

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

**HATTIE CONRAD, by and through her  
attorney-in-fact, Michelle Hysell,**

Plaintiff-Appellant,

vs.

**STATE OF NEBRASKA, DEPARTMENT  
OF HEALTH AND HUMAN SERVICES,**

Defendant-Appellee.

Case No. CI01-136

**JUDGMENT ON APPEAL**

**DATE OF HEARING:** March 18, 2002.

**DATE OF RENDITION:** June 23, 2002.

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

**APPEARANCES:**

For plaintiff-appellant: Glenn Van Velson without plaintiff.

For defendant-appellee: No appearance.

**SUBJECT OF ORDER:** Appeal de novo upon agency record pursuant to Administrative Procedure Act.

**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. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, \_\_\_ N.W.2d \_\_\_ (2002). The record in this case demonstrates that the hearing officer was present at the Health and Human Services West Campus, Folsom and Prospector, 2<sup>nd</sup> Floor, Building 14, Lincoln, Nebraska. Exhibit 2. Lincoln is in Lancaster County. The remainder of the hearing

participants were present at O'Neill, Nebraska. *Id.* O'Neill is in Holt County. The two locations were connected telephonically. *Id.* Prior to the oral arguments on appeal, this court requested the parties to submit supplemental briefs on the issue of jurisdiction. The court concludes that subject matter jurisdiction over this appeal ran to the District Court of Lancaster County and that this court lacks subject matter jurisdiction. Accordingly, the appeal must be dismissed.

3. The right of appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action. *Board of Educ. of Keya Paha County v. State Board of Educ.*, 212 Neb. 448, 323 N.W.2d 89 (1982). Proceedings for review under § 84-917 of the Administrative Procedure Act must be initiated in the district court of the “county where the action is taken.” *Id.* (citing NEB. REV. STAT. § 84-917).

4. The “county where the action is taken” refers to the site of the first adjudication hearing. *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 562 N.W.2d 355 (1997); *Metro Renovation, Inc. v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996).

5. In the context of another statute, the Supreme Court recently expressly held that the location of the hearing is determined by the location of the hearing officer. *Gracey v. Zwonechek*, 263 Neb. 796, \_\_\_ N.W.2d \_\_\_ (2002). This follows logically from the analysis of venue discussed by the Supreme Court in *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000).

6. The *Muir* court sensibly defined the hearing venue as the place of trial, i.e., the site where the power to adjudicate is to be exercised. *Id.* The Supreme Court read the specific venue statute there applicable in pari materia with § 84-913.03 (authorizing hearings by telephone, television, or other electronic means) and § 84-914(1) (providing for “rules of evidence” hearings). While the court did not explicitly discuss the location of a telephonic hearing, it seems inherent in the *Muir* analysis that the venue of a telephone hearing is the location of the hearing officer. However, in *Gracey* the Supreme Court expressly stated that conclusion. The *Gracey* court rejected the contention that the hearing occurs simultaneously at both locations.

7. The courts of other states have generally reached the same conclusion.

A. In *Sleeth v. Department of Public Aid*, 125 Ill. App. 3d 847, 852, 466 N.E.2d 703, \_\_\_ (1984) (emphasis in original), the court reasoned:

The essence of a hearing is the opportunity to be heard by the listener. One can be heard by written affidavit, by closed circuit television, by video tape recording, by telephone or by actual appearance. Each method offers an opportunity to be heard, but only with the last mentioned method is the *situs* of the hearing — is the place where the listener hears — in the actual presence of the speaker. [Footnote omitted.] In the instant case, the listener was not one of the local office personnel in Peoria, but the officer or officers located in Chicago. The speakers were the plaintiffs, and under the procedures followed by the IDPA, the plaintiffs were not present at the *situs* of the hearing. It follows then that the hearing was not conducted in the county of the plaintiffs' residence.

B. In *Detroit Base Coalition for the Human Rights of the Handicapped v. Department of Social Services*, 431 Mich. 172, 428 N.W.2d 335 (1988) (en banc), the Michigan Supreme Court interpreted an administrative rule providing for a hearing “in the county where a claimant resides.” The court rejected the department’s interpretation that a telephone hearing takes place at both the place where the claimant is present and the place where the hearing referee is present. The court adopted the reasoning of the Illinois court. After extensively quoting the Illinois court’s opinion, the Michigan Supreme Court determined that the language

contemplates a hearing at which the plaintiffs are present at the place where the decisionmaker is observing, considering, and evaluating the evidence. . . . [W]e reject defendants’ argument that the location of the telephone hearing is in two places simultaneously and hold that the hearing is considered and conducted at the place where the hearing referee is present. . . .

A policy mandating telephone hearing procedures would mean that as a rule the hearings will *not* take place in the county in which the claimant resides, and therefore does not meet the statutory requirement . . . that the hearing be held at “a reasonable time, date, and place which normally shall be in the county where a claimant resides.”

*Id.* at 182, 428 N.W.2d at 340 (emphasis in original).

C. The Supreme Court of Appeals of West Virginia applied similar reasoning in *Parks v. Board of Review of Dep’t of Employment Security*, 188 W. Va. 447, 425 S.E.2d 123 (1992). See also, Annot., *Propriety of Telephone Testimony or Hearings in Prison Proceedings*, 9 A.L.R.5th 451 *et seq.* (1993); Annot., *Propriety of Telephone Testimony or Hearings in Unemployment Compensation Proceedings*, 90 A.L.R.4th 532 *et seq.* (1991); Annot., *Propriety*

*of Telephone Testimony or Hearings in Public Welfare Proceedings*, 88 A.L.R.4th 1094 *et seq.* (1991).

D. In the administrative license revocation context, the New Mexico Court of Appeals similarly held that the statute did not authorize telephonic revocation hearings and that New Mexico law required the hearings to be held in person in one place in the relevant county. *Evans v. State, Taxation & Rev. Dep't*, 122 N.M. 216, 922 P.2d 1212 (1996).

8. Here, unlike *Gracey*, the issue is not whether the department properly conducted its hearing by telephone. In the public welfare context, unlike administrative licence revocations, the applicable statute does not specify the required location of the first adjudicated hearing. Thus, no statute or rule prevented the hearing from being held with the hearing officer in Lincoln and the other participants electronically participating from O'Neill. Here, the question is where “the action [was] taken” for purposes of § 84-917.

9. This situation also differs from *Gracey* in that § 60-6,208 expressly directs the district court appeal to “the district court *of the county where the alleged events occurred for which he or she was arrested* in accordance with the Administrative Procedure Act.” NEB. REV. STAT. § 60-6,208 (Reissue 1998) (emphasis supplied). That phrase effectively changes the “appeal to the district court of the county where the action was taken” rule of § 84-917 regarding district court appeals from administrative license revocation hearings. But there is no equivalent language regarding district court appeals from public welfare cases. Thus, in public welfare cases, the language of § 84-917 requires the appeal to be taken to the district court of the county where the action was taken. Because the case law, including the rationale underlying *Gracey* and *Muir*, reasons that such hearings are deemed to be held at the location of the hearing officer, the district court appeal in public welfare cases lies to the county where the hearing officer physically conducted the hearing. In this case, the hearing officer performed that duty in Lancaster County.

10. This court has carefully considered whether the decision in *Downer v. Ihms*, 192 Neb. 594, 223 N.W.2d 148 (1974) requires a different result. After extensive review, this court concludes that it does not. Since the decision in *Downer*, both the statute and the regulations relied upon in that Supreme Court opinion have changed. Unlike the situation in 1974, the appeal is no longer taken from the county

board of public welfare. The statute does not require the hearing to be held in the county of the applicant's residence. NEB. REV. STAT. § 68-1016 (Cum. Supp. 2000). The regulations existing at the time of the *Downer* decision have been entirely replaced. See 465 Neb. Admin. Code, ch. 6, § 6-001 *et seq.* (1995). The regulations now expressly provide that “[h]earings are held *either* by telephone *or* at a [d]epartment office.” 465 Neb. Admin. Code, ch. 6, § 6-004.07 (1995) (emphasis supplied). The plain language of that regulation contemplates two, mutually exclusive choices for venue. Venue may occur either by telephone or at a department office. This hearing occurred by telephone. It took place at the location of the hearing examiner. The power to adjudicate was exercised at the location of the hearing examiner in Lincoln, even though the applicant and her representatives participated by telephone from a district office in O’Neill.

11. Because this court lacks subject matter jurisdiction, the appeal must be dismissed.

**JUDGMENT:**

IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The appeal is dismissed for lack of subject matter jurisdiction.
2. Costs on appeal are taxed to the plaintiff-appellant.
3. Any request for attorney fees, express or implied, is denied.

Signed in chambers at Ainsworth, Nebraska, on June 23, 2002.

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 \_\_\_\_.
- 9 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 (“Judgment on appeal entered; appeal dismissed”).  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- Note the decision on the trial docket as: [date of filing] Signed “Judgment on Appeal” entered dismissing appeal for lack of subject matter jurisdiction.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel  
District Judge