

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

MARTIN RAY PAINTER,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF
MOTOR VEHICLES,**

Defendant-Appellee.

Case No. CI03-37

JUDGMENT ON APPEAL

DATE OF HEARING: December 12, 2003.
DATE OF RENDITION: December 18, 2003.
DATE OF ENTRY: Court clerk’s file-stamp date per § 25-1301(3).

APPEARANCES:

For appellant: Rodney J. Palmer without appellant.
For appellee: Milissa Johnson-Wiles, 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 claims that the director denied the appellant due process by failing 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 7. 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. The response shows and the appellant's argument conceded that the motion was untimely. This court finds no abuse of discretion in the director's response.

5. The appellant claims that the director denied the appellant due process by failing to grant a rehearing on the appellant's motion to produce or failing to grant a continuance of the hearing, after a showing of substantial injustice. The only item in the record conceivably qualifying as a showing of substantial injustice is paragraph 3 of appellant's counsel's affidavit, stating: "That it is believed by the Appellant that substantial injustice will result if discovery is not allowed herein and that the [department] and the arresting officer herein has [sic] documents and a video which may be instrumental in the defense of [appellant's] case herein." Exhibit 5. "Substantial injustice" means actual violation of the right or rights of the appellant. 247 Neb. Admin. Code, ch. 1, § 002.09. Motions for discovery "shall be supported by *facts* sufficient to permit the Director to make a reasoned decision." 247 Admin. Code, ch. 1, § 008.03 (emphasis supplied). The assertion upon "belief" fails to constitute a showing of *facts*. An affidavit upon "belief" cannot be punished for false statement and cannot be the basis for a *factual* determination.

6. The appellant claims that the director denied due process by failing to conduct a hearing on the appellant's request for a prehearing conference. 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.

7. The appellant characterizes the three issues above as a denial of due process. That does not change the result. The Nebraska Supreme Court has clearly recognized the mandate of due process in the administrative license revocation context. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). In administrative proceedings, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.*

8. The specific dictates of due process require consideration of three factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.*

9. Unlike the situation in *Marshall*, the procedural requirements here do not affect the appellant’s ability to present evidence. At least, the appellant made no showing of any specific facts tending to establish any reasonable probability of such an effect. At the hearing, appellant’s counsel asked no questions of the arresting officer concerning any documents or any video. This record does not support any contention that the procedures frustrated the appellant’s right to present evidence concerning the accusation. The affidavit appears to attempt the “fishing expedition” that the Supreme Court declined to condone in *Marshall*. The procedures utilized comported with the requirements of due process under the circumstances. The appellant’s due process claims lack 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 was operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of § 60-6,196(1).

12. The decision of the director should be affirmed.

JUDGMENT:

IT IS THEREFORE ADJUDGED that:

1. The order of revocation rendered on September 19, 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 **December 18, 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.
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: