

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

NIELSEN V. DEPARTMENT OF MOTOR VEHICLES

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GREG NIELSEN, APPELLEE,  
V.  
DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

Filed March 11, 2008. No. A-06-1283.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

The State of Nebraska, Department of Motor Vehicles (the Department), appeals the judgment of the district court for Hall County, which reversed an order of the Department revoking the driver's license of Greg Nielsen for 90 days. The issue on appeal involves whether Nielsen was observed for 15 minutes before a breath test was conducted, as required by regulation. We affirm the decision of the district court.

BACKGROUND

On May 14, 2006, David Waskowiak, an investigator with the Hall County Sheriff's Department, stopped Nielsen for speeding. Upon contact with Nielsen, Waskowiak detected an odor of alcohol coming from Nielsen and also observed that Nielsen's eyes were "glassy" and his movements were slow. Nielsen told Waskowiak that he had been drinking all day. Waskowiak asked Nielsen to submit to field sobriety tests, which Nielsen did. Nielsen showed signs of impairment and subsequently failed a preliminary breath test. At that point, Waskowiak placed Nielsen under arrest for driving under the influence of alcohol and transported him to the Hall County Department of Corrections. After arriving at the Department of Corrections, Nielsen submitted to a chemical breath test, which disclosed a breath alcohol content of .272 grams of alcohol per 210 liters of breath. Waskowiak completed a Notice/Sworn Report/Temporary License form (sworn report), which indicated the reasons for arrest and that Nielsen submitted to a breath test that indicated a breath alcohol content of 0.08 or more. The sworn report

specifically stated that Nielsen's breath alcohol content was .272. The sworn report was forwarded to the Department.

Nielsen requested an administrative license revocation hearing. At the hearing, Waskowiak's sworn report was received into evidence. A "Datamaster Checklist Technique" form (checklist) signed by Waskowiak was also entered into evidence, which by regulation must be completed by an officer when conducting a breath test. See 177 Neb. Admin. Code, ch. 1, § 007.02C (2004). The checklist includes several directions that the officer must follow when administering a breath test, including a direction requiring the officer to "Observe subject for 15 minutes prior to testing." The direction also requires the officer to record the time observation began and contains a blank line for the officer to write the time. Waskowiak entered "0002" as the time the observation period began. Next to each direction on the checklist is a box that the officer is to check off upon completion of each respective direction. Waskowiak checked all of the boxes indicating that he had completed each direction.

The test record card from Nielsen's breath test was also entered into evidence. A test record card is the card or tape printed out by the breath testing machine upon completion of a test which states the test results and the time the test was conducted. The test record card indicated that Nielsen's breath test occurred at "00:13."

At the hearing, Waskowiak testified that he observed Nielsen for 15 minutes prior to administering the breath test to Nielsen. Waskowiak testified that he used his own watch to time the 15-minute period. Waskowiak testified that according to his watch, the observation period began at 00:02, or 12:02 a.m., and Nielsen submitted to the breath test at 00:18, or 12:18 a.m. Waskowiak also testified that he followed the checklist in accordance with title 177 of the Nebraska Administrative Code.

On June 13, 2006, the hearing officer recommended that Nielsen's license be revoked for the statutory period. On June 15, the director of the Department adopted the hearing officer's recommendation and revoked Nielsen's driver's license for 90 days. Nielsen appealed the decision to the district court, which reversed the director's decision, finding that Nielsen met his burden to disprove the Department's prima facie case. The district court found that the checklist and the test record card show noncompliance with 177 Neb. Admin. Code, ch. 1, § 002.01E (2004), because the two documents indicate that Nielsen was not observed for the required 15 minutes before the breath test was administered. The Department appeals.

#### ASSIGNMENTS OF ERROR

On appeal, the Department assigns that the district court erred in finding a lack of compliance with § 002.01E and in finding that the Department's prima facie case was rebutted as a result.

#### STANDARD OF REVIEW

A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005); *Hauser v. Nebraska Police Stds. Adv. Council*, 269 Neb. 541, 694 N.W.2d 171 (2005). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the

record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Id.*

#### ANALYSIS

In the instant case, the sworn report prepared by Waskowiak was entered into evidence and complied with the requirements set forth in Neb. Rev. Stat. § 60-498.01 (Reissue 2004). Once the Department establishes that the officer provided a sworn report containing the recitations required by statute, it has made a prima facie case for license revocation, and the director is not required to prove that the recitations are true. See, *Hahn v. Neth, supra; Valeriano-Cruz v. Neth*, 14 Neb. App. 855, 716 N.W.2d 765 (2006). Rather, it becomes the motorist's burden to prove that one or more of the recitations in the sworn report are false. *Id.* The Department established a prima facie case for revocation of Nielsen's license, and the burden then shifted to Nielsen to show that one or more of the recitations in the sworn report is false. The district court found that Nielsen met his burden because the checklist and test record card when read together show a lack of compliance with § 002.01E, thereby invalidating the breath test and making the breath test result on the sworn report false.

Section 002.01E requires that "testing records must show adherence to the approved method, and techniques." The testing records consist of two items, the checklist and the test record card. The district court found that the checklist and the test record card show an 11-minute observation period, rather than the required 15-minute period, and thus, that the testing records show noncompliance with "the approved methods and techniques."

Pursuant to Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 2006) of the Administrative Procedure Act, the district court reviews an agency decision "de novo on the record of the agency." In a true de novo review, the district court's decision is to be made independently of the agency's prior disposition, and the district court is not required to give deference to the findings of fact and the decision of the agency hearing officer. *Langvardt v. Horton*, 254 Neb. 878, 581 N.W.2d 60 (1998); *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995).

An appellate court reviews the district court's decision for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Reissue 1999); *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). As such, our review is limited to whether the district court's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Hahn v. Neth, supra; Hauser v. Nebraska Police Stds. Adv. Council*, 269 Neb. 541, 694 N.W.2d 171 (2005). For the purpose of reviewing an order of an administrative agency, competent evidence means evidence which tends to establish the fact in issue. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

In the instant case, the testing records present evidence which, if believed, is sufficient to rebut the presumption arising from the sworn report. Waskowiak indicated on the checklist that the 15-minute observation period began at "0002," and the test record card shows that the test was completed at 00:13. Thus, the face of the testing records show an elapsed time of only 11 minutes, contrary to the 15-minute period required by the regulation. Although Waskowiak testified that he observed Nielsen for the required 15 minutes prior to administering the breath

test and used his own watch to do so, the district court, in its de novo review, was permitted to resolve conflicts in the evidence and was not required to accept Waskowiak's testimony.

We conclude that the district court's factual finding that the testing records fail to adhere to the approved method and techniques, specifically that the 15-minute observation period was not met, is supported by competent evidence. Accordingly, we cannot conclude that the district court erred in determining that Nielsen met his burden to disprove the Department's prima facie case.

#### CONCLUSION

We conclude that there is competent evidence to support the district court's finding that the testing records did not comply with the approved methods and techniques as required by 177 Neb. Admin. Code, ch. 1, § 002.01E, and, therefore, that Nielsen disproved the Department's prima facie case. Accordingly, we affirm the judgment of the district court.

AFFIRMED.