

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

**KATHLENE J. SHELBURN,  
Plaintiff,**

vs.

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

**Case No. CI99-121**

**JUDGMENT ON APPEAL**

**DATE OF HEARING:** February 18, 2000.

**DATE OF DECISION:** Date of Filing.

**APPEARANCES:**

For plaintiff: Rodney J. Palmer without plaintiff.

For defendant: no personal appearance; John Freudenberg, Special Cherry County Attorney, on behalf of the Attorney General, by telephone for arguments only.

**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). Although the plaintiff in this case did object to a video conference hearing and to the location of the hearing, she thereafter participated in the video conference hearing provided by the director. By so doing, the plaintiff has either waived the requirement by her 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 when the regulations providing for the same, particularly Section 006.01 of Title 247 are (sic) 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). Until a decision of the Nebraska Court of Appeals or the Nebraska Supreme Court states otherwise, that decision constitutes the controlling precedent in this district. 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 her burden of proof on the issue.

6. The plaintiff asserts that the director “[h]ad no adequate objective tests to arrest under *St vs Johnson*, 215 Neb. 391, 338 NW2d 769 (1983).” The court assumes that the plaintiff asserts that the arresting officer, rather than the director, lacked such objective tests. Contrary to the situation in *State v. Johnson*, 215, Neb. 391, 338 N.W.2d 769 (1983), one of the officers in this case performed field sobriety tests, some of which the plaintiff failed. This contention lacks merit.

7. The plaintiff also asserts that the director erred in finding probable cause “when the preponderance of evidence of two witnesses, which was contrary to the officer’s testimony, was conclusive.” Essentially, the plaintiff complains that the director accepted a particular version of the facts over another version in weighing the evidence. Because this court reviews the record de novo, it is unnecessary to consider this matter. Similarly, the plaintiff complains that the director improperly admitted

results of a preliminary breath test. Because the court reviews the record de novo and disregards any improperly admitted evidence, it is unnecessary to consider that matter further.

8. The plaintiff's counsel placed considerable emphasis at argument upon the contention that the first officer on the scene advised the plaintiff that she *had* to take the blood test. The plaintiff argues that she had the right to decline the blood test, albeit acknowledging that such refusal carries adverse legal consequences. NEB. REV. STAT. § 60-6,197 (1999 Supp.) provides for implied consent to such tests by operating a motor vehicle and declares such refusal to submit to the blood test to be unlawful, i.e., to constitute a crime. The plaintiff's argument is analogous to asserting that she has the right to steal someone else's property though she acknowledges that the commission of the crime of theft carries adverse legal consequences. An officer who tells the plaintiff that she must not steal someone else's property provides an equivalent admonition to that in the present case, i.e., that the plaintiff was required by law to submit to the blood test. The plaintiff's argument that an admonition that the plaintiff "had to take the test" differs in some meaningful way from an admonition that "refusing to take the test constitutes a crime" borders on the ludicrous. Such argument clearly lacks any legal merit.

9. The court, upon de novo review, adopts the findings of fact in paragraphs 1 through 5, inclusive, set forth on pages 1 and 2 of the director's order. (T9-10).

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 (1999 Supp.); 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 (1999 Supp.).

11. The decision of the director should be affirmed.

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

1. The Order of Revocation entered on December 22, 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.

Signed in chambers at Ainsworth, Nebraska, on March 22, 2000.

DEEMED ENTERED upon filing of judgment by court clerk.

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 Special 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:

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William B. Cassel  
District Judge