

IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA

SHAWN W. KLEIN,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF MOTOR
VEHICLES,**

Defendant-Appellee.

Case No. CI01-63

JUDGMENT ON APPEAL

DATE OF HEARING: November 30, 2001.

DATE OF RENDITION: January 24, 2002.

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: 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 has 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, 619 N.W.2d 78 (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 discuss in detail those issues clearly lacking any legal merit.

3. The matters asserted in paragraphs 5, 21, and 22 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), which decided those issues adversely to the plaintiff's contentions. The explanations set forth in *Gillespie* need not be repeated here.

4. The matter asserted in paragraph 23A of the petition for review regarding denial of oral arguments or evidentiary hearing on the plaintiff's motion to produce was considered in *Hollenbeck v. Nebraska Dep't of Motor Vehicle*, 2001-037 (Neb. Dist. Ct., 8th Dist., 2001), and decided adversely to the plaintiff's argument. In *Hollenbeck*, this court expressly discussed the claim in light of the Nebraska Supreme Court decision in *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). That discussion need not be repeated here.

5. In paragraph 23B of the petition, the plaintiff attacks the denial of issuance of subpoena to Karen Howard. The record shows a praecipe was received by the department on June 22. By written decision issued June 26, 2001, the director denied the request for noncompliance with 247 Neb. Admin. Code, ch. 1, § 009.05, which requires the request be accompanied by a certified check or money order. The department's response expressly noted the requirement of a "certified check or money order." Exhibit 6-6. The record does not explicitly show whether any check relating to Ms. Howard accompanied the initial request, although the absence of any mention of a check in the cover letter implies the absence of any check. Exhibit 1-10. The plaintiff's attorney submitted a second request received by the department on July 2, 2001. The check submitted with the request was not a certified check or money order, and by written order issued July 9, 2001, the department again denied the request for noncompliance with § 009.05 for that reason.

6. The petition for review does not attack the validity of § 009.05. Rather, the plaintiff makes a claim of disparate enforcement alleging allowance of a similar subpoena for Laurie Wieting upon like method of payment. The plaintiff cites no authority for the proposition that a failure to enforce the

requirement in one instance excuses a compliance in a separate instance, absent any showing of invidious discrimination. The circumstances that resulted in issuance of the subpoena to Wieting, other than the praecipe and cover letter, do not appear in the record. Any conclusion as to differences or lack of differences would constitute mere speculation, in which the court declines to indulge.

7. In paragraph 23C, the plaintiff attacks the validity of 247 Neb. Adm. Code, ch. 1, § 013.03. However, that section has nothing to do with the factual allegations of the paragraph. The court assumes that the plaintiff meant to attack § 010.03. The plaintiff asserts that the statutory classification is “inconsistent” and in violation of due process and equal protection, although the plaintiff does not allege whether he relies on the respective clauses of the state or federal constitutions or both.

8. 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.*

9. The Legislature possessed the power to act on this subject matter. Licensing of motor vehicle operators clearly constitutes a proper subject of legislation. The legislative history evidences a primary remedial goal of promptly removing from the highways persons who operate motor vehicles while under the influence of alcohol. The director has a natural motive to accomplish prompt removal. An accused motorist has a natural motive to resist removal. The distinction between continuances on request of the department from those requested by accused motorists 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. Due process requires only a reasonable opportunity for a predeprivation hearing, not a guarantee that the hearing will always occur prior to the enforcement of revocation. As no suspect classification is implicated, the equal protection analysis does not significantly differ. The court declines to find § 010.03 unconstitutional.

10. In paragraph 23D, the plaintiff makes certain factual allegations, but asserts no specific claim regarding failure to comply with any statute or regulation or any assertions of violation of any constitutional provisions. To the extent that the paragraph implicates the same arguments as paragraph 23C discussed above, the same reasoning controls.

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 September 6, 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 in chambers at **Ainsworth**, Nebraska, on **January 24, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.
If checked, the court clerk shall:

BY THE COURT:

- Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
 - Note the decision on the trial docket as: [date of filing] **Signed "Judgment on Appeal" entered.**
Done on _____, 20____ by _____.
 - Mail postcard/notice required by § 25-1301.01 within 3 days. (Order of revocation affirmed; stay dissolved; costs taxed to plaintiff-appellant)
Done on _____, 20____ by _____.
- 9** Enter judgment on the judgment record.
Done on _____, 20____ by _____.

William B. Cassel
District Judge

Mailed to: