

IN THE SUPREME COURT OF NORTH DAKOTA

Joshua Breeze,)	
)	
Appellant,)	Supreme Court File No.
)	20200267
v.)	
)	
William Panos, Director,)	Grand Forks County No.
Department of Transportation,)	18-2020-CV-01356
)	
Appellee.)	Appellant's Brief

**Appeal from the Judgment entered September 11, 2020 in
Grand Forks County district court, north central judicial
district, North Dakota, the Honorable Lolita G. Hartl
Romanick presiding.**

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

Kiara C. Kraus-Parr
ND Bar No. 06688
Kraus-Parr, Morrow, & Weber
424 Demers Ave
Grand Forks, ND 58201
Office: (701) 772-8991
Fax: (701) 795-1769
service@kpmwlaw.com
Attorney for the Appellant

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Appellant’s written arguments on their merits.

Transcript References:

Mr. Breeze had an administrative hearing on June 4, 2020. The transcript of that hearing is referred to as Tr. in this brief.

JURISDICTION

[¶ 1] This Court will “review appeals from the final judgment of a district court in the same manner as provided for in N.D.C.C. § 28–32–46 or N.D.C.C. § 28–32–47.” *Deeth v. Dir., N.D. Dep’t of Transp.*, 2014 ND 232, ¶ 11, 857 N.W.2d 86. “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.” *Haynes v. Dir., Dep’t of Transp.*, 2014 ND 161, ¶ 6, 851 N.W.2d 172. “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. N.D. Dep’t of Transp., 2004 ND 7, ¶8, 673 N.W.2d 245.

STATEMENT OF ISSUES

- [¶ 2] I. The factual findings made by the agency are not supported by a preponderance of the evidence.
- II. The factual findings do not sufficiently address the evidence presented nor support the conclusions of law.

III. The order is both not in accordance with the law and violates Mr. Breeze's constitutional rights.

IV. Attorney's Fees and costs should be awarded to Mr. Breeze.

STATEMENT OF CASE

[¶ 3] On June 4, 2020 an administrative hearing was held in the underlying case. On June 8, 2020, administrative hearing officer Bipasha Baru issued a hearing officer's decision suspending the driving privileges of the Appellant, Joshua Douglas Breeze, for one hundred eighty days. On June 9, 2020, Mr. Breeze timely appealed to the district court pursuant to N.D.C.C. Section 39-20-06. On September 11, 2020 the district court entered an Order and a Judgment affirming the North Dakota Department of Transportation's Order suspending Mr. Breeze's driving privileges. Mr. Breeze filed a timely notice of appeal from the district court's Judgment.

STATEMENT OF FACTS

[¶ 4] Officer Waltz with the University of North Dakota police department was patrolling traveling west on Demers Avenue in the 2500 block in Grand Forks, North Dakota on May 5, 2020. Tr. pp. 6, 19. He noticed a vehicle in front of him that he believed did not have tails lights on. *Id.* He moved closer to confirm the lights were not on and then activated his overhead lights to initiate a traffic stop in the 2700 block of Demers Avenue. *Id.*

[¶ 5] Officer Waltz testified at the administrative hearing regarding this stop. He said, "The vehicle turned off the roadway to a safer area and

turned onto the on ramp to Columbia Road and then it stopped.” Tr. p. 7 ln 5-7. The officer explained that Mr. Breeze was already in the turn lane when he activated his lights. *Id.* p. 20 ln 5-6. Officer Waltz testified that Mr. Breeze was not evading him by turning off Demers. *Id.* at p. 20 ln 16. Officer Waltz testified that he did not begin his driving under the influence (DUI) investigation until after Mr. Breeze was stopped on the Columbia Rd interchange, south of Demers Ave. Officer Waltz testified that Mr. Breeze came to a stop outside his jurisdiction. Tr. p. 27.

LAW AND ARGUMENT

I. The factual findings made by the agency are not supported by a preponderance of the evidence.

Standard of Review

[¶ 6] “When an appeal involves an interpretation of a statute, a legal question, this Court will affirm the agency’s order unless it finds the order is not in accordance with the law.” *Johnson v. Dep’t of Transp.*, 2004 ND 148, ¶ 5, 683 N.W.2d 886. “Although this Court’s review is limited to the record before the administrative agency, ‘the district court’s analysis is entitled to respect if its reasoning is sound.’” *Deeth v. Dir., N.D. Dep’t of Transp.*, 2014 ND 232, ¶ 10, 857 N.W.2d 86 (*quoting Odrigewitch v. Dir., N.D. Dep’t of Transp.*, 2002 ND 177, ¶ 7, 653 N.W.2d 73).

An Invalid Test:

[¶ 7] Hearing Officer Baru found that “[v]alid test results of 0.22 were obtained at 01:48 AM, within two hours of the time of driving.” RoA Index #16. That factual finding was not supported by a preponderance of the evidence. A warrantless search or seizure is constitutionally impermissible unless it falls within a recognized exception to the warrant requirement. *State v. Salter*, 2008 ND 230, ¶ 6, 758 N.W.2d 702. Officer Waltz, by his own sworn testimony, was outside his jurisdiction when he seized Mr. Breeze under the color of law for a DUI investigation. Lacking criminal jurisdiction, Officer Waltz had no authority to arrest Breeze and the Department cannot satisfy the requirement that there be a valid arrest as provided in N.D.C.C. § 39–20–01(2). Section 39-20 commands:

“The test or tests must be administered at the direction of a law enforcement officer **only after placing the individual under arrest** for violation of section 39-08-01 or an equivalent offense...The 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...”

emphasis added N.D.C.C. § 39–20–01(2), N.D.C.C. § 39–20–07(5). Without a valid arrest the test was not conducted in accordance with the statute, as it was not properly obtained, which makes the test invalid. (*See Olson v. N.D. Dep’t of Transp.*, 2018 ND 94, 909 N.W.2d 676 (N.D. 2018)).

[¶ 8] The district court, in their analysis, does not properly examine the arrest requirement as it relates to a valid test, reviewing only the

administration of the test. *See Order Affirming*, ¶¶ 11-12. Therefore, this finding is not supported by a preponderance of the evidence and the decision of the Hearing Officer must be reversed.

Jurisdictional Authority:

[¶ 9] Ms. Baru found “Waltz had jurisdiction for the stop.” Officer Waltz may have witnessed a driving infraction inside the statutorily defined jurisdiction; however, he had no authority to stop Mr. Breeze outside his jurisdiction or conduct a DUI investigation. Ms. Baru failed to address that factual issue in her findings. Police officers acting outside their jurisdiction no longer have any official capacity. *See Kroschel v. Levi*, 2015 ND 185, ¶ 7, 866 N.W.2d 109.

[¶ 10] N.D.C.C. § 15–10–17, delineates the powers of the state board of higher education. “The state board of higher education has all the powers and shall perform all the duties necessary to the control and management of the institutions described in this chapter. In addition to the powers and duties specified in section 6 of article VIII of the Constitution of North Dakota” N.D.C.C. § 15–10–17. In *Kroschel* this Court held “the statute does not authorize the board to permit campus law enforcement to act outside its institutions.” *Kroschel v. Levi*, 2015 ND 185, ¶ 12, 866 N.W.2d 109. Officer Waltz, by his own sworn testimony, was outside his statutorily defined jurisdiction when he arrested Mr. Breeze. Ms. Baru did not address this issue in her Order therefore the factual finding, “Waltz had jurisdiction for the stop,”

is not supported by a preponderance of the evidence. The district court's Order does not address the lack of supporting evidence, which is an error, but instead focuses on an exception to university police's jurisdiction, hot pursuit.

A Jurisdictional Exception:

[¶ 11] “An officer's authority to arrest also extends beyond the officer's geographical jurisdiction when in ‘hot pursuit’ under N.D.C.C. § 40–20–05.” *State v. Wilkie*, 2017 ND 142, 895 N.W.2d 742 (N.D. 2017), *quoting State v. Demars*, 2007 ND 145, ¶ 11, 738 N.W.2d 486. This jurisdictional exception does not apply. Officer Waltz testified that Mr. Breeze was not attempting to evade him, Mr. Breeze was already in the turning lane with his signal on when Officer Waltz activated his lights, and Mr. Breeze completed his turn for safety reasons. Tr. pp 7, 20. Additionally, the officer had time to request aid from an agency that had jurisdiction on the Columbia Road interchange, but no evidence was presented that he even attempted to request assistance. It is difficult to determine what evidence the Hearing Officer relied on to determine Waltz had jurisdiction for the stop because Ms. Baru did not do any analysis regarding hot pursuit, however, based upon the testimony provided at the hearing, hot pursuit did not extend Officer Waltz's jurisdiction. The factual finding that he had jurisdiction for the stop is not supported by a preponderance of the evidence and the decision of the Hearing Officer must be reversed.

II. The factual findings do not sufficiently address the evidence presented nor support the conclusions of law.

Jurisdiction is not Established by a Totality of the Circumstances:

[¶ 12] Hearing Officer Baru's findings completely omit the question of jurisdictional authority, by limitations in the statute and the North Dakota constitution, raised by Mr. Breeze. Ms. Baru legal analysis was based on a totality of the circumstances standard. However, this standard is inappropriate for a jurisdictional argument because an officer is either properly within their jurisdiction, including extraterritorial exceptions, or they are not.

[¶ 13] Ms. Baru's factual findings do not address that Officer Waltz made a stop outside his jurisdiction without an applicable exception to his jurisdictional authority, such as hot pursuit. Ms. Baru's factual findings do not examine if Officer Waltz was in his jurisdiction when he began his DUI investigation. The findings do not examine if the Officer had time to call for assistance by an appropriate law enforcement agency. The findings do not address if the arrest of Mr. Breeze was valid, as required by N.D.C.C. 39-20-01(2). The findings do not address if N.D.C.C. § 15-10-17(2) and N.D.C.C. § 15-10-17(2)(b) are unconstitutional. Because the factual findings completely omit the question of jurisdictional authority, they cannot support the conclusion that "valid test results were obtained" or that Mr. Breeze was arrested and tested in accordance with N.D.C.C. 39-20. Therefore, the decision of the Hearing Officer must be reversed.

III. The order is both not in accordance with the law and violates Breeze’s constitutional rights.

A Statutorily Illegal Arrest:

[¶ 14] As a general rule a police officer acting outside his jurisdiction “is without official capacity and without official power to arrest.” *Kroschel v. Levi*, 2015 ND 185, ¶ 7, 866 N.W.2d 109 (*quoting Johnson v. Dep’t of Transp.*, 2004 ND 148, ¶ 10, 683 N.W.2d 886). After this Court’s decision in *Kroschel*, N.D.C.C. § 15–10–17 was amended, creating a statutorily defined jurisdiction for university police:

“Specific powers and duties of the state board of higher education. The state board of higher education has all the powers and shall perform all the duties necessary to the control and management of the institutions described in this chapter. In addition to the powers and duties specified in section 6 of article VIII of the Constitution of North Dakota...

2. Authorize the employment of law enforcement officers having jurisdiction on property owned or leased by the state board of higher education to enforce laws and regulations at its institutions, or as otherwise provided in this subsection....

b. A law enforcement officer employed by the university of North Dakota has jurisdiction on all property owned or leased by the state board of higher education and property on and within the boundaries of the intersection of demers avenue and north fifty-fifth street, north fifty-fifth street north to university avenue, university avenue east to north forty-second street, north forty-second street north to gateway drive, gateway drive east to north columbia road, north columbia road south to tenth avenue north, tenth avenue north east to north twenty-fifth street, north twenty-fifth street south to sixth avenue north, sixth avenue north east to north twentieth street, north twentieth street south to fifth avenue north, fifth avenue north west to north twenty-third street, north twenty-third street south to university avenue, university avenue east to north twenty-first street, north twenty-first street south to dyke avenue, dyke avenue east to north washington street, north washington street south to demers avenue, and demers avenue west to north fifty-fifth

street. Jurisdiction under this subdivision includes Grand Forks international airport.”

Based upon that statute, Officer Waltz had no authority to arrest Mr. Breeze because he was outside his jurisdiction and the agency decision must be reversed.

Hot Pursuit:

[¶ 15] Just before N.D.C.C. § 15–10–17 was amended this Court decided *State v. Wilkie*. *Wilkie* acknowledged that a University of North Dakota (UND) police officer had authority to arrest outside their geographical jurisdiction when in hot pursuit. *State v. Wilkie*, 2017 ND 142, 895 N.W.2d 742. Under N.D.C.C. § 40-20-05(2), “hot pursuit” is defined as “the immediate pursuit of a person who is endeavoring to avoid arrest.” In *Wilkie* the Defendant did not voluntarily stop his vehicle and went on driving dangerously without any other law enforcement officer in the area. *Id.* at ¶ 15. The amended section 15-10-17 of N.D.C.C. further defines the exception of “hot pursuit” involving a university officer’s general jurisdictional authority,

A law enforcement officer employed by an institution under the control of the state board of higher education who is in “hot pursuit” may continue beyond the jurisdictional boundaries of each institution to make an arrest, in compliance with a warrant or without a warrant under the conditions of section 29-06-15, **if obtaining the aid** of peace officers having jurisdiction beyond that limit **would cause a delay** permitting escape. As used in this subdivision, “hot pursuit” means the immediate pursuit of a person who is **endeavoring to avoid arrest**.

Emphasis Added. N.D.C.C. § 15-10-17(2)(d). Officer Waltz testified that Mr. Breeze was not evading him by turning off Demers. *Id.* at p. 20 ln 16. There

was no testimony that obtaining aid of peace officers with jurisdiction would cause a delay, but Mr. Breeze was already in the turning lane when Officer Waltz activated his lights. The officer had ample time to request assistance when Mr. Breeze was in the turn lane or after Mr. Breeze completed his turn and came to a stop.

[¶ 16] In the appellant's argument to the district court and in the court's Order hot pursuit is used to justify the arrest of Mr. Breeze. But both examinations overlook that Mr. Breeze was not stopped based on a DUI investigation. The entire foundation for probable cause for Mr. Breeze's arrest was based on an investigation that occurred outside of Officer Waltz's jurisdiction. An arrest based on a theory of "hot pursuit" cannot be founded on an investigation that occurred after the officer stopped, or seized Mr. Breeze.

[¶ 17] Officer Waltz testified that he did not begin his DUI investigation until well after Mr. Breeze stopped his vehicle and rolled down his window. At that time the officer smelled an odor of alcohol coming from the vehicle. The officer decided to continue to seize Mr. Breeze and his passengers outside his jurisdiction, to perform an investigation. That investigation ultimately led to probable cause for a formal arrest of driving under the influence. Another officer, one with jurisdiction, could have performed the exact same investigation had Officer Waltz called for assistance. Hot pursuit does not apply to these facts.

[¶ 18] The District Court found there was enough inference from the record to determine Officer Waltz was in hot pursuit. In paragraph 37 of the Order, the court appears to take the position that a failure to immediately stop in the presence of the emergency lights is sufficient to evidence of hot pursuit and fresh pursuit. The court cited to the decisions in *Krueger* and *Maher* for support.

[¶ 19] In *Maher* the Court found, “that a reasoning mind could reasonably determine that Maher had attempted to evade arrest by failing to stop his vehicle at an earlier point.” *Maher v. North Dakota Dept. of Transp.*, 510 N.W.2d 601, 604 (N.D. 1994). Additionally, the Court noted that no evidence or testimony was presented that after the officer engaged his lights and siren Mr. Maher was not attempting to evade arrest. *Id.* at pp. 603-604.

[¶ 20] The facts found by the Court in *Maher* were that Mr. Maher traveled for 1.2 miles over the “Missouri River from Burleigh County to Morton County. The river also serves as the western boundary to the city limits of Bismarck, which lies within Burleigh County.” *Id.* at 602. It is more logical to conclude from these facts that Mr. Maher knew, and intended to, travel outside the jurisdiction of the officer initiating the stop. In the case before the Court, Mr. Breeze was in a turn lane and rather than stop in the middle of the intersection, he completed his intended turn. Additionally, there was no clear natural boundary that would signal Mr. Breeze was leaving one jurisdiction and entering another. And finally, unlike in *Maher*, there was specific

testimony regarding Mr. Breeze's intention when he completed his turn.

Therefore, this exception does not apply, and Officer Waltz had no authority to arrest Mr. Breeze outside his jurisdiction. The decision of the Hearing Officer must be reversed and order the reinstatement of Appellant's driving privileges.

Fresh Pursuit:

[¶ 21] The district court's reliance on *Krueger* is improper. The district court in paragraph 38 asserts that fresh pursuit is an exception allowed by N.D.C.C. 15-10-17, however that is not true. Fresh pursuit only applies to county law enforcement officers and is limited in range. "A county law enforcement officer employed by a county has jurisdiction within that county and up to one thousand five hundred feet [457.2 meters] outside the county." N.D.C.C. § 11-15-33. Additionally, fresh pursuit does not require that an individual is evading arrest or that calling for aid would cause a delay permitting escape. *See* N.D.C.C. §§ 29-06-07, 15-10-17(2)(d).

[¶ 22] In *Krueger*, the Court explained that Mr. Krueger was not challenging whether the Traill County deputy was in "fresh pursuit" when the officer made the traffic stop in Grand Forks County. Instead Mr. Krueger argued that the hearing officer could not reasonably find the arrest was necessary to prevent his escape. That argument is unnecessary under the definition of fresh pursuit. The Court found that "N.D.C.C. § 11-15-33(2) states that a county law enforcement officer "in fresh pursuit may enter another county and may continue within that county in fresh pursuit to make

an arrest.’... Nothing in the legislative history of the statute suggests that it was intended to mean anything other than what it plainly and unambiguously says. A county law enforcement officer in fresh pursuit may enter another county ‘to make an arrest.’... We conclude the hearing officer did not err in determining that the Traill County deputy had jurisdiction to arrest Krueger in Grand Forks County.” *Krueger v. N.D. Dep’t of Transp.*, 2018 ND 108, 910 N.W.2d 850, 854 (N.D. 2018). The district court’s reasoning is not sound as it is plainly incorrect per the statute and this Court should not give it any consideration.

A Constitutionally Illegal Arrest:

Standard of Review

[¶ 23] All regularly enacted statutes carry a strong presumption of constitutionality. The party challenging the statute must clearly demonstrate that it violates the state or federal constitution. *Grand Forks Prof’l Baseball, Inc. v. North Dakota Workers Comp. Bureau*, 2002 ND 204, ¶ 17, 654 N.W.2d 426; *Olson v. Bismarck Parks Recreation Dist.*, 2002 ND 61, ¶ 11, 642 N.W.2d 864. Any doubt about a statute’s constitutionality must, where possible, be resolved in favor of its validity. *State v. Burr*, 1999 ND 143, ¶ 9, 598 N.W.2d 147. Whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal. *Id.*

[¶ 24] The statute (N.D.C.C. § 15-10-17(2)(b)) was improperly amended after the decision in *Kroschel*. It authorizes “the employment of law

enforcement officers having jurisdiction on property owned or leased by the state board of higher education to enforce laws and regulations at its institutions, **or as otherwise provided in this subsection.**” *Emphasis Added* N.D.C.C. § 15-10-17(2). It then outlines UND police jurisdiction, including property that is not part of the university’s institutions. *See* Exhibit 1. The power of UND police comes from Article VIII § 6 of the North Dakota Constitution:

A board of higher education, to be officially known as the state board of higher education, is hereby created for the control and administration of the following state educational institutions, to wit:

a. The state university and school of mines, at Grand Forks, with their substations.

N.D.Const. Article VIII, Section 6(1)(a). The constitutional limitation of the power of the state board of higher education cannot be increased by the legislature for the UND campus police.

[¶ 25] Article IV § 13 describes the limitation of the legislature when enacting laws.

“The legislative assembly shall enact all laws necessary to carry into effect the provisions of this constitution. Except as otherwise provided in this constitution, no local or special laws may be enacted, nor may the legislative assembly indirectly enact special or local laws by the partial repeal of a general law but laws repealing local or special laws may be enacted.”

N.D.Const. Article IV, Section 13. The increase of the state board of higher education (SBHE)’s authority outside its institution is an enactment of a local or special law. More than once the people of North Dakota have been asked to

increase the jurisdiction of university police by a statewide referendum and have rejected that increase in power. The legislature cannot make an end-run around the people by creating a special law that contradicts the State's constitution.

[¶ 26] A law is general “if the law operates equally upon all persons and things within the scope of the statute. It operates alike on all persons and property similarly situated...In other words, it operates alike in all cases where the facts are substantially the same.” *MCI v. Heitkamp*, 523 N.W.2d 549, 552 (N.D. 1994). Here the law does not and cannot operate the same for all SBHE institutions, because it singles out property specifically located near the UND in the City of Grand Forks. It is impossible to apply the extended jurisdiction specially defined for the City of Grand Forks to any other similarly situated property, such as the North Dakota State University (NDSU) property. It is also impossible for the law to operate equally on all SBHE law enforcement, as N.D.C.C. § 15-10-17(2)(b) specifically and specially creates an extended jurisdiction for only UND law enforcement. NDSU law enforcement, a similarly situated class cannot operate in UND's extended jurisdiction and vice versa. Also, no other SBHE security personnel has jurisdiction at either of the statutorily defined jurisdictions. The law by its very nature and intent does not apply generally to all SBHE property nor to all the police or security personnel employed under the authority of N.D.Const. Article VIII § 6. It is impossible to have a general rule which creates in one instance UND jurisdiction and in

another instance creates other jurisdictions, therefore the law is special and unconstitutional.

[¶ 27] N.D.C.C. § 15-10-17(2)(b) is a local law. “[A] law is ‘local’ if it ‘applies to a specific locality or spot, as distinguished from a law which operates generally throughout the entire state.’” *Gange v. Clerk of Burleigh Cty. Dist. Court*, 429 N.W.2d 429, 436 (N.D. 1988). N.D.C.C. § 15-10-17(2)(b) applies only to area near or adjacent to UND, specifically in the City of Grand Forks, and nowhere else in the State. It is by specific definition and function only applied locally.

[¶ 28] A review of the Senate committee minutes from 2017 shows the goal was to specifically address extending university police jurisdiction in Grand Forks as a result of the North Dakota Supreme Court decision in *Kroschel. Kroschel v. Levi*, 2015 ND 185, 866 N.W.2d 109 (N.D. 2015). Senator Curt Kreun, District 42,

“described the purpose of the bill which is to define the issue from a court case about 1.5 years ago that said the university did not have the ability to have jurisdiction over certain areas around the University of North Dakota and state land located in Grand Forks. ‘This bill defines that particular issue and it grants the ability to work back and forth with the joint powers agreement in there and we also have the ability to work back and forth to create a district and create a buffer surrounding the area around the University.’”

See RoA Index #23, Senate Judiciary Committee Minutes SB 2193, 1/25/2017 page 1. The Senate Judiciary Committee Chairman Armstrong explained the need to change the statute,

“The Supreme Court of North Dakota held that campus police have jurisdiction on campus property only. So if we don’t pass anything, I think they will go in an untenable situation. University Avenue in Grand Forks, which is the guts of UNO (University of North Dakota), is not campus property.”

See RoA Index #23 2017 Senate Standing Committee Minutes, Senate Judiciary Committee SB 2193 1/30/2017 page 2. The Committee support Mr. Breeze’s claim that the intent of the amendment was to create a local and special law for Grand Forks.

[¶ 29] N.D.C.C. § 15-10-17(2) and (2)(b) are unconstitutional laws. N.D.C.C. § 1-02-20 requires that statutes be severed to remain valid, if possible. Rules of construction require N.D.C.C. § 15-10-17(2)(b) be severed after this statement, “A law enforcement officer employed by the university of North Dakota has jurisdiction on all property owned or leased by the state board of higher education.” Statutory construction also requires that N.D.C.C. § 15-10-17(2) sever the statement, “or as otherwise provided in this subsection.” Once those sections have been severed this Court should determine if Officer Waltz was “on property owned or leased by the state board of higher education.” N.D.C.C. § 15-10-17(2). Based on Officer Waltz sworn testimony, for the duration of the entire incident he was never on property owned or leased by the state board of higher education. Therefore, Officer Waltz had no authority to arrest Mr. Breeze and the decision of the Hearing Officer must be reversed.

[¶ 30] The district court claimed in their Order that Mr. Breeze did not raise the issue of the statutory amendments being unconstitutional to the

Hearing Officer. However, this is plainly incorrect, and the court even later in its analysis admits the issue was raised. The court then asserts the issue was not raised with enough specificity to preserve the issue on appeal. The court incorrectly cites to *Schiele* and *Goulet* for support.

[¶ 31] *Schiele* holds the court need not look the record for evidence to support **factual claims**. *Schiele v. Schiele*, 2015 ND 169 ¶ 18, 865 N.W.2d 433, 439 (N.D. 2015). The error explicitly addressed to the agency, and then to the district court, was a purely legal question. Specifically, the complained error was that the legislature exceeded its authority when it amended N.D.C.C. § 15-10-17, increasing the State Board of Higher Education’s authority to police outside land it did not own or lease. The issue required constitutional law analysis and statutory construction. Reliance on *Schiele* is inappropriate.

[¶ 32] In *Goulet* the defendant made a motion under an improper rule of criminal procedure and then attempted to argue that he meant to bring it under an entirely different rule of criminal procedure. This Court held that judges are not “expected to be psychics, with the ability to divine a party’s true intentions in mislabeled and misleading documents.” *State v. Goulet*, 1999 N.D. 80 ¶ 10, 593 N.W.2d 345 (N.D. 1999). While the district court is attempting to argue that there was not enough legal authority cited for the hearing officer to properly rule on the constitutional question, it omits that the Hearing Officer did not address the question of constitutionality and simply made a conclusory statement regarding jurisdiction for the stop. It is unclear

from the decision if the one sentence about jurisdiction included any analysis regarding constitutionality of the statute at issue. Also, Mr. Breeze, through counsel, asked if the agency would like the issue to be briefed and no request was made for further briefing, implying the Hearing Officer understood the legal merits of the argument. Finally, the issue having first been raised in the administrative hearing and then again to the district court should be decided de novo on its merits.

Constitutional and Statutory Limitations:

[¶ 33] The district court asserted in paragraph 48 of its Order that the statute and the constitution can be read in harmony. However that is incorrect. The court wrote “that there may be statutory limitations, i.e. limitations established by the legislature, which are applicable to the work of the institutions under [state board of higher education] control.” Because these limitations would “affect the work of institutions, which are located at different cities throughout the state, that the legislation is not a “local” or “special” legislation in contravention of N.D. Const, art. 4 § 13.” The court does not properly read the word “limitations” or the word “institution” within the context of N.D. Const, art. 8 § 6(6)(b). The article states:

The said state board of higher education shall have full **authority** over the **institutions under its control** with the right, among its other powers, to prescribe, limit, or modify the courses offered at the several institutions. In furtherance of its powers, the state board of higher education shall have the power to delegate to its employees details of the administration of **the institutions under its control**. The said state board of higher education shall have full authority to organize or

reorganize within **constitutional and statutory limitations**, the work of each **institution under its control**, and do each and everything necessary and proper for the efficient and economic administration of said state **educational institutions**.

emphasis added N.D. Const, art. VIII § 6(b)(b). The court's analysis overlooks the constitution gives the SBHE authority to make different local administrative rules only at their various institutions throughout the state. The constitution does not give the legislature the ability to **increase** the administrative authority of the SBHE beyond its institutions at different locations, which is what increased UND police jurisdiction does. The constitutional provision in article 4 section 13 specifically limits (or forbids) the organization of the institution beyond what is statutorily AND constitutionally allowed. The State constitution does not allow for a special law increasing the SBHE authority in local geographic areas of the state. Therefore the amendments in N.D.C.C. § 15-10-17(2) and (2)(b) are unconstitutional requiring reversal of Mr. Breeze's license suspension.

Rational Basis Review:

[¶ 34] In paragraph 50 of the Order Affirming the court wrote, "a statutory amendment is unconstitutional only if there is no rational relationship to a legitimate governmental interest in the exercise of the State Board's authority under the constitution." The court misuses the rational basis test. The test is reserved for violations of equal protection that do not involve a protected class or a fundamental right, but the analysis is inappropriate

because it is used when an enumerated limitation of government power does not exist. It is used to help guide courts in the absence of a specific prohibition on the government's power. Here there is a specific ban of the legislature creating a special or local law. Mr. Breeze did not assert an equal protection argument because the amendments are explicitly prohibited by the North Dakota Constitution. University police buffer zones may be rationally related to a legitimate government interest, but they are still, in this context, prohibited and unconstitutional.

Necessary and Proper:

[¶ 35] The district court notes that “In determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, [courts] look to see whether the statute constitutes a means that is rationally related to implementation of a constitutionally enumerated power.” *Order Affirming* ¶ 50, *quoting U.S. v. Thompson*, 811 F.3d 717, 724 (5th Cir. 2016). First this is not a federal legislative act and the Court must look to state law, second the SBHE constitutional provision gives “full authority to organize or reorganize **within constitutional and statutory limitations**...everything necessary and proper for the...administration of...state educational institutions.” *emphasis added* N.D. Const, art. VIII § 6(b)(b). Finally, the enumerated power of the SBHE limits what authority it has, meaning only actions that occur at its institutions are necessary and proper for administration of state educational institutions. Therefore the

amendments in N.D.C.C. § 15-10-17(2) and (2)(b) are unconstitutional requiring reversal of Mr. Breeze's license suspension.

IV. Attorney's Fees and costs should be awarded to Mr. Breeze.

[¶ 36] Mr. Breeze is entitled to attorney fees and costs under N.D.C.C. § 28-32-50(1), if he prevails and the Court determines the agency acted without substantial justification. Prior to *Kroschel* it may have been justified to effectuate an arrest outside a university police officer's statutorily defined jurisdiction, but that case was decided in 2015, five year ago. The Officer in this case knew at the administrative hearing about the decision in *Kroschel* limiting his authority. There is no substantial justification for ignoring the law explicitly articulated by this court. Attorney fees and costs should be awarded in Mr. Breeze's favor.

CONCLUSION

[¶ 37] WHEREFORE, Mr. Breeze respectfully requests the Court to reverse the hearing officer's decision and award attorney's fees and costs.

Dated: November 18, 2020.

/s/Kiara Kraus-Parr
ND#06688
Kraus-Parr, Morrow, & Weber
424 Demers Avenue
Grand Forks, ND 58201
P: (701) 772-8991
F: (701) 795-1769
service@kpmwlaw.com
Attorney for Appellant

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

Joshua Breeze,)	
)	Supreme Court #20200267
Appellant,)	Case No. 18-2020-CV-01356
)	
v.)	
)	
William Panos, Director,)	Certificate of Compliance
Department of Transportation,)	
)	
Appellee.)	

[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: November 18, 2020.

/s/ Kiara Kraus-Parr
ND#06688
Kraus-Parr, Morrow, & Weber
424 Demers Avenue
Grand Forks, ND 58201
P: (701) 772-8991
F: (701) 795-1769
service@kpmwlaw.com
Attorney for Appellant

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v.)	
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William Panos, Director,)	Certificate of Service
Department of Transportation,)	
)	
Appellee.)	

[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix
Certificate of Compliance

And that said copies were served upon:

Douglas Anderson, Appellee's Attorney, dbanders@nd.gov

By uploading said documents via Supreme Court portal.

Dated: November 18, 2020.

/s/Kiara Kraus-Parr
ND#06688
Kraus-Parr, Morrow, & Weber
424 Demers Avenue
Grand Forks, ND 58201
P: (701) 772-8991
F: (701) 795-1769
service@kpmwlaw.com
Attorney for Appellant

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Appellant's Brief-revised
Appellant's Appendix-revised

And that said copies were served upon:

Douglas Anderson, Appellee's Attorney, dbanders@nd.gov

By uploading said documents via Supreme Court portal.

Dated: November 24, 2020.

/s/Kiara Kraus-Parr
ND#06688
Kraus-Parr, Morrow, & Weber
424 Demers Avenue
Grand Forks, ND 58201
P: (701) 772-8991
F: (701) 795-1769
service@kpmwlaw.com
Attorney for Appellant