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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Larry William Hewitt, Appellant, vs. Ronald Henke, Interim Director, Department of Transportation, Appellee.	**SUPREME COURT NO. 20190389** Civil No. 47-2019-CV-00296 **Oral Argument Requested**

ON APPEAL FROM NOVEMBER 26, 2019 JUDGMENT OF
THE DISTRICT COURT
COUNTY OF STUTSMAN
STATE OF NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT
HONORABLE TROY J. LEFEVRE PRESIDING

APPELLANT'S REPLY BRIEF

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INTRODUCTION

[¶1] Mr. Hewitt[1] and the Department agree the Administrative Agencies Practices Act governs this appeal. *Compare* Appellant's Br., ¶ 15, *with* Appellee's Br., ¶ 27. Because the Departments decision satisfies the requirements for reversal outlined by Section 28-32-46, this Court should reverse the revocation of Mr. Hewitt's driving privileges.

LAW AND ARGUMENT

I. The Department systemically violated the law by repeatedly falsely certifying documents in Jackson's name.

[¶2] When the Department systemically violates the law, this Court will reverse an adverse license action to ensure the Department's future compliance. *Madison v. North Dakota Dep't of Transp.*, 503 N.W.2d 243, 246-47 (N.D. 1993). Mr. Hewitt argued the Department's systemic violation of the law—the Department's systemic false use of Jackson's name to certify documents—requires prophylactic reversal of the revocation of his driving privileges. *See* Appellant's Br., at ¶¶ 17-19. The Department does not—and cannot—dispute it repeatedly falsely certified documents by "Jackson" while Jackson was on forced leave from the Department. Nevertheless, the Department attempts to create additional requirements to this Court's "systemic disregard" jurisprudence. This Court should reject the Department's attempts to insulate its violations of the law, should reverse the Department's decision.

[¶3] Citing *May v. Sprynczynatyk*, 2005 ND 76, 695 N.W.2d 196, the Department argues a systemic disregard of the law is a "persistent" disregard of the law, and a disregard of the law is only persistent if this Court has previously ruled the Department was violating the

[1] Capitalized terms used herein, but not otherwise defined, shall have the meanings ascribed to them in Appellant's Brief.

law. *See* Appellee's Br., ¶¶ 71-72. The argument misapplies *May*, where a motorist challenged the timeliness of a transcript filed by the Department. 2005 ND 76, ¶ 6. This Court found the Department failed to file an administrative transcript within the period prescribed by statute. *Id.* at 8. But this Court deemed the statutory violation did not require reversal because the statute was not jurisdictional. *Id.* at ¶ 15. This motorist also argued the Department's systemic violations of the transcript statute required reversal. *Id.* at ¶ 16. This Court denied the argument, holding a single statutory violation was not systemic disregard. *Id.* at ¶ 17 ("To establish systemic disregard . . . more than a single miscue by the government is required to evidence institutional noncompliance which amounts to systemic disregard of the law." (emphasis added) (citations omitted)). Nowhere in *May* did this Court hold an agency decision only systemically violates the law if the decision violates an on-point decision of this Court.

[¶4] Indeed, this Court's jurisprudence clearly shows it will reverse an agency's decision for systemic violation of a law without a prior reversal. In *Madison*, this Court reversed the Department's decision for repeatedly waiving the applicable North Dakota Rules of Evidence without previously warning the Department. 503 N.W.2d at 246-47. Similarly, in *Scott v. North Dakota Workers Compensation Bureau*, 1998 ND 221, 587 N.W.2d 153, this Court reversed an agency decision when there was "a clear showing of institutional noncompliance which constitutes a systemic disregard of the law, and the Bureau's conduct has been 'prejudicial to the integrity of the system,' thereby warranting reversal." *Id.* at ¶ 22 (citation omitted). In other words, reversal for systemic disregard only requires a showing any agency has repeatedly violated the law.

[¶5] The Department's months-long false certification of documents in the name of "Jackson" in an effort to hide from the public his forced leave is nothing if not systemic.[2] The Department's conduct was prejudicial to the integrity of the system as it amounted to the subornation of perjury. Because this Court reverses the Department's decisions if it systemically violates the law, this Court should reverse Mr. Hewitt's license revocation.

II. The hearing officer erroneously admitted Exhibit 1.1, and the Department cannot ignore the officer's misapplication of law.

A. The hearing officer erred in admitting Exhibit 1.1 into evidence.

[¶6] Mr. Hewitt argued the hearing officer erroneously admitted Exhibit 1.1—the exhibit falsely certified by Jackson—into evidence as a regularly kept record of the Department as prima facie evidence of its contents. *See* Appellant's Br., ¶¶ 20-24. The Department argues the hearing officer properly admitted the facially erroneous exhibit through foundation other than the erroneous certification. *See* Appellee's Br., ¶¶ 49-54. The Department's position misapplies the law.

[¶7] The Department argues Herzig provided foundation to admit the Report and Notice contained in Exhibit 1.1. *Id.* at ¶ 53. The Department correctly identifies Herzig identified the Report and Notice contained in Exhibit 1.1 as a copy of the Report and Notice Herzig provided to Hewitt. *Id.* (citation omitted). But this testimony failed to establish the Report and Notice contained in Exhibit 1.1 was a regularly kept record of the Department—the testimony failed to establish the Report and Notice as a certified record of the Department.

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[2] Indeed, a cursory review of administrative cases during this same period show the Department repeatedly certifying documents using "Jackson's" certification. *See, e.g.*, *Pikop v. Henke*, 09-2019-CV-01695; *Gass v. North Dakota Dep't of Transp.*, 09-2019-CV-01761, *Evans-McConnell Kolstad v. Director, N.D. Dep't of Transp.*, 02-2019-CV-00109.

Cf. Peterson v. North Dakota Dep't of Transp., 518 N.W.2d 690, 693 (N.D. 1994) (documents are only regularly kept records of the Department is certified). Only the regularly kept records of the Department—only certified records—are prima facie evidence of their contents. *See* N.D.C.C. § 39-20-05(4). Because no evidence established the Report and Notice contained in Exhibit 1.1 as a regularly kept record of the Department, its contents were inadmissible hearsay evidence. Because the hearing officer improperly admitted Exhibit 1.1 as evidence of its contents, this Court should reverse.

B. The Department cannot ignore the hearing officer's erroneous admission of evidence.

[¶8] The Department argues that even if the hearing officer erred in admitting Exhibit 1.1 into evidence, the error is inconsequential because the hearing officer properly admitted Exhibit 1.2 into evidence, which provided the same evidence. Appellee's Br., ¶¶ 55-58. As outlined previously and below, Mr. Hewitt disagrees the hearing officer properly admitted Exhibit 1.2. But even if the hearing officer properly admitted Exhibit 1.2, the Department's argument the erroneous admission of Exhibit 1.1 is inconsequential ignores the plain language of statute.

[¶9] In accordance with the Administrative Agencies Practices Act, the courts are to reverse an agency's decision if "[t]he order is not in accordance with the law." N.D.C.C. § 28-32-46(1). An order "is not in accordance with the law" if the order misapplies the law. By erroneously admitting Exhibit 1.1 into evidence, the hearing officer issued an order not in accordance with the law. Because Section 28-32-46 makes that a ground for reversal, this Court should reverse.

III. As the head of an agency of the Department, Rehborg was required to take and subscribe to the oath required by Section 4 Article XI of the North Dakota Constitution.

[¶10] Mr. Hewitt argued Rehborg's certification failed to render Exhibit 1.2 a regularly kept record of the Department. *See* Appellant's Br., ¶¶ 25-27. Mr. Hewitt and the Department agree "before entering upon the duties of that individual's office[,]" a civil officer "shall take and subscribe the oath prescribed in section 4 of article XI of the Constitution of North Dakota." N.D.C.C. § 44-01-05; Appellee's Br., ¶ 41 (quoting N.D.C.C. § 44-01-05). But the Department argues Rehborg is not an "officer" within the meaning of Section 44-01-05. *See* Appellee's Br., ¶ 45. The argument fails.

[¶11] In part, the term "civil officer," for purposes of Section 44-01-05, includes "the appointed head of <u>any</u> state agency and <u>agency division</u>[.]" N.D.C.C. § 41-01-05 (emphasis added). The certification by Rehborg identifies her as the head of an agency division. *See* Appellant's App'x, at 12 (identifying Rehborg as the Interim Director of the Driver's License Division of the Department). Accordingly, Rehborg was required to take the required oath.

[¶12] Nevertheless, the Department argues Rehborg could still act as interim director because Mr. Hewitt did not request a copy of Rehborg's oath from the North Dakota Secretary of State. The argument turns the rules of evidence on its head. The Department bears the burden of proof during administrative proceedings. *Kobilansky v. Leffrig*, 358 N.W.2d 781, 790 (N.D. 1984). The record during the administrative hearing is the Department—the agency for which Rehborg worked—lacked any evidence Rehborg complied with statute. *See* Appellant's App'x, at 47. After admitting the Department's admission it lacked evidence Rehborg took the required oath into the evidentiary record, the Department bore the burden to establish Rehborg had authority to act as interim

director. It failed to do so. Absent authority to act as interim director, the hearing officer erred in using Rehborg's statement to admit Exhibit 1.2. This Court should reverse.

IV. The Department cannot ignore the hearing officer's incorrect findings and conclusions regarding the doctrine of equitable estoppel.

A. The hearing officer misapplied the law in refusing to apply and consider the doctrine of equitable estoppel.

[¶13] Mr. Hewitt argued the hearing officer erred by refusing to apply the doctrine of equitable estoppel to administrative hearings. *See* Appellant's Br., ¶¶ 30-31. Unable to defend the hearing officer's position the doctrine of equitable estoppel is "a doctrine which is not applicable in statutory administrative hearings[,]" the Department now abandons the position. Instead, the Department argues because the issue of equitable estoppel is not included in Section 39-20-05(2), a hearing officer need not consider the doctrine if invoked by a motorist. *See* Appellee's Br., ¶ 70. The argument lacks any basis in the law.

[¶14] In relevant part, Section 39-20-05(2) reads an administrative hearing:

> may cover only the issues of whether the arresting officer had reasonable grounds to believe the individual had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance . . . ; whether the individual was tested in accordance with section 39-20-01 . . . ; and whether the test results show the individual had an alcohol concentration of at least eight one-hundredths of one percent by weight . . . .

N.D.C.C. § 39-20-05(2). Despite the language of Section 39-20-05(2), an administrative hearing requires a hearing officer to apply the North Dakota Rules of Evidence. *See, e.g.*, *Madison*, 503 N.W.2d at 246-47 (overturning Department action when Department waived application of the North Dakota Rules of Evidence). Despite the language of Section 39-20-05(2), and administrative hearing must consider whether law enforcement permissibly seized a motorist. *See, e.g.*, *Lies v. North Dakota Dep't of Transp.*, 2019 ND 83, 924 N.W.2d 448 (overturning Department action law enforcement lacked reasonable suspicion

of criminal activity to justify traffic stop). In other words, an administrative hearing includes the issues related to the issues identified in Section 39-20-05(2)—including whether the doctrine of equitable estoppel should be applied. *See, e.g., Kraft v. Moore*, 517 N.W.2d 643, 645 (N.D. 1994) (holding a motorist's actions correctly invoked the doctrine of equitable estoppel in an administrative hearing). The hearing officer misapplied the law in refusing to consider whether the doctrine of equitable estoppel applied. This Court should reverse.

B. A preponderance of the evidentiary record does not support the hearing officer's factual findings.

[¶15] Mr. Hewitt argued the record does not support the hearing officer's findings of no evidence supporting the doctrine of equitable estoppel. *See* Appellant's Br., ¶¶ 32-33. Mr. Hewitt and the Department agree the elements of the doctrine of equitable estoppel are:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are other than those which the defendant subsequently attempts to assert;
>
> (2) the intention, or at least the expectation, that such conduct will be acted upon by, or will influence, the plaintiff; and
>
> (3) knowledge, actual or constructive, of the real facts.

Dalan v. Paracelsus Healthcare Corp. of N.D., Inc., 2002 ND 46, ¶ 19, 640 N.W.2d 726 (citation and internal quotation omitted); Appellee's Br., ¶ 66 (quoting *Blocker Drilling Canada, Ltd. v. Conrad*, 354 N.W.2d 912, 920 (N.D. 1984)).

[¶16] The Department concedes there is evidence of the first element—Jackson's false certification. Appellee's Br., ¶ 69. Yet the Department argues there is no evidence of the second two elements. *Id.* The Department's argument necessarily takes the position it does not intend or expect motorist to take documents provided by the Department at face

value—an untenable position. The Department's argument also necessarily takes the position it did not know Jackson's certification was false—a position contradicted by the evidence the Department placed Jackson on administrative leave. In other words, a preponderance of the evidence does not support the hearing officer's finding of "no evidence to support a claim of equitable estoppel." Appellant's App'x, at 56.

[¶17] Again, Mr. Hewitt acknowledges this Court defers to factual findings made by a hearing officer. *See, e.g.*, *Obrigewitch v. Director, N.D. Dep't of Transp.*, 2002 ND 177, ¶ 8, 653 N.W.2d 73 ("We defer to the hearing officer's findings of fact if we find them to be supported by a preponderance of the evidence." (citation omitted)). But the Administrative Agencies Practices Act requires reversal of an agency decision if "[t]he findings of fact made by the agency are not supported by a preponderance of the evidence." N.D.C.C. § 28-32-46(5). Because the preponderance of the evidence shows there is at least some evidence supporting a claim for equitable estoppel, this Court should reverse.

CONCLUSION

[¶18] North Dakota Statute requires the imposition of an appellant's costs and fees when the Department lacks substantial justification. N.D.C.C. § 28-32-50(1). There is no justification for falsely certifying documents—there is no justification for effectively suborning perjury. This Court should reverse the revocation of Mr. Hewitt's driving privileges, and award Mr. Hewitt his reasonable costs and fees to direct the Department that when it certifies records, it must do so accurately, and in good faith.

Dated this 18th day of February, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 12 pages.

Dated this _____ day of February, 2020.

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IN THE SUPREME COURT
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LARRY WILLIAM HEWITT, APPELLANT, vs. RONALD HENKE, INTERIM DIRECTOR, DEPARTMENT OF TRANSPORTATION, APPELLEE.	**SUPREME COURT NO. 20190389** Civil No. 47-2019-CV-00296

CERTIFICATE OF ELECTRONIC SERVICE

[¶1] I hereby certify that on February 18, 2020, the following document:

1. Appellant's Reply Brief

was e-mailed to the address below and are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail:

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