

20160027

IN THE SUPREME COURT

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

STATE OF NORTH DAKOTA

APR 11 2016

Glenn Johnathan Lohmann,

Appellant,

v.

North Dakota Department of
Transportation,

Appellee.

STATE OF NORTH DAKOTA

Supreme Ct. No. 20160027

District Ct. No. 08-2015-CV-01585

APPEAL FROM THE NOVEMBER 20, 2015 JUDGMENT OF THE
DISTRICT COURT, BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE THOMAS J. SCHNEIDER

BRIEF OF APPELLEE

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Appellee.

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STATEMENT OF ISSUE

[¶1] Whether the proper foundation was established for the admission of the analytical report of Lohmann's blood test result.

STATEMENT OF CASE

[¶2] Morton County Deputy Sheriff Jon Engelstad ("Deputy Engelstad") arrested Lohmann on March 21, 2015, for the offense of being in actual physical control of his vehicle while under the influence of intoxicating liquor. (Appendix of Appellant ("App.") 20) At the conclusion of the May 11, 2015, administrative hearing, the hearing officer issued her findings of fact, conclusions of law, and decision suspending Lohmann's driving privileges for a period of 180 days. (Id.) Lohmann submitted a Petition for Consideration which the hearing officer denied. (Id. at 21-28-1.) Lohmann requested judicial review of the hearing officer's decision. (Id. at 29-30.)

STATEMENT OF FACTS

[¶3] On March 21, 2015, at approximately 10:30 p.m., Deputy Engelstad observed "a pickup parked at an odd angle, partially over into the driving lane of traffic on Highway 49." (Transcript ("Tr.") 4, l. 14 – 5, l. 13.) Upon approaching the vehicle, Deputy Engelstad observed that the driver, who was identified as Lohmann, had his head down, but was moving "around a little bit in the vehicle." (Id. at 5, l. 25 – 6, l. 6.)

[¶4] When Lohmann opened the door to his vehicle, Deputy Engelstad could smell a strong odor of an alcohol beverage. (Id. at 6, ll. 13-18.) After observing further indicia of Lohmann's intoxication and administering a series of field

sobriety tests, Deputy Engelstad placed Lohmann under arrest for being in actual physical control of his vehicle while under the influence of intoxicating liquor. (Id. at 6, l. 19 – 10, l. 6.)

[¶5] The result of a blood test established Lohmann had a blood alcohol concentration of 0.246% by weight. (App. 5.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶6] Lohmann requested judicial review of the Hearing Officer's Decision by the Burleigh County District Court pursuant to N.D.C.C. § 39-20-06. (App. 29-30.) On appeal, Lohmann raised the argument:

The analytical report should not have been received into evidence because neither N.D.C.C. § 39-20-07(8) nor Rule 902, N.D.R. Evid. were complied with. The analytical report was not properly certified nor was any authenticity established.

(Id. at 30-31.)

[¶7] The district court issued its Order on November 19, 2015, in which the court affirmed the Hearing Officer's Decision. (Id. at 31.) Judgment was entered on November 20, 2015. (Id. at 33-34.) Lohmann appealed the Judgment to the North Dakota Supreme Court. (Id. at 35-36.) On appeal, the Department requests this Court affirm the Judgment of the Burleigh County District Court and the Hearing Officer's Decision suspending Lohmann's driving privileges for a period of 180 days.

STANDARD OF REVIEW

[¶8] "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.

[¶9] "In an appeal from a district court's review of an administrative agency's decision, [the Court] review[s] 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.

[¶10] “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.

LAW AND ARGUMENT

The proper foundation was established for the admission of the analytical report of Lohmann’s blood test result.

[¶11] In this case, as did the appellant in Jangula v. N.D. Dep’t of Transp., Supreme Ct. No. 20150286, Lohmann – citing N.D.C.C. § 39-20-07(8) and Rule 902, N.D.R. Evid. – “argues the analytical report should not have been received into evidence because the document was not properly certified nor was any authenticity established.” (Appellant’s Br. ¶ 11.)

[¶12] Section 39-20-07(8), N.D.C.C., provides that “[a] *certified* copy of the analytical report of a blood . . . analysis . . . 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.” N.D.C.C. § 39-20-07(8) (emphasis added). “Certificate” is defined by N.D.C.C. § 31-04-10 as:

Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there is any, or if such officer is a clerk of a court having a seal, under the seal of such court.

N.D.C.C. § 31-04-10.

[¶13] Rule 902, N.D.R. Evid., on the other hand, provides for the self-authentication of domestic documents in relevant part as follows:

(1) Domestic Public Documents That Are Sealed and Signed.

A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) Domestic Public Documents That Are Not Sealed But Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal, or its equivalent, that the signer has the official capacity and that the signature is genuine.

. . .

(10) Presumptions Under a Statute. A signature, document, or anything else that a statute declares to be presumptively or prima facie genuine or authentic.

N.D.R. Evid. 902.

[¶14] Under an evidentiary provision comparable to N.D.R. Evid. 902(1), the Indiana Court of Appeals found the required seal and the signature to have been satisfied by a document bearing “the seal of the City of Indianapolis” and the signature of the “Public Access Counselor.” Lane-El v. Spears, 13 N.E.3d 859, 870 (Ind. Ct. App. 2014). In addition, the Tennessee Criminal Court of Appeals “disagree[d] with the . . . contention that a document must bear a ‘raised mark’ or

an embossed seal to be properly authenticated. There is no rule requiring that a seal on a document be raised in order to be valid." State v. Troutman, 327 S.W.3d 717, 724 (Tenn. Crim. Ct. App. 2008).

[¶15] In this case, the analytical report of Lohmann's blood test result bears the heading of the Office of Attorney General, Crime Laboratory Division along with the Great Seal of the State of North Dakota. (App. 5-6.) The report also contains the statement of Kali L. Heib, in her official capacity as a forensic scientist, that:

The undersigned forensic scientist, designee of the Director of the North Dakota Office of Attorney General, Crime Laboratory Division, certified this Standard Forensic Advantage Discovery Packet containing the Toxicology Alcohol/ Volatiles Report and Submission for Blood (Form 104) are true and correct copies of the originals on electronic file at the North Dakota Office of Attorney General, Crime Laboratory Division. . . . I am a public officer without seal.

(Id.)

[¶16] Lomann relies on the *pre-electronic posting* case Peterson v. N.D. Dep't of Transp., 518 N.W.2d 690, 696 (N.D. 1994) to support his argument. In Peterson, three appellants asked for administrative hearings in response to notices that the Department intended to suspend their driving privileges for allegedly displaying or possessing altered driver's licenses. 518 N.W.2d at 691. The hearing officer suspended the appellants' driving privileges and a district court subsequently affirmed the suspensions. Id. at 692.

[¶17] The Court reversed the administrative suspension of the appellants' driving privileges. Id. at 696. The Court noted that the only evidence relied upon by the Department appeared to be unsigned and uncertified documents from an unspecified Minnesota agency. Id. at 691. Counsel for the DOT "candidly

admitted at oral argument that she [did] not know where the documents came from, although she speculated that they were sent by either the Moorhead police department or the Minnesota driver's licensing authority." Id. at 692.

[¶18] The Court observed that "DOT's position is apparently that any document placed in a driver's file becomes a 'regularly kept record.'" Id. at 693. The Court noted, however, that "DOT does not cite, nor are we aware of, any statute defining unsigned, uncertified documents as 'regularly kept records.'" Id. at 694. The Court added that "DOT has failed to cite any persuasive support for its assertion that these documents are 'regularly kept records of the director' merely because they have been placed in a driver's file." Id.

[¶19] The Court summarized the relevant facts and concluded as follows:

The documents admitted in this case are unsigned and uncertified; they bear no seal, letterhead, or other indication of official capacity; the separate "supplements" could have been prepared on any typewriter or word processor; and the record contains no evidence establishing where the documents came from. In short, these documents bear no reliable, verifiable indicia that they are in fact true and correct copies of Minnesota police records. Although the Legislature has liberalized some evidentiary requirements in administrative driver's license suspension proceedings [see Salter v. Hjelle, supra], we do not believe the Legislature intended the procedural rules to become so lax as to allow admission of what is essentially an anonymous letter merely because it has found its way into a driver's file at DOT. Under these circumstances, we conclude that these documents are not self-authenticated as "regularly kept records of the director."

Id. at 694-95 (emphasis added.)

[¶20] The Court concluded that the authenticity of the documents also had not been established by extrinsic evidence, observing "admission of the unsigned, uncertified police records in this case is inconsistent with our decision in Langer

v. N.D. State Highway Comm'r, 409 N.W.2d 635 (N.D. 1987).” Peterson, 518 N.W.2d at 695.

[¶21] In Painte v. Dir., Dep’t of Transp., 2013 ND 95, 832 N.W.2d 319, the Supreme Court held that a similar statement or declaration by a crime lab employee who designated herself as a “designee of the Director of the State Crime Laboratory” was sufficient for foundational purposes under N.D.C.C. § 39-20-07(5)&(8). And unlike the case in Painte, here, Lohmann’s record on appeal provides a listing of the director’s designees which conclusively shows that Heib been appointed as a “designee of the Director of the State Crime Laboratory” by Hope Olson the Director of the State Crime Laboratory.

[¶22] The proper foundation was established for the admission of the analytical report of Lohmann’s blood test result.

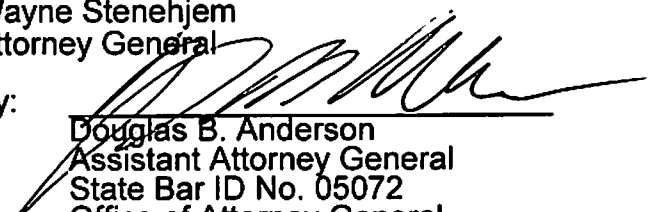
CONCLUSION

[¶23] The Department requests this Court affirm the Judgment of the Burleigh County District Court and the Hearing Officer’s Decision suspending Lohmann’s driving privileges for a period of 180 days.

Dated this 11th day of April, 2016.

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Glenn Johnathan Lohmann,)	
)	
Appellant,)	Supreme Ct. No. 20160027
)	
v.)	District Ct. No. 08-2015-CV-01585
)	
Grant Levi, Director of the)	AFFIDAVIT OF SERVICE BY MAIL
North Dakota Department of)	
Transportation,)	
)	
Appellee.)	

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


[¶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 11th day of April, 2016, I served the attached **BRIEF OF APPELLEE** upon the appellant by placing a true and correct copies thereof in an envelope addressed as follows:

Chad R. McCabe
McCabe Law Firm
402 E Main Ave Ste 100
Bismarck ND 58501

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 11th day of April 11, 2016.



Notary Public

