

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

JUSTIN L. HUGGINS,
Plaintiff,

vs.

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

Case No. CI00-28

JUDGMENT ON APPEAL

DATE OF HEARING: September 20, 2000.

DATE OF RENDITION: September 20, 2000.

DATE OF ENTRY: Date of filing (§ 25-1301).

APPEARANCES:

For plaintiff: Rodney J. Palmer without plaintiff.
For defendant: David M. Streich, Brown County Attorney, on behalf of the Attorney General.

SUBJECT OF JUDGMENT: 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 petition asserts that (1) the director's decision was arbitrary and capricious, (2) the decision resulted from inadmissible evidence, (3) the hearing officer erred in finding reasonable suspicion or probable cause for the stop, and (4) the hearing officer erred in finding the officer's testimony to be credible.
4. The plaintiff's first issue is superseded by this court's standard of review. This court reviews the decision de novo on the record. That standard incorporates a more thorough review than that contemplated by the plaintiff's assignment of error. However, where the evidence is in conflict, the district court, in applying a de novo standard of review, can consider and may give weight to the fact that the

agency hearing examiner 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).

5. The plaintiff's second issue is also superseded by this court's standard of review. Upon de novo review, this court disregards any evidence erroneously received by the hearing officer. *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985). Consequently, this court disregards any improperly received evidence. The plaintiff's second issue requires no further discussion.

6. The plaintiff's final two issues address the weight and credibility of the evidence. In this instance, this court would be inclined to consider and give weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another. However, the hearing officer expressly disclaimed such analysis. (T8.) Consequently, this court reviews the evidence de novo without giving any such consideration or weight.

7. In an administrative license revocation proceeding, the burden is upon a driver to prove that one or more of the recitations in an asserting officer's sworn statement were false. *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995); *Bender v. Department of Motor Vehicles*, 8 Neb. App. 290, 593 N.W.2d 27 (1999). Under these circumstances, the evidence, at best from the plaintiff's perspective, is evenly balanced. The plaintiff failed to sustain his burden of proof.

8. The court, upon de novo review, adopts the findings of fact in paragraphs 1 through 4, inclusive, set forth on pages 1-2 of the director's order. (T6-7).

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

10. The decision of the director should be affirmed.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation rendered on June 23, 2000, 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 this judgment becomes final.

3. Costs on appeal are taxed to the plaintiff.

Signed in chambers at Ainsworth, Nebraska, on September 20, 2000.
DEEMED ENTERED upon the date of filing by the court clerk.

If checked, the Court Clerk shall:

BY THE COURT:

- : 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 _____, 20__ by ____.
- 9 Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- : Mail postcard/notice required by § 25-1301.01 within 3 days, **stating "Order of revocation affirmed; stay dissolved; costs taxed to plaintiff."**
Done on _____, 20__ by ____.
- : Note the decision on the trial docket as: [date of filing] Signed
"Judgment on Appeal" entered.
Done on _____, 20__ by ____.

Mailed to:

William B. Cassel
District Judge