IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Joseph Daniel Potratz, Appellant, v. Director, North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20130322** **District Ct. No. 08-2013-CV-00617**

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

HONORABLE SONNA M. ANDERSON

BRIEF OF APPELLEE

State of North Dakota
Wayne Stenehjem
Attorney General

By: Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
mtpitcher@nd.gov

Attorneys for Appellee.

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STATEMENT OF ISSUES

I. Under N.D.C.C. § 39-20-03.1(4), the Department must show the subject's chemical test was completed within two hours of the time of driving. Potratz's Report and Notice lists the date of occurrence as 02/17/2013. The form lists the time of driving as 1:17 AM, the time of arrest as 1:27 AM, and the time the breath specimen was obtained as 2:00 AM. Does the Report and Notice provide jurisdiction to the Department to suspend Potratz's driving privileges?

II. The Department's Report and Notice form contains a designated blank line for the arresting officer to insert the person's chemical test results provided under N.D.C.C. chapter 39-20. N.D.C.C. § 39-20-03.1(4) requires the officer to forward to the Department the person's Report and Notice showing, among other things, that the person's test results show "an alcohol concentration of at least eight one-hundredths of one percent by weight." Here, the arresting officer wrote ".094% BRAC" on the designated test result line. Does the Department have jurisdiction to suspend Potratz's driving privileges, even though the test result designation did not explicitly include language indicating it was "by weight"?

III. The Approved Method to Conduct Breath Tests with the Intoxilyzer 8000 indicates that identifying information including the subject's weight, among other data, does not have any effect on the reliability of the test. Should the Court affirm the decision finding Potratz's Intoxilyzer test was fairly administered even though his listed weight on the test record is different than his listed weight on his central driving record?

STATEMENT OF CASE

On February 17, 2013, Deputy Danny Lemieux (Deputy Lemieux) of the Burleigh County Sheriff's Department arrested Joseph Daniel Potratz (Potratz) for the offense of driving a vehicle while under the influence of intoxicating liquor (DUI). App. 4. A Report and Notice, including a temporary operator's permit, was issued to Potratz after Intoxilyzer test results indicated Potratz's alcohol

concentration was .094 percent by weight. Id. The Report and Notice notified Potratz of the Department's intent to suspend his driving privileges. Id.

In response to the Report and Notice, Potratz requested an administrative hearing. Transcript ("Tr.") at Exhibit ("Ex.") 1d. The hearing was held on March 15, 2013. App. 7, 8. In accordance with N.D.C.C. § 39-20-05(2) the hearing officer considered four broad issues, as follows:

> (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 eight one-hundredths of one percent by weight but less than eighteen one-hundredths of one percent by weight.

App. 7.

Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision suspending Potratz's driving privileges for a period of 91 days. App. 31-33. Potratz requested judicial review of the hearing officer's decision. App. 34. Judge Sonna Anderson affirmed the hearing officer's decision. App. 36-41. The Judgment was entered August 23, 2013. App. 42. Notice of Entry of Judgment was provided on August 28, 2013. App. 2, at Doc. 40. Potratz appealed from the Judgment to this Court. App. 43. The Department asks this Court to affirm the Judgment of the Burleigh County District

Court and the administrative suspension of Potratz's driving privileges for 91 days.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

Potratz appealed the administrative decision to the Burleigh County District Court. App. 34-35. With respect to Potratz's submission to the chemical Intoxilyzer test, the hearing officer found:

> Intoxilyzer testing was done in accordance with the state toxicologists approved method, with results showing an alcohol concentration of .09% within two hours of the time Mr. Potratz was driving.

App. 33. The hearing officer thereafter made the following applicable conclusions of law:

> Mr. Potratz was arrested for DUI, was properly tested to determine his alcohol concentration after the arrest, and had an alcohol concentration of at least .08% within two hours of the time he was driving.

Id.

Judge Anderson affirmed the hearing officer's decision finding the Department had jurisdiction to suspend Potratz's driving privileges for 91 days. App. 36-41. In regards to Potratz's argument that because the Report and Notice fails to state the date the sample was obtained the Department failed to show the breath sample was obtained within two hours of driving, Judge Anderson wrote:

> The Court affirms the Administrative Law Judge's findings. A plain reading of the form shows that the date of 2/17/2013 was noted in three separate locations on the form. Common sense shows that the time of driving, time of arrest and time of obtaining the breath

sample occurred on the same date and within an hour of each other.

App. 39. The district court also affirmed the hearing officer's decision finding the Report and Notice was properly completed and the form did not fail to state a test result of an alcohol concentration of at least eight one-hundredth of one percent by weight as Potratz claimed. App. 39-40.

Lastly, the district court also considered and denied Potratz's argument that his chemical breath test was not fairly administered because Potratz's listed weight on the Intoxilyzer Test Record and Checklist was not the same as his weight on his central driving record. In making this ruling the district court relied on the Approved Method to Conduct Breath Test with the Intoxilyzer 8000 which indicates the subject's weight and other identifying data does not affect the validity of the test. App. 40-41.

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

I. The Department had jurisdiction to revoke Potratz's driving privileges for one year.

The North Dakota Supreme Court has held that "[t]he Department's authority to suspend a person's license is given by statute and is dependent upon the terms of the statute. The Department must meet the basic and mandatory provisions of the statute to have authority to suspend a person's driving privileges." Aamodt v. N.D. Dep't of Transp., 2004 ND 134, ¶ 15, 682 N.W.2d 308 (emphasis added).

A showing of prejudice is an essential requirement to establish that a claimed deficiency in the compliance with the relevant statutory procedure is basic and mandatory to the Department's authority to suspend or revoke a person's driving privileges. See, e.g., Ike v. Dir., N.D. Dep't of Transp., 2008 ND

85, ¶ 10, 748 N.W.2d 692 ("Although the officer failed to follow the technical requirements of N.D.C.C. § 39-20-03.1, Ike failed to establish that the officer's error was basic and mandatory to the Department's authority to proceed against him. Nor did he show he was prejudiced by the officer's failure to strictly comply with the statute."); Samdahl v. N.D. Dep't of Transp., 518 N.W.2d 714, 716-17 (N.D. 1994) ("Although the unexplained delay of more than one month between the testing of the blood and the giving of notice of intention to suspend driving privileges does not strictly comply with 'the letter of the law,' we seek to avoid absurd results. It would be an absurd result if, in the absence of any showing of harm or prejudice to Samdahl, we were to hold the officer's failure to strictly comply with the statute resulted in Samdahl retaining his driving privileges."); Sabinash v. Dir. of Dep't of Transp., 509 N.W.2d 61, 64 (N.D. 1993) ("[A]lthough Sabinash's permit may have been facially incomplete, his permit was valid, and, having suffered no adverse consequences from the oversight, Sabinash was deprived of no rights granted by NDCC § 39-20-03.1(1)."); Schwind v. Dir., N.D. Dep't of Transp., 462 N.W.2d 147, 149-51 (N.D. 1990) ("Schwind had full notice and knowledge of the administrative proceedings and has not been shown to have been prejudiced by the alleged failure to submit the license."). Cf. Jorgensen v. N.D. Dep't of Transp., 2005 ND 80, ¶ 13, 695 N.W.2d 212 (deficiency in not completing blood test result on Report and Notice found to be jurisdictional due to fact that "information will be more quickly, conveniently, and certainly conveyed to the driver by inserting in the appropriate blank space on the report and notice form the results of the test than by giving the driver a copy of

the analytical report of the analysis of the blood sample tested, which may well be confusing to one unacquainted with such documents."); Aamodt, ¶ 25 (deficiency in not completing probable cause on Report and Notice found to be jurisdictional due to fact that "Aamodt was entitled to know what the officer was relying on.").

a. The jurisdictional requirement for the Report and Notice to show that chemical testing was completed "within two hours of driving" was met.

In this case, Potratz alleges the Department lacked jurisdiction to suspend his driving privileges because the Report and Notice allegedly did not demonstrate his chemical test for intoxication was administered within two hours after he had been driving. Section 39-20-03.1(4), N.D.C.C., provides that "[i]f a person submits to a test under section 39-20-01 . . . and the test shows that person to have 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 the driving . . . the law enforcement officer . . . shall forward to the director a certified written report in the form required by the director." N.D.C.C. § 39-20-03.1(4). Among other matters, "the report must show . . . that the individual was tested for alcohol concentration under [chapter 39-20], and that the results of the test show that the individual had an alcohol concentration of at least eight one-hundredths of one percent by weight . . . ." Id.

Potratz's Report and Notice shows the time of his driving as 1:17 AM on February 17, 2013, and the time that his breath sample was obtained was 2:00 AM. App. 4. Although the Report and Notice does not provide for the date the

specimen was obtained, *plain* common sense dictates the reasonable inference that the breath sample was obtained on February 17, 2013 and that the sample for determining Potratz's alcohol concentration was obtained within two hours after the driving. Further, Deputy Lemieux testified he conducted Potratz's chemical test in accordance with the state toxicologist's approved method and affirmed the test was done within two hours of the time the deputy had seen Potratz driving. App. 20. Potratz failed to testify at the hearing and an unfavorable inference can be drawn by the lack of contrary testimony. 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"). The Department had jurisdiction to suspend Potratz's driving privileges.

b. The jurisdictional requirements of the Report and Notice were not violated as Potratz's form included the appropriate test result.

Another question in this case is whether the provision in N.D.C.C. § 39-20-03.1 regarding the test results being documented in the Department's certified report - the Report and Notice - was satisfied. Potratz alleged the Department lacked jurisdiction to suspend his driving privileges because the Report and Notice failed to comply with N.D.C.C. § 39-20-03.1, requiring a test result showing an "alcohol concentration ... by weight". Potratz Br. 7-9. Potratz alleged the Report and Notice only showed a "test result" but not an alcohol concentration by weight as the statute requires. Id. Potratz's argument is both factually and legally erroneous.

This very same argument was presented to this Court recently in Daniels v. Ziegler, 2013 ND 157, 835 N.W.2d 852. The Court, however, did not decide the issue but instead reversed the district court and reinstated the hearing officer's decision holding Daniels failed to sufficiently articulate the issue in his specifications of error. Id. at ¶ 1. Yet, the Supreme Court has addressed similar jurisdictional arguments involving statutory provisions pertaining to the Department. In one line of cases, this Court held that a failure to strictly comply with statutory provisions deprived the Department of jurisdiction to suspend driving privileges. See Aamodt, 2004 ND 134, (officer's failure to fill out the reasonable grounds portion of the Report and Notice, deprived the Department of jurisdiction to suspend Aamodt's license); Bosch v. Moore, 517 N.W.2d 412 (N.D. 1994) (holding that an officer's failure to submit an Intoxilyzer test record, as required by N.D.C.C. § 39-20-03.1(3), deprived the Department of its authority to suspend driving privileges); Jorgensen v. N.D. Dep't of Transp., 2005 ND 80, 695 N.W.2d 212 (Officer's failure to record the results of the chemical test on the Report and Notice deprived the Department of jurisdiction to suspend Jorgensen's driving privileges); Morrow v. Ziegler, 2013 ND 28, 826 N.W.2d 912. (Officer's failure to record information indicating his belief that the person's body contained alcohol on Report and Notice deprived the Department of jurisdiction to revoke for the person's refusal of an onsite screening test under N.D.C.C. § 39-20-14).

In another line of cases, on the other hand, this Court has determined that failure to comply strictly with statutory provisions did not deprive the Department

of jurisdiction to suspend or revoke driving privileges. See Schwind v. Dir., N.D. Dep't of Transp., 462 N.W.2d 147 (N.D. 1990); Ding v. Dir., N.D. Dep't of Transp., 484 N.W.2d 496 (N.D. 1992); Samdahl v. N.D. Dep't Transp. Dir., 518 N.W.2d 714 (N.D. 1994); Erickson v. Dir., N.D. Dep't of Transp., 507 N.W.2d 537 (N.D. 1993).

In Schwind, a driver claimed the director lacked jurisdiction because the law enforcement officer failed to indicate on the Report and Notice form whether or not the motorist's license was attached. 462 N.W.2d at 148-49. Under N.D.C.C. § 39-20-03.1, the officer was to "immediately take possession of the person's operator's license" and was to "forward to the [director] a certified written report in the form required by the [director] and the person's operator's license." Id.

The court held that interpreting the language to be jurisdictional would produce an absurd result. Id. at 150. In rejecting Schwind's argument, the court concluded that Schwind had full notice and knowledge of the hearing and therefore had not been prejudiced by the alleged failure. Id. at 151; see also Ding, 484 N.W.2d 496 (holding that the director was not stripped of jurisdiction to suspend driver's license based on the fact that the Report and Notice Form was not complete as to blood analysis result at time officer signed it).

In Ding, the driver argued that because the Report and Notice was certified by the arresting officer on a date prior to the blood analysis results being available, the inclusion by the officer of a test result figure in the designated blank spot on the form, previously certified, but not transmitted to the Director stripped the Department of jurisdiction. 484 N.W.2d at 500.

The Supreme Court rejected Ding's jurisdiction argument, explaining as follows:

> The inclusion of the test result from the State Toxicologist is required in the form; however, the officer cannot independently determine in advance of the Toxicologist's analysis what the result is. The officer has merely inserted the result in the designated part of the Report and Notice Form when he received it from the State Toxicologist. That result is only as correct as the analysis from the State Toxicologist. Any certification of that result is based upon information received from the State Toxicologist, whereas the other information on the Report and Notice form, particularly the officer's statement of probable cause, is within the personal knowledge of the officer completing it and, for reasons of accuracy, should be certified to at the time closest to the occurrence and the preparation of the statement.

Id. at 500-01.

Justice VandeWalle's special concurrence, joined by Justice Levine, observed as follows:

> The completion of the form by inserting the blood-alcohol level received from the State Toxicologist after the form had been dated and signed could not affect the accuracy and reliability of the results. Although the form certified by the officer contains necessary information other than the test results, such as the officer's statement of probable cause, which is essential to the issues to be decided at the administrative hearing (see section 39-20-05, NDCC), the officer's completion of the certification prior to the date of receipt of the blood-alcohol level could not have affected that information. . . . Although Ding attempts to cast the issue as one of jurisdiction, the receipt of the certified completed form provided the Director jurisdiction. Defects such as the one Ding magnifies in this case may be relevant insofar as admissibility and weight of evidence are concerned, but they are not jurisdictional. Indeed, such defects may not be apparent from the face of the form.

Id. at 502.

In Erickson, this Court rejected a claim that the director lacked jurisdiction because the driver's blood test results were not forwarded to the Department within five days. 507 N.W.2d at 540. The court explained:

> In resolving the ambiguity in section 39-20-03.1(3), we are guided by Schwind v. Director, Dept. of Transp. . . .
>
> . . . .
>
> Based on the rationale of Schwind, any ambiguity in the jurisdiction requirements of § 39-20-03.1(3) should be construed in favor of the clear purpose of the statute, which is to protect the public by preventing persons from driving under the influence. . . . Although the analytical report must be forwarded before the Director has jurisdiction, N.D.C.C. § 39-20-03.1(3) does not require the analytical report be forwarded within five days.

Id. at 540-41(Emphasis added.)

In Samdahl, the driver claimed the director lacked jurisdiction because the officer allegedly failed to "immediately" issue the Report and Notice form after receiving the Toxicologist results as required under N.D.C.C. § 39-20-03.1. 518 N.W.2d at 717. In rejecting Samdahl's claim, this Court held the language of section 39-20-03.1, regarding the giving of notice of intent to suspend a driver's license, is not jurisdictional. Id. The Court explained:

> This case is very similar to Schwind, in which we held an absurd result would occur if we required that the statute be followed to the letter. Id. "Section 39-20-03.1, NDCC, was enacted, in part, to help ensure that an individual who violated this chapter would not continue to drive." Id. Although the unexplained delay of more than one month between the testing of the blood and the giving of notice of intention to suspend driving privileges does not strictly comply with "the letter of the law," we seek to avoid absurd results. It would be an absurd result if, in the absence of any showing of harm or prejudice to Samdahl, we were to hold the officer's failure to strictly comply with the statute resulted in Samdahl retaining his driving privileges.

Id. (footnotes omitted).

It appears from this Court's analyses between the two lines of cases, that a failure to comply strictly with a statutory provision is more problematic to the Court when the provision is likely to have an adverse impact on the driver. However, the Court generally holds provisions not jurisdictional when the statutory violation, on its face, does not appear to have an adverse impact on the driver. As the Aamodt court indicated the Court is more likely going to find a statutory provision to be basic and mandatory when the provision "involves requirements that are material to the Department's decision to suspend a person's driving privileges and are predicates to the Department acting." Aamodt, 2004 ND at ¶ 23. However, requiring compliance with provisions that are not material to the Department's decision will usually produce an absurd result.

The Department does not contest that including the driver's test result on the Report and Notice is a jurisdictional requirement, as that was the specific holding in Jorgensen. See 2005 ND 80 at ¶ 13. It is the Department's position that Potratz's Report and Notice complied with the statutory provision requiring the test result of an alcohol concentration by weight be on the Department's certified report – Report and Notice form.

Unlike the Report and Notice in Jorgensen, Potratz's Report and Notice contains a test result. As the Court in Jorgensen noted, "[a]lthough the report and notice form contains a blank space for recording the test result of Jorgensen's blood specimen, Hulm did not record the results of a chemical test of Jorgensen's blood." 2005 ND 80 at ¶ 3 (emphasis added). Nowhere in the

Jorgensen opinion does the Court explicitly require the test result on the Report and Notice form to be noted with a designation of alcohol concentration by weight. Jorgensen was entitled to reversal simply because the Report and Notice did not contain the figures showing what Jorgensen's test result was. Because Potratz's Report and Notice contains a test result in the appropriate blank space, the Jorgensen opinion supports the position that the Department had jurisdiction to suspend his driving privileges.

More importantly, the copy of the Report and Notice issued by Deputy Lemieux to Potratz does provide notice to him the test result was of an alcohol concentration by weight. Potratz's argument simply relies on Ex. 1b which shows ".094% BRAC" following "Test Results" when there is no designation following the .094% indicating that it is an alcohol concentration by weight. See App. 4. However, Potratz does not read the form in its entirety. In fact, the test result line reflecting .094% is preceded by information marked by the officer indicating Potratz provided a specimen of breath "for testing under NDCC chapter 39-20 or 39-06.2-10.2" and that the sample was obtained at 2:00 AM. App. 4. By indicating a test result was provided under N.D.C.C. ch. 39-20 the form specifies Potratz provided the necessary result showing he had "an alcohol concentration of at least eight one-hundredths of one percent by weight."

This is consistent with the rationale in Ding, where the Court indicated that the insertion of a test result on the Report and Notice is only as correct as the analysis from the State Toxicologist because such information is not within the personal knowledge of the officer completing the form. Presumably, for this

reason, N.D.C.C. § 39-20-03.1(4) also commands the law enforcement officer to forward to the director a certified copy of the operational checklist and test record of a breath test and/or a certified copy of the analytical report for a blood or urine test administered at the direction of the officer. Therefore, the Report and Notice complied with the statutory requirements that "the results of the test show that [Potratz] had an alcohol concentration of at least eight one-hundredths of one percent by weight".

Potratz also claims the effect of adding a percent sign to a given number is to add two zeros to that number and that numerically ".094%" is the equivalent of .00094, indicating Potratz was presumptively not under the influence. See Potratz Br. 8.

Section 39-08-01(a), N.D.C.C., provides "[a] person may not drive or be in actual physical control of any vehicle upon a highway" 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 the driving or being in actual physical control of a vehicle." N.D.C.C. § 39-08-01 (emphasis added). Expressed in decimal form "eight one-hundredths of one percent" numerically equates to ".08 percent" for purposes of stating alcohol concentration. See Clausnitzer v. Tesoro Refining and Marketing Co., 2012 ND 172, ¶ 3, 820 N.W.2d 665 ("The test indicated Clausnitzer had a blood alcohol content of .058 percent, which was lower than the presumptive level of .08 percent for driving under the influence of alcohol under N.D.C.C. § 39–08–01(1)(a) . . ."); Schlosser v. N.D. Dep't of Transp., 2009 ND 173, ¶ 4, 775 N.W.2d

695 ("The blood test indicated that Schlosser's blood alcohol concentration was greater than .08 percent."); Martin v. N.D. Dep't of Transp., 2009 ND 181, ¶ 3, 773 N.W.2d 190 ("[Martin] was placed under arrest for driving under the influence of alcohol with a BAC of .08 percent or greater.").

Deputy Lemieux's recording of Potratz's test result on the Report and Notice as ".094% BRAC" was correct. Cf. Mees v. N.D. Dep't of Transp., 2013 ND 36, ¶ 4, 827 N.W.2d 345 ("The result of the Intoxilyzer test was .125 percent alcohol concentration."). Potratz's attempt to inappropriately add leading zeros to adversely affect the value of the reported number is mathematically ***incorrect***. No evidence was presented that Potratz was confused by the correctly reported test result of ".094% BRAC." See Geiger, 396 N.W.2d at 303 ("[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").

c. A designation of "alcohol concentration by weight" on the Report and Notice form following the person's test results is not a basic and mandatory provision of N.D.C.C § 39-20-03.1.

In the alternative if this Court does not accept the Department's previous argument and believes the face of the Report and Notice fails to show an "alcohol concentration by weight", the Department's position is that the failure to provide such a designation or unit of measurement on the form itself does not deprive the Department of jurisdiction. Put another way, designating the test result on the Report and Notice form as "alcohol concentration by weight" is not a basic and mandatory provision of the statute.

Potratz alleges that Jorgensen supports his argument. Potratz Br. 7-9. However, the rationale of Jorgensen does not support Potratz's argument as he alleges. Potratz's argument is more of a hyper technical gotcha argument. He is alleging the exact words of the statute must be on the Report and Notice and if not then a driver is automatically entitled to reinstatement of driving privileges even though a driver fails to articulate how having the designation "alcohol concentration by weight" on the form would be of any benefit to him or her.

Potratz's argument amounts to putting form over substance. This Court has repeatedly rejected arguments that exalt form over substance. See e.g., State v. Fitterer, 2002 ND 170, ¶ 9, 652 N.W.2d 908; Whiteman v. State, 2002 ND 77, ¶ 21, 643 N.W.2d 704; State v. Albaugh, 1997 ND 229, ¶ 25, 571 N.W. 2d 345; Dittus v. N.D. Dep't of Transp., 502 N.W.2d 100, 106 (N.D. 1993). In Green v. Green, 2009 ND 162, 772 N.W.2d 612, for example, a father motioned the district court to modify a custody order but did so under the wrong statute. Id. at ¶ 9. The district court denied the motion without scheduling an evidentiary hearing. Id. at ¶ 4. This Court, however, found that the father had correctly alleged grounds to allow modification of the custody order if considered under the proper statute and thus the error was not problematic. Id.

As was determined regarding the argument advanced in Schwind, Erickson, and Samdahl, Potratz's argument, if followed, would likewise lead to an absurd result. The requirements of N.D.C.C. § 39-20-03.1 must be read in conjunction with the purpose of chapter 39-20. The clear purpose of chapter 39-20 is to protect the public and individuals from the tragic injuries associated with

intoxicated drivers. In this case, Potratz has not even alleged, let alone demonstrated, any prejudice from the alleged statutory failure. Absent actual prejudice, in light of the purpose of N.D.C.C. ch. 39-20, it would be an absurd result to find that the director lacked jurisdiction to suspend Potratz's driver's license because the test result as reported by the arresting officer of 0.94% did not include the designation "by weight". This is especially true because it is common knowledge that the legal limit for an alcohol related driving offense is .08. Ordinary citizens do not understand the scientific basis and know precisely what .08 percent or greater means in scientific terms and what exactly the unit of measurement is.

Potratz has failed to show how not having that designation on the form deprived him in any way of knowing what the Department was relying on in suspending his driving privileges. Part of the rationale in Jorgensen for finding the statutory provision at issue to be basic and mandatory was due to the short time period in which the driver has to request an administrative hearing to challenge the suspension of driving privileges. On that specific point, the Court in Jorgensen explained:

> Thus, in determining whether to request a hearing, it is important that a driver facing the loss of driving privileges be able to quickly, conveniently, and certainly know what the officer is relying on. That information will be more quickly, conveniently, and certainly conveyed to the driver by inserting in the appropriate blank space on the report and notice form the results of the test than by giving the driver a copy of the analytical report of the analysis of the blood sample tested, which may well be confusing to one unacquainted with such documents.

2005 ND 80 at ¶ 13 (emphasis added). Because providing the test record, whether blood or breath, would be confusing to the driver, the same can be said of providing

a designation of "alcohol concentration by weight" to the driver. This scientific designation may mean something to a chemist but Potratz has not articulated how having the scientific unit of measurement would be of any conceivable benefit to him or other drivers. The inclusion of such a designation provides no more certainty to a driver about what the Department is relying on to suspend driving privileges or any more help in making the choice of whether to request a hearing. Because Potratz was provided the results of his chemical test on the Department's Report and Notice form, the Department complied with the jurisdictional requirements of N.D.C.C. § 39-20-03.1.

Further, the approved Intoxilyzer Test Record and Checklist shows the reported alcohol concentration to be "0.094" with no reference on this approved form that this number is an alcohol concentration by weight. If this approved evidentiary record provides prima facie proof of alcohol concentration without noting a reference to "alcohol concentration by weight" it would be absurd to require more on the Report and Notice. The Department had the authority to suspend Potratz's driving privileges.

II. The hearing officer reasonably found the Intoxilyzer test was fairly administered and the results were reliable and authentic.

a. This Court reviews the administrative hearing officer's evidentiary ruling for abuse of discretion.

Potratz raises the issue of whether his Intoxilyzer test results were inadmissible. This Court reviews the administrative hearing officer's ruling for an abuse of discretion. See Knudson v. Dir., N.D. Dept. of Transp., 530 N.W.2d 313, 317-18 (N.D. 1995). An abuse of discretion occurs when a hearing officer

acts in an arbitrary, unreasonable, or capricious manner or misinterprets or misapplies the law. Id. The broad question, properly framed, is whether the hearing officer abused her discretion in admitting Potratz's Intoxilyzer test results into evidence.

b. Potratz's Intoxilyzer test was properly admitted into evidence.

This Court has observed that "'[t]he admissibility of an Intoxilyzer test result is governed by N.D.C.C. § 39-20-07(5).'" Buchholtz v. Dir., N.D. Dep't of Transp., 2008 ND 53, ¶ 10, 746 N.W.2d 181 (quoting Johnson v. N.D. Dep't of Transp., 2004 ND 59, ¶ 11, 676 N.W.2d 807). This Court also has observed that "'[f]air administration of an Intoxilyzer test may be established by proof that the method approved by the State Toxicologist for conducting the test has been scrupulously followed.'" Buchholtz, 2008 ND 53, ¶ 10, 746 N.W.2d 181 (quoting Buchholz v. N.D. Dep't of Transp., 2002 ND 23, ¶ 7, 639 N.W.2d 490). However, this Court has noted, "'scrupulous' compliance does not mean 'hypertechnical' compliance." Buchholtz, 2008 ND 53, ¶ 10, 746 N.W.2d 181 (external citations omitted.) Even when there is a deviation from the state toxicologist's directions, the test results may be admitted if the deviation could not have substantially affected the test results. Schwind v. Dir., N.D. Dep't of Transp., 462 N.W.2d 147, 152 (N.D. 1990); see also Wagner v. Backes, 470 N.W.2d 598, 600 (N.D. 1991) ("When . . . we have been able to say that the deviation involved some clerical or ministerial aspect of an approved method and, therefore, could not have affected the test results, we have upheld a license suspension.").

The hearing officer admitted Potratz's Intoxilyzer Test Record and Checklist into evidence. App. 5, 21. As noted on the Intoxilyzer Test Record and Checklist, Trooper Lemieux tested Potratz's alcohol content on February 17, 2013. App. 5. Trooper Lemieux also noted on the Intoxilyzer Test Record and Checklist that "I followed the approved method and the instructions displayed by the Intoxilyzer in conducting this test." Id.

The admission of Potratz's Intoxilyzer Test Record and Checklist was procedurally significant because it shifted to Potratz the burden of presenting evidence that Trooper Lemieux had not fairly administered his Intoxilyzer test. Specifically, N.D.C.C. § 39-20-05(4) provides, in part, that a certified copy of an Intoxilyzer Test Record and Checklist is one of the "regularly kept records of the director" and adds that "[t]hose records establish prima facie their contents without further foundation." (Emphasis added.)

The term "prima facie" is defined, in part, as meaning "a fact presumed to be true unless disproved by some evidence to the contrary." Black's Law Dictionary 1189 (6th ed. 1990). Similarly, the term "prima facie evidence" is defined, in part, as meaning "[s]uch evidence as, in the judgment of the law, is sufficient to establish a given fact . . . and which if not rebutted or contradicted, will remain sufficient." Id. at 1190. At that point, this Court has observed, "if a driver want[s] to discredit the prima facie fairness and accuracy of a test, it [is] the driver's responsibility to produce evidence that the test was not fairly or adequately administered. . . . A driver must do more than raise the mere

possibility of error." Berger v. State Highway Comm'r, 394 N.W.2d 678, 688 (N.D. 1986) (emphasis added).

Potratz argues there was an error on the Intoxilyzer Test Record regarding his weight and alleges Ringsaker v. Dir., N.D. Dep't of Transp., 1999 ND 127, 596 N.W.2d 328 controls the outcome. Potratz Br. 3. Potratz's argument is misplaced.

Ringsaker is not directly on point as Potratz alleges. In Ringsaker the Intoxilyzer test record failed to print a numeric date. 1999 ND 127 at ¶ 3. The "machine incorrectly printed '22/*0/17' where the date should have been." Id. The Supreme Court reviewed the approved method and recognized it did not indicate whether the operator of the Intoxilyzer test should observe the date for legibility, but rather that it simply stated, "[r]emove the Form 106-I and observe for legibility. If the printing is legible the operator should sign the Form 106-I." Id. at ¶ 9. Because the approved method did not define the term "legible", the Supreme Court stated, "when the date fails to print accurately, it raises questions regarding the trustworthiness of the entire test result." Id. at ¶ 10. As there was no expert evidence showing the inaccurate date could not have affected the accuracy of the test result, the Supreme Court reversed the suspension. Id. at ¶¶ 11-15.

Unlike in Ringsaker, here there is no error or misprint on the face of Potratz's Intoxilyzer record. Thus, there is simply no deviation on the face of Potratz's test record which calls into question the fair administration of his Intoxilyzer test. Rather, Potratz is trying to argue that Exhibit 1c is inaccurate

because Potratz's listed weight on the test record of 180 lbs is different than his listed weight Exhibit 13, his Central Driving Record.

However, the subject's weight, and other identifying information is not a part of the approved method that goes to the scientific accuracy of the chemical test. Nothing in the approved method indicates the subject's weight has any bearing on the accuracy of the test result. This information is simply gathered for identification purposes. And unlike the case in Ringsaker, here the approved method explicitly indicates that identifying information, such as the subject's weight has no bearing on the accuracy of the test results.

The "APPROVED METHOD TO CONDUCT BREATH TESTS WITH THE INTOXILYZER 8000" states in pertinent part as follows:

> If upon review, the operator determines any information entered prior to testing or during the test is incorrect, the operator may amend the printed test record by crossing out the incorrect information and writing the correction on the printed test record. Note: Entered information does not have any effect on the subject's reported breath alcohol concentration. Incorrect date in these areas will not cause the test to be invalid. The operator may correct the following items if necessary:
>
> a. Location Code
> b. Date and Time
> c. Subject information
>
> - Name
> - Date of Birth
> - Gender
> - Test Reason
> - **Weight**
> - Citation Number
> - Driver's License Number
> - Driver's License State

Ex. 8, page 6-7 (emphasis added). Because the subject's weight has no effect on the subject's reported breath alcohol concentration, Potratz's argument based

on Ringsaker is misplaced. Given the above evidence, the hearing officer did not abuse her discretion in reasonably determining Potratz's Intoxilyzer test was fairly administered.

CONCLUSION

The Department respectfully requests that this Court affirm judgment of the Burleigh County District Court and affirm the hearing officer's decision suspending Potratz's driving privileges for 91 days.

Dated this 3rd day of January, 2014.

State of North Dakota
Wayne Stenehjem
Attorney General

By: _____
Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
mtpitcher@nd.gov
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
mtpitcher@nd.gov

Attorneys for Appellant.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Joseph Daniel Potratz, Appellant, v. Director, North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20130322** **District Ct. No. 08-2013-CV-00617**

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

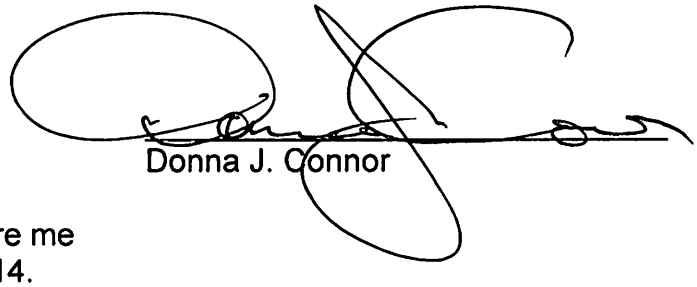
Donna J. Connor states under oath as follows:

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 3rd day of January, 2014, I served the attached **BRIEF OF APPELLEE** upon Joseph Daniel Potratz, by and through his attorney Michael R. Hoffman, by placing a true and correct copy thereof in an envelope addressed as follows:

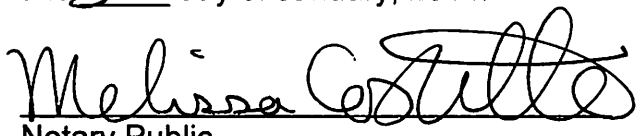
Michael R. Hoffman
Attorney at Law
P.O. Box 1056
Bismarck, ND 58502-1056

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 3rd day of January, 2014.



Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2019