

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

Glenn Johnathon Lohmann

Appellant,

v.

North Dakota Department of Transportation

Appellee.

**Appeal from the Order Affirming the decision of the Hearing Officer
South Central Judicial District
Burleigh County, North Dakota
The Honorable Thomas J. Schneider**

**SUPREME COURT NO. 20160027
BURLEIGH COUNTY NO. 08-2015-CV-01585**

BRIEF OF APPELLANT

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STATEMENT OF ISSUE

ISSUE: **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.**

STATEMENT OF THE CASE

NATURE OF CASE

[¶ 1] The case on appeal is a civil case wherein Glenn Johnathon Lohmann's driving privileges were suspended for a period of 180 days.

COURSE OF PROCEEDINGS

[¶ 2] Lohmann was issued a Report and Notice on April 10, 2015, regarding the possible suspension of his driving privileges. (Exhibit 1(b), App. p. 3). Lohmann timely requested a hearing (App. p. 10) which was held on May 11, 2015. (Tr., Doc. ID No.: 4).

[¶ 3] At the hearing, the Department attempted to offer Exhibit 1 into evidence. (Tr. p. 34, lines 9-10). Lohmann objected to Exhibit 1 being received into evidence, in that the analytical report was not certified or authenticated, and that neither N.D.C.C. § 39-20-07(8) nor Rule 902, N.D.R.Evid. were complied with. (Tr. p. 34, line 25 through p. 35, line 4). He also filed a post hearing Brief. (Doc ID No. 17, App. p. 12).

[¶ 4] The hearing officer suspended Lohmann's driving privileges for a period of 180 days. (Hearing Officer's Decision, Doc. ID No.: 20, App. p. 20). Lohmann timely filed a Petition for Reconsideration, (Doc. ID No. 18, App. p. 21), and timely filed a Notice of Appeal and Specifications of Error on July 20, 2015. (Doc. ID No.: 2, App. p. 29).

DISPOSITION IN THE COURT BELOW

[¶ 5] On November 19, 2015, the Hon. Thomas J. Schneider issued an Order affirming the hearing officer's decision. (Doc. ID No.: 28; App. p. 31). Order for Judgment was entered on November 20, 2015, (Doc. ID No.: 32, App. p. 32), and Judgment was entered on November 20, 2015. (Doc. ID No.: 33, App. p. 33). Notice of Entry of Judgment was sent on November 23, 2015. (Doc. ID No.: 34, App. p. 34). Lohmann timely filed his Notice of Appeal on January 22, 2016. (Doc ID No. 36, App. p. 35).

STATEMENT OF FACTS

[¶ 6] On March 21, 2015, Lohmann was charged with the offense of Actual Physical Control of a Vehicle while Under the Influence. (Doc. ID No.: 20, App. p. 20). On May 11, 2015, an administrative hearing was held regarding the suspension of Lohmann's driving privileges. (Tr., Doc. ID No. 4). At the hearing, the Department attempted to offer Exhibit 1 into evidence. (Tr. p. 34, lines 9-10). Lohmann objected to Exhibit 1 being received into evidence, in that the analytical report was not certified or authenticated, and that neither N.D.C.C. § 39-20-07(8) nor Rule 902, N.D.R.Evid. were complied with. (Tr. p. 34, line 25 through p. 35, line 4). He also filed a post hearing Brief. (Doc ID No. 17, App. p. 12).

[¶ 7] He also filed a post hearing Brief. (Doc ID No. 17, App. p. 12). The hearing officer suspended Lohmann's driving privileges for a period of 180 days. (Hearing Officer's Decision, Doc. ID No.: 20, App. p. 20). The hearing officer overruled the objection and admitted Exhibit 1 into evidence. (Tr. p. 20, lines 5-8).

STANDARD OF REVIEW

[¶ 8] This Court's review of an administrative revocation of a driver's license is governed by the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. *Lange v. North Dakota Dept. of Transp.*, 2010 ND 201, ¶ 5, 790 N.W.2d 28. This Court reviews that record of the administrative agency as a basis for its decision rather than the district court decision.” *Lamb v. Moore*, 539 N.W.2d 862, 863 (N.D.1995). However, “[I]f sound, the district court's analysis is entitled to respect.” *Aamodt v. North Dakota Dept. Of Transp.*, 2004 ND 134, 682 N.W.2d 308, ¶12.

[¶ 9] This Court exercises a limited review in appeals involving driver's license suspensions or revocations, and affirms the agency's decision unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

Lange, supra at ¶ 5 (citing N.D.C.C. § 28-32-46).

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

LAW AND ARGUMENT

ISSUE: **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.**

[¶ 11] Lohmann argues the analytical report should not have been received into evidence because the document was not properly certified nor was any authenticity established. N.D.C.C. § 39-20-07(8) requires that the analytical report be certified. That statute also provides that the certified copy satisfies the directives of N.D.C.C. § 39-20-05.

[¶ 12] The key word in the statutes governing the admissibility of a chemical test is the requirement that the test is “certified,” and Lohmann argues that these statutes all require a “certified” copy. N.D.C.C. § 31-04-10 provides:

Form and contents of certificate for certifying copies to be used as evidence.—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.

Id.

[¶ 13] “Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained.” *State v. Dennis*, ¶ 12, 2007 ND 87, 733 N.W.2d 241, citing N.D.C.C. § 1-02-02. “When the wording of a statute is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” *Dennis*, at ¶ 12, citing N.D.C.C. § 1-02-05. “[I]t is presumed that...[t]he entire statute intended to be effective.” *Dennis*, at ¶ 12, citing N.D.C.C. § 1-02-38(2). “It must be presumed that the Legislature intended all that it said, and that it

said all that it intended to say. The Legislature must be presumed to have meant what it has plainly expressed.” *Dennis*, at ¶ 12.

[¶ 14] To establish that the documents are certified, the documents must be authenticated by the Department prior to being admitted into evidence. In *Peterson v. North Dakota Department of Transportation*, 518 N.W.2d 690 (N.D.1994), this Court held that the Department must establish the documents’ authenticity with extrinsic evidence under Rule 901, N.D.R.Evid., or as self-authenticating documents under Rule 902, N.D.R.Evid. Because no extrinsic evidence was offered as to the documents’ authenticity, the Court held that Rule 901 did not apply, and further held that the documents were not under seal or certified by the custodian of the records in Minnesota and therefore they were not self-authenticating under Rule 902.

[¶ 15] This Court also noted that admission of the unsigned, uncertified police records was inconsistent with *Langer v. North Dakota State Highway Commissioner*, 409 N.W.2d 635 (N.D.1987), where the Court held that an unsigned, uncertified notice of conviction from another state did not provide a proper basis for an administrative suspension of driving privileges. The *Peterson* Court noted that, “[I]t would be illogical to require a greater degree of evidentiary authentication when there has already been a conviction than when there is only an unsubstantiated complaint and investigatory report.” *Id.*

[¶ 16] Moreover, under Art. VI, § 3, N.D. Const., a procedural rule adopted by this Court must prevail in a conflict with a statutory procedural rule. *State v. Hanson*, 558 N.W.2d 611, 615 (N.D.1996)(finding Section 29–01–32 N.D.C.C. invalid to the extent that it requires pretrial disclosure by a defendant of the names and addresses

of persons the defendant intends to call as witnesses at trial and any statements or reports of statements of such persons). Rule 902, N.D.R.Evid. describes methods of self-authentication for domestic documents, and extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

- (1) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any State, district, commonwealth, territory, or insular possession thereof, or of the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
- (2) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1), having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

Id.

[¶ 17] In this case, the documents were not under seal, nor did the documents establish from an employee certified under seal that the signer had the official capacity and that the signature was genuine.

CONCLUSION AND PRAYER FOR RELIEF

[¶ 18] WHEREFORE, the Appellant, Glenn Johnathon Lohmann, by and through his attorney, Chad R. McCabe, respectfully prays that this Court will reverse the judgment affirming the administrative revocation of his driving privileges.

[¶ 19] Dated this 1st day of March, 2015.

/s/ Chad R. McCabe
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CERTIFICATE OF SERVICE

[¶ 20] A true and correct copy of the foregoing document was sent by electronic transmission on this 9th day of March, 2015, to the following:

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500 N. 9th St.
Bismarck, ND 58501-4509
dbanders@nd.gov

/s/ Chad R. McCabe
CHAD R. MCCABE