

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

JEREMY L. REITER,

Plaintiff-Appellant,

vs.

**BEVERLY NETH, DIRECTOR, STATE OF
NEBRASKA, DEPARTMENT OF MOTOR
VEHICLES,**

Defendant-Appellee.

Case No. CI01-62

JUDGMENT ON APPEAL

DATE OF HEARING: July 30, 2001.

DATE OF RENDITION: July 30, 2001.

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

APPEARANCES:

For plaintiff-appellant: David W. Jorgensen, of Nye, Hervert, Jorgensen, & Watson, P.C., with plaintiff.

For defendant-appellee: Thomas P. Herzog, Holt 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 rendered on July 30, 2001.

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. This court is bound by the decision of the Nebraska Supreme Court in *Marshall v. Wimes*, 261 Neb. 846, ___ N.W.2d ___ (2001), in which the Supreme Court concluded that the director’s application of § 009.02 of Title 247 of the Nebraska Administrative Code to deny issuance of

a subpoena to the person who tested the blood sample was in derogation of Marshall's right to procedural due process.

3. Here, as in *Marshall*, the director partially denied the appellant's request to issue the subpoena to the person who analyzed the blood sample. The appellant moved to dismiss on that basis. While the court has some doubt regarding the requested relief on the motion to dismiss, the Supreme Court in *Marshall* encountered a virtually identical record and did not reject the appellant's argument merely because the appellant moved for dismissal rather than continuance.

4. Because the procedure followed here was determined in *Marshall* to be in violation of the constitutional right to due process, and thus the decision was made upon an unlawful procedure, the decision must be reversed and the cause remanded to the director for new proceedings consistent with this judgment.

JUDGMENT:

IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation rendered against the plaintiff-appellant on May 21, 2001, is reversed and the cause remanded to the director for new proceedings consistent with this judgment.
2. Costs on appeal in the amount of \$154.07 are taxed to the defendant-appellee, and judgment is entered in favor of the plaintiff-appellant and against the defendant-appellee for such costs. The judgment shall bear interest at the rate of 5.442% per annum from date of entry of judgment until paid.
3. Any request for attorney fees, express or implied, is denied.

Signed at O'Neill, Nebraska, on July 30, 2001.
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 for new proceedings; judgment against defendant for costs of \$154.07 with interest at 5.442% 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