

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

BRANDON P. SEARS,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF
MOTOR VEHICLES,**

Defendant-Appellee.

Case No. CI03-30

JUDGMENT ON APPEAL

DATE OF HEARING: November 14, 2003.
DATE OF RENDITION: November 18, 2003.
DATE OF ENTRY: Court clerk’s file-stamp date per § 25-1301(3).

APPEARANCES:
For appellant: Rodney J. Palmer with appellant.
For appellee: Charlotte Koranda, Assistant Attorney General, appearing telephonically.

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. Neither party submitted any brief.

4. The appellant assigns error that the hearing officer failed to dismiss the action for failure to produce or to give a hearing on the appellant's motion to produce. The record shows that a designee of the director served a response to the motion. Exhibit 3-2. The applicable regulation states that discovery motions may be granted or denied at the director's discretion. 247 Neb. Admin. Code, ch. 1, § 008.01. This court finds no abuse of discretion in the director's response.

5. The appellant claims that the hearing officer erred by failing to conduct a pretrial conference at the appellant's request. Section 84-913.01 states that the hearing officer "may determine, subject to the agency's rules and regulations, whether a prehearing conference will be conducted." NEB. REV. STAT. § 84-913.01 (Reissue 1999). The language is clearly permissive. The appellant does not cite nor has this court found any agency rule or regulation mandating a prehearing conference. The alleged error lacks merit.

6. The appellant asserts the hearing officer erred by refusing to strike the director's response to the motion to produce because it was not signed by an attorney at law. Representing the interests of others before an administrative agency can constitute the practice of law. *State ex rel. Johnson v. Childe*, 147 Neb. 527, 23 N.W.2d 720 (1946). However, the record demonstrates that the individual signing the response did not act in the capacity of a representative or advocate of a party before the director. Rather, the individual exercised the power of the director as the director's designee. The statutes do not require that the director be a licensed attorney. If the director, as a non-lawyer, can exercise the director's power, this court perceives no legal impediment to delegation of such power to a non-lawyer. This claim lacks merit.

7. The appellant claims that the hearing officer failed “to provide video [tape] acknowledged to be in existence.” Nothing in this record shows that the department refused to issue a subpoena or otherwise frustrated any efforts *by the appellant* to obtain the video tape. The appellant clearly expects the department to do his investigation. Neither the statutes nor the regulations impose any such burden on the department.

8. The appellant claims that the department failed to prove delivery of the sworn report to the department in compliance with the “mailbox” presumption. This court previously rejected a nearly identical claim. *Schifferrn v. Nebraska Dep’t of Motor Vehicle*, 2002-095 (Neb. Dist. Ct., 8th Dist., 2002). The appellant does not cite nor has this court found any contrary precedent. The claim lacks merit for the reasons explained in *Schifferrn*.

9. The appellant assigns error in failing to “show [a] valid stop because no violation of law had occurred or was occurring according to [the] law enforcement officer.” The testimony shows that the law enforcement officer did not “stop” the appellant’s vehicle. Rather, the officer observed the appellant’s vehicle already stopped at the side of the road straddling the white or “fog” line, with one-quarter of the vehicle in the eastbound lane and three-quarters on the shoulder. The officer observed the vehicle’s headlights. Although not absolutely clear, the testimony implies that the vehicle’s motor was running. The observations occurred on a well-traveled highway in the rural area shortly before 3:00 o’clock in the morning. These circumstances provided objective grounds for reasonable suspicion of unlawful activity or a motorist in need of assistance. The officer properly investigated to confirm or refute the suspicion. The investigation resulted in further observations concerning probable cause to believe that the appellant was operating or in the actual physical control of a motor vehicle in violation of § 60-6,196. This claim also lacks merit.

10. 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). The appellant failed to meet that burden.

- 11. 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 a chemical test after being requested to do so by the peace officer in violation of § 60-6,197.

12. The decision of the director should be affirmed.

JUDGMENT: IT IS THEREFORE ADJUDGED that:

- 1. The order of revocation rendered on August 27, 2003, is affirmed.
- 2. The suspension of such revocation on appeal under NEB. REV. STAT. § 60-498.04 (Supp. 2003) (formerly codified at § 60-6,208) 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 at **Ainsworth**, Nebraska, on **November 18, 2003**;
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.
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 _____.

BY THE COURT:

William B. Cassel
District Judge

Mailed to: