b. The next issue is whether article I, § 3 of the Nebraska Constitution (the Nebraska Due Process Clause) affords greater relief than that provided by the federal constitution.

(1) In *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995), the Nebraska Supreme Court observed that states may afford greater due process protection under their state constitutions than is granted by the federal constitution, rejecting the Court of Appeals' presumption that the Supreme Court would automatically limit state due process protection to the limits of the federal constitutional protection.

(2) In *State v. LeGrand*, the Supreme Court provided a limited avenue through which a defendant can mount a *Boykin* challenge to a prior offense sought to be used for enhancement. See also *State v. Lee*, 251 Neb. 661, 558 N.W.2d 571 (1997) (declining to extend *LeGrand* to subsequent case in which prior conviction is element of crime charged); *State v. Davenport*, 5 Neb. App. 355, 559 N.W.2d 783 (1997) (declining to extend *LeGrand* to postconviction proceedings).

(3) However, in *State v. Louthan*, 257 Neb. 174, ___ N.W.2d ___ (1999), the Nebraska Supreme Court held that the due process requirements of both the state and federal Constitutions are satisfied by the right of direct appeal from a plea-based DUI conviction and the procedure set forth in NEB. REV. STAT. § 60-6,196(3), which permits a defendant to challenge the validity of a prior DUI conviction offered for purposes of enhancement on the ground that it was obtained in violation of the defendant's Sixth Amendment right to counsel. In so doing, the Court overruled *State v. LeGrand* to the

extent that it held that a prior conviction sought to be used for enhancement in a DUI prosecution could be collaterally attacked in a separate proceeding.

(4) In *State v. Champoux*, 5 Neb. App. 68, 555 N.W.2d 69 (1996), *aff'd*, 252 Neb. 769, 566 N.W.2d 763 (1997) (upholding municipal zoning ordinance limiting rental of property zoned for single-family or two-family use to “families”), the Nebraska Court of Appeals found no greater due process protection under the state constitution.

(5) This court finds no indication in these cases that the Nebraska Supreme Court would afford greater protection under our state constitution in this instance. Accordingly, the court finds that the plaintiff has failed to establish a state constitutional due process violation.

c. The plaintiff argues a violation of the “separation of powers clause” of the federal constitution. The plaintiff overlooks that unlike the Nebraska Constitution, the federal constitution has no express provision which prohibits the officials of one branch of government from exercising the functions of the other branches. *State v. Phillipps*, 246 Neb. 610, 521 N.W.2d 913 (1994). The federal separation of powers principle is inferred from the overall structure of the U.S. Constitution. See *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). The plaintiff cites no authority, nor can this court find any, supporting the contention that the regulation violates the federal separation of powers doctrine.

d. Similarly, the plaintiff cites no authority to support his contention that either the statute or the regulation violates article II, § 1 of the Nebraska Constitution (the separation of powers clause).

(1) In *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977), the Nebraska Supreme Court observed, in denying an analogous claim, that article I, § 13 of the Nebraska Constitution (“every person . . . shall have a remedy by due course of law, and justice administered without denial or delay”) does not imply that the Legislature is without power to impose a special procedure before access to the courts.

(2) The statute expressly requires that “[u]pon receipt of the . . . sworn report, the director’s order of revocation has prima facie validity and it becomes the petitioner’s burden to establish by a preponderance of the evidence grounds upon which the operator’s license revocation should not take effect.” NEB. REV. STAT. § 60-6,205(7) (Reissue 1998). Except as restricted by the Constitution, it is

the function of the Legislature by enactment of statutes to declare what the law is. *Nebraska Pub. Power Dist. v. City of York*, 212 Neb. 747, 326 N.W.2d 22 (1982).

(3) The adoption of the statute, and the promulgation of the implementing regulation, do not encroach upon the function of the courts. The same rationale urged by the plaintiff would invalidate the statutes mandating the Nebraska Rules of Evidence.

e. The plaintiff also attacks the regulation as an unconstitutional delegation of judicial authority by the Legislature. That contention lacks sufficient clarity to enable this court to precisely determine the nature of the plaintiff's claim.

(1) To the extent the plaintiff attacks the adoption of an administrative scheme to make initial determinations, the argument fails for the reasons stated in *Prendergast v. Nelson*, *supra*.

(2) If the plaintiff contends the regulation exceeds the regulatory authority granted to the department by the Legislature, the plain language of § 60-6,205(7) quoted above defeats that argument. See also *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986).

6. The court finds no merit in the plaintiff's claims regarding discovery violations.

a. In *McPherrin v. Conrad*, *supra*, the Supreme Court rejected the department's contention that the director lacked power to direct the Department of Health to produce the sample of blood obtained in the course of McPherrin's arrest. The Supreme Court stated that the State cannot frustrate the discovery of evidence merely because it has elected to operate through a number of agencies and directors. *Id.* The plaintiff cites no authority that the same doctrine applies equally to political subdivisions as to state agencies. The court perceives substantial policy reasons guiding against such a conclusion and observes that the law in other areas reaches a result contrary to the plaintiff's contention. See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *DeCoste v. City of Wahoo*, 255 Neb. 266, 583 N.W.2d 595 (1998).

b. *McPherrin* teaches that the department may not frustrate the discovery of evidence. However, the plaintiff would impose a heavier burden upon the director to actually retrieve evidence for the plaintiff. The regulations provide sufficient tools to enable the plaintiff to produce evidence by subpoena. The record shows the plaintiff failed to fully utilize such procedures. The regulations, and the actions of the director in the implementation thereof, afforded the plaintiff a reasonable opportunity to

present evidence concerning the accusation. Due process requires nothing more. *McPherrin v. Conrad, supra; Geringer v. City of Omaha*, 237 Neb. 928, 468 N.W.2d 372 (1991).

c. The court generally agrees with the discussion of the issue set forth on page 6 of the director's order. (T13)

7. The plaintiff attacks the ruling receiving Exhibit 13 (director's letter appointing hearing officer) in evidence over plaintiff's hearsay and foundation objections.

a. This court reviews the director's decision "without a jury de novo on the record of the agency." NEB. REV. STAT. § 84-917(5)(a) (1998 Cum. Supp.).

b. In *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995), the Supreme Court explained that in a true de novo review, the court uses the assignments of error as a guide to the factual issues in dispute and makes an independent factual determination based upon the record.

c. In *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997), the Nebraska Supreme Court expanded on the application of review of administrative agency decisions.

(1) The district court is obliged to make an independent determination of the facts without reference to the determinations of fact made by the agency whose decision is being reviewed. *Id.*

(2) Where the evidence is in conflict, the district court, in applying a de novo standard of review, can consider and may give weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another. *Id.* However, this rule does not constitute a directive to courts which make de novo reviews that the courts must give deference to the agency as fact finder. The language is permissive; the reviewing court may give weight to the fact that the agency hearing officer observed the witnesses where the evidence is in conflict. *Id.*

d. Upon a de novo review, the reviewing court will not consider evidence improperly admitted as long as the appellant properly objected to the admission of the evidence at trial. *In re Interest of Joshua M.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Upon de novo review, the court disregards incompetent, irrelevant, and immaterial evidence admitted over objection. *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985). In other words, in performing a de novo review, the court will

disregard evidence which should not have been admitted over objection. *Hanika v. Rawley*, 220 Neb. 45, 368 N.W.2d 32 (1985).

e. The ruling of which the plaintiff complains relates to evidence wholly collateral to the issues for decision. Even if erroneously received, an issue this court need not decide, disregarding the evidence fails to affect the result.

8. The plaintiff complains that the hearing officer erred by allowing evidence of a post arrest advisement form. The department's representative propounded a question about the use of the form. The plaintiff objected. Although the objection was overruled, the witness did not answer that question, but answered a different question to which no objection was made. (28:9-22) No prejudice can result where the question was not answered. Even if it had been answered "yes or no" as the hearing officer directed, the substance or content of the form would not have been thereby received in evidence. The objection was properly overruled.

9. The plaintiff also objected to the receipt of the sworn report in evidence, asserting foundation, hearsay, and the constitutional issues. The department elicited foundation for the exhibit from the witness. That objection was properly overruled. Because the offer was limited to the purposes stated in the regulation, the hearsay objection was properly overruled. The constitutional issues have been considered previously in this judgment. The hearing officer did not err in receiving the document pursuant to the statutory directive for the purpose set forth in the regulation.

10. The court, upon de novo review, adopts the findings of fact in paragraphs 1 through 7, inclusive, set forth on pages 1 and 2 of the director's order. (T8-9)

11. The court finds, by the greater weight of the evidence, that:

a. The officer had probable cause to believe that the plaintiff was operating or in the actual physical control of a motor vehicle in violation of NEB. REV. STAT. § 60-6,196 (Reissue 1998); and,

b. The plaintiff was operating or in the actual physical control of a motor vehicle while having an alcohol concentration in excess of ten-hundredths of one gram by weight of alcohol per two hundred ten liters of his breath.

12. The decision of the director should be affirmed.

JUDGMENT:

IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation entered on May 3, 1999, is affirmed.
2. The suspension of such revocation on appeal under NEB. REV. STAT. § 60-6,208

(Reissue 1998) is dissolved.

3. Costs on appeal are taxed to the plaintiff.

Entered: July 21, 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 both the Brown County Attorney and the Attorney General for defendant.**
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: 7/21/99 Signed "Judgment on Appeal" entered affirming order of revocation, dissolving suspension of revocation on appeal, and taxing costs to plaintiff.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge