

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

CHAD M. GILLESPIE,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF MOTOR
VEHICLES,**

Defendant-Appellee.

Case No. CI01-6

JUDGMENT ON APPEAL

DATE OF HEARING: April 13, 2001.

DATE OF RENDITION: June 7, 2001.

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

APPEARANCES:

For plaintiff-appellant: Rodney J. Palmer without plaintiff-appellant.
For defendant-appellee: David M. Streich, Brown 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 has considered all of the claims asserted in the petition for review. However, the court does not expressly discuss those issues clearly lacking any legal merit.

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claim in paragraph 15 (which is repeated in paragraph 16) that the director's decision was arbitrary and capricious is superseded by this court's standard of review.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 15 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. Paragraph 17A of the petition alleges the hearing officer failed "to find the [d]epartment refused to mark the letter from appellant's attorney as an exhibit or the [m]otion to [p]roduce." These documents were apparently marked as Exhibits 5 and 6 at the time of the hearing, and received in evidence without objection. They were before the director for her consideration, and appear in the record for judicial review. The plaintiff apparently maintains that the *department* should have initially marked and offered these exhibits merely because the plaintiff so requested. While the department might have had some due process obligation to mark the exhibits, this court discerns no right of the plaintiff to control the evidence to be offered *by the department*. To the extent that the department failed to mark the exhibits prior to the hearing, the plaintiff failed to show and this court can discern no prejudice accruing thereby. The exhibits were marked at the hearing. As noted above, they were included in the record at the plaintiff's request. The plaintiff failed to explain how the hearing procedures unfairly affected the plaintiff in any way.

7. Paragraphs 17B and 17C address the regulations regarding advance marking of exhibits for telephone hearings and contemporaneous marking of exhibits for “in person” hearings.

8. The hearing officer conducted the hearing in the Basement Meeting Room of the Brown County Courthouse in Ainsworth, Nebraska. The plaintiff’s counsel appeared at that location. Counsel for the department participated in the hearing by telephone.

9. In *Matthews v. Abramson*, District Court of Cherry County, Case No. 10693 (January 14, 1999), *appeal dismissed*, 256 Neb. e (1999), this court concluded that a telephone conference hearing occurs in the county where the hearing officer is located for purposes of § 60-6,205(6)(a) (“hearing shall be conducted in the county in which the arrest occurred or in any other county agreed to by the parties”). In *Newcomer v. Nebraska Dep’t of Motor Vehicles*, District Court of Brown County, Case No. CI00-10 (September 29, 2000), this court reached the same conclusion for video conference hearings.

10. To the extent of evidence or arguments offered by the plaintiff, the procedure clearly constituted an in-person hearing. However, as to evidence or arguments offered by the department, the hearing occurred telephonically. NEB. REV. STAT. § 84-913.03 (Reissue 1999) expressly authorizes a hearing officer to “conduct . . . part of . . . the hearing by telephone, . . .”

11. The difficulty arises regarding the regulatory distinction between telephone hearings and in-person hearings regarding documentary evidence. Section 008.04A of the regulations describes the procedures for use of documents in connection with telephone hearings. Section 008.04B addresses use of documents at in-person hearings. The department has not promulgated a regulation for hearings conducted partially in person and partially by telephone. The hearing officer treated the hearing as an in-person hearing. Consequently, neither party was required to serve exhibits in advance of the hearing. The plaintiff was afforded the opportunity to examine the exhibits at the hearing.

12. The plaintiff apparently concludes that, because the department’s counsel participated by telephone, the hearing constituted a telephone hearing *with regard to the plaintiff*. The court finds no factual or legal support for that contention. The hearing officer treated the plaintiff no differently than would have occurred if the department’s counsel had personally appeared at the hearing. No hint appears in the record that any evidence was not produced at the hearing because of application of the in-person hearing

procedures concerning documents. The only conceivable prejudice would have been to the department because of the inability of the department's counsel to examine exhibits produced by the plaintiff at the hearing.

13. In *Marshall v. Wimes*, 261 Neb. 846, ___ N.W.2d ___ (2001), the Nebraska Supreme Court reiterated that in proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. The Supreme Court also noted that due process in a license revocation proceeding includes a reasonable opportunity to present evidence concerning the accusation. The hearing officer afforded the plaintiff that reasonable opportunity to present evidence, and the plaintiff utilized that procedure. Unlike *Marshall v. Wimes*, this case does not concern any subpoenas requested by the plaintiff, nor did the procedures adversely affect the plaintiff's ability to present evidence.

14. 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 § 60-6,196; and,

b. The plaintiff was operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of subsection (1) of § 60-6,196.

15. The decision of the director should be affirmed.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation rendered on January 25, 2001, 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 at Ainsworth, Nebraska, on June 7, 2001.

DEEMED ENTERED upon the date of filing by the 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 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:

BY THE COURT:

William B. Cassel
District Judge