

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

BRENT E. NEWCOMER,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF MOTOR
VEHICLES,**

Defendant-Appellee.

Case No. CI00-10

JUDGMENT ON APPEAL

DATE OF HEARING: June 14, 2000.

DATE OF RENDITION: September 29, 2000.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

TYPE OF HEARING: Open court, on record of agency.

APPEARANCES:

For plaintiff:

Rodney J. Palmer, of Palmer & Kozisek, P.C., without plaintiff.

For defendant:

David M. Streich, Brown County Attorney, on behalf of the
Nebraska Attorney General.

SUBJECT OF ORDER: Appeal de novo upon agency record pursuant to NEB. REV.
STAT. § 60-6,208 and Administrative Procedure Act.

PROCEEDINGS: See "Journal Entry" filed June 14, 2000.

FINDINGS: The court finds and concludes that:

1. The plaintiff's petition on appeal assigns several errors, which may be summarized into two allegations: (1) that the director failed to conduct the hearing in the county of arrest pursuant to § 60-6,205(6)(a); and, (2) that the director's decision was arbitrary and capricious.

2. The latter allegation lacks merit. On appeal under the Administrative Procedure Act, this court reviews the decision de novo on the agency record. *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998); *Langvardt v. Horton*, 254 Neb. 878, 581 N.W.2d 60 (1998); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997). In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals. *Wolgamott v. Abramson, supra*; *Booker v. Nebraska State Patrol*,

239 Neb. 687, 477 N.W.2d 805 (1991). The plaintiff's allegation invites the court to apply the wrong standard of review. The court declines the invitation and applies the proper standard.

3. The plaintiff also complains regarding the use of a video conference hearing rather than a hearing conducted in person in the county of arrest. This court has no binding precedent to control the decision on this point.

A. The Nebraska Supreme Court, in *Kimball v. Nebraska Dept. of Motor Vehicles*, 255 Neb. 430, 586 N.W.2d 439 (1998), held that telephonic hearings are permitted in proceedings under the Administrative Procedures Act (§ 84-901 *et seq.*) where a formal "rules of evidence" hearing is requested. However, the Supreme Court did not address the requirement of § 60-6,205(6)(a).

B. This court, in *Matthews v. Abramson*, Cherry County District Court, Case No. 10693 (January 14, 1999), *appeal dismissed*, 256 Neb. e (1999), determined that a telephone conference hearing did not constitute a hearing "in the county" where the plaintiff did not agree. Although the issue was raised in *Hansen v. Nebraska Dept. of Motor Vehicles*, Brown County District Court, Case No. 6832 (July 21, 1999), the court did not decide whether the same result followed regarding a video conference hearing.

C. Although subsequent appeals have been heard from video conference hearings, this court has not reached or decided the issue.

D. In *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, ___ N.W.2d ___ (2000), the Nebraska Supreme Court expressly considered the effect of § 60-6,205(6)(a). The Supreme Court held that § 60-6,205(6)(a) is a venue statute. The Supreme Court read § 60-6,205(6)(a) in pari materia with § 84-913.03 (authorizing hearings by telephone, television, or other electronic means) and § 84-914(1) (providing for "rules of evidence" hearings). The Court did not discuss the location of a telephonic hearing. Because § 60-6,205(6)(a) is a venue statute, a claim that the hearing was not held in the proper county is waived by failure to make timely objection. *Id.* Further, participation in the hearing without objecting to the location constitutes a waiver of the objection. *Id.* The Supreme Court determined that the plaintiff's generalized objection to the hearing "being held over the telephone" failed to raise a question regarding the correct venue under § 60-6,205(6)(a). *Id.* at 456-57, ___ N.W.2d at ___. It

seems inherent in the Court's analysis that the venue of a telephone hearing is the location of the hearing officer, as the Court noted the definition of venue as "the place of trial of an action – the site where the power to adjudicate is to be exercised." *Id.* at 455, ___ N.W.2d at ___.

E. The defendant in this case purportedly quotes from a decision by another district court in *Kunzman v. Wimes*, Box Butte County District Court, Case No. CI99-190 (December 3, 1999), in which that court determined that the *Kimball* case impliedly rejected plaintiff's argument because the Supreme Court did not dismiss on its own motion for lack of jurisdiction.

(1) As a decision of another court of coordinate jurisdiction, the Box Butte County decision deserves, and is accorded, this court's due consideration. Of course, as a court of coordinate jurisdiction, that court's decision does not bind this court. Further, this court finds the other district court's rationale, at least as quoted by the director, unpersuasive.

(2) Only the absence of *subject matter* jurisdiction raises a duty of the appellate court to determine jurisdiction on its own motion. *County of Sherman v. Evans*, 252 Neb. 612, 567 N.W.2d 113 (1997).

(3) Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *Concordia Teachers Coll. v. Nebraska Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997).

(4) Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Id.* While the lack of subject matter jurisdiction cannot be waived nor the existence of subject matter jurisdiction conferred by the consent or conduct of the parties, lack of personal jurisdiction may be waived and such jurisdiction conferred by the conduct of the parties. *Id.* One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person. *Id.*

(5) The Supreme Court's failure to dismiss impliedly determined that the department had subject matter jurisdiction. Section 60-6,205 expressly vests subject matter jurisdiction over administrative license revocations in the Director of the Department of Motor Vehicles. The director had subject matter jurisdiction.

(6) The “in the county” requirement of § 60-6,205(6)(a) has never been held to constitute a jurisdictional requirement. As a matter of venue, it is not jurisdictional. Jurisdiction is the inherent power or authority to decide a case; venue is the place of trial of an action – the site where the power to adjudicate is to be exercised. *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988). Unlike jurisdiction, venue is a personal privilege which, if not raised by a party, is waived unless prohibited by law. *Id.* This is precisely the analysis used by the Supreme Court in *Muir v. Nebraska Dept. of Motor Vehicles*, *supra*. Section 60-6,205 does not prohibit hearings not “in the county.” Indeed, it expressly permits out-of-county hearings where agreed to by the parties. Thus, the director’s failure to hold a hearing “in the county” without the plaintiff’s agreement does not deprive the director of subject matter jurisdiction, but at most constitutes only reversible error. Thus, the Supreme Court’s failure to dismiss did not address the effect of the “in the county” requirement.

4. The defendant’s counsel in this case has furnished the court and opposing counsel with the briefs submitted to the Supreme Court in *Muir*. The state’s brief argues that, if the hearing was held outside the county of arrest, the district court lacked subject matter jurisdiction because § 84-917(2)(a) states that “[p]roceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency.” NEB. REV. STAT. § 84-917(2)(a) (Reissue 1997). However, that argument ignores the specific, contrary requirement of § 60-6,208 that an appeal from the director shall proceed “to the district court of the county where the alleged events occurred for which he or she was arrested in accordance with the Administrative Procedure Act.” NEB. REV. STAT. § 60-6,208 (Reissue 1998). Thus, an appeal from an administrative license revocation hearing, wherever conducted, proceeds to the district court of the county in which the events which caused the arrest occurred. Moreover, the state’s analysis is contrary to the decision in *Muir*.

5. Section § 60-6,205(6)(a) requires that the hearing by the director “shall be conducted *in the county in which the arrest occurred* or in any other county agreed to by the parties.” NEB. REV. STAT. § 60-6,205(6)(a) (Reissue 1998) (emphasis supplied). The plaintiff asserts that the video conference hearing procedure used in this case violated § 60-6,205(6)(a).

6. The director’s decision apparently questions whether the plaintiff’s objection to a hearing not conducted “in the county” was properly preserved.

A. The director's conclusions of law assert that "[t]he [d]irector's file reveals that in this hearing, the appellant never filed an objection to holding the hearing by video conference prior to his oral motion at the time of hearing." T11. Thereafter, the director's conclusions state that "[t]he failure of the appellant to give the [d]epartment sufficient notice to set the hearing by another method seems a patently procedural sword which deliberately prevents any thoughtful consideration of substantive evidence on the issues allowed by statute." T12.

(1) However, the record shows that by letter dated March 9, 2000, and file-stamped by the department as received on March 10, 2000, the plaintiff expressly requested "that the hearing be held in the county of arrest, namely Brown County, Nebraska." E4 at 4-4.

(2) The director's notice of hearing mailed thereafter on March 20 demonstrates that the director did not intend to honor the plaintiff's written request. E3.

(3) This court perceives no justification for requiring the plaintiff to file a later objection, where the explicit written request was received by the department prior to notice of hearing and was disregarded.

B. The record clearly shows that the hearing officer, the department's legal representative, the reporter, and the arresting officer were situated in Lincoln, Lancaster County, Nebraska. 3:6-14. The record further shows that the plaintiff and his attorney were in Brown County. 3:6-14.

C. At the outset of the hearing conducted, the plaintiff's attorney specifically objected "to the format of having this hearing by video conference in that the Hearing Officer is sitting in a different county other than that of arrest . . ." 4:3-6. He further moved for dismissal on that ground. Following the denial of the motion to dismiss, the plaintiff and his attorney declined to participate further and left the proceeding.

(1) The requested relief in the motion, i.e., dismissal, was not appropriate and was greater than the maximum possible relief arguable under the circumstances.

(2) Assuming that the plaintiff's objection was well-taken, i.e., assuming that the hearing was not being conducted "in the county," the proper relief would have been for continuance of the hearing for the purpose of convening "in the county."

D. Nevertheless, the court concludes that the objection was properly preserved and was not waived by the plaintiff. As the plaintiff had already filed an express written request for a hearing “in the county,” the plaintiff had no reason to believe that any further request would have been honored. For the same reason, the court concludes that the plaintiff did not “agree” to a hearing in any other county than that in which the arrest occurred, i.e., Brown County.

7. The director relies upon the promulgated regulation stating:

Informal hearings shall be held either by telephone, in person, or by video conference if technically feasible *at the discretion of the Director*, in the county in which the arrest occurred. The parties may agree to another venue.

247 Neb. Admin. Code, ch. 1, § 022.01 (September 8, 1998) (emphasis supplied). The director apparently interprets the emphasized language to confer discretion to conduct a hearing outside of the county without regard to objection by the plaintiff.

8. The court observes that the regulation applies on its face to “informal hearings.” Under the regulatory scheme, there are two types of hearings: (1) informal hearings, and, (2) “rules of evidence” hearings. 247 Neb. Admin. Code, ch. 1, §§ 019.01 and 019.02 (September 8, 1998). The plaintiff requested and the director ordered a “rules of evidence” hearing. E4 at 4-1. Thus, the regulation, by its own plain language, applies to informal hearings and does not apply to “rules of evidence” hearings, such as the hearing in this case. The court finds no regulation addressing venue in “rules of evidence” hearings.

9. However, even assuming that the regulation applies to “rules of evidence” hearings, the regulation cannot sustain the director’s position.

A. The statutory scheme gives the director authority to “adopt and promulgate rules and regulations to govern the conduct of the hearing and insure that the hearing will proceed in an orderly manner.” NEB. REV. STAT. § 60-6,205(7) (Reissue 1998).

B. Ordinarily, deference is accorded to an agency’s interpretation of its own regulations unless plainly erroneous or inconsistent. *Sunrise Ctry. v. Nebraska Dep’t, Soc. Serv.*, 246 Neb. 726, 523 N.W.2d 499 (1994); *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). However, in this case the record does not show, nor does the director argue before this court, that it has interpreted the regulation in any particular way.

C. Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *Sunrise Ctry. v. Nebraska Dep't, Soc. Serv., supra*; *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994); *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989).

D. The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency. *Sunrise Ctry. v. Nebraska Dep't, Soc. Serv., supra*; *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994).

E. A legislative enactment may properly confer general powers upon an administrative agency and delegate to the agency the power to make rules and regulations concerning the details of the legislative purpose. *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996); *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979).

F. However, an administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which they are to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute. *County Cork v. Nebraska Liquor Control Comm., supra*; *Bond v. Nebraska Liquor Control Comm.*, 210 Neb. 663, 316 N.W.2d 600 (1982).

10. It does not appear to this court that the regulation explicitly addresses the issue of where a telephone or video conference “hearing” is deemed to have been “conducted” within the meaning of the statute. Certainly, the director lacks authority to promulgate a regulation modifying or altering the statutory language. Thus this court must interpret the statute.

11. This court has searched for, and been unable to find, any other instance in which the Legislature has provided for an administrative hearing before a state agency and also directed that the hearing be conducted “in the county” The Legislature must have meant something when it adopted this language. The Legislature presumably knew of the existence of the general administrative procedure statute authorizing telephone or video conference hearings. The primary question facing this court is: what

did the Legislature intend regarding video conference hearings in administrative license revocation proceedings.

12. In *Hoiengs v. County of Adams*, 254 Neb. 64, 71, 574 N.W.2d 498, ___ (1998), the Supreme Court reiterated the long-established law:

It is true that in accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions of the same statute, or in different statutes, the last in point of time or order of arrangement prevails. *Sidney Education Assn. v. School Dist. Of Sidney*, 189 Neb. 540, 203 N.W.2d 762 (1973); *Stoller v. State*, 171 Neb. 93, 105 N.W.2d 852 (1960); *Markel v. Glassmeyer*, 137 Neb. 243, 288 N.W. 821 (1939); *Chilen v. Commercial Casualty Ins. Co.*, 135 Neb. 619, 283 N.W. 366 (1939). However, the fundamental rule in construing statutes is that they shall be construed in pari materia and from their language as a whole to determine the intent of the Legislature. All subordinate rules are mere aids in reaching this fundamental determination. *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987); *Malone v. Benson*, 219 Neb. 28, 361 N.W.2d 184 (1985). It is the duty of a court, as far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it so that they are consistent, harmonious, and sensible. *Smith v. Smith*, 242 Neb. 812, 497 N.W.2d 44 (1993); *Malone, supra*. Where it is possible to harmonize apparently conflicting statutes, such is to be done. See *Sidney Education Assn., supra*.

Moreover, as stated in *Sanitary & Imp. Dist. No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 922, 573 N.W.2d 460, ___ (1998):

Specifically, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Omaha World-Herald v. Dernier, ante* p. 215, 570 N.W.2d 508 (1997); *Loup City Pub. Sch. v. Nebraska Dept. of Rev.*, 252 Neb. 387, 562 N.W.2d 551 (1997); *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

The Court further observed that:

In general, a court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. See, *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997); *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996); *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). However, to the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *SID No. 2 v. County of Stanton*, 252 Neb. 731, 567 N.W.2d 115 (1997); *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996).

Id. at 922-23, 573 N.W.2d at ____.

13. At the beginning, this court must inquire where a video conference is deemed to have been held. This court can find no express Nebraska authority on this issue. The decision in *Muir* leads this court to conclude that the Supreme Court would determine a hearing occurred at the location of the hearing officer. However, the issue of telephone or video conference hearings has been considered in other jurisdictions.

A. In *Sleeth v. Department of Public Aid*, 125 Ill. App. 3d 847, 852, 466 N.E.2d 703, ____ (1984) (emphasis in original), the court reasoned:

The essence of a hearing is the opportunity to be heard by the listener. One can be heard by written affidavit, by closed circuit television, by video tape recording, by telephone or by actual appearance. Each method offers an opportunity to be heard, but only with the last mentioned method is the *situs* of the hearing — is the place where the listener hears — in the actual presence of the speaker. [Footnote omitted.] In the instant case, the listener was not one of the local office personnel in Peoria, but the officer or officers located in Chicago. The speakers were the plaintiffs, and under the procedures followed by the IDPA, the plaintiffs were not present at the *situs* of the hearing. It follows then that the hearing was not conducted in the county of the plaintiffs' residence.

B. In *Detroit Base Coalition for the Human Rights of the Handicapped v. Department of Social Services*, 431 Mich. 172, 428 N.W.2d 335 (1988) (en banc), the Michigan Supreme Court interpreted an administrative rule providing for a hearing “in the county where a claimant resides.” The court rejected the department’s interpretation that a telephone hearing takes place at both the place where the claimant is present and the place where the hearing referee is present. The court adopted the reasoning of the Illinois court. After extensively quoting the Illinois court’s opinion, the Michigan Supreme Court determined that the language

contemplates a hearing at which the plaintiffs are present at the place where the decisionmaker is observing, considering, and evaluating the evidence. . . . [W]e reject defendants’ argument that the location of the telephone hearing is in two places simultaneously and hold that the hearing is considered and conducted at the place where the hearing referee is present. . . .

A policy mandating telephone hearing procedures would mean that as a rule the hearings will *not* take place in the county in which the claimant resides, and therefore does not meet the statutory requirement . . . that the hearing be held at “a reasonable time, date, and place which normally shall be in the county where a claimant resides.”

Id. at 182, 428 N.W.2d at 340 (emphasis in original).

C. The Supreme Court of Appeals of West Virginia applied similar reasoning in *Parks v. Board of Review of Dep't of Employment Security*, 188 W. Va. 447, 425 S.E.2d 123 (1992). See also, Annot., *Propriety of Telephone Testimony or Hearings in Prison Proceedings*, 9 A.L.R.5th 451 *et seq.* (1993); Annot., *Propriety of Telephone Testimony or Hearings in Unemployment Compensation Proceedings*, 90 A.L.R.4th 532 *et seq.* (1991); Annot., *Propriety of Telephone Testimony or Hearings in Public Welfare Proceedings*, 88 A.L.R.4th 1094 *et seq.* (1991).

D. In the administrative license revocation context, the New Mexico Court of Appeals similarly held that the statute did not authorize telephonic revocation hearings and that New Mexico law required the hearings to be held in person in one place in the relevant county. *Evans v. State, Taxation & Rev. Dept.*, 122 N.M. 216, 922 P.2d 1212 (1996). In addition to similarity of the applicable statute to other New Mexico statutes, the court identified other common elements of the types of statutes: serious consequences to the parties involved (loss of permission to drive a motor vehicle), and the importance of determination of credibility at such hearings, whether the credibility of the accused or of the accuser. The court expanded upon this rationale, stating at some length:

In DMV license revocation proceedings, the credibility of the police officer and the driver is not infrequently at issue. By statute, the hearing officer shall decide, in part: “whether the law enforcement officer had reasonable grounds to believe that the person had been driving a motor vehicle within this state while under the influence of intoxicating liquor.” [citation omitted] Resolving whether the law enforcement officer had “reasonable grounds” to stop the motorist and then had “reasonable grounds” to test the motorist for impairment can be intensely factual determinations in which credibility may become the determining factor. [citation omitted] Additional factual issues may easily arise, including whether the driver declined to submit to a breath or blood test, whether the officer advised the motorist of the consequences of refusal, whether an initially recalcitrant driver recanted, or whether his change of mind was timely. [citations omitted]

Traditionally, our legal system has depended upon personal contact between the fact finder and the witness to allow the fact finder to observe the demeanor of the witness as a means of assessing credibility. A long line of New Mexico cases reserves the determination of witness credibility to the fact finder, in this case the hearing officer. [citations omitted] In license revocation proceedings, the initial hearing with the Department hearing officer provides the driver his or her only opportunity to have a fact finder make this credibility assessment.

Existing case law confirms the importance of in-person hearings when critical credibility determinations are at stake. . . . [O]ur Supreme Court held that the Department of Human Services did not violate due process by using telephonic hearings in disability termination proceedings. [citation omitted] However, the Court noted that hearings of this nature frequently relied on documentary medical evidence with witness credibility being only “a minimal factor.” [citation omitted]

Further it may not be just the credibility of the parties that is at stake in these hearings. “Justice should not only be done, but should manifestly and undoubtedly be seen to be done.” [citations omitted] In license revocation proceedings, the presence of the hearing officer may be necessary for the participants to have a sense of fair play — that the Department has fairly considered the evidence, regardless of whether they agree with the result.

Id. at 218-19, 922 P.2d at 1214-15.

14. The hearing in this case was conducted by video conference rather than by telephone. However, the court concludes that this difference does not affect the result.

A. Under the Illinois court’s rationale, the location of the listener is conclusive. As that court observed, only the in-person hearing affords the plaintiff the opportunity to be present in the same location as the listener, i.e., the hearing officer.

B. The New Mexico court’s reasoning also applies persuasively to video conference hearings. While the video conference does afford some opportunity for the hearing officer to see the witnesses, it obviously does not provide the same opportunity as an in-person hearing.

C. In this case, the arresting officer was present at the same location as the hearing officer. 3:12-14. The video conference relegated the plaintiff to second-class status at a remote location. This compounds the problem concerning credibility determinations which the New Mexico court viewed as critical.

15. This court, after review of the statutory language, the regulation, and the case law, is persuaded that a video conference hearing was not held “in the county in which the arrest occurred” in this case.

A. The court adopts the reasoning of the Illinois and Michigan courts that a telephone or video conference hearing occurs where the listener, i.e., the hearing officer, is situated.

B. The Legislature elected to impose a special hearing requirement in license revocation proceedings. That special requirement compels the director to conduct the hearing in the county of arrest unless the *parties* otherwise agree.

(1) The director's decision argues that the requirement was included for the benefit of the arresting officer. T13. However, that argument founders upon the plain language of the statute, which authorizes hearings not "in the county" if the *parties* agree.

(a) Clearly, the arresting officer is not a "party" within the meaning of the statute.

(b) The promulgated regulations clearly and explicitly state that "[t]he parties in administrative license revocation hearings shall be the Department of Motor Vehicles and the Appellant." 247 Neb. Admin. Code, ch. 1, § 004 (September 8, 1998). Even under the regulations, the arresting officer is not a "party."

(c) If the statute had been intended to address the arresting officer's convenience, it would not have conferred upon the "parties" the power to incommode the officer, affording the officer no voice as to the hearing location.

(2) Obviously, the plaintiff, one of the parties, did not agree to a video conference hearing, with the hearing officer situated in Lincoln. The hearing occurred, for purposes of § 60-6,205(6)(a), in Lancaster County, not in Brown County.

C. The specific requirement of an "in the county" hearing in the license revocation statute prevails over the general authorization for video conference hearings in the Administrative Procedure Act, to the extent of a conflict.

D. Through the "in the county" requirement, the Legislature balanced costs and benefits. It recognized the important benefits of personal hearings so eloquently explained by the New Mexico Court of Appeals. Yet, it also strove to conserve resources. The Legislature placed control over this balance with the motorist. The director always has the fiscal incentive to agree to a telephone or video conference hearing. Where credibility determinations are vital, the motorist may choose to require a hearing in the county. If not, the motorist may have equal or greater incentive to agree to a telephone or video conference. Such agreement could save the motorist substantial attorney fees by allowing an attorney to

appear telephonically from his office or by video conference from a nearby location rather than travel to a hearing location in a faraway county of arrest.

E. The director exceeds his statutory authority by requiring an “out-of-county” hearing by video conference without the agreement and over the objection of the motorist. In so doing, the director effectively modifies or alters the statute. Such change constitutes the prerogative of the Legislature. Neither the director nor this court possesses the power to effect such a modification.

F. Obviously, the director might persuade the Legislature that the fiscal savings of telephone or video conference hearings from “outside the county” outweighs the benefits conferred by “in the county” hearings. The Legislature could amend the statute. But the director cannot unilaterally modify the statutory requirement.

16. Because the hearing was not conducted in compliance with the statutory requirement for a hearing “in the county,” the matter should be remanded to the director for a new hearing in compliance therewith.

17. In order to facilitate further review by a higher appellate court, had it been appropriate to reach the issue, this court, upon its own de novo review, would have adopted by reference the findings of fact set forth in paragraphs 1 through 4 of the “Proposed Findings of Fact” section of the director’s order. Further, but for the court’s conclusion that remand for a new hearing is required, the court would have concluded that the evidence showed that: (1) the law enforcement officer had probable cause to believe that the plaintiff was operating or in actual physical control of a motor vehicle in violation of § 60-6-196, and, (2) the plaintiff was operating or in actual physical control of a motor vehicle while having an alcohol concentration in excess of 0.10 of one gram by weight per 210 liters of his breath.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation entered against the plaintiff on April 21, 2000, is reversed and the proceeding remanded to the director for a new hearing in compliance with this judgment.

2. Costs on appeal in the amount of \$120.22 are taxed to the defendant, and judgment is entered in favor of the plaintiff and against the defendant for such costs. The judgment shall bear interest at the rate of 7.241% per annum from date of judgment until paid.

3. Any request for attorney fees, express or implied, is denied.

Signed in chambers at Ainsworth, Nebraska, on September 29, 2000.
DEEMED ENTERED upon filing 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.
Done on _____, 20__ by ____.
- Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: [date of filing] Signed
“Judgment on Appeal” entered reversing order of revocation and
remanding for new hearing, and taxing costs to defendant.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge