

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

DAVID H. PAULING,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF MOTOR
VEHICLES,**

Defendant-Appellee.

Case No. CI01-17

JUDGMENT ON APPEAL

DATE OF HEARING: June 29, 2001.

DATE OF RENDITION: June 29, 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). 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). 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. *Chrysler Corp. v. Lee Janssen Motor Co.*, *supra*.

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. Many of the assertions of the petition for review are identical to those considered in *Gillespie v. Nebraska Dep't of Motor Vehicle*, 2001-036 (Neb. Dist. Ct., 8th Dist., 2001). The explanations set forth in *Gillespie* need not be repeated here.

4. The only matters requiring discussion pertain to the plaintiff's assignments regarding failure to comply with discovery and failing to provide a hearing on the plaintiff's motion to produce. Substantially identical claims were resolved adversely to the plaintiff in *Hollenbeck v. Nebraska Dep't of Motor Vehicle*, 2001-037 (Neb. Dist. Ct., 8th Dist., 2001). Because of the relation of the claim to a recent Nebraska Supreme Court decision, the court sets for more explanation than might otherwise be required.

5. In *States v. Anderson*, 219 Neb. 545, 364 N.W.2d 38 (1985), the Nebraska Supreme Court declined to recognize prehearing discovery as among those due process elements absolutely imperative to fair hearing. Yet, the Supreme Court recognized the power of the administrative body to provide discovery, and approvingly quoted authority requiring such power to be exercised judicially and not arbitrarily. The Nebraska Supreme Court in *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995), observed that due process in an administrative proceeding includes the reasonable opportunity to present evidence concerning the accusation.

6. 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 particular issue in *Marshall* related to the director's refusal to issue a subpoena for appearance at the administrative hearing.

7. This court recognizes that in all of these cases, the Nebraska Supreme Court ultimately considered whether the administrative agency's action deprived the accused of the reasonable opportunity to present evidence concerning the accusation at the administrative hearing. Thus, prehearing discovery is not specifically mandated as an element of due process. But the administration of prehearing discovery may not be manipulated by the agency to deprive the accused of the reasonable opportunity to present

evidence at the ultimate hearing. On the other hand, the Supreme Court does not condone the use of prehearing discovery as a “fishing expedition.” *Id.*

8. Neither due process, the statutes governing administrative hearings, nor the regulations adopted by the department require hearing or argument on prehearing motions. Consequently, the director’s March 15 ruling on the plaintiff’s discovery motion without hearing or argument was not contrary to law. As no hearing was required on the prehearing discovery motion, the department’s frustration of plaintiff’s March 9 attempt at self-help in scheduling such a hearing similarly fell within the agency’s discretion.

9. Nothing appears in the record to show that the director’s March 15 denial of hearing on the prehearing discovery motion constituted an abuse of discretion. Indeed, the record in this case expressly shows that the arresting officer provided nothing to the department that was not provided to plaintiff’s counsel on the discovery request. Nothing appears in the record to connect the director’s ruling on the motion to produce or the director’s contemporaneous action denying hearing on the motion with any inability of the plaintiff to present evidence at the administrative hearing. The record does not reflect any denial of issuance or enforcement of subpoenas, or any other indication of any interference with the plaintiff’s right to a reasonable opportunity to present evidence.

10. The plaintiff here shows nothing more than the “fishing expedition” disapproved by the Supreme Court. The ability to request discovery was not intended as a substitute for the plaintiff’s obligation to develop and present evidence at the hearing. While the plaintiff is entitled to prevent the department from hiding evidence, he is not entitled to expect the department to go find all of the potential evidence for him. The name and agency of the officer administering the breath test is disclosed in the sworn report. The plaintiff made no effort to subpoena the officer or any supporting records in the possession of that officer or his agency. He will not now be heard to complain that there might have been favorable evidence available, when he chose to forgo the opportunity to present it.

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

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.

12. The decision of the director should be affirmed.

JUDGMENT:

IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation rendered on April 3, 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 29, 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.

9 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, 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