20180290

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Shaun Robert Ebach, Appellant, v. Thomas Sorel, Director, North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20180290** **District Ct. No. 36-2018-CV-00122**

APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED JUNE 14, 2018
RAMSEY COUNTY, NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT

HONORABLE DONOVAN FOUGHTY

BRIEF OF APPELLEE

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STATEMENT OF ISSUE

[¶1] The hearing officer reasonably determined that Ebach's chemical Intoxilyzer test was fairly administered and the twenty minute waiting period had been ascertained and correctly suspended Ebach's driving privileges for driving or being in actual physical control of a vehicle while under the influence of alcohol in violation of N.D.C.C. § 39-08-01.

STATEMENT OF CASE

[¶2] On February 18, 2018, Officer Nickolas Holter (Officer Holter), a Devils Lake Police Officer, arrested Shaun Robert Ebach (Ebach) for driving a vehicle while under the influence of intoxicating liquor (DUI). Appendix to Brief of Appellant (App.) 13. A Report and Notice, including a temporary operator's permit, was issued to Ebach after a reported alcohol content of 0.208 was received. Transcript (Tr.) at Exhibit (Ex.) 1b and 1C. The Report and Notice notified Ebach of the Department's intent to revoke his driving privileges. Id.

[¶3] In response to the Report and Notice, Ebach requested an administrative hearing. Tr. at Ex. 1d. The hearing was held on March 13, 2018. App. 13; Tr. Ex. 2. The hearing officer considered the following issues regarding the suspension of the Ebach's driving privileges for a period of 180 days:

1) Whether Officer Holter had reasonable grounds to believe Ebach had been driving or in actual physical control or a vehicle while under the influence in violation of North Dakota Century Code § 39-08-01 or equivalent ordinance;

2) Whether Ebach was lawfully arrested and advised of the charge, prior to being given the Implied Consent advisory and a chemical test being requested, in accordance with North Dakota Century Code § 39-20-01;

3) Whether the chemical breath test Ebach was given was fairly administered and was in compliance with the basic and mandatory requirements of North Dakota Century Code § 39-20-03.1 and the department was authorized to suspend Ebach's driving privileges under North Dakota Century Code § 39-20-04.1; and

4) Whether Ebach's test results showed an alcohol concentration of at least eighteen one hundredths of one percent by weight.

App. 13, Tr. at Ex. 2.

[¶4] Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision revoking Ebach's driving privileges for a period of 180 days. Id. Ebach requested judicial review of the hearing officer's decision. App. 1, Index #1.

STATEMENT OF FACTS

[¶5] Officer Holter had observed Ebach speeding and observed some erratic driving and initiated a stop. Tr. 5, ll. 7-14. Officer Holter first made contact with Ebach shortly before 2:03 a.m. and confirmed this time using his watch. Tr. 12, ll. 14-18. During the stop, Officer Holter observed actions of the driver that suggested impairment, Ebach had stated he had been consuming alcoholic beverages and Officer Holter asked Ebach to exit the vehicle to conduct field sobriety tests to determine his level of impairment. Tr. 6, ll. 2-15. After conducting the field sobriety tests, Officer Holter read the implied consent for the breath screening test and asked Ebach to submit to the test. Tr. 9, ll 5-9.

[¶6] Prior to Officer Holter conducting a preliminary breath screen he checked Ebach's mouth and Ebach did not have anything inside his mouth at that time. Tr. 9, ll. 16-21. Officer Holter further testified while Ebach had been with him, Ebach did not have anything to eat, drink or smoke. Tr. 9, ll. 24-25; Tr.10, l. 1. After the

preliminary breath screen Ebach was placed under arrest and placed in handcuffs. Tr. 10, ll. 3-10.

[¶7] Officer Holter testified he is certified to administer the Intoxilyzer 8000 and that he did so in accordance with the approved method. Tr. 10, ll.19-20; Tr. 13, ll. 10-21. The approved method required Officer Holter to "ascertain that the subject has had nothing to eat, drink, or smoke within twenty minutes prior to the collection of the breath sample" by "[a]nswer[ing] the question with either "N" (No) or "Y" (Yes)," prior to the collecting the breath sample. Tr. Ex. 8, p. 4. Officer Holter complied with this by answering the question with a "Y" for yes. Tr. Ex. 1c. Officer Holter testified he conducted the test in accordance with the approved method, and that he certified a copy of the Intoxilyzer Test Record and Checklist (Test Record). Tr. 10, ll. 17-20.

[¶8] Ebach's attorney objected to the admission of the Test Record into evidence. Tr. 11, ll. 14-22. The hearing officer overruled the objection and admitted the Test Record into evidence. Tr. 11, 23-25; Tr. Ex. 1c.

[¶9] Officer Holter testified he obtained the chemical breath sample from Ebach at 2:26 a.m. and that he used his watch to establish the twenty-minute waiting period. Tr. 11, ll. 24-25; Tr. 12, l. 1-10. The time on the Intoxilyzer 8000 machine was approximately six minutes behind the time on his watch. Tr. 12, ll. 4-5. The time printed out on the Test Record was 2:20, Officer Holter testified that based on his watch the test would have been conducted at 2:26. Tr. 12, ll. 8-10. Officer Holter had noted the time difference in his report. Tr. 13, ll. 18-21.

[¶10] The hearing officer found there was no evidence that Ebach had anything

in his mouth during his time with Officer Holter. Tr. 16, ll. 21-22. The test sample was taken 23 minutes after Officer Holter stopped and first contracted Ebach. Tr. 16, ll. 19-21. The hearing officer found the test was fairly administered and the prima facie showing that the twenty minute waiting period had been ascertained had not been rebutted. Tr. 16, ll. 22-25.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶11] Ebach requested judicial review of the Hearing Officer's Decision by the Ramsey County District Court in accordance with N.D.C.C. § 39-20-06. App. 22., On appeal Ebach identified the following issues for review. Whether Officer Holter scrupulously followed the approved method by complying with the twenty minute waiting period prescribed in administering the chemical Intoxilyzer 8000 test. Ebach also claimed he was entitled to reasonable attorney's fees and costs, arguing the agency acted without substantial justification in revoking Ebach's driving privileges.

[¶12] With respect to Ebach's argument about the twenty minute waiting period, Ebach argued the hearing officer erred in concluding that he failed to adequately rebut the prima facie showing that there was scrupulous compliance with the Approved Method. The Department countered by arguing that Officer Holter conducted the test in accordance with the Approved Method and had ascertained the twenty minute waiting period prior to conducing the test.

[¶13] Judge Donovan Foughty issued an Order Affirming Hearing Officer's Decision on June 5, 2018. App. 15. Judgment was entered on June 14, 2018. App. 17. Notice of Entry of Judgment was provided later that same day. App. 18.

Ebach appealed from the Judgment to this Court. App. 19. The Department asks this Court to affirm the judgment of the Ramsey County District Court and the administrative suspension of Ebach's driving privileges for 180 days.

STANDARD OF REVIEW

[¶14] The Administrative Agencies Practices Act governs an appeal from an administrative hearing officer's decision suspending a license. N.D.C.C. ch. 28-32; N.D.C.C. ch. 39-20. The appeal is civil in nature. Knoll v. N.D. Dep't of Transp., 2002 ND 84, ¶ 16, 644 N.W.2d 191. And it is separate and distinct from any criminal matter that may ensue. Id. The North Dakota Century Code provides, in relevant part, that a court must affirm an agency's order except in the event of any of the following:

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] "When reviewing the agency's factual findings, [the Court] do[es] not make independent findings of fact or substitute [its] judgment for that [of the] agency, but determine[s] only whether a reasoning mind reasonably could have determined the factual conclusions were proven by the weight of the evidence from the entire record." Ringsaker v. Dir., N.D. Dep't of Transp., 1999 ND 127, ¶ 5, 596 N.W.2d 328. "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

[¶16] Ebach raises two issues on appeal to this Court. First, whether Ebach's Intoxilyzer Test Record and Checklist ("Test Record") was admissible in this civil proceeding prior to further testimony of the law enforcement officer's compliance with the approved method in conducting the test. Second, whether Ebach is entitled to an award of attorney fees and costs under N.D.C.C. § 28-32-50(1) in the event the hearing officer's decision is not affirmed by the Supreme Court.

I. The hearing officer reasonably determined that Ebach's chemical Intoxilyzer test was fairly administered and the twenty minute waiting period had been ascertained.

[¶17] N.D.C.C. § 39-20-07 governs the evidentiary use of the breath analysis results. The statute lessens the Department's Burden in laying the evidentiary foundation of the admission of the blood analysis results. Cf. Berger v. State

Highway Comm'r, 394 N.W.2d 678, 688 (N.D. 1986); see also Pladson v. Hjelle, 368 N.W.2d 508, 513 (N.D. 1985).

[¶18] "Under N.D.C.C. § 39-20-07(5), '[t]he 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*....'" Filkowski v. Dir., N.D. Dep't of Transp., 2015 ND 104, ¶ 12, 862 N.W.2d 785 (emphasis added) (quoting N.D.C.C. § 39-20-07(5)).

[¶19] "Four foundational elements must be documented or demonstrated for the admission of the test report: (1) the sample must be properly obtained, (2) the test must be fairly administered, *(3) the method and devices used to test the sample must be approved by the director of the state crime laboratory or the director's designee, and (4) the [chemical] test must be performed by an authorized person or by one certified by the director of the state crime laboratory or the director's designee as qualified to perform it*." Id. (emphasis added) (citing Schlosser v. N.D. Dep't of Transp., 2009 ND 173, ¶ 9, 775 N.W.2d 695; see also Frank v. Dir., N.D. Dep't of Transp., 2014 ND 158, ¶¶ 9-10, 849 N.W.2d 248).

[¶20] Ebach's counsel objected to the admittance of both the Report and Notice and the Test Record. Tr. 11, ll. 14-22. The basis for the objection called into question the fairness of the administration of the test due to lack of compliance with the twenty minute waiting period prescribed in the approved method.

[¶21] Once admitted "[t]he Intoxilyzer Test Record and Checklist is...presumed to show fair administration of the approved method until the defendant shows that 'the evidence as a whole clearly negates the presumed fact.'" Mees v. N. D. Dep't. of Transp., 2013 ND 36, ¶12, 827 N.W.2d 345 (quoting Thorsrud v. N. D. Dep't. of Transp., 2012 ND 136, ¶ 10, 819 N.W.2d 483). However, fair administration of the test can also be established by proof that the directions for the test have been scrupulously followed. Id. Testimony from the test operator may be used to show that the approved method was scrupulously complied with. See Filkowski, 2015 ND ¶ 16, 862 N.W.2d 791.

[¶22] After the Test Record was entered into evidence, Officer Holter testified that he first made contact with Ebach shortly before 2:03 a.m., and he confirmed this time using his watch. Tr. 12, ll. 14-18. Officer Holter testified he obtained the chemical breath sample from Ebach at 2:26 a.m. and that he used his watch to establish the twenty-minute waiting period. Tr. 11, ll. 24-25; Tr. 12, l. 1. The time on the Intoxilyzer 8000 machine was approximately six minutes behind the time on his watch. Tr. 12, ll. 4-5. The time printed out on the test record was 2:20 a.m., Officer Holter testified that based on his watch the test would have been conducted at 2:26 a.m. Tr. 12, ll. 8-10. Officer Holter noted the time difference in his report. Tr. 13, ll. 18-21.

[¶23] Once fair administration of the test in accordance with the approved method had been shown and the Test Record admitted into evidence, the burden shifted to Ebach to show the test was not fairly administered. See Thorsrud v. Dir., N. D.

Dept. of Transp., 2012 ND 136, ¶10, 819 N.W.2d 483 (following Berger v. State Highway Commissioner, 394 N.W.2d 678, 688 (N.D. 1986).

[¶24] For a driver to discredit the prima facie accuracy of the testing information, it is the driver's responsibility to produce evidence the test was not fairly or adequately administered. Cf. Berger v. State Highway Comm'r, 394 N.W.2d 678, 688 (N.D. 1986); see also Pladson v. Hjelle, 368 N.W.2d 508, 513 (N.D. 1985). Other than pointing out that the times listed on the Report and Notice did not facially show a twenty minute waiting period, Ebach offered no other evidence that the twenty minute waiting period had not been ascertained. Officer Holter explained the time difference was due to the times being obtained from two separate instruments used during the investigation – Officer Holter's watch and the Intoxilyzer 8000 machine. Tr. 12, ll. 1-5. Officer Holter ascertained the 20 minute waiting period using his watch. Tr. 12, l. 1. While his report was not entered into evidence, Officer Holter further corroborated the time difference by testifying he had placed the time difference into his report. Tr. 13, l. 21. Ebach offered no evidence that ascertaining the twenty minute waiting period using his watch, made the approved method incomplete or unscientific. "A court cannot determine the approved method is incomplete or unscientific unless it is provided with evidence." Berger, 394 N.W.2d at 688.

[¶25] Ebach offered no evidence or testimony challenging Officer Holter's testimony about how he ascertained the twenty minute waiting period. Therefore, based upon the testimony of Officer Holter, a reasoning mind could have reasonably determined the twenty minute waiting period had been ascertained

prior to the administration of the test. The hearing officer's finding that Officer Holter had ascertained the twenty minute waiting period prior to conducting the Intoxilyzer 8000 test and that Ebach failed to offer any evidence to rebut that the twenty minute waiting period showing was supported by a preponderance of the evidence.

[¶26] Although a preponderance of the evidence showed that Officer Holter had ascertained the twenty minute waiting period, Ebach argues that the hearing officer erred in admitting the Test Record prematurely due to the facial showing of the time on the Report and Notice.

[¶27] Pursuant to N.D.C.C. § 28-32-11.1, the hearing officer has discretion in regulating the introduction of evidence during the course of a hearing. Knudson v. Dir., N.D. Dep't of Transp., 530 N.W.2d 313, 316 (N.D. 1995) "Given the discretion afforded to hearing officers in the exclusion and admission of evidence, [this Court] conclude[d] it appropriate to apply the abuse of discretion standard to those evidentiary rulings." Id. at 317.

1. The admissibility of the Test Record was established by compliance with N.D.C.C. § 39-20-05.

[¶28] Section 39-20-05, N.D.C.C., declares the Test Record to be a regularly kept record of the Department. A proper foundation for admissibility of Ebach's Test Record was established by compliance with N.D.C.C. § 39-20-05. "Generally, before documentary evidence is admissible it must be authenticated." R & D Amusement Corp. v. Christianson, 392 N.W.2d 385, 386 (N.D. 1986). "Authentication is simply identification. Identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter

in question is what its proponent claims." Frost v. N.D. Dep't of Transp., 487 N.W.2d 6, 8 (N.D. 1992) (internal citations omitted). Additionally, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to signatures, documents, or other matters declared by statute to be presumptively or prima facie genuine or authentic. N.D.R.Ev. 902(10).

[¶29] Under the statute, a certified copy of an Intoxilyzer checklist and test record is deemed regularly a kept record of the Department. See Dittus v. N.D. Dep't of Transp., 502 N.W.2d 100, 105-06 (N.D. 1993). N.D.C.C. § 39-20-05(4) provides, in part, that a certified copy of a Test Record is one of the "regularly kept records of the director" and adds that "[t]hose records establish prima facie their contents without further foundation." In this case the Department introduced the Test Record and it was admitted into evidence after Officer Holter had testified that he was a certified operator of the Intoxilyzer 8000, he tested Ebach, he conducted the test in accordance with the approved method and that he certified the copy of the Test Record. Tr. 4, ll. 4-7 – Tr. 10, ll. 17-20.

[¶30] As the proper foundation was given establishing the Test Record as a regularly kept record of the Department, the Hearing Officer properly admitted the Test Record into evidence. Appellant argues that there was a lack of foundation for the admittance of the Test Record as it was facially invalid. Appellant's argument does not address lack of foundation for the admittance of a regularly kept record of the Department. Rather it speaks to the prima facie accuracy of the testing information. Ebach's objection to the Test Record may have called into question the prima facie accuracy of the test results, but it did not preclude the

admittance of the Test record as a regularly kept record of the director under N.D.C.C. § 29-20-05(4).

[¶31] No further foundation was required and no evidence has been presented showing that the certified copy provided to the Department was anything other than a true and correct duplicate of the original. Therefore, the hearing officer's decision to admit Exhibit 1c was not an abuse of discretion.

2. Alternatively, if the Court finds that the Test Record was not admissible as a regularly kept record under N.D.C.C. 39-20-05, any foundational defect that may have occurred by premature admission of the Test Record was cured by Officer Holter's testimony that he used his watch to ascertain the twenty minute waiting period had elapsed prior to the administration of the Intoxilyzer 8000 Test.

[¶32] Ebach argues the hearing officer erred in admitting the Test Record because the approved method was not established prior to the admission of the Test Record. Specifically, Ebach argues the twenty minute waiting period was not ascertained prior to the administration of the test, as shown by the times entered in the Report and Notice for the time of driving and the time of the test. The Report and Notice facially shows a time period of less than twenty minutes had passed from the time the officer had stopped Ebach to the time when the test was administered. Ebach argues due to this facial showing, the hearing officer erred in admitting the Test Record into evidence.

[¶33] "Any error which does not affect the substantial rights of the defendant is to be disregarded." State v. Puhr, 316 N.W.2d 75, 78 (1982) (citing Rule 52(a) N.D.R.Crim.P.). If this Court decides the hearing officer erred in admitting the Test Record, the Court must decide whether the error was so prejudicial that Ebach's substantial rights were affected and that a different decision would have resulted.

City of Fargo v. Erickson, 1999 ND 145, ¶ 13, 598 N.W.2d 787.

[¶34] To determine if Ebach's substantial rights were affected and a different decision would have resulted without the error the Court must consider "the entire record … and the probable effect of the error determined in the light of all the evidence." Id. An error in the premature admission of the test results may be cured by later testimony. Puhr, 316 N.W.2d at 78 (finding that the defendant's substantial rights were not affected by the trial court's error in admitting a test result when the twenty minute observation requirement had not been met at the time of admission when later testimony cured the foundation defect.) If the Test Record was admitted prematurely, the foundational requirement necessary to show fair administration of the test was met after Officer Holter testified he used his watch to ascertain the twenty minute waiting period and that the Intoxilyzer's time was six minutes behind his watch. The admission of the Test Record prior to the testimony of Officer Holter regarding how he had ascertained the twenty minute waiting period did not affect the substantial rights of Ebach, as had the hearing officer reserved ruling on the objection (or waited to admit the Test Record) until after testimony regarding how Officer Holter ascertained the twenty minute waiting period was given, the same result would have occurred. Immediately after the Test Record was admitted, the hearing officer asked Officer Holter to explain how he had ascertained the twenty minute waiting period, at which point any foundational defect had been cured. Any error in admitting the Test Record prior to the testimony of Officer Holter regarding how he ascertained the twenty minute waiting period, was harmless error. See Puhr, 316 N.W.2d at 78.

II. Ebach's request for attorney's fees and costs is untenable.

[¶35] "Section 28-32-50(1), N.D.C.C. requires a court to award a non-administrative agency party attorney's fees and costs if the court rules in favor of that party and it determines an administrative agency acted without substantial justification in the same civil judicial proceeding." Schock v. N.D. Dep't of Transp., 2012 ND 77, ¶ 41, 815 N.W.2d 255 (emphasis in original.) "Merely because an administrative agency's actions are not upheld by a court does not mean that the agency's action was not substantially justified." Tedford v. Workforce Safety & Ins., 2007 ND 142, ¶ 25, 738 N.W.2d 29. This Court has interpreted "substantially justified" to mean … "justified to a degree that could satisfy a reasonable person." Peterson v. N.D. Dep't of Transp., 518 N.W.2d 690, 696 (N.D. 1994) (external citation omitted.) An agency's actions may be substantially justified even if they ultimately are found by a court to be erroneous, if a reasonable person could think the actions had a reasonable basis in law and fact. Id. "An administrative agency's position is substantially justified . . . if a reasonable person could think the position is correct and the position has a reasonable basis in law and fact." Dutton v. Workforce Safety & Ins., 2010 ND 99, ¶ 15, 783 N.W.2d 278.

[¶36] Only in rare and extreme circumstances has the Court upheld an award of attorney's fees under N.D.C.C. § 28-32-50, or its predecessor, N.D.C.C. § 28-32-21.1, in appeals by non-agency parties from final agency orders. See Singha v. N.D. State Bd. of Med. Examiners, 1998 ND 42, ¶ 38, 574 N.W.2d 838 (agency "inexplicably" failed to comply with procedures in Administrative Agencies Practice Act); Walton v. N.D. Dep't Human Serv., 552 N.W.2d 336 (N.D. 1996) (agency

improperly allocated burden of proof, ignored relevant statutory standards, and made probable cause finding despite lack of any supporting evidence); Lamplighter Lounge, Inc. v. State ex rel. Heitkamp, 523 N.W.2d 73 (N.D. 1994) (agency required appellant to undergo a second administrative hearing while first hearing and same issue was on appeal to this Court); Aggie Investments GP v. Pub. Serv. Comm'n, 470 N.W.2d 805, 813-14 (N.D. 1991) (agency failed to follow law requiring a hearing whenever interested parties are not in agreement).

[¶37] In this case, Ebach's arguments are without merit. The Department submits Ebach should not prevail on either prong of the test for attorney's fees and costs under N.D.C.C. § 28-32-50(1). First, as presented above, the hearing officer did not abuse his discretion in admitting the Test Record, as proper foundation was present under N.D.C.C. § 39-20-05. Further, based upon the evidence and testimony presented at the administrative hearing, a reasoning mind could reasonably determine that the twenty minute waiting period had been ascertained prior to the administration of the chemical test. The Department respectfully submits, that this Court should affirm the hearing officer's decision suspending Ebach's driving privileges for 180 days.

[¶38] Second, regardless of the outcome of this appeal, the Department again respectfully submits, for the reasons identified above, that there was at least "substantial justification" for the hearing officer's decision. And, even if this Court disagrees, Ebach has not shown that the hearing officer's decision was not substantially justified and Ebach should not be entitled to an award of attorney's fees and costs.

CONCLUSION

[¶39] The Department respectfully requests that this Court affirm the judgment of the Ramsey County District Court and the Department's decision suspending Ebach's driving privileges for a period of one hundred and eighty days.

Dated this 27th day of September, 2018.

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Attorney General

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Shaun Robert Ebach, Appellant, v. Thomas Sorel, Director, North Dakota Department of Transportation, Appellee.	)	**AFFIDAVIT OF SERVICE BY CERTIFIED MAIL** **Supreme Ct. No. 20180290** **District Ct. No. 36-2018-CV-00122**

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

[¶1] Lisa Johnson 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 27th day of September, 2018, I served the attached **BRIEF OF APPELLEE** upon Shaun Robert Ebach, by and through his attorneys Drew James Hushka and Luke Thomas Heck, by electronic mail as follows:

Drew J. Hushka Attorney at Law dhushka@vogellaw.com	Luke Thomas Heck Attorney at Law lheck@vogellaw.com

_____
Lisa Johnson

Subscribed and sworn to before me
this 27th day of September, 2018.

_____
Notary Public

CIVIL LITIGATION
NATURAL RESOURCES
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September 27, 2018

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: Shaun Robert Ebach v. Thomas Sorel, Director, North Dakota Department of Transportation;
Supreme Ct. No. 20180290
District Ct. No. 36-2018-CV-00122

Dear Ms. Miller:

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

Thank you.

Sincerely,

Nici Meyer
Assistant Attorney General

lj
Enclosures
cc: Drew J. Hushka
Luke Thomas Heck