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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 REPLY BRIEF

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I. THE DEPARTMENT'S DECISION VIOLATES THE ADMINISTRATIVE AGENCIES PRACTICE ACT

A. The Hearing Officer Lacked Basis in Statute or Rule to Admit the Test Record

1. The Test Record was not admissible as a regularly kept record.

[¶1] Relying on Section 39-20-05, the Department argues the Test Record was properly admitted simply as a regularly kept record of the Department. Appellee's Br., ¶¶ 28-31. The Department's argument misapplies decades of this Court's precedent.

[¶2] North Dakota statute establishes "a certified copy of the checklist and test records received by the director from a certified breath test operator[]" are admissible as regularly kept records. N.D.C.C. § 39-20-05(4). However, North Dakota statute further establishes such records are only admissible—

> 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 the 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). While Section 39-20-05(4) provides general rules for admission of regularly kept records, "Section 39-20-07, N.D.C.C., governs the admission of a chemical test result and allows the use of certified documents to establish the evidentiary foundation for the results." Ell v. Director, 2016 ND 164, ¶ 17, 883 N.W.2d 464.

> "If the documentary evidence and testimony does not show scrupulous compliance with the methods approved by the director of the state crime laboratory or the director's designee, the evidentiary shortcut provided by N.D.C.C. § 39-20-07 cannot be used and fair administration of the test must be established through expert testimony."

Id. at ¶ 19 (quoting State v. Van Zomeren, 2016 ND 98, ¶ 10, 879 N.W.2d 449); cf. also State v. Keller, 2013 ND 122, ¶ 8, 833 N.W.2d 486 ("If the State fails to establish compliance with those directions for sample collection which go to the scientific accuracy and reliability of the test, the State must prove fair administration of the test through expert testimony." (emphasis added) (citation omitted)). Accordingly, this Court has repeatedly held that absent compliance with Section 39-20-07(5), the Department cannot permissibly admit testing records. See, e.g., id. at ¶ 22 (the hearing officer erred in admitting the breath test result without proof of compliance with the approved method or expert testimony, therefore, "we conclude the hearing officer's findings are not supported by a preponderance of the evidence and the decision is not in accordance with the law"). "It is the Department's burden to prove the Intoxilyzer test was fairly administered." Ringsaker v. Director, N.D. Dept. of Transp., 1999 ND 127, ¶ 11, 596 N.W.2d 328 (citation omitted).

[¶3] In this case, proper admission of the Test Record required evidence Officer Holter performed the test "according to the methods and with devices approved by the director of the state crime laboratory or the director's designee[.]" When the hearing officer admitted the Test Record without evidence the test was performed according to the methods approved by the state crime laboratory, the hearing officer improperly admitted the Test Record. Cf. Ringsaker, 1999 ND 127, ¶¶ 13-15 (hearing officer incorrectly admitted evidence when evidence admitted without prima facie showing of compliance with the approved method).

2. The Hearing Officer admitted the Test Record in violation of Section 39-20-07(5) and the North Dakota Rules of Evidence.

[¶4] The Department alternatively argues that even if the Test Record is not *per se* admissible as a regularly kept record, the hearing officer did not err in admitting the Test Record because Officer Holter retroactively laid proper foundation. Appellee's Br., ¶¶ 17-27. The Department's argument misapplies the law.

[¶5] As outlined above, the plain text of Section 39-20-07(5) only allows admission of test records without expert evidence "when it is shown" the sample was properly obtained, the test was fairly administered, the test was performed according to the approved methods, and by a qualified operator. N.D.C.C. § 39-20-07(5) (emphasis added). In other words, there must be sufficient evidence the test was performed according to the approved method before a test is admitted. But when the hearing officer admitted the Test Record the evidentiary record lacked evidence of compliance with the approved method—indeed, the evidentiary record showed a facial violation of the approved methods. The hearing officer, therefore, improperly admitted the Test Record.

[¶6] Even if Section 39-20-07(5) did not establish that a proper foundation must be laid before test records may be admitted, admission of the Test Record still violated the North Dakota Rules of Evidence. The North Dakota Rules of Evidence generally govern evidentiary issues during administrative proceedings. N.D.C.C. § 28-32-24(1).[1] In accordance with the North Dakota Rules of Evidence, "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding

[1] It is assumed the Department does not claim the North Dakota Rules of Evidence were waived. Cf. N.D.C.C. § 28-32-24(1) ("An administrative agency, or any person conducting proceedings for it, may waive application of the North Dakota Rules of Evidence if a waiver is necessary to ascertain the substantial rights of a party to the proceeding, but only relevant evidence shall be admitted. The waiver must be specifically stated, orally or in writing, either prior to or at a hearing or other proceeding.").

that the fact does exist. The court may admit the proposed evidence on the condition that the proof will be introduced later." N.D.R. Evid. 104(b). Stated differently, Rule 104(b) allows a hearing officer to conditionally admit testimony on the condition that proper relevance is later established.

[¶7] While the deferential abuse of discretion standard governs evidence admission issues, "[a]n abuse of discretion occurs when a [hearing officer] arbitrarily, unreasonably, or capriciously, or if [he or she] misinterprets or misapplies the law." State v. Cook, 2018 ND 100, ¶ 12, 910 N.W.2d 179 (citation omitted). The hearing officer abused his discretion in this case because he did not conditionally admit relevant evidence pending proper foundation—the hearing officer admitted the Test Record despite its facial inadmissibility by overruling Mr. Ebach's specific and proper objection. See Tr., at 11:14-24; cf. Cook, 2018 ND 100, ¶ 13 ("Here, the district court 'conditionally' admitted baggies and a full lab report into evidence. The court indicated the State needed to lay more foundation as to the evidence before it could be fully admitted." (emphasis added)). Indeed, even the Department concedes "[t]he Report and Notice facially shows a time period of less than twenty minutes had passed from the time the officer had stopped [Mr.] Ebach to the time when the test was administered." Appellant's Br., ¶ 32. The hearing officer acted arbitrarily by misapplying the law in fully admitting the Test Record over the specific objection of Mr. Ebach.

B. The Administrative Agencies Practice Act Requires Reversal of the Department's Decision

[¶8] Finally, the Department argues that Mr. Ebach's argument must fail because his substantial rights were not affected. Appellee's Br., ¶¶ 33-34. The Department's argument is a *non sequitur* as it relies on criminal case law and the North Dakota Rules of

Criminal Procedure which do not apply in the present case. Rather, the Administrative Agencies Practice Act outlines an agency's decision shall 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 v. Dir., Dep't of Transp., 2013 ND 95, ¶ 6, 832 N.W.2d 319 (same).

[¶9] As originally outlined by Mr. Ebach, the hearing officer's decision denied him a fair hearing. See Appellant's Br., ¶¶ 11-14; see also N.D.C.C. § 28-32-46(4) (decision to be reversed if appellant denied a fair hearing). Additionally, the hearing officer's finding fail to fail to sufficiently address the contrary evidence—that the observation period was not observed. Cf. N.D.C.C. § 28-32-46(7) (decision to be reversed if agency's findings do not sufficiently address contrary evidence). To the extent the hearing officer's adoption of a contrary position "addresses" the contrary evidence, the finding was not supported by the preponderance of the evidence as greater evidence showed the observation period was not observed. Cf. N.D.C.C. § 28-32-46(5) (decision to be

reversed if the agency's findings are not supported by the preponderance of the evidence).

[¶10] The Department's substantial rights argument is a legal red herring—the relevant inquire is whether the Administrative Agencies Practice Act requires reversal. Numerous reasons exist for reversal of the hearing officer's decision in accordance with the Administrative Agencies Practice Act.

II. ATTORNEY FEES AND COSTS SHOULD BE AWARDED IN MR. EBACH'S FAVOR

[¶11] The Department fails to justify why the hearing officer admitted facially inadmissible evidence, or why the hearing officer made result-oriented findings of fact, against the preponderance of the evidence, to reach the predetermined result sought. 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

[¶12] For the reasons set forth, and for the reasons outlined previously, Mr. Ebach requests reversal of the hearing officer's decision, and an award of his attorneys' fees and costs.

Respectfully submitted October 5, 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 October 5, 2018, the following documents:

Appellant's Reply Brief

were electronically filed and served on the following:

Thomas Sorel
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Dated this 5th day of October, 2018.

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