

**IN THE SUPREME COURT
IN THE STATE OF NORTH DAKOTA**

Brian Michael Masset

Appellant,

v.

North Dakota Department of Transportation

Appellee.

**Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable Donald L. Jorgensen**

**SUPREME COURT NO. 20100098
BURLEIGH COUNTY NO. 08-09-C-2263**

BRIEF OF APPELLANT

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1. TABLE OF AUTHORITIES

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2. STATEMENT OF ISSUE

ISSUE : The Department has violated N.D.C.C. §§ 28-32-36 and 28-32-44, in that a significant portion of the recording of the administrative hearing held before the Department was inadvertently deleted and no longer exists.

3. STATEMENT OF THE CASE

NATURE OF CASE

4. The case on appeal is a civil case wherein Brian Michael Masset's driving privileges were suspended by the North Dakota Department of Transportation for a period of 180 days.

COURSE OF PROCEEDINGS

5. Masset was mailed a Report and Notice on July 17, 2009, regarding the possible suspension of his driving privileges. (Exhibit 1b, App. p. 2). Masset timely requested a hearing which was held on August 12, 2009. (App. p. 3; also see Hearing Transcript of August 12, 2009).
6. Masset's driving privileges were suspended for a period of 180 days on August 12, 2009. (Hearing Officer's Decision, App. p. 3). Masset timely filed a Petition for Reconsideration on August 27, 2009, arguing that the arresting officer sent different specimen submitter's checklists to the Department than were filled out after an attempted blood draw. (App. pp. 4-6). The hearing officer granted the petition on August 31, 2009, to take testimony related to issue raised. (App. p. 7).
7. A hearing was held on September 16, 2009, and the scope of the hearing was limited to the discrepancy in the specimen submitter's checklists. (Hearing Transcript of September 16, 2009; App. p. 26, Tr. p. 1, lines 1-10). The earlier suspension order was sustained. (App. pp. 8-10). Masset timely filed his Notice of Appeal and

Specifications of Error with the Burleigh Co. District Court on September 29, 2009.
(App. pp. 11-12).

DISPOSITION IN THE COURT BELOW.

8. On January 11, 2010, the Hon. Donald L. Jorgensen issued an Order affirming the hearing officer's decision. (App. pp. 13-15). Order for Judgment was signed on January 21, 2010, (App. p. 17), and Judgment was entered on January 22, 2010. (App. p. 18). Notice of Entry of Judgment was sent on January 27, 2010. (App. p. 16). Masset timely filed his Notice of Appeal on March 26, 2010. (App. p. 21).

9. STATEMENT OF FACTS

10. An administrative hearing regarding the suspension of Masset's driving privileges was held on August 12, 2009, pursuant to N.D.C.C. §39-20-05, and Masset's driving privileges were suspended for a period of 180 days on August 12, 2009. (App. p. 3). Masset sought reconsideration, due to the fact that the arresting officer sent different specimen submitters' checklists to the Department than those filled out after an attempted blood draw and a successful blood draw. (App. pp. 4-6). When Masset submitted the different checklists from those made part of the record at the administrative hearing, the petition for reconsideration was granted on August 31, 2009. (App. p. 7).
11. A hearing was held on September 16, 2009, and the scope of the hearing was limited to the discrepancy in the specimen submitter's checklists. (Hearing Transcript of September 16, 2009). This new administrative hearing was only for additional testimony from the officer specific to the specimen submitter's checklists and nothing more. (Hearing Transcript of September 16, 2009). At the time this hearing

was held, no transcript had been made by the Department, and it was unknown that there was any deficiency in the original hearing transcript of August 12, 2009 until the transcript was later prepared by the hearing officer. (App. p. 24, Hearing Transcript of August 12, 2009, p. 1, lines 1-7).

12. After Masset filed his appeal with the Department, the Department attempted to submit the required transcripts of the two administrative hearings. However, the transcript from the first administrative hearing indicates that, “the first approximately ten minutes of the administrative hearing were not recorded either because of operator error [mine] or because of a malfunction in the recording equipment.” (App. p. 24, Hearing Transcript of August 12, 2009, p. 1, lines 1-7). The hearing officer then provided a “summary paragraph” which is alleged to be, “an accurate summary of Trooper Bohn’s testimony.” (App. p. 24, Hearing Transcript of August 12, 2009, p. 1, lines 10-25, p. 2, line 1).

13. STANDARD OF REVIEW

14. The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs this Court’s review of an administrative suspension of a driver's license. *Johnson v. Department of Transp.*, 2004 ND 148, 683 N.W.2d 886, ¶ 5. This Court reviews that 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). This Court exercises a limited review in appeals involving driver's license suspensions or revocations, and affirms 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.

Johnson, supra, at ¶ 5, citing N.D.C.C. § 28-32-46. “[T]he ultimate conclusion of whether [the] facts meet the legal standard, rising to the level of a reasonable and articulable suspicion, is a question of law which is fully reviewable on appeal.” *Salter v. North Dakota Dept. of Transp.*, 505 N.W.2d 111, 112 (N.D.1993).

15. LAW AND ARGUMENT

ISSUE : The Department has violated N.D.C.C. §§ 28-32-36 and 28-32-44, in that a significant portion of the recording of the administrative hearing held before the Department was inadvertently deleted and no longer exists.

16. N.D.C.C. § 28-32-44(1) requires that, “[A]n administrative agency shall maintain an official record of each adjudicative proceeding or other administrative proceeding heard by it.” Moreover, section (2) of this statute requires that “the administrative agency concerned shall prepare and file...a certified copy of the entire record of proceedings before the agency...”
17. In addition, N.D.C.C. § 28-32-36 provides that, “[A]n administrative agency shall make a record of all testimony...and other evidence presented at any adjudicative proceeding or other administrative proceeding heard by it.” This statute requires that oral testimony at administrative hearings be recorded by a court reporter, a stenographer, or an electronic recording device. *Id.*

18. N.D.C.C. § 28-32-44(4) does not permit hearing officer's memories. "The agency record of the proceedings may consist only of the following: ***(h) the transcript of the hearing prepared for the person presiding at the hearing.***" A "transcript" is "[A]n official copy of the record of proceedings in a trial or hearing," (Black's Law Dictionary (6th Ed.1991), and a "word-for-word typing of everything that was said 'on the record' during the trial." *Id.* Normally this is a typed copy of the court reporter's notes or of the electronically recorded testimony. There is no provision for reconstructing lost testimony.
19. There is no statutory equivalent of Rule 10, subsections (f) (g) and (h), N.D.R.App.P, as these rules do not govern this administrative appeal. *See Buzick v. N.D. State Highway Com'r*, 351 N.W.2d 438 (1984). Furthermore, since in Department of Transportation hearings, the hearing officer serves in dual capacities, e.g. judge and prosecutor, he certainly cannot be expected to make an impartial ruling on what was presented. *See Dittus v. North Dakota Dept. of Transp.* 502 N.W.2d 100, 103 (N.D.1993)(the mere combination of adjudicative and prosecutorial functions in the Department's hearing officer does not, without more, violate a driver's due process rights).
20. In North Dakota's "Through the Looking Glass" environment it is imperative that testimony be completely recorded by an unimpeachable source. Piling the prosecutorial function on top of the hearing officer's judicial function deprives the hearing officer of that presumption of correctness and regularity we normally afford judicial officers. Here, the Department has failed to maintain the record, and the attempted reconstruction of Trooper Bohn's testimony in a "summary paragraph" is

insufficient to satisfy the requirements of N.D.C.C. §§ 28-32-36 and 28-32-44.

21. N.D.C.C. § 28-32-46 states, in part, that “the court must affirm the order of the agency unless it finds that any of the following are present: * * * 3. The provisions of this chapter have not been complied with in the proceedings before the agency.” The controlling case is *State v. Simpfenderfer*, 120 N.W.2d 595 (N.D.1963). There, this Court dealt with the same exact issue....the transcript was incomplete. This Court, following the same above language of § 28-32-46 (then found in N.D.C.C. § 28-32-19, held:

The provisions of the chapter referred to require, among other things, that a record be made of all testimony adduced at the hearing before the administrative agency, and that stenographic notes of such testimony and all evidence and exhibits produced on the hearing before the agency be filed with the agency. It then goes on to provide:

“* * * A transcript of the evidence taken by or before an administrative agency shall be furnished to any party to the proceeding upon written request therefor, * * *” Sec. 28-32-12, N.D.C.C.

This provision of the law was not complied with in this case. The transcript which was furnished by the agency was incomplete and did not contain all of the testimony given before the assistant attorney general. Under the provisions of Section 28-32-19, above referred to, if any of the provisions of the Act have not been complied with the district court shall remand the case to the agency in accordance with its decision.

The trial court found that the agency had not furnished a transcript of all of the testimony adduced at the hearing, which is one of the things required of it by the law. It then became the duty of the trial court to remand the case to the Attorney General for the production of a correct record, and the trial court's action in dismissing the entire proceedings was improper. *If the Attorney General was unable to furnish such transcript as is required by law, a rehearing should have been ordered by such agency so that a record which would satisfy the requirements of the law might be made.*

State v. Simpfenderfer supra at 597 (emphasis added).

22. In this case, the Department argues that Masset must show prejudice. However, this

Court did not require any showing of prejudice in *Simpfenderfer*, and that case should be controlling. Following *Simpfenderfer*'s holding, this Court should, "acknowledge the importance of the rule of stare decisis, grounded upon the theory that when a legal principle is accepted and rights may accrue under it, security and certainty require the principle be recognized and followed thereafter." *Interest of C.R.C.*, 2001 ND 83, ¶ 39, 625 N.W.2d 533 (Neumann, J., concurring).

23. Moreover, in *Greenwood v. Moore*, 545 N.W.2d 790 (N.D.1996), this Court stated:

Usually, when no statutory remedy is specified for an agency's failure to meet a time limit, we do not reverse without a showing of prejudice from the delay.

Here, however, while the legislature did not make the time limit jurisdictional, it clearly intended the time for a hearing to be imperative.

Id.

24. This Court, in *Greenwood, supra*, and without a showing of prejudice, concluded that the Department did not hold a timely hearing and affirmed the reversal of the Department's decision suspending Greenwood's driving privileges. Furthermore, when this Court has found a statutory provision to be "a basic and mandatory" provision, this Court has reversed the Department without any showing of prejudice. See *Jorgensen v. North Dakota Department of Transportation*, 2005 ND 80, 695 N.W.2d 212 and *Aamodt v. North Dakota Dep't of Transp.*, 2004 ND 134, 682 N.W.2d 308.

25. Here, while the legislature did not make N.D.C.C. §§ 28-32-36 and 28-32-44 jurisdictional, it clearly intended the recording of all testimony to be imperative. As this Court held in *Simpfenderfer, supra*, "If the Attorney General was unable to furnish such transcript as is required by law, a rehearing should have been ordered

by such agency so that a record which would satisfy the requirements of the law might be made.” *Id.*

26. CONCLUSION AND PRAYER FOR RELIEF

27. In this case, the Department violated N.D.C.C. §§ 28-32-36 and 28-32-44, in that a significant portion of the recording of the administrative hearing held before the Department was inadvertently deleted and no longer exists. The Department is unable to furnish a complete transcript of the proceedings as is required by law.
28. WHEREFORE, the Appellant, Brian Michael Masset, by and through his attorney, Chad R. McCabe, respectfully prays that this Court will reverse the judgment affirming the administrative suspension of his driving privileges and remand for a new hearing.
29. Dated this 29th day of April, 2010.

/s/ Chad R. McCabe
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30. CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by electronic

transmission on this 29th day of April, 2010, to the following:

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/s/ Chad R. McCabe
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