

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

KENNETH R. TURPIN, JR.,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF MOTOR
VEHICLES,**

Defendant-Appellee.

Case No. CI00-34

JUDGMENT ON APPEAL

DATE OF HEARING: December 20, 2000.

DATE OF RENDITION: December 28, 2000.

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

APPEARANCES:

For plaintiff-appellant: Rodney J. Palmer, of Palmer & Kozisek, P.C., without plaintiff.
For defendant-appellee: 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.

FINDINGS: The court finds and concludes that:

1. 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).

2. After careful review of the record and the pleadings on file, the court previously concluded that the record was incomplete. On November 22, 2000, the court entered an order directing the department to include the items omitted from the initial filing. The court allowed until December 13, 2000, for that filing. No supplemental transcript was filed. It now becomes necessary to consider the proper disposition of this proceeding.

3. NEB. REV. STAT. § 84-915.01(2) (Reissue 1999) specifies that:

The agency record shall consist only of:

(a) Notices of all proceedings;

(b) Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the agency pertaining to the contested case;

(c) The record of the hearing before the agency, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the agency during the proceeding, and all proffers of proof and objections and rulings thereon; and

(d) The final order.

4. NEB. REV. STAT. § 84-917(4) (Reissue 1999) requires that:

Within thirty days after service of the petition or within such further time as the court for good cause shown may allow, the agency shall prepare and transmit to the court a certified copy of the official record of the proceedings had before the agency. Such official record shall include: (a) Notice of all proceedings; (b) any pleadings, motions, requests, preliminary or intermediate ruling and orders, and similar correspondence to or from the agency pertaining to the contested case; (c) the transcribed record of the hearing before the agency, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the agency during the proceeding, and all proffers of proof and objections and rulings thereon; and (d) the final order appealed from.

5. Section 84-915.01(2) defines the “agency record.” Section 84-917(4) requires the agency to prepare and transmit to the reviewing district court the “official record” and specifically defines the contents of the record to be submitted. The two definitions are entirely consistent and virtually identical.

6. As the court previously noted in ordering a supplemental transcript, the petition for review in this court alleges correspondence between plaintiff’s counsel and the department dated June 5, 2000. The answer filed on behalf of the department admits that allegation. However, that correspondence does not appear anywhere in the record of the agency filed with this court. It clearly falls within the scope of § 84-915.01(2)(b) and § 84-917(4). Moreover, except for certain exhibits received in evidence at the hearing and which appear in the bill of exceptions (§ 84-915.01(2)(c)), there is nothing in the transcript prior to the date of the hearing. The content of the bill of exceptions makes that extremely unlikely. Consequently, the court previously concluded that the record was incomplete. As noted above, no supplemental transcript was filed as directed by this court.

7. This court has used the words “transcript” and “bill of exceptions” in the manner customary in Nebraska appellate practice. The statutes (§§ 84-915.01(2) and 84-917(4)) clearly contemplate a “record” encompassing both the traditional transcript and bill of exceptions. Moreover, those statutes mandate the inclusion of specific material.

8. This court is keenly aware that the statutory scope of review requires the court to consider the matter de novo on the record of the agency. *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997). In that case, the Supreme Court held that in reviewing a final decision of an administrative agency in a contested case pursuant to the administrative procedure act, a court may not take judicial notice of an adjudicative fact which was not presented to the agency, because the taking of such evidence would impermissibly expand the court’s statutory scope of review. *Id.* However, in this instance this court concludes that the cited rule does not prevent consideration of the defendant’s answer.

9. In *Chapman v. Department of Motor Vehicles*, 8 Neb. App. 386, 594 N.W.2d 655 (1999), the Court of Appeals observed that § 84-917 does not require the department to file a responsive pleading. Rather, the agency is required to prepare and transmit to the court a certified copy of the official record before the agency. *Id.* Thus, the department was not required to file any answer. But this court finds no case stating that, if the department does file an answer, the court must disregard it. Although it arose in the context of an error proceeding and not under the Administrative Procedure Act, the Court of Appeals, in *Cox v. Douglas Cty. Civ. Serv. Comm.*, 6 Neb. App. 748, 577 N.W.2d 758 (1998), stated that an answer or other pleading by a defendant in error can have no function other than to advise the court of events that have occurred after the order appealed from. In the present case, the answer serves to advise the court of the defendant’s failure to prepare and transmit the entire record required by the statute. That failure occurred after the final order of which the plaintiff complains.

10. This court finds very little appellate guidance concerning the situation of an incomplete record. The case of *Maurer v. Weaver*, 213 Neb. 157, 328 N.W.2d 747 (1982), provides some initial help. This court notes that *Maurer* was decided prior to the 1988 amendment to § 84-917(4) enlarging and specifically defining the record to be transmitted, and prior to the 1994 adoption of § 84-915.01 specifically defining the official record. The *Maurer* court first concluded that the initial failure to file a complete record was not jurisdictional. This court concludes that principle of law remains effective. The

holding in *Maurer* that the failure to file the transcript within the initial statutory period does not, in and of itself, entitle the party seeking review to have the agency's order set aside similarly remains effective. The Supreme Court implicitly approved the district court order requiring the agency to submit a supplemental transcript. However, once the original and supplemental transcripts were before the district court, it declined to consider them because they had not been marked as exhibits and offered in evidence. The Supreme Court reversed and remanded to the district court to consider the supplemental transcript. Thus, *Maurer* teaches that the district court may properly order the agency to supplement an incomplete record. However, that case does not address what should be done when the agency fails to do so.

11. In *James v. Harvey*, 246 Neb. 329, 518 N.W.2d 150 (1994), the agency failed to timely file the record within the initial 30-day statutory period but requested and obtained from the district court a substantial extension of time to file the record. It again failed to meet the extended deadline. The appellant moved to strike the agency answer and to enter default judgment. Only after the filing of that motion did the agency file the record. The district court reversed the agency decision as a sanction for failing to timely file the transcript. The Supreme Court affirmed, noting that in an APA action, it is the agency's responsibility to provide the transcript in a timely fashion. The Supreme Court stated that the failure to do so subjects the agency to the disciplinary powers of the court. The Supreme Court found that the district court did not abuse its discretion in reversing the agency's order.

12. Cases from other jurisdictions vary widely. See 73A C.J.S. *Public Administrative Law and Procedure* § 197-98 (1983). Under some statutes, the reviewing court has the legal authority and power to order supplementation of the record where anything material to any party is omitted from the record or where supplementation is necessary for effective judicial review. *Id.* At the other extreme, some courts hold that a petitioner has the legal means to compel the agency to certify a complete record if not satisfied with the record certified, and it is not for the court on appeal to order a more complete record. In those jurisdictions, the record properly brought before the court is conclusively presumed to be correct and the appellate court is bound by the record as certified. *Id.*

13. The decisions in *Maurer* and *James* suggest that Nebraska law is closer to the former than the latter, and that even under the latter standard, in Nebraska the legal means to compel the agency to certify a complete record inheres in the review proceeding.

14. Moreover, the specific certification of the record in this case explicitly demonstrates that the agency submitted only a partial record. The agency records custodian merely certifies that “I have compared the attached record with documents on file in the office of the Legal Division, and such record is a true and correct copy of the original of such documents *which are a part of the record* and file.” T2 (emphasis supplied). The agency failed to certify that the document transmitted to this court is “a certified copy of the official record of the proceedings had before the agency” as required by § 84-917(4). This court’s review cannot be confined to whatever partial record the agency chooses to submit. The statute precludes the appellant from enlarging the agency record. The same statute necessarily prevents the agency from diminishing that record. Even if Nebraska law conclusively presumes the certified record to be correct and binds the court to the certified record, the agency in this case failed to properly certify the complete record. This court cannot be bound to an improperly, i.e., uncertified, record.

15. The petition for review states no claim that the record is incomplete. Of course, the petition is filed prior to the certification and transmission of the record. This court could scarcely expect the petition to allege something not yet in existence.

16. The item omitted from the record, as demonstrated by the pleadings, is the plaintiff’s express request for a hearing “in the county in which the arrest occurred” made prior to the setting of any hearing by the department. NEB. REV. STAT. § 60-6,205(6)(a) (Reissue 1998). The plaintiff raised the issue again at the hearing, and upon an adverse ruling, declined to further participate in the hearing. The omitted item is critical to the analysis of waiver of venue discussed by the Supreme Court in *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, ___N.W.2d ___ (2000), and further considered by this court in *Newcomer v. Nebraska Dept. of Motor Vehicles*, District Court of Brown County, Nebraska, Case No. CI00-10, September 29, 2000. Had a complete record been properly certified, the analysis below demonstrates a high likelihood that the agency decision would have been reversed and remanded for a new hearing.

17. In *Muir v. Nebraska Dept. of Motor Vehicles*, *supra*, 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 ____.

18. 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 constitutes reversible error.

19. This court’s decision in *Newcomer* describes at some length the policy considerations underlying the statutory requirement and the reasons that none of the regulations of the department affect the analysis. The court will not restate that lengthy analysis here. Suffice it to say, the same considerations would apply.

20. Had the agency properly certified the entire record, the probable result of this court’s review, based on *Muir* and *Newcomer*, would have been a reversal and remand for an “in the county” hearing. But, as the Supreme Court observed in *James v. Harvey*, *supra*, it is the duty of courts to prevent dilatory proceedings in the administration of justice. That decision also recognized the inherent power of a court to dismiss an action for disobedience of a court order. In this case, as in *James*,

dismissal would penalize the party seeking review of the order. Mere reversal of the order and remand for a new hearing would place the agency in the same position it likely would have been had it properly filed a certified record to begin with or had it taken advantage of the opportunity to file a supplemental record. The only sanction sufficient to send a message to the department concerning its dilatory practice is reversal of the order with instructions to reinstate the plaintiff's operator's license.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation entered against the plaintiff on August 10, 2000, is reversed and the proceeding remanded to the director with instructions to reinstate the plaintiff's operator's license.
2. Costs on appeal in the amount of \$118.47 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 7.052% 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 December 28, 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 for costs with interest on the judgment record.
Done on _____, 20__ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days ("Order of Revocation reversed and remanded with directions to reinstate license; judgment against defendant for costs of \$118.47 with interest at 7.052% per annum from date of judgment").
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:

BY THE COURT:

William B. Cassel
District Judge