

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

SCOTT L. MARSHALL,
Plaintiff,

vs.

**EDWARD WIMES, DIRECTOR, STATE
OF NEBRASKA, DEPARTMENT OF
MOTOR VEHICLES,**
Defendant.

Case No. CI99-125

JUDGMENT ON APPEAL

DATE OF HEARING: January 20, 2000.

DATE OF DECISION: January 24, 2000.

APPEARANCES:

For plaintiff: David W. Jorgensen without plaintiff.
For defendant: Thomas P. Herzog, Holt 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 plaintiff was denied due process because the Director "unreasonably withheld discovery and did not comply with discovery requests and did not issue subpoenas as requested."

a. In *States v. Anderson*, 219 Neb. 545, 364 N.W.2d 38 (1985), the Nebraska Supreme Court declined to state that pretrial discovery is among those due process elements absolutely imperative to a fair hearing. The Court stated that procedural due process requires notice reasonably calculated to inform one of the accusation levied, identification of the accuser, a factual basis for the accusation, a reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.*; *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995);

Geringer v. City of Omaha, 237 Neb. 928, 468 N.W.2d 372 (1991). This court declines to extend settled constitutional law to include a mandate of prehearing discovery.

b. Thus, the absence of a constitutional right to discovery disposes of the first two portions of the claimed deprivation of due process.

c. The third portion of the claim concerns failure to issue subpoenas.

(1) As to subpoenas demanded for depositions, the same rationale defeats the plaintiff's claim.

(2) As to subpoenas demanded for the hearing, the director denied the request as untimely. This court finds no abuse of discretion in making such determination.

4. The plaintiff attacks the constitutionality of Title 247, § 1-009.02, asserting that the regulation unconstitutionally deprives the plaintiff of the due process of law. The plaintiff fails to cite any Supreme Court or Court of Appeals decision supporting this contention. This court declines to so hold.

5. The record fails to support the plaintiff's contention that the arresting officer failed to give a verbal notice of revocation. *Kuebler v. Abramson*, 4 Neb. App. 420, 544 N.W.2d 513 (1996).

6. The plaintiff attacks the director's refusal to continue the hearing until after disposition of a related criminal case, asserting a denial of Fifth Amendment rights. The administrative license revocation statutes are not criminal proceedings, but are civil proceedings that may result in a civil sanction. *Kalisek v. Abramson*, 257 Neb. 517, ___ N.W.2d ___ (1999). The administrative license revocation statutes and the criminal statutes present clearly distinct mechanisms for enforcement, adjudication, and appeal. *Id.* The Fifth Amendment does not apply to this civil proceeding.

7. The plaintiff attacks the receipt of the sworn report in evidence, asserting that it contained hearsay and lacked foundation, as a violation of the rules of evidence.

a. The plaintiff seeks to indirectly attack the regulation allowing receipt of the sworn report as prima facie evidence that the operator's license should be revoked. The Supreme Court approved the receipt of the sworn report in *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). To circumvent the *McPherrin* decision, the plaintiff claims that the director erred in receiving the report in evidence.

b. This court rejected the specific grounds asserted here upon a nearly 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 in this district. The plaintiff's claim lacks merit.

8. The remaining grounds asserted by the plaintiff also lack merit, and do not require specific discussion.

9. 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).

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 violation of NEB. REV. STAT. § 60-6,196 (Reissue 1998).

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 25, 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 24, 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 Holt 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