

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

STEVEN R. SCHIFFERN,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF
MOTOR VEHICLES,**

Defendant-Appellee.

Case No. CI02-89

JUDGMENT ON APPEAL

DATE OF HEARING: September 16, 2002.

DATE OF RENDITION: September 18, 2002.

DATE OF ENTRY: Court clerk’s file-stamp date per § 25-1301(3).

APPEARANCES:

For plaintiff-appellant: Rodney J. Palmer without plaintiff-appellant.

For defendant-appellee: Thomas P. Herzog, Holt 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. 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 appellant's contentions. The explanations set forth in *Gillespie* need not be repeated here.

3. The principal arguments advanced by the appellant for reversal appear in paragraphs 13A and 13B regarding admission of the sworn report in evidence. Counsel for appellant forthrightly conceded that a similar argument was advanced and rejected by this court in *Turpin v. Nebraska Dep't of Motor Vehicles*, 2002-019 (Neb. Dist. Ct., 8th Dist., 2002) and that no higher Nebraska appellate court has ruled to the contrary. The appellant invites this court to reexamine *Turpin*.

4. 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 v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). In *Irwin*, the department wholly failed to adduce any foundational testimony that the officer "provided" the report to the department. The document was not certified under seal of the department, and consequently, was 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.

5. However, in *Turpin* and in the present case, unlike the situation in *Irwin*, the officer clearly testified that he "filled out" a sworn report, that the exhibit was a copy of his sworn report, that it was an accurate copy, that he signed the original in the presence of a

notary public, that he was then swearing that the content of the report was true, and that he caused the report to be “sent” to the department. Exhibit 1, 10:18-11:10. He also testified that the report consists of three copies, i.e., pages, and that one was given to appellant, one was retained in the file and the other is mailed to the state. Exhibit 1, 11:24-12:14. When a foundational objection was sustained, the officer succinctly restated the prior testimony, stating:

Well, I filled out the petition, the notice of sworn report and temporary licence at the courthouse before Mr. Schiffern had left the jail. It was completed in full and signed in front of a notary. The yellow copy goes to the driver and gave it to the driver.

A verbal notice of revocation was read to the driver. The petition for the hearing and the envelope was provided to the driver. And the white copy, the notice for the Department of Motor Vehicles was mailed to the State of Nebraska by our secretary, that’s our normal procedure for filing with the state, it’s always mailed in.

And the pink copy, the department’s copy or my copy, is stuck in the file.

Exhibit 1, 13:13-14:2. On cross examination, the officer admitted that he did not personally send the report to the Department of Motor Vehicles, and that after he filled it out in the early morning hours he took it to the O’Neill Police Department office and left it there to be mailed by the police department secretary. Exhibit 1, 18:7-20:2.

6. As in *Turpin*, the appellant’s argument relies upon 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). The appellant correctly argues that the evidence here does not satisfy the foundational requirements for application of that presumption.

7. However, as this court noted in *Turpin*, 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 appellant, 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 May 13, 2002, some eight 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.

8. This court again concludes that the requirement of *McPherrin* has been satisfied. 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(2) (Supp. 2001) (emphasis supplied). This court considers the Legislature’s choice of the verb “forward” as significant. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001). When used as a verb in the plain, ordinary, and popular sense, the word “forward” means “to send forward,” i.e., to send toward a place in advance, onward, or ahead. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 755 (2d ed. 1987). Another way of stating the

same meaning of the verb “forward” is to “transmit.” *Id.* The plain and ordinary use of the word does not require personal delivery by the peace officer. The verb form of “forward” also encompasses affirmative directions to another or use of established procedures to achieve a result. If the Legislature had intended to impose a specific duty on the peace officer to personally mail or deliver the report to the department, it could certainly have done so. The choice of the word “forward” rejected such specific requirements and implicitly authorized a variety of possible methods of transmission.

9. 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 “forward[ed]” the report to the department. The hearing officer properly received the sworn report. The burden then rested on the plaintiff to disprove the contents of the sworn report, which he failed to do.

10. 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 appellant was operating or in actual physical control of a motor vehicle in violation of § 60-6,196; and,

b. The appellant refused to submit to or failed to complete a chemical test after being requested to do so by the peace officer in violation of § 60-6,197.

11. The decision of the director should be affirmed.

JUDGMENT:

IT IS THEREFORE ADJUDGED that:

1. The order of revocation rendered on June 5, 2002, 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 **September 18, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

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 Holt 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 _____.

William B. Cassel, District Judge

Mailed to: