

## IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

Brandon Wade Lindstrom,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	
	)	
North Dakota Department of	)	Supreme Court No. 20190204
Transportation,	)	
	)	Burleigh County No. 08-2019-CV-00654
Defendant/Appellee.	)	

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BRIEF OF APPELLANT

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Appeal from Judgment, dated and filed on May 3, 2019

Entered following the District Court's Order Affirming Decision

dated and filed on May 1, 2019

Burleigh County District Court

South Central Judicial District

The Honorable Thomas J. Schneider

\*\*\* **ORAL ARGUMENT REQUESTED** \*\*\*

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## [¶2] STATEMENT OF THE ISSUES

- A. The five (5) day forwarding requirement of N.D.C.C. § 39-20-03.1(4) is imperative, and it is a basic and mandatory statutory requirement; therefore it is jurisdictional. Accordingly, because the law enforcement officer, here, did not forward the Report and Notice form (temporary operator's permit) to DOT within five (5) days of issuance of the temporary operator's permit, the order is not in accordance with the law, and DOT is deprived of jurisdiction to impose administrative sanctions upon Lindstrom.

## [¶3] STATEMENT OF THE CASE

[¶4] On January 28, 2019, Brandon Lindstrom was arrested for Driving Under the Influence after coming into contact with a North Dakota State Highway Patrol trooper. (DOT Administrative Hearing Transcript (“Tr.”) at 10, lines (“L.”) 23-24). Lindstrom was issued a temporary operator’s permit. (Exhibit 1, page 2 of 6, Transcript of DOT Hearing). Lindstrom timely requested an administrative hearing and, on February 27, 2019, the Department of Transportation (“Department” and “DOT”) held a hearing. After the hearing, the hearing officer mailed out a decision which ordered the suspension of Lindstrom's driving privileges for one hundred eighty (180) days. (Appendix (“App.”) at 6-7).

[¶5] On March 5, 2019, Lindstrom filed a Notice of Appeal and Specifications of Error with the District Court alleging numerous errors in the DOT administrative proceedings. (App. 8-10). After both Petitioner and Respondent submitted written arguments to the district court, the court issued its Order affirming the decision of the hearing officer - a one sentence ruling. (App. 25).

[¶6] On May 3, 2019, Judgment was entered in this matter. (App. 26-27). On May 7, 2019, the Department filed a Notice of Entry of Judgment. (App. 28). On

June 27, 2019, Lindstrom filed a Notice of Appeal to this Court seeking relief. (App. 29-33). Lindstrom asks this court to reverse the decision of the district court and to reinstate his driving privileges.

#### [¶7] STATEMENT OF THE FACTS

[¶8] On January 28, 2019, a trooper arrested Mr. Lindstrom for DUI (Tr. at 10, L. 22-24), and issued him a Report and Notice form (temporary operator's permit). *See* Exhibit 1 (page 2 of 6). Seven (7) days later, the arresting trooper sent the Report and Notice form to DOT. (Exhibit 1, page 2 of 6) ("RECEIVED IN ENVELOPE POSTMARKED FEB - 4 2019"). Lindstrom requested an administrative hearing to contest the suspension of his driving privileges.

[¶9] At the beginning of the February 27, 2019, administrative hearing, Lindstrom objected the Department's authority to suspend:

"MR. HERBEL: ... We would like to interpose an objection on the record at the outset of the hearing ...  
... on jurisdictional grounds.

MS. HUBER: What jurisdictional grounds, Mr. Herbel?

MR. HERBEL: We would object to the department's jurisdiction. The trooper did not abide by the five day forwarding requirement of 39-20-03.1 set forth with the basic and mandatory requirement of the statute. Because it was not met, the department is deprived of jurisdiction to suspend Mr. Lindstrom's ... driving privileges. And because the requirement was not met, we ask that the matter be dismissed."

(Tr. at 2, L. 17 - 3, L. 4). Despite the obvious prima facie evidence on the Report and Notice form, showing that the trooper completely failed to meet the five-day requirement, the hearing officer/DOT prosecutor promptly disregarded Lindstrom's objection and

motion to dismiss, but failed to make an argument on behalf of DOT; thereby waiving argument on the issue.

[¶10] During the administrative hearing, the trooper testified that he believed he placed the Report and Notice form in an in-house bin the next day, and the trooper explained how he hoped the Report and Notice form would find its way to DOT:

"MR. HERBEL: Okay. And your testimony is that you placed the Report and Notice form in a drop box in house; is that right?

TROOPER MAYER: That's fair.

MR. HERBEL: So you, yourself, did not ... and you were the one ... you, yourself, did not take it to the post office; correct?

TROOPER MAYER: No, I did not.

MR. HERBEL: Didn't mail it [in] any government mailbox; correct?

TROOPER MAYER: Correct.

MR. HERBEL: You ...

TROOPER MAYER: I can't testify if the post office picks up directly from the drop box or how that works.

MR. HERBEL: Okay. And you don't have any certified mail receipts or anything like that, is that fair?

TROOPER MAYER: That's correct.

MR. HERBEL: There's no tracking number? This wasn't sent by Fed Ex or UPS or anything?

TROOPER MAYER: No.

MR. HERBEL: So your job was you put it in the drop box in house at North Dakota Highway Patrol?

TROOPER MAYER: That's correct.

MR. HERBEL: And this is ... is this the facility down by Express Way and Rosser area?

TROOPER MAYER: Yes."

(Tr. at 22, L. 22 - 23, L. 19).

[¶11] Lindstrom then again asked for a dismissal based upon lack of jurisdiction, because the Report and Notice form was not forwarded to DOT within 5 days as required by N.D.C.C. § 39-20-03.1(4). The hearing officer denied the request, without explanation and without advancing an argument on behalf of DOT. Lindstrom then asked again for an explanation that would assist the district court on an appeal in this matter, and the hearing officer refused to provide one:

"MR. HERBEL: And now when I'm asking for a rul ... I don't understand why DOT doesn't see the clear jurisdictional flaw, the violation of the five-day requirement.

...

[MS. HUBER]: I will take a look at that.

MR. HERBEL: I ... so I don't understand your object ... your ... your denial of the motion without any explanation and then we have to wait for a decision a week later, after you've crafted a way to take my client's driving privileges.

MS. HUBER: So I'm not ...

MR. HERBEL: That's a concern of mine.

MS. HUBER: I'm not arguing with you about the motion. I've already overruled it. I preserved it for the record.

MR. HERBEL: Without explanation.

MS. HUBER: Yes."

(Tr. at 28, L. 20 - 29, L. 10).

[¶12] The hearing officer found that the trooper mailed the Report and Notice form to DOT one day after it was issued to Lindstrom - far different than the 7-day delay evidenced by the Department's own "received" stamp. Lindstrom's driving privileges were suspended for 180 days.

### [¶13] STANDARD OF REVIEW

[¶14] “The Administrative Agencies Practice Act, N.D.C.C. ch 28-32, governs review of an administrative decision to suspend or revoke a driver's license.” *See Dworshak v. Moore*, 1998 ND 172, ¶6, 583 N.W.2d 799. “This Court will affirm 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.

N.D.C.C. § 28-32-46.” *See Lee v. NDDOT*, 2004 ND 7, ¶8, 673 N.W.2d 245.

[¶15] “The interpretation of a statute is a question of law.” *See Aamodt v. North Dakota Dept. of Transp.*, 2004 ND 134, ¶14, 682 N.W.2d 308. “An agency's decisions on questions of law are fully reviewable.” *See Landsiedel v. Director, North Dakota Department of Transportation*, 2009 ND 196, ¶6, 774 N.W.2d 645; *see also Jorgensen v. North Dakota Dept. of Transp.*, 2005 ND 80, ¶7, 695 N.W.2d 212 (“The interpretation of a statute is a question of law, which is fully reviewable on appeal.”).



[¶16] STATEMENT ON ORAL ARGUMENT

[¶17] The issue presented, here, is an issue previously presented to this Court, but never resolved by this Court. The question is whether the five (5) day forwarding requirement of N.D.C.C. § 39-20-03.1(4) is a basic and mandatory statutory requirement (jurisdictional) and whether it is mandatory and imperative. The issue presented is an important issue to resolve, and oral argument would be helpful to this Court in arriving at a decision.

[¶18] LAW AND ARGUMENT

- A. The five (5) day forwarding requirement of N.D.C.C. § 39-20-03.1(4) is imperative, and it is a basic and mandatory statutory requirement; therefore it is jurisdictional. Accordingly, because the law enforcement officer, here, did not forward the Report and Notice form (temporary operator's permit) to DOT within five (5) days of issuance of the temporary operator's permit, the order is not in accordance with the law, and DOT is deprived of jurisdiction to impose administrative sanctions upon Lindstrom.

[¶19] As follows, North Dakota law requires a law enforcement officer to timely forward the Report and Notice form (a/k/a temporary operator's permit) to DOT:

"The law enforcement officer, within five days of the issuance of the temporary operator's permit, shall forward to the director a certified written report in the form required by the director. ... "

*See* N.D.C.C. § 39-20-03.1(4) (emphasis added). Therefore, the 5-day forwarding requirement is mandatory. So, if the evidence shows that the Report and Notice form (temporary operator's permit) was not forwarded to DOT within 5 days of issuing it to the driver, the Department is divested of jurisdiction to take action against driving privileges.

[¶20] In this case, the evidence clearly shows that Mr. Lindstrom was issued a temporary operator's permit on January 28, 2019. *See* Exhibit 1 (page 2 of 6) ("I certify that I (check one) ☒ issued ☐ mailed this Temporary Operator's Permit to the driver on MM/DD/ CCYY 1/28/19"). The evidence also clearly shows that the Report and Notice form (permit) was mailed and forwarded to DOT on February 4, 2019 - 7 days after issuance of the temporary permit. *See id.* (Report and Notice form bearing the Department's own evidentiary stamp: "RECEIVED IN ENVELOPE POSTMARKED FEB - 4 2019"). This clearly violates the 5-day forwarding requirement of N.D.C.C. § 39-20-03.1(4).

[¶21] "The Department's Report and Notice form is admissible as prima facie evidence of its contents once it is forwarded to the director of the Department." *See Gillmore v. Levi*, 2016 ND 77, ¶12, 877 N.W.2d 801. Therefore, the date stamp on Lindstrom's Report and Notice form (permit) is to be accepted "on its face" (prima facie) as correct, convincing, reliable, and accurate, unless and until that presumption is rebutted.

[¶22] So, what does DOT do to rebut that strong presumption? Almost nothing. Remember, the trooper testified that he "placed the Report and Notice form in a drop box in house," that he "did not take it to the post office," and that he "[d]idn't mail it [in] any government mailbox." (Tr. at 22, L. 22 - 23, L. 19) (he "put it in the drop box in house at North Dakota Highway Patrol"). Based upon this flimsy testimony, the hearing officer found that the trooper "forwarded the report and notice form and the test results to the Department by placing them in the mail on January 29, 2019;" the day he claims to have placed the form in a bin at the North Dakota Highway Patrol. (App. 6). This finding is

not supported by the record; nor is the Conclusion of Law that "the greater weight of the evidence shows that that [sic] report and notice and test results were properly forwarded within five days of the issuance of the temporary operators permit as is required." (App. 6).

[¶23] Apparently, it no longer matters when the Report and Notice form is actually mailed. Under the Department's "I wish I had mailed it" rationale, all that matters is that the officer formulate a wish to mail the required report.

[¶24] Under this warped rationale, the trooper could have placed the Report and Notice form on the dashboard of his squad car, with a sticky note reminding the trooper to mail DOT the form within 5 days. Then, when the trooper actually mails the form 7 days later, he could claim that he actually started the mailing process a week prior, within 5 days, when he first placed the form on his dashboard. That is how ludicrous the DOT finding is in this case.

[¶25] Furthermore, think back to the days of paper filings with the district court. Now, imagine if counsel had missed a filing deadline or an appeal deadline, and made a late filing. Imagine, further, that counsel had argued to this Court that the late filing was actually timely, because he had placed the document for filing in his outbox or out bin, and that the date of placing the filing in his outbox should be considered the date of filing/mailing, even though it was not placed in the U.S. mails that day. Under this "dog-ate-my-homework"-like argument, this Court would likely laugh counsel out of the courtroom. And, this Court would be right to do so.

[¶26] Placing a document in an "in-house bin" does not constitute forwarding or mailing. "A requirement to "forward" is met by placing the papers in the mail." *See*

*Nelson v. Director, North Dakota Dept. of Transp.*, 1997 ND 81, ¶14, 562 N.W.2d 562.

"To "forward" means "to send forward; to send toward the place of destination; to transmit.'" *See id.* Forward does not mean to sideline in an office bin.

[¶27] Indeed, instead of forwarding, the trooper is keeping the paperwork in-house, in a bin. In fact, the trooper admitted: "I can't testify if the post office picks up directly from the drop box or how that works." (Tr. at 23, L. 6-7) (there is no evidence the post office has any affiliation or if they even pick up). It is just as likely that a highway patrol employee eventually takes the bin materials to the post office, albeit, a week later.

[¶28] Moreover, a driver has 10 days to request a hearing at DOT to contest a potential suspension of his driving privileges. Let's say the driver kept his written request for an administrative hearing in his work bin and it was not mailed out until after the 10-day window closed, on day 12. Would DOT agree that it was sufficient, and timely, that the driver placed his written request in his work bin within 10 days, for eventual pickup? Would DOT agree that a postmark on the driver's request, 12 days beyond the date of issuance of the permit, was still timely because the driver had placed the request for hearing in his work bin within 10 days? No; and no. *See Buzick v. North Dakota State Highway Com'r*, 351 N.W.2d 438 (1984) (driver's request for hearing mailed one day after the request deadline is untimely).

[¶29] Yet, DOT wants this court to take the position that placing the document in a bin at work, without any affirmative conduct to comply with the 5-day forwarding requirement, rebuts or supersedes the prima facie contents of a Report and Notice form that clearly shows a postmark beyond the 5-day forwarding requirement. This is

nonsensical. The "Report and Notice form is admissible as prima facie evidence of its contents once it is forwarded to the director of the Department." See *Gillmore*, 2016 ND 77, at ¶12. The prima facie evidence in this case shows that the five (5) day forwarding requirement was not complied with.

[¶30] By picking a specific 5-day forwarding timeframe, it appears the Legislature desired to make this mandate jurisdictional. Why else would the Legislature specify 5 days, as opposed to "immediately," like so many other places in the Century Code? Surely, a driver's 10-day timeframe to forward a request for an administrative hearing is bright-line, strict, basic, and mandatory in order to invoke due process. See *Greenwood v. Moore*, 545 N.W.2d 790, 794 (N.D. 1996) ("A driver must act within the time directed for requesting a hearing or lose the right to a hearing"). Why, then, wouldn't the corresponding 5-day forwarding requirement of the officer to submit the administrative complaint also be bright-line, strict, basic, and mandatory to invoke jurisdiction?

[¶31] To that point, the Department argues that a driver's 10-day requirement to forward to DOT a request for hearing is quasi-jurisdictional, in that the failure to meet that requirement deprives a driver of the right to invoke the administrative process. Out of the other side of the agency mouth, the Department utters that the officer's 5-day requirement to forward to DOT the administrative complaint (Report and Notice form) is not jurisdictional. This double standard smacks of hypocrisy.

[¶32] The Department's interpretation of the 5-day requirement within N.D.C.C. § 39-20-03.1(4) unfairly slants the law in favor of DOT. "The legislature was concerned that the law not be slanted too much toward the [agency's] convenience." See *Aamodt*,

2004 ND 134, at ¶24. Indeed, Justice Gorsuch warned that when administrative agencies dictate interpretations of rules, regulations, and laws the agencies have created or have largely assisted in creating, this interferes with courts arriving at interpretations that "represent the best and fairest reading" of the law - which "creates a systematic judicial bias in favor of the ... government, the most powerful of parties, and against everyone else." *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2425 (2019) (Gorsuch, J. concurring in the judgment).

[¶33] To dull the mandatory 5-day requirement, and permit officers to hold a Report and Notice form for as long as they desire, creates real danger of unwarranted suspensions. When DOT receives a driver's hearing request and no Report and Notice has been received at the Department, DOT routinely sends out a form letter to the driver or driver's counsel and informs that "[o]ur office has not received any information that would allow us to process your request for a hearing." Neither a driver nor his counsel is ever informed if a Report and Notice form is submitted after DOT's form letter is mailed out. Therefore, a driver can request a hearing, receive back a letter that DOT has no open file related to the request, and never be informed that the Report and Notice form has been subsequently submitted to DOT. When no hearing request is made after the Report and Notice has finally been received, the Department does not set for hearing and instead issues a suspension. This creates a real danger to the rights of drivers and creates a real need for a bright-line rule that the 5-day forwarding requirement is jurisdictional.

[¶34] However, even if this Court would find that, unlike every other timeline in the expedited administrative process, the 5-day forwarding requirement is not jurisdictional, "the legislature ... clearly intended the time ... to be imperative." *See*

*Greenwood*, 545 N.W.2d, at 796. Like the consequential 10-day hearing request deadline (*Buzick*, 351 N.W.2d 438) and the consequential 30-day deadline for holding the hearing (*Greenwood*, 545 N.W.2d 790), the 5-day requirement to forward the administrative complaint, within this expedited construct,<sup>1</sup> is consequential, vital, and imperative.

[¶35] The Department argues that every other timeline is mandatory, except the 5-day forwarding requirement. This proposed rule would not simply slant the law toward the agency's convenience, it would pitch the law perpendicular and amend the timeline right out of the Century Code. The Legislature did not intend this. There is a need for a bright-line rule, as the Legislature intended.

[¶36] “The Department's authority to suspend a person's license is given by statute” and, accordingly, “[t]he Department must meet the basic and mandatory provisions of the statute to have authority to suspend a person's driving privileges.” *See Aamodt*, 2004 ND 134, at ¶15. Here, the trooper failed to abide by the five (5) day forwarding requirement in N.D.C.C. § 39-20-03.1(4), a basic and mandatory statutory requirement, and therefore DOT’s order is not in accordance with the law. The failure to comply with the basic and mandatory statutory requirements of N.D.C.C. § 39-20-03.1(4) deprives DOT of jurisdiction to impose administrative sanctions upon Mr. Lindstrom. Therefore, Lindstrom's driving privileges should be reinstated.

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<sup>1</sup> “[S]tates were eligible for additional funding if they established an expedited driver's license suspension or revocation system” - and North Dakota did. *See Greenwood*, 545 N.W.2d, at 795.

[¶37] CONCLUSION

[¶38] For the foregoing reasons, Brandon Lindstrom respectfully requests that this Court reverse the decision of the district court and reinstate his driving privileges.

Respectfully submitted  
this 21st day of August, 2019.

*/s/ Dan Herbel*

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[¶39] CERTIFICATE OF COMPLIANCE

[¶40] The undersigned hereby certifies that this document complies with the page limitation designated in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, and further certifies that this document contains seventeen (17) pages.

Dated this 21st day of August, 2019.

*/s/ Dan Herbel*

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[¶41] CERTIFICATE OF SERVICE

[¶42] The undersigned hereby certifies that, on August 21, 2019, the BRIEF OF APPELLANT and the APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Michael Pitcher, Assistant Attorney General, at the following:

Electronic filing to: “Michael Pitcher” < mtpitcher@nd.gov >

Dated this 21st day of August, 2019.

/s/ *Dan Herbel*

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## IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

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Plaintiff/Appellant,	)	
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North Dakota Department of	)	Supreme Court No. 20190204
Transportation,	)	
	)	Burleigh County No. 08-2019-CV-00654
Defendant/Appellee.	)	

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 CERTIFICATE OF SERVICE
 

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[¶1] The undersigned hereby certifies that, on August 28, 2019, the BRIEF OF APPELLANT (with corrected citations to the Appendix) and the APPENDIX TO BRIEF OF APPELLANT (with corrected page-numbering) were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Michael Pitcher, Assistant Attorney General, at the following:

Electronic filing to: "Michael Pitcher" < [mtpitcher@nd.gov](mailto:mtpitcher@nd.gov) >

Dated this 28th day of August, 2019.

/s/ *Dan Herbel*

---

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