

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

**KAREN JOY JOHNSON,**

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF MOTOR  
VEHICLES,**

Defendant-Appellee.

Case No. CI00-104

**JUDGMENT ON APPEAL**

**DATE OF HEARING:** February 13, 2001.

**DATE OF RENDITION:** February 15, 2001.

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

**APPEARANCES:**

For plaintiff-appellant:

Plaintiff-Appellant pro se.

For defendant-appellee:

Eric A. Scott, Cherry County Attorney, on behalf of Nebraska Attorney General.

**SUBJECT OF JUDGMENT:** Decision on the merits on petition for review under Administrative Procedure Act.

**FINDINGS:** The court finds and concludes that:

1. This court determines the action after de novo review upon the record of the agency. As the Nebraska Court of Appeals recently restated, proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Chrysler Corp. v. Lee Janssen Motor Co.*, 9 Neb. App. 721, \_\_\_ N.W.2d \_\_\_ (2000). 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. *Id.*

2. The court separately discusses the claims asserted in the petition for review. The court notes that the petition was prepared by an attorney who initially represented the plaintiff in this review proceeding. Prior to oral argument, the plaintiff's counsel was granted leave to withdraw without objection. The plaintiff did not submit any brief. Although the plaintiff was subsequently granted a continuance of the oral argument, she did not obtain successor counsel and presented her oral argument pro se. Her oral

argument did not address most of the claims asserted in the petition. Nevertheless, the court has considered all matters raised by the petition for review. Of course, the plaintiff is held to the same standard as if she was represented by counsel. *Mix v. City of Lincoln*, 244 Neb. 561, 508 N.W.2d 549 (1993); *Martin v. Martin*, 188 Neb. 393, 197 N.W.2d 388 (1972); *Vielehr v. Malone*, 158 Neb. 436, 63 N.W.2d 497 (1954).

3. Paragraph 5 of the petition generally alleges that the procedure used by the department was contrary to law and in excess of the statutory authority and jurisdiction of the agency. This general assertion is insufficient as an assignment of error. A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 750 (2000). This court finds nothing in the record to show that the procedure was contrary to law or in excess of the statutory authority and jurisdiction of the agency.

4. The plaintiff's claim in paragraph 12 that the director's decision was arbitrary and capricious 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. Paragraph 12 of the petition also claims that the decision resulted from evidence which was not competent, was irrelevant, consisted of hearsay, and for which insufficient foundation was established. This generalized and vague claim also fails to advise this court of the issue or issues sought to be presented. Moreover, 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. This issue requires no further discussion.

6. The plaintiff complains in paragraph 14A that the hearing officer should not have taken official notice of Title 177 and Title 247 of the Nebraska Administrative Code. In *Nissen v. Nebraska Dep't of Corr. Servs.*, 8 Neb. App. 865, 602 N.W.2d 672 (1999), the Nebraska Court of Appeals observed that NEB. REV. STAT. § 84-906.05 of the Administrative Procedure Act had been amended,

effective August 28, 1999, to provide that every court of this state may take judicial notice of any rule or regulation that is signed by the Governor and filed with the Secretary of State pursuant to NEB. REV. STAT. § 84-906. Where an amendment to a statute makes a procedural change, it is binding upon a tribunal on the effective date of the amendment and is applicable to pending cases. *Nissen v. Nebraska Dep't of Corr. Servs.*, *supra*. Properly adopted and filed agency regulations have the effect of statutory law. *Id.* An agency does not have the discretion to waive, suspend, or disregard in a particular case a validly adopted rule. *Id.* The hearing officer properly took notice of the applicable agency rules and regulations.

7. Paragraph 14B of the petition alleges the hearing officer improperly allowed evidence of the “[p]reliminary [b]reath [t]est without Class C permit in evidence, [c]hecklist in evidence . . . .” At the hearing, the plaintiff objected only to the test result, based on the absence of the actual permit and the absence of the actual checklist in evidence. This was not a “rules of evidence” hearing, but rather only an informal hearing. The hearing officer properly overruled the plaintiff’s objection on foundation.

8. In paragraph 14C of the petition, the plaintiff next complains regarding testimony concerning the administration and results of the horizontal gaze nystagmus test by the arresting officer. The Nebraska Supreme Court recently reconsidered the status of that technique under Nebraska law. In *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000), the court concluded that the basic scientific principle upon which the HGN field sobriety test is based, i.e., that alcohol consumption causes nystagmus, is generally accepted in the relevant scientific community. However, the court also concluded that, in light of evidence in the record that nystagmus can be caused by factors other than alcohol and that intoxication cannot be established by the HGN test alone, limitations should be placed upon the purposes for which HGN test results are admissible. The Supreme Court held in *Baue* that the HGN field sobriety test meets the *Frye* standard for acceptance in the relevant scientific communities, and when the test is given in conjunction with other field sobriety tests, the results are admissible for the limited purpose of establishing that a person has an impairment which may be caused by alcohol. The Supreme Court overruled *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986), to the extent inconsistent with that holding. In *Baue*, the court also adopted the majority view regarding foundation for testimony concerning administration of the test, and stated that a police officer may testify to the results of HGN testing if it is shown that the officer has been

adequately trained in the administration and assessment of the HGN test and has conducted the testing and assessment in accordance with that training. The *Baue* decision predated the hearing in this case. The department's attorney adduced the arresting officer's testimony to make the required showing. The hearing officer properly admitted the HGN testimony.

9. Paragraph 14D asserts that the hearing officer improperly considered evidence of valium use. This court agrees that the testimony regarding valium use was improper and should have been stricken. However, this was an informal hearing. The director's decision makes no reference to valium use; thus, it is doubtful that either the hearing officer or the director relied on the improper evidence. And of course, under the de novo standard of review, this court disregards that evidence.

10. Paragraph 14E of the petition claims that the hearing officer improperly determined that the plaintiff refused to take a test of blood or urine where the testimony was that the plaintiff agreed to take a blood test.

11. The plaintiff's oral argument almost totally addressed this claim. However, her argument consisted of her own statements as to what she did or did not do. This court cannot consider as evidence the statements made by the plaintiff at oral argument. Giving her statements any evidentiary weight would violate the standard of review and impermissibly consider matters outside the record of the agency. *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997) (taking of evidence would impermissibly expand the court's statutory scope of review de novo on the record of the agency). The plaintiff did not testify or otherwise present evidence on her own behalf at the agency hearing. The only witness was the arresting officer. Consequently, this court's review is limited to what was shown or not shown by the arresting officer's testimony. Unfortunately, the plaintiff as a non-lawyer, being totally unfamiliar with the procedures involved and the standard of review, did not effectively address that in her argument.

12. The officer testified that he requested both a blood test for alcohol test and a urine test for drug content. The officer then speculated about what the plaintiff might have been willing to do. The hearing officer sustained the plaintiff's objection to that testimony and this court also disregards that testimony. The officer testified that when he asked the plaintiff to take the blood test, she refused. On cross examination, the arresting officer confirmed that the plaintiff refused to take a urine test. He then

admitted that “she kind of indicated that she would be okay with the blood test.” Exhibit 1, at 12:19-20. Later, the officer testified that the plaintiff “never stated completely . . . .” Exhibit 1, at 15:5-10.

13. Although the hearing officer found that the plaintiff stated she would take a blood test and this court considers that the hearing officer observed the witness, this court finds upon de novo review that the arresting officer’s testimony shows that the plaintiff did not unequivocally consent to a blood test. The plaintiff failed to meet her burden of proof to show that she unqualifiedly and unequivocally consented to the blood test.

14. In *Croghan v. State*, District Court of Rock County, Nebraska, Case No. 4844 (June 10, 1998), the court extensively considered the statutory requirements to submit to tests.

a. An arrested motorist “refuses” to submit to a chemical test when the motorist’s conduct, demonstrated under the circumstances confronting the officer requesting the chemical test, justifies a reasonable person’s belief that the motorist understood the officer’s request for a test and manifested a refusal or unwillingness to submit to the requested test. *State v. Clark*, 229 Neb. 103, 425 N.W.2d 347 (1988). Anything less than an unqualified, unequivocal assent to an arresting officer’s request to submit to a chemical test constitutes a motorist’s refusal to submit to a chemical test. *Id.*

b. NEB. REV. STAT. § 60-6,197(1) (Cum. Supp. 2000) provides:

Any person who operates or has in his or her actual physical control a motor vehicle in this state shall be deemed to have given his or her consent to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine.

c. NEB. REV. STAT. § 60-6,197(4) (Cum. Supp. 2000) provides:

Any person arrested as provided in this section may, upon the direction of a peace officer, be required to submit to a chemical test or tests of his or her blood, breath, or urine for a determination of the concentration of alcohol or the presence of drugs. . . . Any person who refuses to submit to such test or tests required pursuant to this section shall be subject to the administrative revocation procedures provided in sections 60-6,205 to 60-6,208 . . . .

d. NEB. REV. STAT. § 60-6,199 (Reissue 1998) states that “[t]he peace officer who requires a chemical blood, breath, or urine test or tests pursuant to section 60-6,197 may direct whether the test or tests shall be of blood, breath, or urine.”

e. In *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996), the Nebraska Supreme Court determined that a motorist who provides a sufficient sample of breath to register a digital reading on an Intoxilyzer, but who does not provide enough breath to cause the machine to print the result on a test record card, has submitted to a breath test as required by Nebraska law in the absence of any statutory or regulatory requirement that the results be printed on a test record card and in the absence of any evidence of willful noncooperation. In *Mackey v. Director of Dept. of Motor Vehicles*, 194 Neb. 707, 235 N.W.2d 394 (1975), the motorist elected a urine test under a statute permitting the motorist to choose the type of test. The motorist was unable to provide a sample, despite trying to do so. The officer then directed the motorist to submit to either a breath or blood test, and the motorist's refusal to do so constituted a refusal under the statute.

f. Prior to 1990, the statutory language referred to a chemical test in the singular tense. In L.B. 799 of the 1990 Session Laws, the Legislature amended the predecessor section of § 60-6,197(1) as follows (additions underlined):

Any person who operates or has in his or her actual physical control a motor vehicle upon a public highway in this state shall be deemed to have given his or her consent to submit to a chemical test or tests of his or her blood, urine, or breath for the purpose of determining the amount of alcoholic content of or the presence of drugs in such blood, breath, or urine.

g. In the same statute, the Legislature amended the predecessor section of §60-6,197(4) as follows (additions underlined, deletions stricken):

Any person arrested as provided in this section may, upon the direction of a law enforcement officer, be required to submit to a chemical test or tests of his or her blood, breath, or urine for a determination of the alcohol content or the presence of drugs. Any person who refuses to submit to ~~a chemical blood, breath, or urine test~~ such test or tests required pursuant to this section shall be subject to . . . .

h. Indeed, the title of L.B. 799 stated that it was, *inter alia*, an act to “provide for implied consent to *a chemical test* for the presence of drugs as prescribed . . . .” L.B. 799, 1990 Session Laws (emphasis added). Thus, the statutory language of the legislative act concerning the phrase “or tests” clearly shows that it was intended to provide for one type of chemical test for alcohol and for another type for drugs. And that is precisely what the officer required in this case.

15. In *State v. Baker*, 184 Neb. 724, 171 N.W.2d 798 (1969), the Nebraska Supreme Court reiterated that a statute providing that a presumption of intoxication arises under a determination of the amount of alcohol in the subject's body fluid at the time in question, as shown by chemical analysis, is in derogation of the common law and subject to strict construction. This court has strictly construed the applicable statutes.

16. This court finds the officer's testimony that the plaintiff "never stated completely" inconsistent with an unequivocal consent to take a blood test. Thus, upon de novo review, this court finds that the arresting officer's testimony shows that the plaintiff did not unequivocally and unqualifiedly assent. As discussed above, this court cannot consider the plaintiff's statements at oral argument as evidence of what she did or did not do. And the plaintiff did not argue the import of the officer's testimony. This court is left to do its own interpreting without any meaningful input from the plaintiff.

17. In paragraph 14F, the plaintiff asserts that the arresting officer did not properly advise the plaintiff of the "effect of failure to take two tests." Although the allegation is somewhat murky, this court assumes that the plaintiff is alleging failure to comply with § 60-6,197(10) which requires that "[a]ny person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged." NEB. REV. STAT. § 60-6,197(10) (Cum. Supp. 2000). The officer testified that he read a "Post Arrest Chemical Test Advisement" form to the plaintiff; however, that form does not appear in the record. Exhibit 1, at 13:14-25. Although the officer testified about at least part of the content of the form, because the plaintiff failed to include the form in the record this court cannot assume that the form does not properly advise the motorist. The motorist in an administrative license revocation appeal bears the burden of proof. *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). The plaintiff failed to meet her burden to show that the officer failed to comply with § 60-6,197(10).

18. Paragraph 14G alleges that the arresting officer failed to read the back of hearing exhibit 4, the notice of revocation/sworn report/temporary license form, to the plaintiff. The plaintiff cites no authority which would require the officer to read the back of the form verbally to the motorist. NEB. REV. STAT. § 60-6,205(2) (Reissue 1998) requires the officer to "verbally serve notice to the arrested person of the intention to immediately impound and revoke the operator's license of such person and that the

revocation will be automatic thirty days after the date of arrest unless a petition for hearing is filed within ten days after the date of arrest . . . .” The officer’s testimony shows without dispute that he read the portion of the front of hearing exhibit 4 necessary to fully comply with the statutory mandate. Moreover, the evidence shows that he served the form on the plaintiff, who had every opportunity to read the additional advisements on the reverse side. The arresting officer complied with the statutory mandate.

19. Paragraph 14H asserts the hearing officer erred in admitting hearing exhibit 4. Where a formal “rules of evidence” hearing is requested, the “rules of evidence applicable in the district court” are, by the clear language of the Nebraska statutes, the Nebraska Evidence Rules codified in chapter 27 of the Nebraska Revised Statutes. *Kimball v. Nebraska Dep’t of Motor Vehicles*, 255 Neb. 430, 586 N.W.2d 439 (1998). Here, of course, the plaintiff did not request a “rules of evidence” hearing; thus, only an informal hearing was required or provided. The plaintiff’s specific claim in paragraph 14H that the exhibit was “ambiguous, contained hearsay and lacked foundation” probably could only apply in a “rules of evidence” hearing. Although strict rules of evidence are not applied to administrative license revocation hearings, the proceedings must still be fundamentally fair. *In re Interest of Kassara M.*, 258 Neb. 90, \_\_\_ N.W.2d \_\_\_ (1999). In determining whether admission or exclusion of particular evidence would violate due process, the Nebraska Evidence Rules serve as a guidepost in that determination. *Id.* The admission of hearing exhibit 4 did not violate the requirement of due process.

20. Upon de novo review, the court finds by the greater weight of the evidence that:

- a. The arresting officer had probable cause to believe that the plaintiff was operating or in actual physical control of a motor vehicle in violation of section 60-6,196; and,
- b. The plaintiff refused to submit to or failed to complete a chemical test after being requested to do so by the officer.

21. The decision of the director should be affirmed.

**JUDGMENT:**

IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation rendered on November 16, 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-appellant. Any request for attorneys' fees, express or implied, is denied.

Signed in chambers at Ainsworth, Nebraska, on February 15, 2001.  
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 Cherry 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