

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORIGINAL

Michael Isaak,)
)
 Appellee,)
)
 v.)
)
 David Sprynczynatyk, Director,)
 North Dakota Department of)
 Transportation,)
)
 Appellant.)

Supreme Ct. No. 20010291
District Ct. No. 01-C-00311

20010291

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IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEB 12 2002
STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT
STARK COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT

HONORABLE RONALD L. HILDEN

REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Whether Isaak's deficient Specifications of Error are excused by his assertion the time for filing the specifications is unreasonable or by any lack of prejudice to the Department.

II. Whether Isaak's assertion a conviction in another state requires heightened compliance is misplaced because his previous conviction was already established by his driving record.

LAW AND ARGUMENT

I. Isaak's deficient Specifications of Error are not excused by his assertion the time for filing the specifications is unreasonable or by any lack of prejudice to the Department.

Isaak asserts “[i]f the petitioner had a reasonable time to file the specifications of error, more complete specifications of error could be accomplished[.]” (Brief of Appellee at 6.) Isaak’s assertion is undermined because, during the hearing he raised the argument regarding enhancement of the suspension. Because Isaak already knew of the alleged error, he did not need more time to discover the alleged error and to identify it as an issue for appeal in his Specifications of Error.

Isaak also asserts there was no prejudice to the Department. Prejudice to the Department, however, is not controlling. Although this Court in Vetter noted prejudice may be a factor to consider in addressing a failure to comply with the specificity requirement, the Court went on to simply warn “[t]he time has come to compel compliance with the specificity requirement” and summary affirmance of an agency decision is proper where a person fails to comply with the requirement. Vetter v. North Dakota Workers Compensation Bureau, 554 N.W.2d 451, 453-54 (N.D. 1996).

Consistent with the warning in Vetter, this Court has declined, without reference to prejudice, to consider an argument not raised in specifications of error. See Aalund v. North Dakota Workers Compensation Bureau, 2001 ND 32, 622 N.W.2d 210. In Aalund, an appellant failed to identify in his specifications of error, an issue he raised on appeal. Id. at ¶ 11. The appellant also did not

posture his argument in terms of a constitutional issue. Id. at ¶ 12. This Court acknowledged “in Matter of Boschee, 347 N.W.2d 331, 334-35 [(N.D. 1984)], we said in appeals from administrative agency decisions, courts may consider only those grounds identified in specifications of error under N.D.C.C. 28-32-15[.]” Id. This Court held under the circumstances the appellant “failed to properly preserve this issue for our review, and we decline to further consider it.” Id.

Isaak’s assertion there was no prejudice to the Department accordingly does not excuse his failure to identify, in his Specifications of Error, the issue regarding enhancement of his suspension. Isaak failed to properly preserve the issue, and the district court judgment reversing the 365-day administrative suspension thus should be reversed.

II. **Isaak’s assertion a conviction in another state requires heightened compliance is misplaced because his previous conviction was already established by his driving record.**

Isaak asserts there should be heightened compliance with the statutory requirement for a conviction in another state. (Brief of Appellee at 6.) The case Isaak cites, Kobilansky v. Liffrig, 358 N.W.2d 781 (N.D. 1984), does not support his assertion, as it does not involve an out-of-state conviction.

Isaak also does not support his assertion by citing Langer v. North Dakota State Highway Comm’r, 409 N.W.2d 635 (N.D. 1987). In Langer, driving privileges were suspended based upon a document asserted to be a notice of a DUI conviction in South Dakota. Id. at 635. This Court considered whether the document was sufficient for suspension under N.D.C.C. § 39-06-27. Id.¹

¹ Section 39-06-27, N.D.C.C., has been amended since Langer; however, the pertinent portion remains essentially the same.

Section 39-06-27, N.D.C.C., provided the Department could suspend the license of a resident “upon receiving notice of the conviction of such person in another state of an offense therein which, if committed in this state, would be grounds for the suspension[.]” Id. at 635-36. Section 39-06-30, N.D.C.C., indicated “conviction” meant a final order or judgment of conviction. Id. at 636.² This Court emphasized the document relied upon by the Department did not indicate there was a final order or judgment of conviction by the South Dakota court. Id. This Court, accordingly, held the document did not support the suspension under N.D.C.C. § 39-06-27. Id.

Langer is distinguishable from this case. Langer involved a suspension under N.D.C.C. § 39-06-27 which required a notice of an out-of-state conviction. This case, on the other hand, involves a suspension under N.D.C.C. § 39-20-04.1(1)(b), which could be, and was, enhanced based upon what “the person’s driving record shows.” No notice of conviction was required for Isaak’s suspension enhancement.

Reliance on Isaak’s driving record is consistent with the doctrine of res judicata. “The doctrine of administrative res judicata prevents collateral attacks on administrative agency decisions and protects successful parties from duplicative proceedings.” Lamplighter Lounge, Inc. v. State ex rel. Heitkamp, 510 N.W.2d 585, 591 (N.D. 1994). Generally, a final decision “is conclusive, with regard to the issues raised, or those that could have been raised, and determined therein, as to the parties and their privies in all other actions.” Id. (citation omitted). “The res judicata effect of an agency decision extends to matters adjudicable at the time of that decision.” Id.

² Section 39-06-30, N.D.C.C., has been amended since Langer; however, the pertinent portion remains essentially the same


Isaak's previous conviction, as shown on his driving record, is res judicata.³ In 1999, Isaak received a suspension hearing notice for the out-of-state conviction. Isaak failed to timely request a hearing on the suspension and, thus, did not challenge the evidence of the out-of-state conviction. The conviction was entered on his driving record and a suspension was imposed. Isaak's previous DUI conviction, accordingly, was established by his driving record, and the suspension under N.D.C.C. § 39-20-04.1(1)(b) was proper.

CONCLUSION

The Department respectfully requests this Court reverse the district court judgment and reinstate the 365-day administrative suspension.

Dated this 12th day of February, 2002.

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³ Even if Isaak's ability to contest his prior conviction was not barred by res judicata, Isaak presented no evidence at the hearing in this case refuting the information provided in his driving record.

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AFFIDAVIT OF SERVICE BY MAIL

**Supreme Ct. No. 20010291
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STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

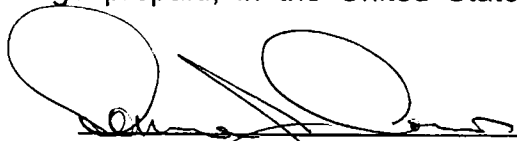
Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 12th day of February, 2002, I served the attached **REPLY BRIEF** upon Michael Isaak, by and through his attorney Ronald A. Reichert, by placing a true and correct copy thereof in an envelope addressed as follows:


Ronald A. Reichert
Attorney at Law
P.O. Box K
Dickinson, ND 58602-8305

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.



Donna J. Connor

Subscribed and sworn to before me
this 12th day of February, 2002.



Notary Public

