20120316

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Debbie Ann Painte,	)	
	)	
Appellee,	)	Supreme Ct. No. 20120316
	)	
v.	)	
	)	District Ct. No. 30-2012-CV-00317
Director, North Dakota Department of Transportation,	)	
	)	
Appellant.	)	
	)	

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

HONORABLE BRUCE B. HASKELL

BRIEF OF APPELLANT

State of North Dakota
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II. Whether the district court erred in reversing the hearing officer's decision, rather than remanding the matter to the Department.

III. Whether the Department laid the proper foundation for the admission of Painte's chemical test for intoxication

STATEMENT OF CASE

Mandan Police Officer April Jose ("Officer Jose") arrested Debbie Ann Painte ("Painte") on March 8, 2012, for the offense of being in actual physical control of a vehicle while under the influence of intoxicating liquor. (App. to Br. of Appellant ("Department's App.") 3.) Painte requested a hearing in accordance with N.D.C.C. § 39-20-05. (Id. at 9-10.) At the April 10, 2012, administrative hearing, the hearing officer considered the following issues:

> (1) [w]hether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of N.D.C.C. section 39-08-01 or equivalent ordinance;
>
> (2) [w]hether the person was placed under arrest;
>
> (3) [w]hether the person was tested in accordance with N.D.C.C. section 39-20-01 or 39-20-03 and, if applicable, section 39-20-02; and
>
> (4) [w]hether the test results show the person had an alcohol concentration of at least eighteen one-hundredths of one percent by weight.

(Id. at 12.)

Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision suspending Painte's driving privileges for a period of 180 days. (Id. at 15.) Painte requested judicial review of the hearing officer's decision. (Id. at 16-18.)

STATEMENT OF FACTS

On March 8, 2012, at approximately 2:49 a.m., Officer Jose "[was] called by an owner of a property that there was a vehicle parked in her parking area that was running, and there was somebody inside of it and had been so for a while." (Tr. 5, ll. 14-16.) Upon arriving at the reported location, Officer Jose observed "a parked vehicle that was running . . . with a female inside." (Tr. 5, l. 22 – 6, l. 2.)

Officer Jose testified the occupant, who was identified as Painte, "was not conscious at the time" and "was kind of slumped over in the seat, and her eyes were closed." (Tr. 6, ll. 3-8.) Officer Jose "knock[ed] on the window to get [Painte] to open her eyes." (Tr. 6, ll. 7-8.) Officer Jose observed "there was a pool of vomit on the ground outside of the vehicle" and Painte "was bleeding on her nose." (Tr. 6, ll. 16-22.) Officer Jose also observed "[t]here was an odor of an alcoholic beverage" and Painte "was very difficult to understand;" "[s]he was having a hard time following instructions as to locating her driver's license" and "[h]er eyes were very red and bloodshot." (Tr. 7, ll. 7-10.)

Officer Jose testified Painte "appeared to be intoxicated, so [she] had her step out of the vehicle to perform some field sobriety tests." (Tr. 7, ll. 1-4.)

Painte failed the horizontal gaze nystagmus test and was unable to complete the walk-and-turn test. (Tr. 7, l. 11 - 9, l. 11.) Painte was unable to complete the S-D5 onsite screening test. (Tr. 9, l. 23 - 10, l. 6.)

Officer Jose placed Painte under arrest for the offense of being in actual physical control of a vehicle while under the influence of intoxicating liquor. (Tr. 10, ll. 7-9.) Officer Jose transported Painte to the Morton County Jail for a blood draw. (Tr. 10, ll. 10-21.) The results of the blood test established Painte had a blood alcohol concentration of 0.217% by weight. (Department's App. 6-7.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

At the administrative hearing, Painte objected to the admissibility of Exhibit 1 (Department's App. 2-11.), being inclusive of the Report and Notice and the regularly kept records of the Department concerning Painte's chemical test for intoxication:

> I object to Exhibit 1. Page 1c ... is ... which claims to be a certification, is more than a certification. It is hearsay, as far as a method and a device. It purports to give approval to a method and device which, statutorily, Roberta Grieger-Nimmo cannot do. She is not the state toxicologist, nor designated ... nor a deputy state toxicologist. So that's number one. She does set forth that she followed a ... approved method to conduct blood alcohol analysis, Revision 0.0 of a non-specified date. There has been at least one method approved by the state toxicologist, received in Exhibit 8, and that is dated, and it's an approved method TXS-O20 ... 020, but there is no undated method of a revision 0.0. So, Ms. Grieger's ... attempt to give approval to whatever method she used does not conform to the statutory hearsay exception established by the legislature.
>
> I further object on the grounds that there's no showing that the blood was drawn under sterile conditions. It was drawn in a jail, and jails are not sterile. One of the underlying assumptions of the implied consent law ... are ... is that the ... if there is blood drawn, it will be drawn in a medical facility, I believe, as was approved in

Schmerber. So, basically, the location is improper.

No showing that there was a proper arrest, in that there was no showing that ... Ms. Painte was in actual physical control of a motor vehicle while under the influence.

I guess those are my objections to ... well, just a minute. There's more in here. As ... well, those are my ... will do for my objections to Exhibit 1.

(Tr. 13, l. 13 – 14, l. 17.) The hearing officer overruled Painte's objections and received Exhibit 1 into evidence. (Tr. 14, ll. 18-19.) In closing, Painte argued:

Basically, no showing that Deb was in fact actual physical control. No showing that the test was conducted in accordance with the method approved by the state toxicologist, other than a hearsay statement by an ... an analyst, and that says that she used a method that hadn't received approval, as far as I can see.

(Tr. 15, ll. 7-13.)

The hearing officer found:

Mandan Police Officer April Jose was called to check on a parked vehicle with its engine running and a female slumped over in the vehicle. Officer Jose arrived, saw the parked vehicle with its engine running and with a female slumped over, eyes closed. She knocked on the window and the driver, Debbie Painte, awoke. Ms. Painte had an odor of an alcoholic beverage, had bloodshot eyes, appeared to have difficulty following directions, and in general appeared to be intoxicated. Officer Jose requested field tests. Results were unsatisfactory or failing on the horizontal gaze nystagmus test. Two other tests were attempted unsuccessfully and will not be considered here. Officer Jose arrested Debbie Painte for APC (actual physical control) and then requested blood testing to determine Ms. Painte's alcohol concentration. Ms. Painte consented to blood testing to determine her alcohol concentration after the arrest. Blood was drawn by an R.N., in accordance with the state toxicologist's directions, within two hours of the time Ms. Painte was in actual physical control of a vehicle. Blood testing was done in accordance with the state toxicologist's approved method, with results showing an alcohol concentration of .21%.

(Department's App. 15.) The hearing officer concluded:

> Officer Jose had reasonable grounds to believe that Debbie Painte was in actual physical control of a vehicle in violation of N.D.C.C. 39-08-01 or equivalent ordinance. Ms. Painte was arrested for APC, was properly tested to determine her alcohol concentration after the arrest, and had an alcohol concentration of at least .18% within two hours of the time she was in actual physical control of the vehicle.

(Id.) The hearing officer issued her findings of fact, conclusions of law, and decision suspending Painte's driving privileges for a period of 180 days. (Id.)

Painte appealed the administrative decision to the Morton County District Court. (Id. at 16-18.) Painte alleged:

> 1. Hearing officer erred concluding that the chemical test was fairly administered. There was no showing that the test was administered in accordance with a method approved by the state toxicologist for the analysis of a sample of blood.
>
> 2. The hearing officer erred in concluding that there was probable cause to arrest Ms. Painte for Actual Physical Control of a motor vehicle as there was no showing that Ms. Painte was in a position to operate the controls of the motor vehicle.

(Id.)

Judge Bruce B. Haskell issued an Order on Appeal on June 18, 2012, reversing the hearing officer's decision. (Id. at 19-22.) Judge Haskell ruled:

> The North Dakota Supreme Court has adopted a three-step process when reviewing an appeal from an administrative agency's decision. The following three steps are considered:
>
> (1) Are the agency's findings of fact supported by a preponderance of the evidence? (2) Are the conclusions of law sustained by the agency's findings of fact? (3) Is the agency's decision supported by the conclusions of law?
>
> *See*, Obrigewitch v. Director, N.D. Dept. of Transp. 2002 ND 177, 653 N.W.2d 73.
>
> . . .
>
> In reviewing the transcript of the hearing, the Court finds that each of the hearing officer's findings of fact is supported by

> evidence presented at the hearing. From these findings of fact, the hearing officer's conclusions of law include that "Officer Jose had reasonable grounds to believe that Debbie Painte was in actual physical control of a vehicle . . ." Transcript at p. 16, lines 20-22. The appellant argues that the key factor in determining whether the defendant is in actual physical control of a vehicle is whether the defendant is able to manipulate the controls of the vehicle. The appellant further argues that there was no evidence presented at the hearing that the appellant was in a position where she was exercising real control over the vehicle. However, even in the cases cited by the appellant, it is clear that the North Dakota Supreme Court takes a very broad view of what constitutes actual physical control. In this case, there is evidence in the record from which the hearing officer could have reasonably found that the appellant was able to manipulate the controls. However, the hearing officer makes no finding of fact nor a conclusion of law that the appellant was able to manipulate the controls. The hearing officer failed to articulate that finding, nor any other nexus between her findings of fact and her conclusions of law. The hearing officer merely recites her findings of fact and then her conclusions of law. The Court believes it is incumbent upon a hearing officer to clearly explain how the findings of fact lead to the conclusions of law. In this case, the hearing officer failed to do so and this Court is unable to determine upon what facts the officer bases her conclusions of law. Therefore, the decision of the administrative hearing officer is REVERSED and the appellant's privilege to operate a motor vehicle is reinstated.

(Id. at 20-21.) The district court did not decide the issue raised by Painte regarding the fair administration of the test.

Judgment was entered on June 28, 2012. (Id. at 23-26.) The Department appealed the Judgment to the North Dakota Supreme Court. (Id. at 27-28.) The Department requests this Court reverse the judgment of the Morton County District Court and reinstate the hearing officer's decision suspending Painte's driving privileges for a period of 180 days.

STANDARD OF REVIEW

"The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of administrative license suspensions." Ringsaker v. Dir., N.D. Dep't of Transp., 1999 ND 127, ¶ 5, 596 N.W.2d 328. "On appeal from a district court's review of an administrative agency's decision, [the North Dakota Supreme Court] review[s] the agency decision." Elshaug v. Workforce Safety & Ins., 2003 ND 177, ¶ 12, 671 N.W.2d 784. The Court reviews "the agency's findings and decisions, and not those of the district court, though the district court's analysis is entitled to respect if its reasoning is sound." Hawes v. N.D. Dep't of Transp., 2007 ND 177, ¶ 13, 741 N.W.2d 202.

Section 28-32-46, N.D.C.C., provides the Court must affirm an administrative agency's order unless one of the following is present:

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.

"When reviewing the agency's factual findings, [the Court] do[es] not make independent findings of fact or substitute [its] judgment for that agency, but determine[s] only whether a reasoning mind reasonably could have determined the factual conclusions were proven by the weight of the evidence from the entire record." Ringsaker, at ¶ 5.

LAW AND ARGUMENT

I. The hearing officer's findings of fact support the conclusion of law that Officer Jose had reasonable grounds to believe Painte was in actual physical control of a vehicle in violation of N.D.C.C. § 39-08-01.

Section 39-08-01(a), N.D.C.C., prohibits a person from being "in actual physical control ["APC"] of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if . . . [t]hat person has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after . . . being in actual physical control of a vehicle." N.D.C.C. § 39-08-01(a).

The North Dakota Supreme Court has "repeatedly recognized that the purpose of the actual-physical-control offense is to prevent an intoxicated person from getting behind the steering wheel of a motor vehicle because that person may set out on an inebriated journey at any moment and is a threat to the safety

and welfare of the public." State v. Saul, 434 N.W.2d 572, 576-77 (N.D. 1989). See also City of Fargo v. Novotny, 1997 ND 73, ¶ 5, 562 N.W.2d 95 ("The actual physical control statute is a preventive measure, enabling law enforcement to apprehend intoxicated drivers before they strike."); State v. Ghylin, 250 N.W.2d 252, 253, Syl. 1 (N.D. 1977) ("The purpose of Section 39-08-01, North Dakota Century Code, is to deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers.").

Section 39-20-05(2), N.D.C.C., provides the scope of the issues to be determined at the administrative hearing includes "whether the arresting officer had reasonable grounds to believe the individual . . . was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance." N.D.C.C. § 39-20-05(2). "The term 'reasonable grounds' used in N.D.C.C. § 39-20-05 is synonymous with the term 'probable cause.'" Hoover v. Dir., N.D. Dep't of Transp., 2008 ND 87, ¶ 9, 748 N.W.2d 730.

"Probable cause to arrest exists when the facts and circumstances within police officers' knowledge and of which they have reasonably trustworthy information are sufficient to warrant a person of reasonable caution in believing an offense has been or is being committed." Fargo v. Egeberg, 2000 ND 159, ¶ 8, 615 N.W.2d 542. "Probable cause does not require the commission of an offense to be established with absolute certainty, or beyond a reasonable doubt." Id. at ¶ 10.

"The essential elements of APC are: (1) the defendant is in actual physical control of a motor vehicle on a highway or upon public or private areas

to which the public has a right of access; and (2) the defendant was under the influence of intoxicating liquor, drugs, or other substances." State v. Haverluk, 2000 ND 178, ¶ 15, 617 N.W.2d 652. "A driver has 'actual physical control' of his car when he has real (not hypothetical), bodily restraining or directing influence over, or domination and regulation of, its movements of machinery." Ghylin, 250 N.W.2d at 254 (quoting Commw. v. Kloch, 327 A.2d 375, 383 (Pa. Super. Ct. 1975)). See also Hawes v. N.D. Dep't of Transp., 2007 ND 177, ¶ 6, 741 N.W.2d 202 ("We have long construed the actual physical control statute to broadly prohibit any exercise of dominion or control over a vehicle by an intoxicated person."). Therefore, "[t]he primary factor in determining the offense of actual physical control is whether the defendant has the ability to manipulate the controls of the vehicle." Rist v. N.D. Dep't of Transp., 2003 ND 113, ¶ 14, 665 N.W.2d 45.

In this case, the hearing officer made the relevant findings of fact:

> Mandan Police Officer April Jose was called to check on a parked vehicle with its engine running and a female slumped over in the vehicle. Officer Jose arrived, saw the parked vehicle with its engine running and with a female slumped over, eyes closed.

(Department's App. 15.) The hearing officer concluded "Officer Jose had reasonable grounds to believe that Debbie Painte was in actual physical control of a vehicle in violation of N.D.C.C. 39-08-01 or equivalent ordinance." (Id.)

The district court acknowledged "there is evidence in the record from which the hearing officer could have reasonably found that the appellant was able to manipulate the controls." (Id. at 21.) The district court, however, stated "the hearing officer makes no finding of fact nor a conclusion of law that the

appellant was able to manipulate the controls." (Id.) The district court reversed the hearing officer's decision based upon the perceived "fail[ure] to articulate that finding, nor any other nexus between her findings of fact and her conclusions of law" and the perceived failure "to clearly explain how the findings of fact lead to the conclusions of law." (Id.)

The Supreme Court has stated "[f]indings of fact should be stated with sufficient specificity to assist [the] Court and afford [it] a clear understanding of the trial court's decision, but the findings are adequate if [the Court] [is] able to understand from them the factual basis for the trial court's determination." Wolf v. Wolf, 474 N.W.2d 257, 258 (N.D. 1991) (citation omitted). The Supreme Court has further stated:

> Although we ordinarily remand for clarification of missing or conclusory findings of fact, we will not do so when, through inference or deduction, we can discern the rationale for the result reached by the trial court. We may rely on implied findings of fact when the record enables us to understand the factual determinations made by the trial court and the basis for its conclusions of law and judgment.

Almont Lumber & Equip., Co. v. Dirk, 1998 ND 187, ¶ 13, 585 N.W.2d 798 (internal citations omitted) (emphasis added). See also Forster v. West Dakota Veterinary Clinic, Inc., 2004 ND 207, ¶ 60, 689 N.W.2d 366 ("Given the conflicting evidence on the issue, we conclude the district court's implied finding that there was no oral agreement about employment for a definite term is not clearly erroneous."); Moen v. State, 2003 ND 17, ¶¶ 8-11, 656 N.W.2d 671 (affirming judgment where "the district court necessarily made an implicit finding that Moen discovered or reasonably should have discovered his claim on or

before April 11, 1999, and accordingly dismissed his claim."); Holtz v. Holtz, 1999 ND 105, ¶¶ 18, 25, 595 N.W.2d 1 ("[T]he trial court found April 'would not be capable or competent to raise' Jessica, thereby implying that a change of custody was not only in Jessica's best interests, but was required by the material change of circumstances. . . . We conclude the trial court's implied finding that the material change of circumstances required or compelled, in Jessica's best interests, the change of custody is not clearly erroneous."); City of Fargo v. Windmill, Inc., 350 N.W.2d 32, 34 n. 2 (N.D. 1984) (even though "no findings of fact or conclusions of law were prepared by the Board to indicate the underlying basis for its decision . . . . the 'Specifications of Charges' and transcript of the hearing before the Board clearly reveal the underlying basis and grounds relied upon by the Board in reaching its decision" even though "no findings of fact or conclusions of law were prepared by the Board to indicate the underlying basis for its decision.").

The Wisconsin Supreme Court has held "an essential finding that was not explicitly made but was supported by the evidence" may be "implied from the conclusion." Mueller v. Mizia, 147 N.W.2d 269, 274 (Wis. 1967) (citing Miles Homes, Inc., v. Starrett, 127 N.W.2d 243, 245 (Wis. 1964) ("Although the circuit court made no specific finding that Miles did not make a good-faith effort to perform, such finding may be implied from the conclusion that there was no substantial performance, and there is evidence to support it."). "[F]indings of ultimate facts include by necessary intendment the findings on all intermediate facts necessary to sustain them." Jay v. Dollarhide, 84 Cal. Rptr. 538, 558 (Cal.

Ct. App. 1970). "[A] specific finding is not required on an issue where it follows by necessary implication from a general finding." Bley v. Ad-Art, Inc., 59 Cal. Rptr. 26, 33-34 (Cal. Ct. App. 1967). "[W]here proper findings have been made upon the various issues of the case it is not necessary to negate issues contradictory thereto. The finding on a particular issue is an implied negation of all contradictory propositions." Id.

"An ultimate finding usually involves 'a conclusion of law or at least a determination of a mixed question of law and fact.'" Hunter Indus. Facilities, Inc. v. Tex. Natural Res. Conservation Comm'n, 910 S.W.2d 96, 104 (Tex. Ct. App. 1995) (quoting Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491 (1937)) ("'[U]ltimate finding of compliance with or satisfaction of a statutory standard' . . . has the same legal effect as a conclusion of law or a mixed question of law or fact."). "The distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree." Burks v. Poppy Constr. Co., 370 P.2d 313, 319 (Cal. 1962). The Indiana Court of Appeals has stated:

> It has been said that an ultimate fact is the final or resultant fact that has been reached by the process of logical reasoning from the detail of probative fact. Ultimate facts are determined as a result of an inferential process; the evidentiary facts are the premises and the ultimate facts the conclusions. Therefore, an ultimate fact may be determined as a result of a natural connection of one fact with others by a process of reasoning. A conclusion of law differs in that it is made by attaching a rule of law or legal incident to a particular fact proved. It is the process by which the result is attained which is determinative of the distinction in the particular case.

Guevara v. Inland Steel Co., 95 N.E.2d 714, 717 (Ind. Ct. App. 1950) (internal citations omitted).

The Supreme Court has stated "the ability to control and operate the vehicle . . . is a question of fact properly left to the agency to decide." Vanlishout v. N.D. Dep't of Transp., 2011 ND 138, ¶ 17, 799 N.W.2d 397. See also Haverluk, ¶ 17 ("The defendant's ability to manipulate the vehicle controls is a question of fact for the jury.") A finding of the ability to control and operate a vehicle may be inferred from the underlying evidentiary facts. See, e.g., Commw. v. Crum, 523 A.2d 799, 802 (Pa. Super. Ct. 1987) ("The facts of the instant action are sufficient to support an inference that appellant was in control of either the machinery of the motor vehicle or the management of the motor vehicle itself.").

"[T]he ultimate conclusion of whether the facts meet the legal standard that the arresting officer had reasonable grounds to believe [the person] had been in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of § 39-08-01, N.D.C.C., is a question of law fully reviewable on appeal." Obrigewitch v. Dir., N.D. Dep't of Transp., 2002 ND 177, ¶ 8, 653 N.W.2d 73. The ability to control and operate a vehicle may be characterized as a finding of ultimate fact that leads to the logical conclusion of law the arresting officer had reasonable grounds to believe the person was in actual physical control of a vehicle.

In this case, Painte's ability to control and operate a vehicle reasonably may be ***inferred*** -- without the need for express terms of art -- from the underlying evidentiary facts, as noted by the district court in that "there is evidence in the record from which the hearing officer could have reasonably

found that the appellant was able to manipulate the controls." (Department's App. 21.) A finding of ultimate fact that Painte had the ability to control and operate her vehicle also may be implied from the hearing officer's conclusion of law "Officer Jose had reasonable grounds to believe that Debbie Painte was in actual physical control of a vehicle in violation of N.D.C.C. 39-08-01 or equivalent ordinance." (Department's App. 15.)

This case is no less compelling than that of Vanlishout, ¶ 18, in which the Supreme Court affirmed the hearing officer's determination Vanlishout was in actual physical control of his vehicle despite the facts he was in the backseat and the vehicle was stuck in the ditch. Painte failed to present any evidence to dispute the reasonable inference she was the sole occupant of the vehicle or the vehicle, with its engine running, was inoperable. See Geiger v. Hjelle, 396 N.W.2d 302, 303 (N.D. 1986) ("[f]ailure of a party to testify permits an unfavorable inference in a civil proceeding" and "the hearing officer could also consider the lack of contrary evidence"). Painte also failed to present any evidence that – regardless of her location within the vehicle -- she could not have been able to position herself in the driver's seat of the vehicle and drive away.

The findings of fact, whether express or implied, support the hearing officer's conclusion of law that Officer Jose had reasonable grounds to believe Painte was in actual physical control of her vehicle while under the influence of intoxicating liquor.

II. The district court erred in reversing the hearing officer's decision, rather than remanding the matter to the Department.

The Supreme Court has held "[w]hen an agency fails to prepare an essential finding of fact . . . [the Court] may remand to the agency with instructions to prepare proper findings." Evans v. Backes, 437 N.W.2d 848, 851 (N.D. 1989) ("We conclude that the hearing officer's failure to draft a finding of fact on the critical issue of whether Evans was denied a reasonable opportunity to consult an attorney before deciding whether to submit to the blood test, warrants our remanding for preparation of a finding on this issue.") See also Richter v. N.D. Dep't of Transp., 2008 ND 105, ¶ 9, 750 N.W.2d 430 ("Under N.D.C.C. § 28-32-46, if we do not affirm the order of the agency, the order 'must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.' We therefore reverse under N.D.C.C. § 28-32-46(7) and remand for the hearing officer to make findings of fact that sufficiently address the evidence presented to the agency by the appellant."); Dunseith Pub. Sch. Dist. v. State Bd. of Pub. Sch. Educ., 437 N.W.2d 825, 830 (N.D. 1989) ("Because we believe the State Board has not made adequate findings as required by Section 15-27.2-04, we reverse the judgment of the district court and remand. On remand, we instruct the trial court to enter an order remanding this matter to the State Board for the preparation of complete and adequate findings and conclusions which satisfy the requirements of Section 15-27.2-04.") (internal citation omitted).

In this case, it is the Department's position the hearing officer's conclusion of law is supported by the findings of fact, whether they are express or implied.

The district court erred in reversing the hearing officer's decision in the first instance. However, if the Supreme Court finds the district court correctly determined the hearing officer did not make an essential finding of fact and that fact cannot be implied, then the district court's judgment should be reversed with instructions to enter an order remanding this matter to the Department for the preparation of further findings.

III. The Department laid the proper foundation for the admission of Painte's chemical test for intoxication.

"Section 39-20-07, N.D.C.C., governs admissibility of blood test results." City of West Fargo v. Hawkins, 2000 ND 168, ¶ 15, 616 N.W.2d 856. Section 39-20-07, in relevant part, provides

> Upon the trial of any civil . . . proceeding arising out of acts alleged to have been committed by any individual . . . in actual physical control of a motor vehicle while under the influence of intoxicating liquor . . . , evidence of the amount of alcohol concentration . . . in the individual's blood . . . at the time of the act alleged as shown by a chemical analysis of the blood . . . is admissible. For the purpose of this section:
> . . .
>
> 5. 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 or the director's designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director's designee. The director of the state crime laboratory or the director's designee is authorized to approve satisfactory devices and methods of chemical analysis and determine the qualifications of individuals to conduct such analysis, and shall issue a certificate to all qualified operators who exhibit the

certificate upon demand of the individual requested to take the chemical test.

. . .

8. A certified copy of the analytical report of a blood or urine analysis referred to in subsection 5 and which is issued by the director of the state crime laboratory or the director's designee must be accepted as prima facie evidence of the results of a chemical analysis performed under this chapter. The certified copy satisfies the directives of subsection 5.

N.D.C.C. § 39-20-07 (emphasis added).

In this case, Painte alleges the proper foundation for the admission of her chemical test for intoxication was not laid because there purportedly was no evidence that Roberta Geiger-Nimmo ("Geiger-Nimmo") was the state crime laboratory director's designee for purpose of the statutory functions described by section 39-20-07. Geiger-Nimmo identified herself on the certification for the Submission for Blood (104) and Toxicology Alcohol/Volatiles Analytical Report as a "designee of the Director of the State Crime laboratory." (Department's App. 4-7.) Geiger-Nimmo also is identified on the "List of Individuals Certified to Conduct Blood Alcohol Analysis (August 17, 2011)" as being certified to conduct the blood alcohol analyses. (Id. at 14.) Painte failed to introduce any evidence to dispute Geiger-Nimmo's certification that she was the Director's designee. The proper foundation for the introduction of Painte's chemical test for intoxication was laid.

CONCLUSION

The Department respectfully requests this Court reverse the judgment of the Burleigh County District Court and reinstate the hearing officer's decision suspending Debbie Ann Painte's driving privileges for a period of 180 days. In

the alternative, the Department respectfully requests the Court reverse the district court's judgment with instructions to enter an order remanding this matter to the Department for the preparation of further findings

Dated this 17th day of September, 2012.

State of North Dakota
Wayne Stenehjem
Attorney General

By: _____

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Debbie Ann Painte, Appellee, v. Director, North Dakota Department of Transportation, Appellant.	)	**Supreme Ct. No. 20120316** **District Ct. No. 30-2012-CV-00317** **AFFIDAVIT OF SERVICE BY MAIL**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

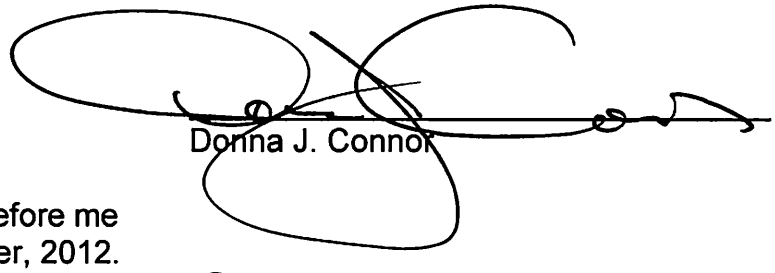
Donna J. Connor states under oath as follows:

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 17th day of September, 2012, I served the attached **BRIEF OF APPELLANT and APPENDIX TO BRIEF OF APPELLANT** upon the appellee by placing true and correct copies thereof in an envelope addressed as follows:

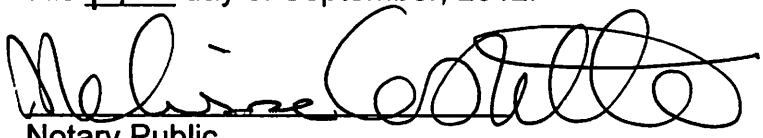
Thomas M. Tuntland
Tuntland & Colling
P.O. Box 1315
Mandan, ND 58554

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



Donna J. Connor

Subscribed and sworn to before me
this 17th day of September, 2012.



Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2013