

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

**DAVID H. PAULING,**

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF MOTOR  
VEHICLES,**

Defendant-Appellee.

Case No. CI01-20

**JUDGMENT ON APPEAL**

**DATE OF HEARING:** August 3, 2001.

**DATE OF RENDITION:** August 3, 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, and on brief, Jodi M. Fenner, Assistant 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. Several 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., 8<sup>th</sup> 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 the commercial vehicle definition in NEB. REV. STAT. § 60-465 (Reissue 1998).

5. The plaintiff claims that there was no evidence that the truck was a commercial vehicle. Of course, the plaintiff had the burden to prove that it was not a commercial vehicle. In view of the descriptive testimony regarding the vehicle, the court concludes the plaintiff failed to meet that burden. The officer testified that it was a "semi" probably pulling a trailer. The plaintiff admitted it was a 1989 blue Freightliner. The evidence clearly shows the vehicle was designed or used to transport property, and suggests a semi-tractor with trailer. The evidence fails to show by the greater weight of the evidence that the vehicle had a gross vehicle weight rating of 26,000 pounds or less.

6. The plaintiff attacks the form of the exclusion for certain farm trucks from the commercial motor vehicle definition in § 60-465(2), in that it excludes from the definition farm trucks operating within 150 miles of the farm rather than including only those operating more than 150 miles from the farm or ranch. It certainly would be possible to write the statute with inclusionary language, but the court finds no authority which requires the Legislature to do so. The plaintiff does not allege any legal requirement that the statute be so written. The exclusion is unambiguous. The argument concerning the form of the statute lacks merit.

7. The plaintiff also asserts that the statutory classification is arbitrary and unreasonable in violation of the due process clauses of the state and federal constitutions. As the Supreme Court stated in *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947), it is generally held that due process is satisfied if the Legislature had the power to act on the subject matter, if that power was not exercised in an arbitrary, capricious, or unreasonably discriminatory manner, and if the act, being definite, had a reasonable relationship to a proper legislative purpose. In other words, if an act of the Legislature is authorized and promulgated by the inherent and reserved constitutional powers of the state, and is enforced

with due regard to and observance of the rules established by our system of jurisprudence for the security of life, liberty, and property, it is not in conflict with due process of law. *Id.*

8. Clearly, the Legislature possessed the power to act on this subject matter. The Legislature clearly desired to balance the potential detriment to the public safety posed by farm trucks excluded from the commercial motor vehicle regulatory framework with the financial detriment to farmers and ranchers forced to comply with special licensing. The legislative history cited by the defendant supports that rationale. Under the plaintiff's reasoning, no such distinction could be sustained. That position imposes a higher standard than the case law and the text requires. The establishment of a distance limitation bears a reasonable relationship to the proper legislative purpose. The fact that the Legislature might also have chosen a different distinction does not render the chosen classification invalid. The exclusion furthers a proper legislative purpose and does not violate due process.

9. 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 commercial motor vehicle; and,

b. The plaintiff was operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of § 60-4,164.

10. The decision of the director should be affirmed.

**JUDGMENT:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The order of disqualification rendered on April 23, 2001, is affirmed.

2. The order entered on June 1, 2001, staying enforcement of the disqualification order is dissolved, and the remaining period of disqualification 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 August 3, 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 disqualification 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:

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William B. Cassel  
District Judge