

IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA

ROY E. BENNETT,
Plaintiff,

vs.

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

Case No. CI99-119

JUDGMENT ON APPEAL

DATE OF HEARING: January 21, 2000.

DATE OF DECISION: January 21, 2000.

APPEARANCES:

For plaintiff: Rodney J. Palmer without plaintiff.
For defendant: Eric A. Scott, Cherry 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 Exhibit 7 as prima facie evidence . . . the same, particularly Section 006.01 is unconstitutional because it did not provide for due process, violates the separation of powers clauses of the 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.

5. The plaintiff’s claim that the officer failed to adequately advise the plaintiff of the consequences of an adverse test result does not find support in the record. The previous appellate court precedent has been largely superceded by legislative amendment. The post-arrest advisement form does not appear in the record, and the contents of the form cannot be adequately determined by the limited testimony. The plaintiff failed to sustain his burden of proof on the issue.

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 December 17, 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 21, 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 Cherry 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 _____.
- : Enter the decision on the trial docket as: Signed "Judgment on Appeal" entered affirming order of revocation, dissolving automatic suspension of revocation, and taxing costs to plaintiff.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge