IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 30, 2009
STATE OF NORTH DAKOTA

Ines M. Dunn,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	Supreme Court No. 20090317
	)	
North Dakota Department of, Transportation,	)	Burleigh County No. 08-09-C-1492
	)	
	)	
Defendant/Appellee.	)	

BRIEF OF APPELLANT

Appeal from Judgment, dated and filed October 7, 2009

Entered Upon October 7, 2009, Order for Judgment and

September 29, 2009, Order upholding hearing officer's decision

Burleigh County District Court

South Central Judicial District

The Honorable Bruce B. Haskell

Dan Herbel
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[¶1] TABLE OF AUTHORITIES

[¶2] STATEMENT OF THE CASE

[¶3] On January 1, 2009, Ines Dunn was arrested for driving under the influence and was issued a temporary operator's permit that same day. (Exhibit 1b, Transcript of DOT Revocation Hearing). Ms. Dunn timely requested an administrative hearing. (Exhibit 1c). The Department of Transportation ("DOT" and "Department") set her hearing for January 20, 2009. (Appendix ("App.") at 15). Dunn appeared early for her administrative hearing but was turned away by the hearing officer. (App. 11-12). Even though there were eleven (11) days remaining within the thirty (30) day timeframe, the hearing was not rescheduled and no hearing was held.

[¶4] Ms. Dunn then applied to Burleigh County District Court for a Writ of Mandamus ordering the Director of the DOT to conduct an administrative hearing. (App. 4-18). The Honorable Gail Hagerty found that Ms. Dunn was wrongly denied her DOT hearing and ordered the Director to hold an administrative hearing for Ms. Dunn. (App. 19).

[¶5] Five (5) months after Dunn's original hearing date, the DOT held a hearing regarding Ms. Dunn's driving privileges. (Exhibit 2). Before and during her hearing, Ms. Dunn objected to the timeliness of the hearing and argued that pursuant to N.D.C.C. § 39-20-05 the hearing was not timely held. (App. 2-19; and DOT Administrative Hearing Transcript ("Tr.") at 2, lines ("L.") 3-4). The hearing officer did not address the N.D.C.C. § 39-20-05 argument and then revoked Ms. Dunn's driving privileges for one (1) year. *See* Hearing Officer's Decision (Transcript attachment).

[¶6] On June 30, 2009, Ms. Dunn filed a Notice of Appeal and Specifications of Error with the District Court alleging errors in the DOT administrative proceedings.

(App. 20-22). After Ms. Dunn filed her brief on appeal, the district court granted Dunn's appeal. (App. 33). The Department requested reconsideration of the Order after a subsequent Judgment was filed. (App. 54-59). The Court then reversed itself and vacated the Judgment, even though there was no request to vacate Judgment. (App. 61-62 and 74).

[¶7] On October 9, 2009, the Department mailed Dunn the second Judgment, Order for Judgment, and Notice of Entry of Judgment in this matter. (App. 77-78). On October 20, 2009, Dunn filed a Notice of Appeal to this Court seeking relief. (App. 79). Dunn appeals and asks that this Court vacate the Order for Judgment and Judgment filed October 7, 2009, in favor of the Department. Dunn also asks this court to reverse the decision of the district court and to reinstate her driving privileges. Dunn further asks that she be awarded attorney's fees and costs under N.D.C.C. § 28-32-50.

[¶8] STATEMENT OF THE ISSUES

I. Ms. Dunn's DOT hearing was not timely held, pursuant to N.D.C.C. § 39-20-05, and there were no compelling reasons to excuse non-compliance with the statute; consequently, the order is not in accordance with the law

II. Ms Dunn was denied fairness and due process throughout the conduct of the administrative proceedings

III. The award of attorney's fees and costs under N.D.C.C. § 28-32-50 is appropriate in this matter

IV. It was improper for the district court to apply N.D.R.Civ.P. 60(b) to its review of Ms. Dunn's administrative matter in order to vacate a validly entered Order and Judgment

[¶9] STATEMENT OF THE FACTS

[¶10] On January 1, 2009, Burleigh County Deputy Gary Schaffer arrested Petitioner Ines Dunn on suspicion of DUI and issued her a temporary operator's permit (Report and Notice form). (Exhibit 1b). On January 2, 2009, Ms. Dunn requested an administrative hearing concerning the potential suspension of her North Dakota driving privileges. (Exhibit 1c). Ms. Dunn's administrative hearing was scheduled for January 20, 2009, at 4:00 p.m., and Ms. Dunn received notice of said hearing. (App. 15).

[¶11] On January 20, 2009, Ms. Dunn fired Ralph Vinje as her attorney in this matter but she did not withdraw her request for an administrative hearing. (App. 11). The same day, January 20, 2009, at 3:40 p.m., Ms. Dunn appeared early for her 4:00 p.m. administrative hearing at the administrative hearing room at the Department of Transportation in Bismarck, ND. (App. 11).

[¶12] When Ms. Dunn appeared early for her 4:00 p.m. administrative hearing, Hearing Officer Mary Ellen Varvel informed her that the hearing had been cancelled by Mr. Vinje's secretary that same day. (App. 11). Ms. Dunn then told Hearing Officer Varvel that Dunn did not cancel the hearing and she concurrently informed Ms. Varvel that she still wanted a hearing concerning the potential suspension of her North Dakota driving privileges. (App. 11). Hearing Officer Varvel responded to Ms. Dunn by telling her that there would be no hearing and that her calendar was too full to re-schedule the hearing, even though there were still eleven (11) days remaining within the available thirty (30) days in which to hold a hearing. (App. 11). Hearing Officer Varvel then asked Ms. Dunn to leave the hearing room at the Department of Transportation. (App. 12).

[¶13] Hearing Officer Varvel then drafted a decision which stated that "Ines M. Dunn withdrew her request for a hearing concerning whether her North Dakota driving privileges should be revoked for one year;" in direct contradiction of what Ms. Dunn told her. (App. 16). Although, Hearing Officer Varvel indicates a January 20, 2009 hearing date on her Decision, it is abundantly clear that no hearing was afforded Ms. Dunn. (App. 16). Additionally, the Hearing Officer's Decision delineates the outcome as follows:

> "**DECISION:** None."

(App. 16).

[¶14] On February 19, 2009, Ms. Dunn wrote a letter to Hearing Officer Varvel which reiterated her desire to have an administrative hearing. (App. 17). Six days later, on February 25, 2009, Hearing Officer Varvel wrote a response letter to Ms. Dunn which stated:

> "The deadline for a hearing based on your January 1, 2009, arrest was January 31, 2009. No hearing will now be held."

(App. 18) (emphasis added). Hearing Officer Varvel also enclosed a copy of the January 20, 2009, Hearing Officer's Decision. (App. 18). No administrative hearing was held for Ms. Dunn.

[¶15] After the Department refused to hold an administrative hearing for Ms. Dunn, she applied to Burleigh County District Court for a Writ of Mandamus ordering the Director of the North Dakota Department of Transportation to conduct an administrative hearing. (App. 4-18). District Court Judge Gail Hagerty found that Ms. Dunn was wrongly denied her DOT hearing, was entitled to an administrative hearing,

granted Ms. Dunn's request for Mandamus, and ordered the Director to hold an administrative hearing for Ms. Dunn. (App. 19).

[¶16] Before her hearing, Ms. Dunn presented the hearing officer with a Pre-Hearing Motion to Dismiss. (App. 2-19). When the hearing commenced, Ms. Dunn properly lodged her argument in the proper forum by objecting to the timeliness of the hearing and argued that "based on 39-20-05, … the hearing is not timely held." (Tr. at 2, L. 3-4). The hearing officer did not address the timeliness argument, but instead replied:

> "… the order from Judge Hagerty, dated June 12th, 2009. In that order, Judge Hagerty orders that "The director of the Department of Transportation shall hold an administrative hearing for petitioner Dunn expeditiously and not later than 14 days from the date of this order." I intend to comply with Judge Hagerty's order, and so I'm going to deny your motion to dismiss and go forward with the hearing."

(Tr. at 2, L. 7-14).

[¶17] Also during the hearing, the hearing officer offered certain documents for admission into the record without authentication or any testimony for their support. Ms. Dunn's counsel objected to admission of the documents on foundational grounds because "[t]he officer did not testify as to these documents." (Tr. at 12, L. 5-7). The hearing officer overruled Ms. Dunn's objection. (Tr. at 12, L. 8-9). When Ms. Dunn asked for an explanation on the ruling instead of just the one-word "overruled," the hearing officer told Dunn's counsel:

> "you have not specified in what way the foundation is lacking; and, therefore, without specificity, it is not apparent to me what your basis is for the objection, therefore, it is deemed waived."

(Tr. at 12, L. 19-22). The hearing officer then made derogatory remarks to Dunn's counsel. (Tr. at 13, L. 24 – 14, L. 3). The hearing officer revoked Ms. Dunn's driving privileges for one (1) year.

[¶18] On June 30, 2009, Ms. Dunn filed a Notice of Appeal and Specifications of Error with the district court alleging errors in the DOT administrative proceedings. (App. 20-22). After Ms. Dunn filed her brief on appeal, the district court granted Dunn's appeal based on what the court perceived as an untimely response by the DOT, without reaching the merits of the case. (App. 33).

[¶19] On September 2, 2009, Judgment was entered in Dunn's favor. (App. 51-52). On September 3, 2009, the Department faxed a request for reconsideration of the Order but did not request that the Judgment be vacated. (App. 54-59). The Judgment was received by Dunn's counsel on September 4, 2009, in an envelope postmarked September 3, 2009. (App. 51-53). Dunn's counsel believed that the district court entered Judgment after reviewing the Department's request for reconsideration. Also, the Judgment was validly entered and the Department did not attack the Judgment.

[¶20] On September 29, 2009, the district court reversed itself and upheld the hearing officer's decision. (App. 61-62). On October 5, 2009, the Department then submitted a proposed Order for Judgment and Judgment that contained language to vacate the Judgment, even though there was no request to vacate Judgment. (App. 63-67). Because the Department mailed the proposed Order and Judgment to the wrong address, Dunn's counsel did not receive the paperwork until October 7, 2009. (App. 67).

[¶21] On October 7, 2009, Dunn's counsel faxed to the district court Dunn's objection to the new quasi-request to vacate the previously entered Judgment citing

supporting caselaw. (App. 68-73). The district court ignored Dunn's objection and entered Judgment in favor of the Department on October 7, 2009.

[¶22] STANDARD OF REVIEW

[¶23] This Court's "review of a district court decision on an administrative revocation of a driver's license is governed by the Administrative Agency's Practice Act, under Chapter 28-32, N.D.C.C." *See Baillie v. Moore*, 522 N.W.2d 748, 749 (N.D. 1994). "This Court will affirm the agency's decision unless:

> 1. The order is not in accordance with the law.
>
> 2. The order is in violation of the constitutional rights of the appellant.
>
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
>
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
>
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
>
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
>
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
>
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46." *See Lee v. NDDOT*, 2004 ND 7, ¶8, 673 N.W.2d 245. "In reviewing a license" revocation, this Court gives "deference to the Department's findings" and "determines only whether a reasoning mind could have concluded the Department's findings were supported by the weight of the evidence from the entire

record." *See Eriksmoen v. NDDOT*, 2005 ND 206, ¶7, 706 N.W.2d 610. "An agency's decisions on questions of law are fully reviewable." *See Schaaf v. N.D. Department of Transportation*, 2009 ND 145, ¶7, 771 N.W.2d 237.

[¶24] LAW AND ARGUMENT

I. Ms. Dunn's DOT hearing was not timely held, pursuant to N.D.C.C. § 39-20-05, and there were no compelling reasons to excuse non-compliance with the statute; consequently, the order is not in accordance with the law

[¶25] N.D.C.C. § 39-20-05 commands that if a person requests a hearing at the Department of Transportation, "[t]he hearing must be held within thirty days after the date of issuance of the temporary operator's permit." *See* N.D.C.C. § 39-20-05 (emphasis added). Although the statutory language of N.D.C.C. § 39-20-05 is not jurisdictional, it is nevertheless required and imperative. In *Greenwood v. Moore*, this Court commented on the "imperativeness" of holding a timely DOT hearing. *See Greenwood v. Moore,* 545 N.W.2d 790 (N.D. 1996).

[¶26] In *Greenwood,* Fargo police officers "were called to the scene of an accident" where, upon arrival, "they saw that someone had driven a pickup off the street into the front yard of a home, struck a mailbox, and left the pickup stuck in snow." *See Greenwood,* 545 N.W.2d 790, 792 (N.D. 1996). Then, shortly after the officers observed "a car at the scene, with Greenwood between the car and the pickup, attempting to attach a tow line to the vehicles," they investigated the matter and subsequently arrested Greenwood for DUI. *See id*.

[¶27] After Greenwood timely requested a DOT hearing to challenge the suspension of his driving privileges, the Department set the hearing for the twenty-ninth

day following the issuance of the temporary operator's permit. *See Greenwood*, 545 N.W.2d at 792. Shortly after the DOT hearing commenced, the hearing was suspended for completion on another day and thereafter twice reset. *See id*. When the hearing was finally reconvened, Greenwood objected to the hearing "because over thirty days had elapsed" since the issuance of Greenwood's temporary operator's permit. *See id*. The hearing officer overruled Greenwood's objection and ultimately ordered the suspension of Greenwood's driver's license. *See id*. Greenwood then appealed to the district court. *See id*.

[¶28] The district court reversed the order of the hearing officer, on grounds other than the timeliness of the hearing, and the Department appealed to the North Dakota Supreme Court. *See Greenwood,* 545 N.W.2d at 792-93. This Court affirmed the ruling of the lower court and explained that "the district court correctly reversed the Department's decision suspending Greenwood's driving privileges," but did so because "the Department did not hold a timely hearing." *See id* at 796. This Court ruled:

> "[W]hile the legislature did not make the time limit jurisdictional, it clearly intended the time for a hearing to be imperative. Therefore, we conclude that the Department is authorized only to take the license of an impaired driver expeditiously."

See Greenwood, 545 N.W.2d at 796 (emphasis added).

[¶29] The *Greenwood* court stated that "[t]he key language in NDCC 39-20-05 directs that "[t]he hearing must be held" within the designated time." *See Greenwood,* 545 N.W.2d at 794 (emphasis added). This Court remarked that "[t]he word 'must' … indicates a mandatory and not merely a directory or nonmandatory duty" and "implies obligation or compulsion -- to be legally or morally obliged to do a given thing." *See id*

at 795. In view of that, this Court declared that "the imperative effect of the legislative direction is strong" and that "[t]he statute mandates an expedited administrative hearing." *See id*.

[¶30] The *Greenwood* court, recognizing the imperative and mandatory language of N.D.C.C. § 39-20-05 directing expeditiousness, made clear that "[t]he appropriate standard for excusing the delay of a license suspension hearing is contained in the Department's own regulation … NDAC 37-03-03-09," which holds paramount "the time constraints provided by North Dakota Century Code section 39-20-05 for holding the hearing." *See Greenwood,* 545 N.W.2d at 796. In emphasizing the essential need to hold an expeditious hearing under N.D.C.C. § 39-20-05, the high court held that "[t]he Department can excuse its own failure to meet the hearing deadline only when it has "most compelling reasons" for the delay." *See id* (emphasis added).

[¶31] In employing the appropriate time standard, this Court stated that "[t]he Department offers no explanation why it delayed completion of Greenwood's hearing so long, and thus no "most compelling reason" is apparent here" to excuse the hearing being "delayed past the thirty-day maximum." *See Greenwood,* 545 N.W.2d at 796. The Court concluded that the hearing was not timely and expeditiously held as commanded by N.D.C.C. § 39-20-05 and Section 37-03-03-09 of the North Dakota Administrative Code. *See id*.

[¶32] In our case, like in *Greenwood*, the DOT hearing was not held within thirty days of issuance of the temporary operator's permit. Here, Deputy Schaffer issued Ms. Dunn a temporary operator's permit on January 1, 2009. (Exhibit 1b). Ms. Dunn timely requested a hearing on January 2, 2009. (Exhibit 1c). On January 20, 2009, Ms. Dunn

timely appeared for her administrative hearing and informed the hearing officer that she still wanted a hearing. (App. 11). The hearing officer told Ms. Dunn that there would be no hearing, that her calendar was too full to re-schedule the hearing, and asked Ms. Dunn to leave the hearing room at the Department of Transportation. (App. 11-12). No administrative hearing was held within thirty (30) days of issuance of the temporary operator's permit.

[¶33] After Dunn was turned away from her hearing by the hearing officer and after Dunn struggled through the Mandamus process, District Court Judge Gail Hagerty vindicated Dunn's position by ruling that Dunn had been improperly denied a hearing and that she was entitled to a hearing. (App. 19). Finally, a DOT hearing was held on June 24, 2009 – one hundred seventy-four (174) days after issuance of the temporary operator's permit. Without question, the hearing was not held expeditiously or within the imperative thirty-day time window mandated by N.D.C.C. § 39-20-05 and *Greenwood*. *See Greenwood*, 545 N.W.2d 790.

[¶34] "The Department can excuse its own failure to meet the hearing deadline only when it has "most compelling reasons" for the delay." *See Greenwood*, 545 N.W.2d at 796 (emphasis added). In our case, like in *Greenwood*, there were no compelling reasons for the delay. Here, like *Greenwood*, the Department did not hold a timely hearing, pursuant to N.D.C.C. § 39-20-05, and there were no compelling reasons to excuse non-compliance with the statute. Therefore, the order of the hearing officer is not in accordance with the law. Accordingly, the decision of the hearing officer should be reversed and Ms. Dunn's driving privileges should be reinstated.

II. Ms Dunn was denied fairness and due process throughout the conduct of the administrative proceedings

[¶35] "It is well settled that a driver's license is a protectable property interest that may not be suspended or revoked without due process." *See Morrell v. N. Dak. Dept. of Transportation*, 1999 ND 140, ¶8, 598 N.W.2d 111. A driver is entitled to be treated with fairness and with dignity and respect by an administrative agency. "[A] fair trial in a fair tribunal is a basic requirement of due process." *See Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). In our case, the actions and procedure employed by the DOT did not afford Ms. Dunn a fair process in a fair tribunal.

[¶36] In the case at hand, even though Ms. Dunn timely requested a hearing and appeared early for her scheduled hearing, she was nevertheless treated with disrespect, was refused a hearing, and was asked to leave the hearing room by an indignant hearing officer. (App. 11-12). Hearing Officer Varvel's reception of Ms. Dunn was unfair and troubling. After Ms. Dunn concurrently reiterated her desire for a hearing, Hearing Officer Varvel, instead of attempting to reschedule the hearing, responded to Ms. Dunn by telling her that there would be no hearing and that her calendar was too full to re-schedule the hearing. (App. 11-12).

[¶37] Through the Mandamus process, Ms. Dunn was finally awarded her right to a hearing. After finally being granted a hearing where she could at last present her argument that the hearing was untimely held under North Dakota law, Ms. Dunn presented the tribunal her Motion to Dismiss the action. (App. 2-19). However, the hearing officer did not really address the timeliness argument of N.D.C.C. § 39-20-05 and instead responded that he was just "comply[ing] with Judge Hagerty's order." (Tr. at 2, L. 7-14). The hearing officer's unwillingness to apply the law and the DOT's own

regulation, NDAC 37-03-03-09, or to even explain how N.D.C.C. § 39-20-05 does not apply to this case after finally convening the hearing five (5) months later, indicates lack of impartiality and fairness.

[¶38] Additionally, Ms. Dunn was treated unfairly and disrespectfully at her DOT hearing. After the hearing officer offered documents for admission into the record, Dunn's counsel objected to those documents on foundation grounds because there was no testimony advanced in their support. The objection was overruled, but the hearing officer would not provide an explanation for his ruling as requested by Ms. Dunn. An exchange ensued as follows:

"MR. VUKELIC:	Your objection is noted for the record. It is overruled. Exhibit 1 is received. Do you have questions for the deputy?
MR. HERBEL:	Again, is there a ruling so I can understand, from this tribunal, what the basis …
MR. VUKELIC:	I'm not sure that you would understand it Mr. Herbel, but I've said what I'm going to say with regard to your objections. Do you have questions for the deputy?
MR. HERBEL:	I've been fairly polite. I don't think that it … it's proper for you to make derogatory comments to me like that.
[MR. VUKELIC:]	I'm sorry if you consider these comments derogatory, Mr. Herbel. … It is overruled. If you think that that's insufficient, please take it up with the district court on appeal. …
MR. HERBEL:	Well, and I get … so the tribunal is not going to offer an explanation on the ruling; because we don't believe that we've waived that argument, and I understand that you feel that this is some sort of trivial argument. To my client it's not a trivial argument; and to take shots at me that I wouldn't necessarily understand the legal analysis, I don't think that's appropriate."

(Tr. at 13, L. 21 – 14, L. 20). Instead of giving an explanation for his evidentiary ruling, the hearing officer treated Ms. Dunn in a belittling and unfair manner. Also, because the hearing officer would not provide specificity or explain his rulings, Ms. Dunn was unable to rebut the DOT's rulings with adequate argument.

[¶39] Throughout the conduct of the administrative proceedings, Ms. Dunn was denied fairness and due process. Although Ms. Dunn appeared for her hearing in January, she was turned away and denied a hearing. When the District Court determined that Ms. Dunn was treated unfairly and at long lost granted her the right to a hearing, she was not treated in a fair and impartial manner in the conduct of the hearing. The hearing officer conducted himself in an unprofessional and disrespectful manner and exhibited a lack of impartiality.

[¶40] The DOT's unfair treatment of Ms. Dunn in this matter should not be rewarded. "Respect for law and human dignity can best be fostered by a process that is fair and just." *See Lawrence v. Delkamp*, 2008 ND 111, ¶24, 750 N.W.2d 452 (Sandstrom, J., dissenting). Ms. Dunn was denied fairness and due process throughout the conduct of the administrative proceedings. Because Ms. Dunn was denied fairness and due process, the decision of the hearing officer should be reversed and Ms. Dunn's driving privileges should be reinstated.

III. The award of attorney's fees and costs under N.D.C.C. § 28-32-50 is appropriate in this matter

[¶41] Under N.D.C.C. § 28-32-50, a Court must award a driver costs and attorney's fees if it "determines that the administrative agency acted without substantial justification." *See* N.D.C.C. § 28-32-50. In our case, the DOT's refusal to allow Ms.

Dunn a hearing until ordered by the District Court, along with the Hearing Officer's decision to revoke Ms. Dunn's driving privileges despite the unambiguous deadline imposed by N.D.C.C. § 39-20-05 and *Greenwood v. Moore*, 545 N.W.2d 790 (N.D. 1996), is without justification and is so starkly in contravention of North Dakota law as to warrant the imposition of attorney's fees and costs as allowed by N.D.C.C. § 28-32-50. Accordingly, Ms. Dunn should have been awarded attorney's fees and costs pursuant to N.D.C.C. § 28-32-50.

IV. It was improper for the district court to apply N.D.R.Civ.P. 60(b) to its review of Ms. Dunn's administrative matter in order to vacate a validly entered Order and Judgment

[¶42] Rule 60(b) of the North Dakota Rules of Civil Procedure "is inapplicable to an administrative appeal to district court." *See Lewis v. N.D. Workers Compensation Bureau*, 2000 ND 77, ¶13, 609 N.W.2d 445. "In view of the district court's purely appellate function in the administrative process and the nature of a motion for relief from judgment," this Court has concluded that "Rule 60(b) is inconsistent with the statutory appeal procedures of the Administrative Agencies Practice Act." *See id* at ¶11.

[¶43] "Applying Rule 60(b), which is a rule of trial procedure, to an administrative appeal, which invokes the court's appellate jurisdiction, is not only awkward in a theoretical sense, but would allow the [district] court powers prohibited by the statute." *See id* at ¶11. Section 28-32-46, N.D.C.C., "contains specific limitations on a court's powers of adjudicative disposition, and nothing in the statute grants a court the power to revisit its judgment." *See id* at ¶11 (emphasis added).

[¶44] In the case at hand, the Department requested reconsideration of the Order granting appeal after Judgment was entered but did not request that the Judgment be vacated. (App. 54-59). The Department referenced N.D.R.Civ.P. 60(b) in its "Conclusion" but provided no analysis of Rule 60(b). Similarly, the district court did not reference Rule 60(b) and provided no analysis of Rule 60(b) in its September 29, 2009, Order upholding the hearing officer's decision; nor did the Order direct that either the previous Order or Judgment be vacated. (App. 61-62). The Department's first quasi-attempt to attack the Judgment in favor of Ms. Dunn was on October 5, 2009, when the Department submitted a proposed Order for Judgment and Judgment that contained language to vacate the Judgment in favor of Ms. Dunn, even though there was no request to vacate Judgment. (App. 63-67).

[¶45] As soon as Dunn received the proposed language regarding vacating Ms. Dunn's Judgment, Dunn faxed to the district court her objection to the new quasi-request to vacate her Judgment along with supporting caselaw. (App. 68-73). Nevertheless, the district court vacated Ms. Dunn's Judgment and entered Judgment in favor of the Department on October 7, 2009, seemingly pursuant to Rule 60(b).

[¶46] "Rule 60(b) is not a substitute for an appeal." *See Olander Contracting Co. v. Gail Wachter Investments*, 2003 ND 100, ¶10, 663 N.W.2d 204. The district court's employment of N.D.R.Civ.P. 60(b) in its review of Ms. Dunn's administrative matter in order to vacate a validly entered Order and Judgment was improper. "Because Rule 60(b) does not apply to administrative appeals," the Department's Motion for Reconsideration "was, in effect, a nullity, and the trial court lacked the ability to entertain

it." *See Lewis*, 2000 ND 77 at ¶14. Accordingly, the Department's Judgment should be vacated.

[¶47] CONCLUSION

[¶48] For the foregoing reasons, Ines Dunn respectfully requests that this Court reverse the decision of the district court and reinstate his driving privileges.

Respectfully submitted
this 30th day of November, 2009.

/s/ *Dan Herbel*

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[¶49] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on November 30, 2009, the BRIEF OF APPELLANT and the APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Andrew Moraghan, counsel for Appellee, at the following:

Electronic filing TO: "Michael Pitcher" < mtpitcher@nd.gov >

Dated this 30th day of November, 2009.

/s/ *Dan Herbel*

Dan Herbel