

IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA

NICHOLAS M. HAMLING,
Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF
MOTOR VEHICLES,**

Defendant-Appellee.

Case No. CI03-20

JUDGMENT ON APPEAL

DATE OF HEARING: May 20, 2003.

DATE OF RENDITION: May 20, 2003.

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

APPEARANCES:

For appellant: Rodney J. Palmer without appellant.

For 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. See *Gillespie v. Nebraska Dep't of Motor Vehicle*, 2001-036 (Neb. Dist. Ct., 8th Dist., 2001).

3. The appellant asserts that the law enforcement officer's testimony was insufficient on several matters. However, these arguments rest upon the erroneous assumption that the appellee had the burden of proof on the issues at the hearing. 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. See also *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002) (proper sworn report frees department in a.l.r. proceeding from establishing the foundational elements which would be necessary for the admission of a test in a driving under the influence prosecution). Although the department did not adduce testimony to demonstrate the presence of probable cause, the department did not bear the burden of doing so. Instead, the appellant had the burden to adduce testimony demonstrating the *absence* of probable cause. The appellant failed to meet that burden. It is not sufficient to merely point to what the department did not prove.

4. The appellant attacks the sworn report as incomplete or inadequate in certain respects. In each instance as a blank line or unchecked box, the blank is not completed or box checked because it does not apply in the instance of a blood test with delayed results. That is the situation here. The reasons stated for the arrest bear a reasonable relationship

to the evidence and, while succinct, are sufficient. The appellant's claims regarding the sworn report lack merit.

5. 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).

6. The decision of the director should be affirmed.

JUDGMENT:

IT IS THEREFORE ADJUDGED that:

1. The order of revocation rendered on February 27, 2003, 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 **May 20, 2003**;
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 both the Cherry County Attorney and the Nebraska Attorney General.**

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 ("Revocation order affirmed; stay dissolved; costs taxed to appellant").

Done on _____, 20____ by _____.

Enter judgment on the judgment record.

Done on _____, 20____ by _____.

William B. Cassel
District Judge

Mailed to: