

IN THE DISTRICT COURT OF ROCK COUNTY, NEBRASKA

JAMIE L. TURPIN,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF MOTOR
VEHICLES,**

Defendant-Appellee.

Case No. CI01-21

JUDGMENT ON APPEAL

DATE OF HEARING: December 21, 2001, in chambers at District Courtroom, Brown County Courthouse, Ainsworth, Nebraska.

DATE OF RENDITION: January 26, 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: Avery L. Gurnsey, Rock 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, 11, and 12 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 plaintiff's assignment of error in paragraph 13A, regarding failure to provide exhibits in advance of the hearing, was considered and rejected in *Gillespie*. The same reasoning applies equally here.

5. The matters asserted in paragraph 13B of the petition for review regarding denial of an evidentiary hearing on, and the summary response to, the plaintiff's motion to produce were 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 position. 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.

6. In paragraph 13C of the petition, the plaintiff asserts error through a hypertechnical reading of 247 Neb. Admin. Code, ch. 1, § 008.01 ("all discovery motions may be granted or denied at the Director's discretion"). The plaintiff contends that the director failed to grant or deny the motion to produce. Manifestly, the department's response demonstrates that the director granted the motion as to items in the possession of the department, but denied the motion as to items not in its possession. Even as to the latter, the director left open the possibility of a motion to compel where access might be denied to the plaintiff. The plaintiff's interpretation of this language would apparently have this court determine that the director must either totally deny or totally grant the motion. Such interpretation would lead to absurd results and the court declines to so hold.

7. In paragraph 13F, the plaintiff asserts that the "[o]nly evidence on test of [plaintiff] was that which was received as being what the officer recollected it to be not [what] it was in fact." The testimony

in question concerned a digital readout of an electronic device. The only objection asserted was on lack of foundation. The testimony clearly established the foundation of the presence of the witness at the location of the device. The question called for his personal observation. No other foundation was required. Any other objections that might have been made were waived by failing to state such other grounds. A party may not predicate error on the admission of evidence to which a timely objection was not made. *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988); *State v. Blair*, 227 Neb. 742, 419 N.W.2d 868 (1988).

8. However, this court also perceives in paragraph 13F the erroneous assumption that the defendant had the burden of proving the test result. The department bears an initial burden of production to make a prima facie case for revocation. *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). It meets that burden by the proper introduction of the officer's sworn report. *Id.* It then becomes the licensee's burden to establish grounds for reversal by a preponderance of the evidence. *Id.* The motorist in an administrative license revocation appeal bears the ultimate burden of proof once the sworn report is properly received in evidence. Thus, assuming momentarily that the sworn report was properly received in evidence, the plaintiff had the burden of proving that the test result did not show that the plaintiff had the required alcohol concentration, which he failed to do.

9. Finally, this court reaches the principal arguments advanced by the plaintiff in paragraphs 13D and 13E regarding admission of the sworn report in evidence. In *Irwin v. Nebraska Dep't of Motor Vehicles*, 2001-057 (Neb. Dist. Ct., 8th Dist., 2001), this court extensively discussed the foundational requirements for admission of the sworn report derived from the pronouncement of the Supreme Court in *McPherrin*. In *Irwin*, the department wholly failed to adduce any foundational testimony that the officer "provided" the report to the department. At the initial stage of the hearing in the present case, the department followed a similar flawed procedure. Exhibit 1, 9:8-10:6. The document is not certified under seal of the department, and consequently, is not self-authenticating. NEB. REV. STAT. § 27-902 (Reissue 1995). The plaintiff properly objected on foundation, and the hearing officer erred in overruling the foundational objection. However, in the present case, unlike the situation in *Irwin*, the initial error by the hearing officer was rendered harmless by the subsequent foundational testimony of the officer and reintroduction of the exhibit in evidence. Exhibit 1, 21:1-23:14. The officer clearly testified that he

completed the sworn report, signed it in the presence of the notary, recognized his signature on the exhibit copy, caused the report to be mailed to the department, and the exhibit copy was a true and correct copy of the original report. The department reoffered the exhibit in evidence, and at that point the hearing officer received the document in evidence.

10. The only serious question here concerns the applicability of the presumption of receipt of mail. The presumption of receipt of mail by the addressee does not arise unless it is shown that the letter was properly addressed, stamped, and mailed. *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992). Absent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository, proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide. *Id.* See also 31A C.J.S. *Evidence* § 152 *et seq.* (1996).

11. On cross-examination, the officer explained that he put the report in the envelope, sealed the envelope, addressed the envelope, and placed it in the box at the State Patrol office. He testified to an office practice where the sergeant places postage on the mail left in that box and does the actual mailing. Exhibit 1, 25:8-26-9. He did not, however, testify that he had personal knowledge that the sergeant actually followed the office practice on that date. *Id.*

12. In the usual case, the alleged recipient is denying receipt of the mailed item. Here, both the party initiating the mailing (the officer) and the ultimate recipient (the department) are advocating that the document was mailed and was received. The plaintiff, who disputes the receipt, was not a party to the transmission of the document, either as sender or recipient. This situation is compounded by the presence affixed to the document of what purports to be a “received” stamp showing receipt of the document by the department on August 29, 2001, four days after the date of the jurat by the notary public administering the oath for the sworn report. In the absence of testimony authenticating the “received” stamp, or proper self-authentication, this court declines to consider or give weight to the presence of the “received” stamp.

13. Ultimately, this court concludes that, unlike the situation in *Irwin*, there is evidence that the officer commenced the process of forwarding the document to the department. The statute does not expressly require mailing or personal delivery, but imposes a requirement upon the arresting peace officer to “within ten days forward to the director [the] sworn report” NEB. REV. STAT. § 60-6,205(3) (Reissue 1998). This court declines to impose a hypertechnical approach, and concludes that the officer’s testimony was sufficient to make a prima facie case that he “forwarded” the report to the department. The hearing officer properly received the sworn report upon the reoffer after foundational testimony. The burden then rested on the plaintiff to disprove the contents of the sworn report, which he failed to do.

14. 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.

15. The decision of the director should be affirmed.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The order of revocation rendered on September 21, 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 26, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties, **including to both the Rock County Attorney and the Nebraska Attorney General for defendant**.
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 _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge