

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

PATRICK J. CARR,
Plaintiff,

vs.

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

Case No. 6847

JUDGMENT ON APPEAL

DATE OF HEARING: January 19, 2000.

DATE OF DECISION: January 19, 2000.

APPEARANCES:

For plaintiff: Mark Kozisek 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. The parties previously stipulated on the record in this court that the order of the director should be affirmed.
2. This court determines the action after de novo review upon the record of the agency.
3. 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.
4. 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).

5. The plaintiff claims that the hearing officer “admitted Exhibit 6 (Title 247) that the same, particularly Section 006.01 is unconstitutional because it did not provide for due process, violates the separation of powers clauses in U.S. and Nebraska Constitutions, is an unlawful delegation of power and authority to an administrative agency reserved to the judiciary and obviates the 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.

6. The court, upon de novo review, adopts the findings of fact in paragraphs 1 through 5, inclusive, set forth on page 2 of the director’s order. (T10).

7. 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 violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1998).

8. The decision of the director should be affirmed.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation entered on July 9, 1999, is affirmed.

2. The suspension of such revocation on appeal under NEB. REV. STAT. § 60-6,208 (Reissue 1998) is dissolved, and the full period of revocation shall run from the date of final judgment herein.

3. Costs on appeal are taxed to the plaintiff.

Entered: January 19, 2000.

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 _____.
- : Transcribe trial docket entry dictated in open court.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge