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NOVEMBER 10, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Michael Dale Filkowski, Appellant, v. Director, North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20140290** **District Ct. No. 27-2013-CV-00292**

APPEAL FROM THE DISTRICT COURT
MCKENZIE COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT

HONORABLE ROBIN A. SCHMIDT

BRIEF OF APPELLEE

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[¶2] Whether the preponderance of the evidence established Filkowski's blood test was performed in accordance with the correct approved method.

[¶3] Whether the analytical report of Filkowski's blood test established Filkowski had an alcohol concentration of at least eight one-hundredths of one percent by weight irrespective of the fact the report used the word "ethanol."

[¶4] Whether the preponderance of the evidence established Filkowski's blood test was performed by an individual possessing a certificate of qualification to administer the test.

STATEMENT OF CASE

[¶5] North Dakota Highway Patrol Trooper Chelsey Schatz ("Trooper Schatz") placed Filkowski under arrest on October 5, 2013, for the offense of driving a vehicle while under the influence of intoxicating liquor. (Appendix of Appellant ("Filkowski App.") 70.) An administrative hearing was held on December 5, 2013, regarding the proposed suspension of Filkowski's driving privileges for the alcohol-related traffic offense. (Id. at 25-69.) Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision suspending Filkowski's driving privileges for a period of 91 days. (Id. at 70.) Filkowski requested judicial review of the hearing officer's decision. (Id. at 71-73.)

STATEMENT OF FACTS

[¶6] On October 5, 2013, at approximately 1:01 a.m., McKenzie County Deputy Sheriff Travis Bateman ("Deputy Bateman") observed a vehicle that was being driven by Filkowski "cross[] over the white fog line by at least one to two tire widths, then drift[] back to its left over the course of about a mile. And it came over to its left to where it crossed over the center line." (Id. at 30, ll. 6-11.) After stopping the vehicle and observing indicia of Filkowski's intoxication, Deputy Bateman turned the matter over to Trooper Schatz. (Id. at 31, l. 1 -- 33, l. 10.)

[¶7] After making her own observations of Filkowski's indicia of intoxication, Trooper Schatz requested Filkowski submit to a series of field sobriety tests, including the onsite screening test, which Filkowski failed. (Id. at 44, l. 1 - 58, l. 11.) Trooper Schatz placed Filkowski under arrest for the offense of driving a vehicle while under the influence of intoxicating liquor. (Id. at 58, ll. 12-20.)

[¶8] Trooper Schatz transported Filkowski to the McKenzie County Hospital where the law enforcement officer informed Filkowski of the implied consent advisory and then requested he submit to a blood test to which Filkowski consented. (Id. at 59, l. 14 - 60, l. 2.) The results of Filkowski's blood test established he had a blood alcohol concentration reported on the analytical report as "Ethanol 0.166 g/100ml. (Id. at 5.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶9] At the administrative hearing, Filkowski objected to the admissibility of the analytical report of his blood test on the following grounds:

> Furthermore on Exhibit 1e it shows the results here as ethanol, 0.166 grams per 100 milliliters. In that regard I would indicate to

> the hearing officer that Section 39-20-07, Subsection 4 define alcohol concentration and it states alcohol concentration is based upon grams of alcohol per 100 milliliters of blood. It doesn't use the word ethanol. And I would indicate to the hearing officer that without expert testimony by the director, the state toxicologist or an analyst or whoever that listing ethanol, 0.166 grams per 100 milliliters does not comply with the statute defining alcohol concentration.
>
> . . .
>
> And then I have another objection to Exhibit 1e. It says, the method used is the approved method to conduct blood alcohol analysis. And then in parens, capital REV. 0.1 close paren. The approved method documents the foundation in this case, as Exhibit 8. Exhibit 8 is entitled Approved Method to … excuse me. Approved Method to Conduct Blood Alcohol Analysis (TxS-020), then revision number 0.1.
>
> Exhibit 1e fails to reflect Exhibit 8, fails to tie into Exhibit 8 as reflecting the same method. And I submit again, without testimony or other proof to show that these methods are one and the same that that is insufficient evidence in this case, upon which to make a finding against Mr. Filkowski.
>
> . . . . Exhibit 1f indicates that a signature of one Kali Hiev, K-A-L-I H-I-E-V [sic], forensic scientist. And then to the right of that it says analysis performed alcohol/volatile analyst. It does not, in fact, indicate who the analyst is that performed the analysis and that's a failure of proof.

(Id. at 65, l. 5 -- 66, l. 15.)

[¶10] Filkowski further objected to the admissibility of the analytical report of his blood test and the jurisdiction of the Department on the following ground:

> I'm also going to object that the submitter's portion of the checklist of Form 104 is not in evidence today. And without that, I submit there's insufficient evidence here to show that the approved method was followed. The approved method of Exhibit 104 does have a bottom portion which is called the submitters … specimen submitter's checklist. That is not in evidence. And more importantly, I guess, was not submitted to the director.

> And therefore there's not jurisdiction to proceed in this case against Mr. Filkowski. . . .

(Id. at 66, ll. 16-25.)

[¶11] The hearing officer overruled Filkowski's objections and admitted the analytical report of Filkowski's blood test into evidence. (Id. at 67, ll. 1-2.) The hearing officer found that "[a]t the state lab the blood ample [sic] was analyzed by a qualified analyst on an approved device, according to the approved method. The test was fairly administered. The test result obtained showed an alcohol concentration of 0,166g/100mL." (Id. at 69.) The hearing officer concluded "Filkowski was . . . tested in accordance with NDCC section 39-20-01 and section 39-20-02. The test results show Mr. Filkowski had an alcohol concentration of at least eight one-hundredth of one percent but less than eighteen one-hundredths of one percent by weight." (Id.)

[¶12] Filkowski requested judicial review of the administrative decision by the McKenzie County District Court pursuant to N.D.C.C. § 39-20-06. (Id. at 71-73.) Among other matters, Filkowski alleged in his Notice of Appeal and Specifications of Error:

> 1. The bottom portion of Form 104, see Exhibit 7, the specimen submitter's checklist, was not sent to the Director by the law enforcement officer, and therefore the Director did not have jurisdiction to proceed against Filkowski's driving privileges.
>
> . . .
>
> 4. Exhibit 1e, the "Approved Method to Conduct Blood Alcohol Analysis (Rev. 0.1)" is not supported by Exhibit 8 or any other exhibit or by testimony, and therefore was not admissible.

5. Exhibit 1e states the Results as "Ethanol". "Ethanol" is nowhere stated in Chapter 39-20. Therefore, "alcohol concentration" in N.D.C.C. § 39-20-07(4) is not shown. Without testimony, "alcohol concentration" is not proven.

6. Exhibit 1f fails to show who performed the analysis of Filkowski's blood, and therefore there was no showing that Filkowski's blood was analyzed by a person approved to do the analysis.

(Id. at 71-72.)

[¶13] The district court issued its Memorandum Opinion and Order on May 28, 2014, in which it affirmed the Hearing Officer's Decision suspending Filkowski's driving privileges. (Id. at 74-75.) Judgment was entered on May 30, 2014. (Id. at 76-77.) Filkowski appealed the Judgment to the North Dakota Supreme Court. (Id. at 78.) On appeal, the Department respectfully requests this Court affirm the judgment of the McKenzie County District Court and the Hearing Officer's Decision suspending Filkowski's driving privileges for a period of 91 days.

STANDARD OF REVIEW

[¶14] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to revoke driving privileges." Haynes v. Dir., Dep't of Transp., 2014 ND 161, ¶ 6, 851 N.W.2d 172. 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.

[¶15] "In an appeal from a district court's review of an administrative agency's decision, [the Court] reviews the agency's decision." Haynes, at ¶ 6. The Court "do[es] not make independent findings of fact or substitute [its] judgment for that of the agency; instead, [it] determine[s] whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." Id.

[¶16] "When an 'appeal involves the interpretation of a statute, a legal question, this Court will affirm the agency's order unless it finds the agency's order is not in accordance with the law.'" Harter v. N.D. Dep't of Transp., 2005 ND 70, ¶ 7, 694 N.W.2d 677 (quoting Phipps v. N.D. Dep't of Transp., 2002 ND 112, ¶ 7, 646 N.W.2d 704). The "[i]nterpretation of a statute is a question of law fully reviewable on appeal." State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60.

[¶17] "This Court reviews an administrative hearing officer's evidentiary rulings under the abuse of discretion standard." Potratz v. N.D. Dep't of Transp., 2014

ND 48, ¶ 7, 843 N.W.2d 305 (citing Knudson v. Dir., N.D. Dep't of Transp., 530 N.W.2d 313, 317 (N.D. 1995)).

[¶18] "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.

LAW AND ARGUMENT

I. The Department had the authority to suspend Filkowski's driving privileges irrespective of the fact that Form 104's specimen submitter's checklist was not forwarded to the Department with the copy of the analytical report of his blood test.

[¶19] In this case, Filkowski alleges the Department lacked the authority to suspend his driving privileges due to the fact that Form 104's specimen submitter's checklist was not forwarded to the Department with the copy of the analytical report of his blood test. "Filkowski contends that by failing to forward the completed Specimen Submitter's checklist to the Director, the Director had insufficient evidence to proceed against his driving privileges, i.e., the Director did not have jurisdiction to proceed against his driving privileges." See Br. of Appellant at ¶ 14.

[¶20] The prerequisites for the exercise of Department's jurisdiction to suspend or revoke a person's driving privileges are established by statute. See Bosch v. Moore, 517 N.W.2d 412, 413 (N.D. 1994). "The Department's authority to suspend a person's license is given by statute and is dependent upon the terms

of the statute." Aamodt v. N.D. Dep't of Transp., 2004 ND 134, ¶ 15, 682 N.W.2d 308. "The Department must meet the basic and mandatory provisions of the statute to have authority to suspend a person's driving privileges." Id.

[¶21] "Whether the provision is basic and mandatory rests primarily on whether the Department's authority is affected by failure to apply the provision." Morrow v. Ziegler, 2013 ND 28, ¶ 9, 826 N.W.2d 912 (citing Aamodt, at ¶ 23). The Court must articulate "what in [the statute] is a basic and mandatory requirement such that the Department would be without authority to adjudicate revocation of [a person's] driving privileges." Ike v. Dir., N.D. Dep't of Transp., 2008 ND 85, ¶ 7, 748 N.W.2d 692.

[¶22] Of relevance to Filkowski's argument is section 39-20-03.1(4)'s requirement that "the law enforcement officer shall forward to the director . . . the certified copy of the analytical report for a blood . . . test for all tests administered at the direction of the officer." N.D.C.C. § 39-20-03.1(4). Under this provision, the Supreme Court has held that the failure to forward the results of all the blood-alcohol tests conducted on a driver deprives the Department of the authority to suspend a person's driving privileges. See, e.g., Larson v. Moore, 1997 ND 227, ¶ 10, 571 N.W.2d 151 ("The officer's failure to submit the first sample for testing to obtain an analytical report as required by N.D.C.C. § 39-20-03.1(3) deprived the Department of authority to suspend Larson's driver's license."); Bosch v. Moore, 517 N.W.2d 412, 413 (N.D. 1994) ("[W]e conclude that the officer's failure to submit the Intoxilyzer test records deprived DOT of authority to suspend Bosch's driving privileges.").

[¶23] Form 104 (see Filkowski App. 4, 7-8), however, is ***not*** the analytical report for a blood test that is required to be forwarded to the Department by section 39-20-03.1(4). Rather, Form 104 is an evidentiary device for the introduction of the analytical report at the administrative hearing.

[¶24] As explained by the Supreme Court, "Form 104, drafted by the State Toxicologist, contains directions and a checklist to ensure proper collection and submission of blood samples." Barros v. N.D. Dep't of Transp., 2008 ND 132, ¶ 10, 751 N.W.2d 261. The Supreme Court has stated:

> Form 104 has several functions. First, the certification of the laboratory technician "ensures that the scientific accuracy and reliability of the test are not affected by improper collection or preservation of the blood sample." Second, the certifications of the specimen submitter and receiver provide "an evidentiary shortcut for establishing chain of custody" by ensuring the specimen is received in the same condition as it was submitted.

State v. Jordheim, 508 N.W.2d 878, 883 (N.D. 1993) (internal citations omitted). See also Schlosser v. N.D. Dep't of Transp., 2009 ND 173, ¶ 11, 775 N.W.2d 695 ("A completed Form 104 can be used to show fair administration of the test, chain of custody, and compliance with the State Toxicologist's approved methods.").

[¶25] The Supreme Court has determined the failure to introduce Form 104's specimen submitter's checklist into evidence at the hearing does not necessarily render the analytical report to be inadmissible. In Jordheim, the Supreme Court stated:

> . . . Form 104 has three sections that correspond to the conduct of the three people who normally participate in administering the blood test. The top half of the form includes the name of the person whose blood is drawn, and a list of directions for both the specimen

> collector and the recipient of the sample at the laboratory. ***The bottom half of the form contains a similar list for the specimen submitter. The submitter, who will usually be a police officer, is directed to retain this half of Form 104 in police records, undoubtedly for later evidentiary use.*** . . .

508 N.W.2d at 881-82 (emphasis added).

[¶26] In Jordheim the Court determined "[t]he bottom half of Form 104 was not offered by the prosecution." Id. at 882. Nevertheless, the Court found "Officer Renner testified that he performed the steps required in the form," and "this testimony, coupled with the documentary exhibits, established fair administration through scrupulous compliance with Form 104." Id. "Conversely, when an officer did not testify he performed each and every step in accordance with detailed procedures promulgated by the State Toxicologist, this Court held the test was not fairly administered and a Form 104 missing the bottom half should not have been admitted into evidence" State v. Keller, 2013 ND 122, ¶¶ 16, 18-20, 833 N.W.2d 486 (despite the fact that the bottom half of the completed Form 104 was entered into evidence, the Court determined "[t]he documents introduced into evidence and certified by the State Toxicologist's assignee, coupled with the deputy's testimony, establish Keller's blood test was fairly administered.").

[¶27] Section 39-20-03.1(4) does not require that proof of the fair administration of a blood test be provided to the Department at the time it receives the certified copy of the analytical report for a blood test. Rather proof of fair administration is a matter reserved for determination at the administrative hearing. Trooper Schatz testified at the administrative hearing regarding the steps required by the Form 104's specimen submitter's checklist. See Filkowski App. 60, ll. 15-22.

[¶28] The Department had the authority to suspend Filkowski's driving privileges irrespective of the fact that Form 104's specimen submitter's checklist was not forwarded to the Department with the copy of the analytical report of his blood test.

II. The preponderance of the evidence established Filkowski's blood test was performed in accordance with the correct approved method.

[¶29] "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(5) provides:

> 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. . . .

N.D.C.C. § 39-20-07(5). "[T]o 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).

[¶30] In this case, Filkowski alleges the proper foundation for the admission of the analytical report of his blood test was not established because the document titled "Approved Method to Conduct Blood Alcohol Analysis (TxS-020) Revision Number 0.1" that was admitted into evidence at the administrative hearing for foundational purposes (see Filkowski's App. 9-24) was not the methodology used

to conduct his blood test. See Br. of Appellant at ¶ 21. Filkowski's analytical report stated his blood test was administered according to "Approved Method to Conduct Blood Alcohol Analysis (Rev. 0.1)." See Filkowski's App. 5.

[¶31] The certification page which accompanied Filkowski's analytical report and which was signed by Kali L. Hieb, in her capacity as a designee of the Director of the State Crime Lab, stated "the analysis of [Filkowski's] blood sample has been performed according to the method and with a device approved by the State Toxicologist." (Appendix of Brief of Appellee ("Department's App.") 1.) The disparity between the wording "Approved Method to Conduct Blood Alcohol Analysis (TxS-020) Revision Number 0.1" and "Approved Method to Conduct Blood Alcohol Analysis (Rev. 0.1)" is insufficient to overcome the certification of the Director's designee. Filkowski raised no more than a mere possibility of error.

[¶32] The preponderance of the evidence supports the hearing officer's determination that Filkowski's blood test for was performed in accordance with the correct approved method.

III. The analytical report of Filkowski's blood test established Filkowski had an alcohol concentration of at least eight one-hundredths of one percent by weight irrespective of the fact the report used the word "ethanol."

[¶33] In this case, Filkowski alleges the analytical report of his blood test was inadmissible because the report states his test result in terms of "ethanol" and N.D.C.C. ch. 39-20 does not define "alcohol concentration" by reference to the word "ethanol." See Br. of Appellant at ¶ 30.

[¶34] Section 39-20-05(2), N.D.C.C., provides that the scope of issues at a license suspension hearing includes "whether the test results show the individual had an alcohol concentration of at least eight one-hundredths of one percent by weight. . ." N.D.C.C. § 39-20-05(2). Section 39-20-07(4) provides "[a]lcohol concentration is based upon grams of alcohol per one hundred milliliters of blood or grams of alcohol per two hundred ten liters of end expiratory breath or grams of alcohol per sixty-seven milliliters of urine." N.D.C.C. § 39-20-07(4).

[¶35] Chapter 39-20 does not define the term "alcohol." Nevertheless, as applicable to the implied consent requirements for commercial motor vehicle drivers, "'[a]lcohol' means any substance containing any form of alcohol, including ***ethanol***, methanol, propanol, and isopropanol." N.D.C.C. § 39-06.2-02(1) (emphasis added). See also Michaels v. State ex rel. Dept. of Transp., 271 P.3d 1003, 1009 (Wyo. 2012) ("The plain and ordinary meaning of the word 'alcohol' is: ' a: ***ethanol*** especially when considered as the intoxicating agent in fermented and distilled liquors b: drink (as whiskey or beer) containing ***ethanol***.'") (quoting Merriam-Webster Collegiate Dictionary 27).

[¶36] In addition, the "Approved Method to Conduct Blood Alcohol Analysis (TxS-020) Revision Number 0.1" that was admitted into evidence at the administrative hearing for foundational purposes references the word "ethanol," throughout the methodology in the blood analysis. See Filkowski's App. 9-24. The analytical report of Filkowski's blood test established Filkowski had an alcohol concentration of at least eight one-hundredths of one percent by weight irrespective of the fact the report used the word "ethanol."

IV. The preponderance of the evidence established Filkowski's blood test was performed by an individual possessing a certificate of qualification to administer the test.

[¶37] In this case, Filkowski alleges there is no evidence his blood test was performed by an individual possessing a certificate of qualification to administer the test as required by the foundational requirements of section 39-20-07.

[¶38] Filkowski's analytical report, however, was signed by Hieb, in her capacity as a forensic scientist, who certified "[t]he results and conclusions in this report are the opinions and interpretations of the analyst(s) from the submitted evidence." (Filkowski App. 6.) Hieb also signed the certification page which accompanied Filkowski's analytical report and in which she stated "the analysis of [Filkowski's] blood sample has been performed according to the method and with a device approved by the State Toxicologist and [she is] certified by the State Toxicologist to conduct blood analysis to determine alcohol concentration." (Department's App. 1.) In addition, the Department's records independently show that Hieb has been certified to conduct blood alcohol analysis. (Id. at 5-6.)

[¶39] A reasonable inference can be drawn -- for which Filkowski offered no contrary evidence -- that Hieb was the analyst who performed Filkowski's blood test. The preponderance of the evidence established that Filkowski's blood test was performed by an individual possessing a certificate of qualification to administer the test.

CONCLUSION

[¶40] The Department respectfully requests this Court affirm the judgment of the McKenzie County District Court and the Hearing Officer's Decision suspending Filkowski's driving privileges for a period of 91 days.

Dated this ____ day of November, 2014.

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Attorney General

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Michael Dale Filkowski, Appellant, v. Director, North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20140290** **District Ct. No. 27-2013-CV-00292** **AFFIDAVIT OF SERVICE BY MAIL**

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

[¶1] Donna J. Connor states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 10th day of November, 2014, I served the attached **BRIEF OF APPELLEE and APPENDIX TO BRIEF OF APPELLEE** upon the appellant by placing true and correct copies 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 _____ day of November, 2014.

_____
Notary Public

CIVIL LITIGATION
500 NORTH 9TH STREET
BISMARCK, ND 58501-4509
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November 10, 2014

HAND DELIVERED

Penny L. Miller
Clerk of the Supreme Court
State Capitol
Judicial Wing, 1st Floor
600 East Boulevard Avenue
Bismarck, ND 58505-0530

Re: Michael Dale Filkowski v. Director, North Dakota Department of Transportation;
Supreme Ct. No. 20140290
District Ct. No. 27-2013-CV-00292

Dear Ms. Miller:

Enclosed for filing are the original and seven copies of the Brief of Appellee, Appendix to Brief of Appellee, and an Affidavit of Service by Mail in the above-referenced matter. The Brief of Appellee will be electronically mailed to your office today in the same order as the paper brief.

Thank you.

Sincerely,

Douglas B. Anderson
Assistant Attorney General

mcc
Enclosures
cc: Michael R. Hoffman (w/encs.)

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