

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

New Freedom Center, Inc.,

Petitioner/Appellant,

vs.

Job Service North Dakota and James L.
Maurer,

Respondents/Appellees.

SUPREME COURT NO. 20190405

Civil No. 08-2019-CV-01450

ON APPEAL FROM JUDGMENT DATED OCTOBER 25, 2019
STATE OF NORTH DAKOTA
BURLEIGH COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE THOMAS SCHNEIDER

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

New Freedom Center requests oral argument. This appeal raises an issue of first impression concerning what evidence is admissible before Job Service to show employee misconduct – only evidence relied on by the employer to determine that the employee should be terminated, or all evidence known to the employer at the time of termination.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did Job Service error when it concluded Maurer had not engaged in misconduct and when it found he had not been warned.
2. Did Job Service error when it failed to consider the child pornography found on Maurer's computer.
3. Did Job Service have improper ex parte communications with Maurer prior to the hearing.

STATEMENT OF THE CASE

[¶1] After placing employee James Maurer on probation for making threatening statements during a staff meeting, Appellant New Freedom Center (NFC) conducted an investigation of his at work conduct. That investigation discovered a multitude of bad acts by Maurer, including the discovery of child pornography on Maurer's work computer. NFC concluded, however, it would terminate Maurer's employment for misconduct - violating the terms of his suspension prior to discovery of the child pornography. It nonetheless completed its investigation before terminating Maurer. During the Job Service hearing on whether NFC terminated Maurer for misconduct, Job Service would not allow NFC to present evidence of the child pornography on Maurer's computer, concluding that even though NFC knew about the pornography prior to Maurer's termination, because NFC concluded it would terminate Maurer prior to discovery of this information it was not relevant.

[¶2] Job Service erred. All evidence available to NFC prior to Maurer's termination should have been admitted and considered by Job Service.

[¶3] Maurer was terminated by NFC on January 24, 2019. (Appendix ("A") at 66.) Job Service determined Maurer was discharged from his employment but that the available evidence was insufficient to establish misconduct.

[¶4] NFC appealed Job Service's decision and Job Service then conducted a hearing on March 27, 2019. (A at 65.)

[¶5] After the hearing, Job Service issued its decision finding that Maurer was discharged from his employment with NFC for reasons that did not constitute misconduct, and therefore Maurer was entitled to benefits. (A at 92-96.)

[¶6] On May 10, 2019, NFC appealed Job Service’s decision by filing its Petition for Judicial Review with the District Court. (A at 97-101.)

[¶7] On October 21, 2019, the District Court affirmed Job Service’s decision. (A at 98-103.) Judgment was entered on October 25, 2019. (A at 109.) Job Service served it Notice of Entry of Judgment on October 29, 2019. (A at 110.)

[¶8] New Freedom Center filed this appeal on December 19, 2019. (A at 111-114.)

STATEMENT OF THE FACTS

[¶9] New Freedom Center is a drug/alcohol treatment facility. Maurer worked full time at New Freedom as an addiction counselor (A at 8.) As part of his duties, Maurer regularly worked with clients who came to the Center for drug and/or alcohol evaluations. (Id.)

[¶10] On January 10, 2019, Josh Olson, the owner of New Freedom Center, was alerted by other staff members that during a staff meeting earlier the same day Maurer made inappropriate and alarming statements concerning ammunition, gun powder, guns, cleaning with bleach and that “I will never get caught.” (A at 10; 40-41.)

[¶11] NFC employee Jackie Binstock testified that during the meeting, out of the blue, Maurer asked “anybody smell anything?” Maurer then said he smelled gun powder in the air. Maurer then commented that he loved shooting his gun, “but don’t worry I clean up with bleach.” Maurer also referenced that “fingerprints don’t stay, something to that effect.” (A at 42.) Maurer also mentioned that because he used bleach there was no evidence left behind. (A at 42.)

[¶12] Ms. Binstock indicated Maurer’s demeanor was hostile. (A at 42-43.) She testified that he had been in and out of NFC employee James Knopik’s office multiple times before the meeting and they had been yelling at each other. (Id.) Ms. Binstock heard Maurer repeat more than three times, loudly, “it doesn’t fuckin’ matter, it doesn’t fuckin’ matter.”

(A at 43.) The shouting got louder and louder and Ms. Binstock was alarmed. (A at 43.) Ms. Binstock indicated that based on Maurer's demeanor and what was occurring at the office immediately prior to the meeting, she felt unsettled by his comments at the meeting. (A at 43.)

[¶13] These comments from Maurer occurred at a time when Maurer's supervisor, James Knopik, was leaving his employment with New Freedom Center, and Maurer learned that he would not be promoted to fill the supervisor position. (A at 22.)

[¶14] Prior to this incident, Maurer had a history of poor work performance, of using inappropriately foul language at the NFC facility, and for using racial slurs directed at the Center's Native American clients. (A at 47.) Maurer was mean to clients and staff and had been warned about his attitude and his use of foul language. (A at 16.)

[¶15] When Olson learned of Maurer's alarming comments at the meeting, he immediately placed him on probation. (A at 10.) Olson told Maurer to leave the NFC facility and to not return unless supervised. (A at 64, 67.) Olson considered Maurer's wrongful conduct at the meeting to be the final straw. (A at 11.) Maurer had a history of misconduct including poor work performance and also creating a hostile work environment at the NFC. (A at 11-15.) Maurer had in large part avoided termination or consequence for his wrongful actions because he was protected by his friend and supervisor James Knopik. (A at 21-22, 23.)

[¶16] The purpose of the probation was to allow Olson time to investigate Maurer's actions before deciding for sure whether to terminate him. After Olson put Maurer on probation, he investigated Maurer's on the job conduct. Olson learned that Maurer refused to complete evaluations if a NFC client was late, even if Maurer had no other work

commitments. (A at 12.) Olson learned that Maurer made inappropriate discriminatory comments about gays and lesbians. (A at 12.) Olson also learned of racial slurs made by Maurer. (A at 12.)

[¶17] Olson learned from NFC employee Megan Williams that Maurer was hostile and hard to talk to making it very difficult for his coworkers to communicate with him. (A at 32.) Maurer's hostility was getting worse. (A at 34.) Ms. Williams testified that on one occasion Maurer was aggressive toward her and hit her on the head with some paperwork. (A at 32.) When she asked Maurer why he had struck her, Maurer did not answer. (A at 32.) Ms. Williams also informed Olson that she had taken a phone call from a client who was upset because Maurer had sworn excessively at the client during an assessment. (A at 33.) She informed Maurer's supervisor of the call, but nothing was done by Knopik that she was aware of. (A at 35.) The foul language continued in the office. (A at 35.)

[¶18] NFC employee Jackie Binstock testified that Maurer had a poor demeanor toward her. She indicated she discussed his poor behavior with Knopik multiple times. (A at 43.) Ms. Binstock reported that when she walked by Maurer's office he would laugh at her in a weird way, so much so that other employees noticed Maurer's wrongful behavior. (A at 44.) Ms. Binstock further indicated that one of NFC's Clinical Directors also experienced Maurer's poor demeanor and believed that Maurer was after him. (A at 45.) Ms. Binstock testified that Maurer loudly cussed in the office, repeating the "F-word." (A at 45.) Ms. Binstock relayed an incident where Maurer acted aggressively during a staff meeting, rolling his eyes, throwing the tablet he had in his hand down and informing the other employees in his office that "he was done with the conversation." (A at 46.)

[¶19] Ms. Binstock also testified that one of the employees in the office was disabled – she had a lazy eye. Maurer gave the employee the silent treatment. When Binstock brought the situation up with Maurer, he got upset and declared “I don’t have to talk to that F-in woman she’s got a lazy eye.” (A at 47.)

[¶20] NFC Employee Susan Bartasch testified that former employee Summer King informed her that Maurer had assaulted her. Bartasch then reviewed NFC’s video surveillance system and witnessed Maurer assault Ms. King by striking her on the head. (A at 38.)

[¶21] Olson also learned Maurer was not completing evaluations thereby shirking his job duties. (A at 17.) Maurer and Knopik claimed it was because the amount of work lessened. This contention was refuted by Olson and by Ms. Bartasch. (A at 36.) The electronic calendar which would demonstrate whether Maurer was shirking his responsibilities was erased without explanation. Bartasch testified that Maurer had access to the system. (A at 39.)

[¶22] Ms. Bartasch testified she heard Maurer refer to a Native American clients as “FBI” which she understood to mean “Fucking Big Indians.” (A at 36.)

[¶23] Ms. Binstock testified she heard Maurer refer to a Native American client as an “ugly Indian.” Maurer’s swearing, and racist statements were loud enough to be overheard by clients in the Center’s lobby area. (A at 47.)

[¶24] Olson had Maurer’s computer looked at to see if he could determine how much time Maurer was spending playing computer games at the office. (A at 17.) This review disclosed that Maurer had child pornography on his computer. (A at 17-18, 19-20.) Olson initially testified this information factored into his decision to terminate Maurer. (A at 18.)

During Job Service’s rebuttal case, however, while being cross-examined by Job Service’s Hearing Examiner, Olson indicated that he had already decided to terminate Maurer (but he had not yet terminated Maurer) when he learned of the child pornography. (A at 50.) The computer review also disclosed that Maurer was playing Candy Crush on his work computer and also visiting on-line dating sites. (A at 20; 30.)

[¶25] At the time that Olson placed Maurer on probation and removed him from the facility, Olson directed that Maurer not return except at a time agreed upon by Olson. (A at 28.) Olson would allow Maurer to pick up his personal belongings while supervised. (A at 27-28.) In disregard of these instructions, Maurer returned to the facility the very night he was placed on probation. (Id.) It was unusual for Maurer to be at the facility in the evening. Olson presumed Maurer was there to try to destroy or remove evidence of his wrongdoing. (A at 24-29; 31.)

[¶26] Maurer testified on his own behalf. He claimed that Knopik approved his actions, but he did not ask Knopik any questions concerning his behavior when he called Knopik as a witness. (A at 52.) Maurer confirmed that he had been warned about his wrongful behavior at the office. (A at 55.) He admitted to referring to Native American clients as “fucking big Indian.” (A at 56.) Maurer admitted to hitting an employee. (A at 57.) Maurer admitted to playing computer games at the office (A at 58.) Maurer did not deny having child pornography on his work computer, did not deny striking NFC employee Summer King, and he did not deny Binstock’s testimony about his aggressive and inappropriate behavior. (A at 54-60.)

[¶27] Based on his knowledge of all of the facts listed above, on January 24, 2019, Olson terminated Maurer from his employment at new Freedom Center. (A at 29.)

[¶28] Job Service concluded that NFC failed to establish that Maurer was terminated for misconduct. (A at 92-96.)

LAW AND ARGUMENT

I. STANDARD OF REVIEW.

[¶29] This Court's review of Job Service's decision is governed by N.D.C.C. § 28-32-46, which requires Job Service's decision be affirmed if the findings of fact are supported by a preponderance of the evidence; the conclusions of law are supported by the findings of fact; the decision is in accordance with the law and it does not violate the claimant's constitutional rights; and the procedures did not deprive the claimant of a fair hearing. See Kryzsko v. Ramsey County Soc. Servs., 2000 ND 43, ¶ 5, 607 N.W.2d 237. The Court is required to affirm Job Service's decision unless one of the enumerated reasons listed in § 28-32-46 is found. Id.

[¶30] On appeal this Court does not make independent findings of fact or substitute its judgment for that of the agency, but determines only whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence. Sonterre v. Job Service North Dakota, 379 N.W.2d 281, 283-84 (N.D. 1985) (quoting N.D. Real Estate Comm'n v. Boschee, 347 N.W.2d 331, 335 (N.D. 1984) (citations omitted)).

[¶31] NFC has the burden to establish by a preponderance of the evidence that Maurer's actions constitute misconduct which results in a disqualification from benefits. Schadler v. Job Serv. N.D., 361 N.W.2d 254, 257 (N.D. 1985). Misconduct which would be grounds for dismissal is not necessarily grounds for disqualification from unemployment compensation benefits. See Steele v. Job Serv. N.D., 445 N.W.2d 635, 642 (N.D. 1989); Perske v. Job Serv. N.D., 336 N.W.2d 146, 148 (N.D. 1983). This Court has explained

that employee misconduct is conduct showing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. Perske, 336 N.W.2d at 148-49. Misconduct is a mixed question of fact and law. Medcenter One v. Job Serv. N.D., 410 N.W.2d 521, 524 (N.D. 1987).

II. Job Service Erred when it Concluded Maurer had not engaged in misconduct and when it found he had not been warned.

[¶32] Job Service made findings of fact and then legally concluded Maurer had not engaged in misconduct. In so deciding, Job Service concluded Maurer had not created a hostile work environment, despite the credible, unrefuted evidence that Maurer had used racial slurs, assaulted two employees, was hostile to coworkers, and that he inappropriately brought up guns, ammunition and washing with bleach during a staff meeting. Job Service erroneously concluded that there was no first-hand evidence that the conversation about guns was threatening. (A at 95.) Job Service ignored both Maurer's history of hostility, his prior actions immediately prior to the meeting, and the first-hand testimony of Ms. Binstock.

[¶33] Job Service found that Maurer had assaulted a fellow employee but then erroneously concluded Maurer was entitled to strike a fellow employee as a "joke" and that this assault was not misconduct. (A at 95.) In so deciding, Job Service ignored the unrefuted evidence that Maurer struck at least two employees and that both employees did

not believe Maurer was joking. Job Service erred when it concluded Maurer did not commit misconduct by creating a hostile work environment.

[¶34] Job Service concluded there was not sufficient evidence to establish Maurer's poor work performance. (A at 105.) Yet the evidence established that Maurer looked at pornography on his work computer, engaged in on-line dating, played computer games, and refused to conduct evaluations if the client was late. Further, Binstock testified about Maurer refusing to communicate with some employees and Maurer becoming aggressive and ending a meeting before the subject of the meeting was resolved. These facts support a legal conclusion of misconduct. Job Service erred when it concluded that Maurer had not intentionally engaged in poor performance.

[¶35] Job Service concluded that it was not misconduct for Maurer to enter the NFC facility after hours, the same day he was told to leave the facility and was placed on probation for discussing guns and ammunition during a staff meeting. The evidence establishes that Maurer was specifically told by Olson to stay away from the facility and that he was not to retrieve his personal property unsupervised. This occurred after Olson received first-hand contemporaneous information that Maurer was angry and agitated and that he had made inappropriate comments about guns and shooting. It is within this context that Maurer was placed on probation and asked to leave and stay away from the facility. Job Service found that Maurer did not follow NFC's instructions but that his failure should be excused: "Albiet [Maurer] did not do as instructed it is reasoned the claimant made a good faith error in judgment." (A at 106.) Job Service's legal conclusion is error. Returning to the facility after hours, after specifically being told to stay away, under the circumstances present here is misconduct.

[¶36] Based on the facts as found by Job Service, NFC established that Maurer was terminated for misconduct.

III. Job Service Erred When it Failed to Consider the Child Pornography found on Maurer's computer.

[¶37] The undisputed facts establish that Maurer had child pornography on his computer. Maurer did not deny the pornography was his, despite having the opportunity to do so. (A at 60.) The other undisputed fact is that Olson and the NFC had knowledge of the pornography before Olson terminated Maurer.

[¶38] Job Service concluded that although NFC knew of this misconduct prior to termination, because Olson had already decided to terminate Maurer when he learned of the pornography, the pornography is not relevant to Job Service's determination of misconduct. Job Service then precluded NFC from making a record concerning the pornography. (A at 62.) This legal conclusion by Job Service is error. The issue before Olson at the time of Maurer's termination was whether NFC should allow Maurer to continue as a NFC employee. The legal issue at the Job Service hearing was whether Maurer engaged in behavior meeting the standard for employee misconduct under North Dakota law.

[¶39] As to the first issue, Olson properly concluded that NFC should terminate its employment relationship with Maurer. Olson made a subjective decision to terminate Maurer based on less than all of the evidence of misconduct. Olson's conclusion that he need not rely on the pornography as part of his decision to terminate Maurer is not determinative of whether this evidence can be used to establish that Maurer engaged in misconduct while an employee of NFC

[¶40] Job Service did not explain the legal rationale for its conclusion that evidence of Maurer’s misconduct must be limited entirely to Olson’s subjective belief on what evidence justified Maurer’s termination. It appears, however, that Job Service misapplied concepts related to “after-acquired evidence” of wrongdoing. Here, however, the evidence of misconduct was not “after-acquired.” It was known prior to Maurer’s termination.

[¶41] Although after-acquired evidence may not be used to avoid all liability for wrongfully terminating an employee, under the “after-acquired evidence doctrine” after acquired evidence can be used to limit an employer’s liability. This doctrine precludes or limits an employee from receiving remedies for wrongful discharge if the employer later discovers evidence of wrongdoing which would have led to the employee’s termination had the employer known of the misconduct; an employer can avoid backpay and other remedies by coming forward with after-acquired evidence of an employee’s misconduct, but only if it can prove by a preponderance of the evidence that it would have fired the employee for that misconduct. Rivera v. Nibco, Inc., 364 F.3d 1057 (9th Cir. 2004).

[¶42] Job Service concluded that because Olson had already decided to terminate Maurer when he discovered that Maurer had child pornography on his work computer, that this evidence could not be used to show misconduct. This is error. As demonstrated by the after-acquired-evidence doctrine, the question is whether the evidence of child pornography, along with the other factors used by Olson, would have caused Maurer to be terminated. There is no doubt that if Maurer had not been terminated for creating a hostile work environment and violating his probation terms, Olson would have terminated him for having pornography on his computer as well as playing games during work and engaging in on-line dating. The fact that Olson subjectively decided that he need not rely on all of

the available information has no bearing on NFC's ability to use all evidence acquired before termination to show misconduct.

[¶43] Job Service erred and its decision should be reversed.

IV. Job Service Had Improper Ex Parte Communications with Maurer Prior to the Hearing.

[¶44] Job Service had ex parte communications with Maurer prior to the hearing (“I did have a few conversations with Mr. Maurer . . .”). (A at 7.) The substance of these ex parte communications were never disclosed to NFC.

[¶45] The North Dakota Administrative Agencies Practice Act places strict requirements on *ex parte* communications during a pending administrative action:

3. Except as provided in subsection 4 or unless required for the disposition of ex parte matters specifically authorized by statute, no party to an adjudicative proceeding, no person who has a direct or indirect interest in the outcome of the proceeding, no person allowed to participate in the proceeding, and no person who presided at a previous stage in the proceeding may communicate directly or indirectly in connection with any issue in that proceeding, while the proceeding is pending, with any agency head or hearing officer in the proceeding without notice and opportunity for all parties to participate in the communication.

4. In an adjudicative proceeding conducted by a hearing officer other than the agency head, counsel for the administrative agency and the agency head, without notice and opportunity for all parties to participate, may communicate and consult regarding the status of the adjudicative proceeding, discovery, settlement, litigation decisions, and other matters commonly communicated between attorney and client, to permit the agency head to make informed decisions. This subsection does not apply after recommended findings of fact, conclusions of law, and orders have been issued, except counsel for the administrative agency and the agency head may communicate regarding settlement and negotiation after recommended findings of fact, conclusions of law, and orders have been issued.

N.D.C.C. § 28-32-37(3)-(4) (emphasis added).

[¶46] This Court has explained that failure to follow the law may result in a dismissal adverse to the offending agency:

We have also explained that “[w]hen ‘systemic disregard of law’ by a governmental agency becomes evident, a court may reverse a decision in favor of the government to prophylactically ensure that the government ‘acts consistently and predictably in accordance with the law.’” *Greenwood v. Moore*, 545 N.W.2d 790, 793 (N.D.1996) (quoting *Madison*, 503 N.W.2d at 246–47); see, e.g., *Scott v. North Dakota Workers Comp. Bureau*, 1998 ND 221, ¶¶ 10–22, 587 N.W.2d 153 (ex parte contacts between Bureau's outside counsel and claims director were “institutional noncompliance” constituting “systemic disregard of law”); *Elshaug v. North Dakota Workers Comp. Bureau*, 2000 ND 42, ¶¶ 8–9, 607 N.W.2d 568 (ex parte contacts no less egregious than in *Scott*). However, a party must show “more than a ‘single miscue’ by the government ... to evidence the institutional noncompliance that amounts to ‘systemic disregard of law.’ ” *Greenwood*, at 793.

Kilber v. Grand Forks Pub. Sch. Dist., 2012 ND 157, ¶ 18, 820 N.W.2d 96, 105

[¶47] In *Kilber*, the issue concerned ex parte communications between a school board member and a school district patron in a grocery store, in which the patron relayed information regarding *Kilber*. In response, the school district argued any procedural errors were harmless because “overwhelming” evidence was presented demonstrating *Kilber* could not provide his students with an appropriate learning environment based on the pattern of his inappropriate conduct. The District contended the Board did not have improper ex parte communications in violation of N.D.C.C. § 28–32–37 because the Board member did not seek out the parent and it was a matter of “general interest.” The District also argued *Kilber* was not prejudiced by the two Board members' actions. *Kilber v. Grand Forks Pub. Sch. Dist.*, 2012 ND 157, ¶¶ 22–35, 820 N.W.2d 96, 108–09.

[¶48] This Court found the school board members had ex parte communications and gained access to information regarding *Kilber* that were not introduced into evidence at the hearing. The Court noted that the administrative law judge and the school board president gave special instructions and admonishments to the school board to consider only information in the record presented. This Court concluded *Kilber* was not prejudiced by

the violations. Kilber v. Grand Forks Pub. Sch. Dist., 2012 ND 157, ¶ 25, 820 N.W.2d 96, 108–09.

[¶49] It is impossible for NFC to determine the prejudice caused by the ex parte communications because Job Service failed to disclose the content as required by law.

[¶50] This Court should sanction Job Service by dismissing this case in NFC’s favor for violating North Dakota law. In the alternative, this Court should remand and require Job Service to disclose the nature of the ex parte communications and to allow NFC to present its objections on the record and demonstrate any prejudice.

CONCLUSION

[¶51] This Court should reverse and enter judgment in favor of New Freedom Center. In the alternative this Court should remand back to Job Service for further proceedings as to evidence of pornography on Maurer’s work computer and as to prejudice caused by the undisclosed ex parte communications.

Respectfully submitted February 11, 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 20 pages.

Dated this 11th day of February, 2020.

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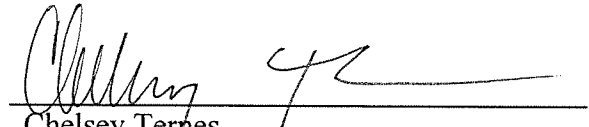
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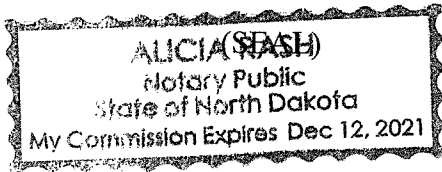
STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

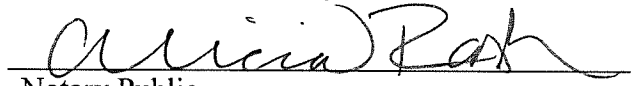
Chelsey Ternes, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on February 11, 2020, **Appellant's Brief and Appellant's Appendix** were filed electronically with the Clerk of Court of the North Dakota Supreme Court through the Supreme Court E-Filing Portal, and that the same documents were electronically served through the portal:

Michael Pitcher
mtpitcher@nd.gov


Chelsey Ternes

Subscribed and sworn to before me this 11 day of February, 2020.




Notary Public