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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Shaun Robert Ebach, Appellant, vs. Thomas Sorel, Director Department of Transportation, Appellee.	**SUPREME COURT NO. 20180290** District Court No. 36-2018-CV-00122

ON APPEAL FROM AN ORDER AFFIRMING AN
ADMINISTRATIVE HEARING OFFICER'S DECISION,
ENTERED JUNE 5, 2018
RAMSEY COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
THE HONORABLE DONOVAN J. FOUGHTY, PRESIDING

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] Whether the hearing officer's decision was not in accordance with the law.

STATEMENT OF THE CASE

[¶2] Appellant, Shaun Robert Ebach ("Mr. Ebach"), appeals an Order of the Honorable Donovan J. Foughty, affirming an administrative suspension of his driving privileges, and disqualification of his commercial vehicle operation. App., at 9. On March 16, 2018, a hearing officer decision suspended Mr. Ebach's driving privileges, as well as disqualified his commercial driving privileges. App., at 9-10. Following appeal, the district court issued and order affirming the hearing officer's decision. App., at 9. Mr. Ebach timely appeals to this Court. App., at 15. Mr. Ebach argues the hearing officer cannot deny him a fair hearing by admitting evidence without foundation and making result-oriented findings of fact. The hearing officer's decision should be reversed.

STATEMENT OF THE FACTS

[¶3] At all relevant times, Officer Nickolas Holter ("Officer Holter") was an officer with the City of Devils Lake Police Department. Tr. at 3:24-4:3. On February 18, 2018, at approximately 02:03, Officer Holter stopped a vehicle being driven by Mr. Ebach for speeding. Id. at 4:8-11; id. at 5:5-10. Following a preliminary screening test, Officer Holter arrested Mr. Ebach for suspicion of DUI at approximately 02:12. Id. at 12:19-20.

[¶4] Officer Holter transported Mr. Ebach to the Law Enforcement Center. Id. at 10:4-8. Officer Holter requested a chemical test, and Mr. Ebach consented. Id. at 10:11-16. Officer Holter conducted the Intoxilyzer chemical test, obtaining a result at approximately 02:20. App., at 2. The Department used this result to reach its decision.

LAW AND ARGUMENT

I. The Decision is Contrary to the Law and Evidences Results-Oriented Fact Finding.

[¶5] In short, the hearing officer erred in finding the record supported that Officer Holter scrupulously complied with the required twenty (20) minute deprivation period; and further erred in denying Mr. Ebach a fair hearing based on the results-oriented, predetermined fact finding that resulted in the erroneous conclusion that the chemical breath test was fairly administered. This Court should reverse the hearing officer's decision, and award attorney fees and costs in Mr. Ebach's favor.

A. Standard of Review

[¶6] In accordance with the Administrative Agencies Practice Act, see generally N.D.C.C. ch. 28-32, on appeal, this Court reviews the agency decision, and not the decision of the district court. Painte v. Dir., Dep't of Transp., 2013 ND 95, ¶ 6, 832 N.W.2d 319. In accordance with Section 28-32-46, the agency decision will be reversed if:

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 or 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; see also Painte, 2013 ND 95, ¶ 6 (same). On appeal, evidentiary rulings are generally reviewed for abuse of discretion. Knudson v. Dir., N.D. Dept. of Tranps., 530 N.W.2d 313, 316 (N.D. 1995). Hearing officers abuse their discretion when they act in an unreasonable, capricious manner, or misapply the law. Id. Result-oriented evidentiary rulings are arbitrary and capricious. The hearing officer's decision was not rendered in accordance with the law by: (1) admitting the chemical test records without adequate foundation; (2) shifting the burden of proof; and (3) result-oriented fact-finding.

1. The Hearing Officer Erred by Admitting Facially Invalid Chemical Test Records

[¶7] In accordance with North Dakota Statute:

> 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). "The purpose of section 39-20-07 is to ease the requirements for admissibility of chemical test results while ensuring that the test upon which the results is fairly administered." Ringsaker v. Dir., N.D. Dept. of Transp., 1999 ND 127, ¶ 7, 596 N.W.2d 328 (citation omitted). "Absent testimony by the state toxicologist, the foundational requirement necessary to show fair administration of a breathalyzer test and admissibility of the test results is a showing that the test was administered in accordance with the approved methods filed with the clerk of the district court." Henderson v. Dir., N.D. Dep't of Transp., 2002 ND 44, ¶ 16, 640 N.W.2d 714 (citing Ringsaker at ¶ 8).

"Without strict compliance with the approved method, the scientific accuracy of the test cannot be established without expert testimony." Ringsaker at ¶ 8.

[¶8] In this case, the Department entered the approved method into evidence at the administrative hearing. See tr. at 1:24-2:22. In its relevant part, the approved method requires: "[b]efore proceeding the operator shall ascertain that the subject has had nothing to eat, drink, or smoke within twenty minutes prior to the collection of the breath sample." App., at 7.

[¶9] At the hearing, the hearing officer sought to enter into evidence the (1) Report and Notice, and (2) the Intoxilyzer Test Record and Checklist. See tr. at 11:4-13. The Report and Notice facially outlines Officer Holter came into contact with Mr. Ebach at 02:03. App., at 1. Officer Holter corroborated this evidence with his testimony. Tr.., at 4:8-11; id. at 12:14-15. The Report and Notice further outlines Officer Holter arrested Mr. Ebach at 02:12. App., at 1. Officer Holter's testimony also corroborated this evidence. Tr., at 12:19-20. Officer Holter, through the Report and Notice, also averred he obtained Mr. Ebach's chemical breath sample at 02:20. App., at 1. Officer Holter further testified that he signed the Report and Notice, attesting it was "true and correct to the best of [his] knowledge at the time of completing [the] report." Compare id. with tr. at 4:15-24. In other words, the Report and Notice facially shows Officer Holter did not scrupulously comply with the 20 minute deprivation period when obtaining a chemical breath sample from Mr. Ebach, in violation of the approved method. Like the Notice and Report, the Intoxilyzer Test Record and Checklist established Mr. Ebach's relevant chemical test occurred at 02:20—only 17 minutes after Officer Holter testified he came into contact with Mr. Ebach. See App., at 2.

[¶10] When Mr. Ebach's counsel objected to admission of the Intoxilyzer Test Record and Checklist for lack of scrupulous compliance with the approved method, despite no further evidence in the record, the hearing officer overruled Mr. Ebach's objection. Tr. at 11:14-24. "When the State fails to establish compliance with the toxicologist's directions, which go to the scientific accuracy of the test, the State must prove fair administration though expert testimony." Lee v. North Dakota Dept. of Transp., 2004 ND 7, ¶ 16, 673 N.W.2d 245 (citing Schwind v. Dir., N.D. Dept. of Transp., 462 N.W.2d 147, 152 (N.D. 1990)). "Absent a showing of strict compliance with the approved method, expert testimony is necessary to demonstrate the scientific accuracy of the test." Id. at ¶ 16. Here, no expert testimony demonstrated the scientific accuracy of the test, and there was no showing of strict compliance with the approved method at the time of admission of the Intoxilyzer Test Record and Checklist. Indeed, the evidence available to the hearing officer—advanced by the hearing officer—was Officer Holter could only have possibly observed Mr. Ebach for 17 minutes. Even assuming, *arguendo*, Officer Holter was able to verify Mr. Ebach did not have anything to "eat, drink, or smoke" during the entirety of that time, Officer Holter still failed to comply with the approved method. Accordingly, the hearing officer wrongfully admitted the test, and the Department's decision must be reversed. See, e.g., id. at ¶ 17 ("Because the foundation for admission of the Intoxilyzer test result was not laid, the decision of the hearing officer is not supported by the weight of the evidence.").

2. The Hearing Officer Erred by Making Result-Oriented Findings of Fact

[¶11] Mr. Ebach anticipates the Department will argue the hearing officer's admission of the Intoxilyzer Test Record and Checklist was proper because Officer Holter's

testimony later established compliance with the 20-minute deprivation period. The Department's argument would be nothing but a *post hoc* attempt to pardon the hearing officer's improper result-oriented fact-finding.

[¶12] As outlined above, the hearing officer admitted the Intoxilyzer Test Record and Checklist despite the facial showing of lack of compliance with the approved method. After already admitting the test, the hearing officer elicited testimony regarding the deprivation period. See Tr., at 11:24-12:10. Officer Holter testified the time on the Notice and Report and the Intoxilyzer Test Record and Checklist was inaccurate based on his watch. Id. Officer Holter provided no explanation for why he certified in the Notice and Report he certified the accuracy of the Notice and Report if he knew the inaccuracy of testing time indicated. Id. Likewise, Officer Holter provided no explanation for why he would include the "correct" watch times for the incident and arrest portions of the document, and why he knowingly included an "incorrect" time for the time of testing. Id. Nevertheless, the hearing officer ultimately adopted Officer Holter's explanation for the discrepancy. Id. at 16:10-13.

[¶13] The hearing officer's "findings" show Mr. Ebach was denied a fair hearing. The findings amount to an *ex post facto*, result-oriented, justification for a predetermined outcome. First, the findings fail to provide any analysis for why Officer Holter's Notice and Report provided "accurate" times for the stop and arrest," but an "inaccurate" time for the test occurrence. Mr. Ebach proffers the findings provide no analysis because there is no justification for why Officer Holter would knowing provide an "inaccurate" time on his sworn Notice and Report. Likewise, the findings fail to provide any justification for why Officer Holter's testimony was more credible than his sworn Notice and Report.

Moreover, the findings fail to indicate the reasonableness of Officer Holter's submission of inaccurate documents to the Department. Indeed, Mr. Ebach avers the hearing officer's deliberate choice to ignore any and all evidence contrary to the finding clearly shows the hearing officer simply made factual findings to justify the decision the hearing officer had already rendered—that the Intoxilyzer Test Record and Checklist would be put into evidence.

[¶14] A hearing officer's decision should be reversed if the findings of fact fail to address the evidence presented. N.D.C.C. § 28-32-46(7). Moreover, findings are arbitrary and capricious if the product of result-oriented fact-finding. Here, the hearing officer predetermined the admissibility of the Intoxilyzer Test Record and Checklist—indeed, the hearing officer admitted the Intoxilyzer Test Record and Checklist before eliciting the needed foundation. The hearing officer then acted arbitrarily and capriciously by retroactively tailoring the findings to support the predetermined conclusion. Despite the attempt to retroactively support admission of the Intoxilyzer Test Record and Checklist, the hearing officer's findings failed to address the compelling contrary evidence—Officer Holter's sworn Notice and Report. The hearing officer's *ad hoc*, *ex post facto* justifications denied Mr. Ebach a fair hearing, and require reversal.

II. Attorney Fees and Costs Should be Awarded in Mr. Ebach's Favor

[¶15] Mr. Ebach is entitled to attorney fees and costs in accordance with Section 28-32-50(1) if he prevails and the Court determines the agency acted without substantial justification. See N.D.C.C. § 28-32-50(1). Mr. Ebach urges the Department justify why the hearing officer properly admitted evidence without foundation, and then attempted to rectify the mistake with result-oriented fact-finding for the predetermined conclusion.

The Department cannot, and there is no justification for the hearing officer denying Mr. Ebach a fair hearing. Attorney fees and costs should be awarded in Mr. Ebach's favor.

CONCLUSION

[¶16] Mr. Ebach respectfully requests this Court vindicate Mr. Ebach's right to a fair hearing by finding the hearing officer improperly admitted the Intoxilyzer Test Record and Checklist, and by declining to allow the hearing officer to retroactively justify the predetermined outcome. Because the hearing officer denied Mr. Ebach a fair hearing, the hearing officer's decision must be reversed. Additionally, because the right to a fair hearing is clearly established, and violation of the right was not substantially justified, Mr. Ebach further requests an award of his attorneys' fees and costs.

Respectfully submitted this 30th day of August, 2018.

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Shaun Robert Ebach, **Appellant,** **vs.** **Thomas Sorel, Director, Department of Transportation,** **Appellee.**	**SUPREME COURT NO.: 20180290** District Court No.: 36-2018-CV-00122 **CERTIFICATE OF SERVICE**

[¶1] I hereby certify that on August 30, 2018, the following documents:

1. **Appellant's Brief; and**
2. **Appellant's Appendix**

were filed electronically filed on the following:

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Dated this 30th day of August, 2018.

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[¶1] I hereby certify that on September 6, 2018, the following documents:

Appellant's Appendix *[with Additional Documents]*

were electronically filed and served on the following:

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Dated this 6th day of September, 2018.

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