

**IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA**

**GERALD D. SMITH,**  
**Plaintiff,**

vs.

**NEBRASKA DEPARTMENT OF MOTOR  
VEHICLES,**  
**Defendant.**

**Case No. 6859**

**JUDGMENT ON APPEAL**

**DATE OF HEARING:** November 17, 1999.

**DATE OF DECISION:** November 22, 1999.

**APPEARANCES:**

For plaintiff: Rodney J. Palmer with 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.
2. For the court's convenience in drafting this judgment, the court incorporates certain findings of fact by the director. However, the court reaches such factual findings independently following its own de novo review.
3. The plaintiff 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).
  - a. Although the plaintiff in this case did object to a video conference hearing and to the location of the hearing, he thereafter participated in the video conference hearing provided by the director.
  - b. By 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).
4. The plaintiff claims that the hearing officer "admitted Title 247 and Exhibit 6 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.”

a. 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).

b. This court rejected an identical challenge in *Hansen v. Nebraska Dept. of Motor Vehicles*, District Court of Brown County, Case No. 6832 (July 21, 1999). That decision constitutes the controlling precedent. The plaintiff’s claim lacks merit.

5. The plaintiff claims that the hearing officer erred in admitting hearsay statements of Jeremy O’Hare and Tom Osborn.

a. The defendant sought admission “not for the truth of any of the statements, just to show how the deputy got from Mr. O’Hare to Mr. Smith.” 13:8-10.

b. If one disregards the content of the statement, as if the testimony had simply been that O’Hare and Osborn “made statements about the defendant,” such statements would clearly not constitute hearsay. By receiving the actual statement only for the purpose that the statement was made and not for its truth, the same evidentiary result obtains. The hearing officer’s ruling was correct.

6. The plaintiff asserts a Fourth Amendment claim regarding the arrest of the plaintiff on his own premises without a warrant. However, as the director correctly found, at the time of Deputy Sears’ arrival at the plaintiff’s residence, the plaintiff was outside the home. Deputy Sears did not go to the premises for the express purpose of making an arrest. The deputy thereafter obtained sufficient information to constitute probable cause for a warrantless arrest upon the charge of operating a motor vehicle under the influence of alcohol. The plaintiff’s assertion of error lacks merit.

7. The plaintiff’s claim that the officer violated NEB. REV. STAT. § 29-404.02 (Reissue 1995) also fails. The destruction of evidence through the dissipation of an individual’s blood-alcohol level over time is sufficient justification for a warrantless arrest. *State v. Marcotte*, 233 Neb. 533, 446 N.W.2d 228 (1989).

8. The plaintiff also asserts that he had been drinking alcohol in his home between the time of the automobile accident and the officers’ arrival at his home. The hearing officer chose not to believe

that testimony. On de novo review, the court considers and gives weight to the fact that the hearing officer observed the witnesses and accepted one version of the facts rather than another. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997).

9. The court, upon de novo review, adopts the findings of fact in paragraphs 1 through 4, inclusive, set forth on page 2 of the director's order. (T9).

10. 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.

11. The decision of the director should be affirmed.

**JUDGMENT:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation entered on August 27, 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: November 22, 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: [date from order] 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