

20090156

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUN 22 2009

Brock Joel Schlosser,

Appellee,

v.

North Dakota Department
of Transportation,

Appellant.

STATE OF NORTH DAKOTA

Supreme Ct. No. 20090156

District Ct. No. 08-08-C-02699

APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE GAIL HAGERTY

BRIEF OF APPELLANT

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STATEMENT OF ISSUE

Schlosser was arrested for DUI and issued a Report and Notice after the results of a blood test showed his alcohol concentration was .15 percent by weight. Schlosser requested a hearing. At the hearing testimony was given by the arresting officer and several exhibits were introduced into evidence, including Submission for Blood Form 104. However, the specimen's submitter's checklist was not included. Instead, a blank copy of the checklist was provided. The officer testified he completed all of the steps on the checklist. Schlosser did not contradict or impeach the officer's testimony regarding the completion of the checklist steps. Was Schlosser's blood test fairly administered?

STATEMENT OF CASE

On September 14, 2008, North Dakota Highway Patrol officer Sergeant Jody Skogen ("Skogen") arrested Brock Joel Schlosser ("Schlosser") for driving under the influence of intoxicating liquor. App. 12. Skogen issued a Report and Notice to Schlosser after the results of a blood test showed that Schlosser's alcohol concentration was .15 percent by weight. App. 30; App. 32. The Report and Notice informed Schlosser of the Department's intent to suspend his driving privileges. App. 30.

Schlosser requested an administrative hearing. The hearing occurred on October 22, 2008. App. 1. Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Schlosser's driving privileges for 365 days. App. 28-29. Schlosser appealed that decision to the Burleigh County District Court. Judge Gail Hagerty reversed the hearing officer's decision, and Judgment was entered on April 2, 2009. App. 43. The Department appealed from the Judgment to this Court. App. 44. The Department asks this Court to reverse the Judgment of the Burleigh County District Court and affirm the administrative suspension of Schlosser's driving privileges for 365 days.

STATEMENT OF FACTS

On September 14, 2008, Skogen arrested Schlosser for driving under the influence of alcohol. App. 12. Schlosser submitted to a blood test and blood was drawn by a registered nurse at the Mandan Police Department. Id. Skogen performed the tasks on the state toxicologist's blood specimen submitter's checklist. App. 13. He put the blood tube in the box along with Form 104, sealed the box and mailed it to state toxicology on September 15, 2008. Id.

The test results indicated that Schlosser had an alcohol concentration of .15 percent by weight. App. 32. Skogen mailed the Report and Notice to Schlosser, which indicated that the Department intended to suspend his driving privileges. App. 30.

Schlosser requested a hearing, and a hearing was held on October 22, 2008. App. 1. At the hearing, testimony was given by Skogen and several exhibits were introduced into evidence, including the Analytical Report and Submission for Blood Form 104. App. 2-15. Skogen did not forward a completed copy of the specimen submitter's checklist to the Department. Thus, a completed copy of the checklist was not introduced into evidence. App. 14. A blank copy of the specimen submitter's checklist was provided. App. 34. Skogen testified that he completed all of the steps on the specimen submitter's checklist. App. 13. Following the hearing, the hearing officer issued her decision suspending Schlosser's driving privileges for 365 days. App. 28-29.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

In her Order reversing the hearing officer's decision, Judge Gail Hagerty stated as follows:

Schlosser also argues there was not sufficient evidence from which the administrative law judge could conclude the blood test was properly administered. A checklist is completed by the persons involved in testing. In this case, the checklist was not submitted as evidence. The trooper was asked if he completed all

the steps listed on the checklist and indicated he did. However, there was no further testimony about what those steps were and how they were completed.

The trooper's conclusory statement is not sufficient to provide evidence that the test was properly administered. The findings of fact in this matter are not supported by the evidence.

The Court reverses the decision to suspend Schlosser's driving privileges.

App. 40-42.

STANDARD OF REVIEW

"An appeal from a district court decision reviewing an administrative license suspension is governed by the Administrative Agencies Practice Act, Chapter 28-32, N.D.C.C." McPeak v. Moore, 545 N.W.2d 761, 762 (N.D. 1996). "This Court reviews the record of the administrative agency as a basis for its decision rather than the district court decision." Lamb v. Moore, 539 N.W.2d 862, 863 (N.D. 1995) (citing Erickson v. Dir., N.D. Dep't of Transp., 507 N.W.2d 537, 539 (N.D. 1993)). "However, the district court's analysis is entitled to respect if its reasoning is sound." Kraft v. State Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572.

This Court's review "is limited to whether (1) the findings of fact are supported by a preponderance of the evidence; (2) the conclusions of law are sustained by the findings of fact; and (3) the agency's decision is supported by the conclusions of law." McPeak, 545 N.W.2d at 762 (citing Zimmerman v. N.D. Dep't of Transp. Dir., 543 N.W.2d 479, 481 (N.D. 1996)).

Findings by an administrative agency are sufficient if the reviewing court is able to understand the basis of the fact finder's decision. In re Boschee, 347 N.W.2d 331, 336 (N.D. 1984). A court must not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). Rather, a reviewing court determines only "whether a reasoning

mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record.” Id. (citation omitted).

LAW AND ARGUMENT

The hearing officer’s determination that blood testing was conducted in accordance with the approved method and fairly administered is not against the greater weight of the evidence.

The North Dakota Supreme Court has observed that the “fair administration of the blood test can . . . be shown by . . . proof of compliance with the State Toxicologist’s directions which go to the scientific accuracy of the test.” Kummer v. Backes, 486 N.W.2d 252, 255 (N.D. 1992). “The state toxicologist’s directions for sample collection and preservation are contained in Form 104.” Id. “The fact that Form 104 represents the State Toxicologist’s approved method for blood collection . . . is not subject to reasonable dispute.” State v. Jordheim, 508 N.W.2d 878, 882-83 (N.D. 1993).

This Court has elaborated as follows:

Form 104 has three sections that correspond to the conduct of the three people who normally participate in administering the blood test. The top half of the form includes the name of the person whose blood is drawn, and a list of directions for both the specimen collector and the recipient of the sample at the laboratory. The bottom half of the form contains a similar list for the specimen submitter. The submitter, who will usually be a police officer, is directed to retain this half of Form 104 in police records, undoubtedly for later evidentiary use.

Id. at 882-83.

The issue in this appeal is whether there was a showing of scrupulous compliance with the steps of the approved method performed by the specimen submitter. The steps of the approved method to be performed by the specimen submitter, who usually is the arresting officer, are contained in a blank copy of the specimen submitter’s checklist introduced into evidence at Schlosser’s hearing. App. 34. A completed copy of the specimen submitter’s checklist was

not introduced into evidence. However, there is no statutory requirement that the specimen submitter's checklist must be submitted into evidence.

While it is true that foundation for admission of blood test results into evidence can be established entirely through properly completed and certified documents, nothing prevents foundation from being established through testimony. See Jordheim, 508 N.W.2d at 881. In Jordheim, a completed copy of the specimen submitter's checklist was not introduced into evidence. This Court observed in Jordheim that "[w]ithout this completed form, the documents introduced did not show fair administration of Jordheim's blood test." Id. at 882. Nonetheless, this Court noted, "[t]o overcome this omission, [the arresting officer] testified that he performed the steps required in the form." Id. (emphasis added.) The extent of the arresting officer's testimony was described by this Court as follows: "Here, Officer Renner testified he did 'everything' required by Form 104, and 'filled out the rest of the proper paper work.'" Id. at 883. This Court concluded that "this testimony, coupled with the documentary exhibits, established fair administration through scrupulous compliance with Form 104." Id. at 882.

In this case, the hearing officer made a factual finding that "[b]lood testing was done in accordance with the state toxicologist's approved method." App. 29. The hearing officer also commented that Schlosser was "properly tested." Id. This Court has observed that "we will not disturb the agency's findings unless they are against the greater weight of the evidence." Johnson v. N.D. Dep't of Transp., 530 N.W.2d 359, 361 (N.D. 1995) (citation omitted). The hearing officer's determination that Skogen's testimony showed compliance with the approved method for specimen submission is not against the greater weight of the evidence.

There are five steps to the approved method for specimen submission. App. 34. Skogen testified that he correctly completed each of the listed steps. App. 13. Schlosser did not object, attempt to counter, or impeach Skogen's testimony. His only objection was that an officer is required to submit a completed specimen submitter's checklist and that testimony that the steps were completed is insufficient. App. 14-15. However, this Court has specifically rejected that position. See Jordheim, 508 N.W.2d 878, 882 (N.D. 1993).

The argument that Skogen's testimony was too conclusory also is unpersuasive. Skogen's testimony that he completed all of the steps is equivalent to the testimony in Jordheim that the officer did "everything" required by Form 104. Skogen's testimony about the checklist, while not expansive, constitutes a factual assertion that each of the necessary steps was completed. This testimony was subject to challenge. However, Schlosser did not attempt to cross-examine or impeach Skogen's factual assertion that the necessary steps were completed. Therefore, there is nothing in the record contradicting Skogen's factual testimony that he completed each of the steps.

Along the same lines, in McNamara v. Dir., N.D. Dept. of Transp., 500 N.W.2d 585 (N.D. 1993), this Court noted that, when the face of the Form 104 does not establish fair administration of a chemical test, "the State must therefore do so by other evidence." Id. at 589 (quoting State v. Schwalk, 430 N.W.2d 317, 323 (N.D. 1988)). This Court added:

We find that the test results were properly admitted because 'other evidence' was offered by the DOT to prove fair administration of the blood test. [Sergeant] Nelson testified that each and every one of the nine steps on the checklist was followed. Nelson's testimony provided the necessary proof needed to show that the approved methods for conducting the blood test were 'scrupulously' met. We have acknowledged numerous times that such testimony, if complete, satisfies the fair administration requirement, allowing test results into evidence.

McNamara, 500 N.W.2d at 590 (citations omitted.) Thus, this Court has explicitly rejected the argument that compliance with the approved method for specimen submission can only be established by a fully completed specimen submitter's checklist. Specifically, compliance with the approved method for specimen submission also can be established through "testimony" or "other evidence".

N.D.C.C. § 39-20-07(5) provides in pertinent part:

The results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with devices approved by the director of the state crime laboratory . . .

The plain language of the statute does not require written confirmation either that a sample was properly obtained or the test was fairly administered. No law prohibits the Department from relying on testimony to show fair administration of a chemical test.


In this case, the test was shown to be fairly administered through a combination of Skogen's unrefuted testimony, completed specimen collector's checklist, and the analytical report and Form 104. A reasoning mind reasonably could have concluded, as the hearing officer did, that there was scrupulous compliance with the approved method, for specimen submission, and that Schlosser's test was fairly administered. Therefore, grounds do not exist for reversing the hearing officer's decision.

CONCLUSION

The Department respectfully requests that this Court reverse the judgment of the Burleigh County District Court and affirm the Department's decision suspending Schlosser's driving privileges for 365 days.

Dated this 22nd day of June, 2009.

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STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

ss.


Melissa Castillo states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 22nd day of June, 2009, I served the attached **BRIEF OF APPELLANT** and **APPENDIX OF APPELLANT** upon Brock Joel Schlosser, by and through his attorney Chad R. McCabe, by placing a true and correct copy thereof in an envelope addressed as follows:

Chad R. McCabe
Attorney at Law
523 North Fourth Street
Bismarck, ND 58501

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.


Melissa Castillo

Subscribed and sworn to before me
this 22nd day of June, 2009.


Notary Public

DONNA J. CONNOR
Notary Public
State of North Dakota
My Commission Expires Aug. 6, 2009