

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

DAVID R. WALTON,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF
MOTOR VEHICLES,**

Defendant-Appellee.

Case No. CI02-27

JUDGMENT ON APPEAL

DATE OF HEARING: September 27, 2002.

DATE OF RENDITION: September 29, 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: David M. Streich, Brown 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 failure to serve the notice required by §§ 60-6,205(4) or 60-6,205(5)(a).

4. The hearing record shows that a blood test was utilized and that the results were not available while the appellant was in custody. Section 60-6,205(4) imposes a service requirement relating to §§ 60-6,205(2) (refusal to submit to the chemical test while in custody) and 60-6,205(3) (chemical test results are available while subject remains in custody). By its own terms, the service requirement of § 60-6,205(4) does not apply where the test results only become available later.

5. Section 60-6,205(5)(a) does not by its terms require any service on the appellant. Thus, the specific allegation made by the appellant lacks merit.

6. Section 60-6,205(5)(b) does impose a mailing requirement on the director. The agency record does not directly document compliance with the service requirement. But the sworn report shows administration of the oath to the arresting officer on June 13, 2002, and the testimony shows that it was mailed by the officer to the department. At least one day of transit time to the department may be inferred even if no weight is given to the "received" stamp on the sworn report purporting to show that the sworn report was received by the department on June 17. The appellant's petition for administrative hearing, received

without objection, shows a “received” stamp by the department of June 24, 2002. The filing of the appellant’s petition for administrative hearing raises at least an inference of service by the department in compliance with § 60-6,205(5)(b). The record contains no evidence to raise a contrary inference. This court concludes that the record provides sufficient evidence of service of notice to the appellant. As the case of *Kuebler v. Abramson*, 4 Neb. App. 420, 544 N.W.2d 513 (1996), cited by the appellant notes, the purpose of the requirement is to provide notice to the driver of the government action and afford a reasonable opportunity to contest the action. That purpose has obviously been fulfilled.

7. At oral argument, appellant urged a somewhat different claim, i.e., that the arresting officer failed to submit the sworn report within ten days after receipt of the chemical test. Appellant asserted that both a breath test (with results presumably available immediately) and a blood test were administered. However, the record shows no indication of the administration of a breath test. The record shows only a blood test with delayed results. The record shows the receipt of blood test results on June 8, and completion of the sworn report on Thursday, June 13. Even if mailed that same date, two days of mail transit time between this area of the state and the department’s office in Lincoln would not be unusual, which would easily result in the document not being received by the department until Monday, June 17. Even if no weight is given to the “received” stamp on the sworn report, the evidence fails to establish that the report was not received by the department within 10 days after the arresting officer received the blood test results. The substitute claim also lacks merit.

8. 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 was operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of § 60-6,196(1).

9. The decision of the director should be affirmed.

JUDGMENT:

IT IS THEREFORE ADJUDGED that:

1. The order of revocation rendered on July 10, 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 29, 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 Brown 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: