

ORIGINAL (e-filed)

20090025

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
DISTRICT COURT NO. 08-08-C-1818  
SUPREME COURT NO. 20090025

Kyle Schaaf, )  
)  
Appellee, )  
)  
vs. )  
)  
North Dakota Department )  
of Transportation. )  
)  
Appellant. )

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

APR - 9 2009

STATE OF NORTH DAKOTA

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APPEAL FROM THE DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
BURLEIGH COUNTY, NORTH DAKOTA  
THE HONORABLE BRUCE B. HASKEL

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BRIEF OF APPELLEE

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**ISSUE PRESENTED FOR REVIEW**

**ISSUE: I      WHETHER THE N.D.D.O.T. HEARING OFFICER'S  
DECISION IS VALID BECAUSE OF THE HEARING  
OFFICER'S FAILURE TO CARRY OUT DUTIES  
REQUIRED BY STATUTE.**

## STATEMENT OF THE CASE

### **(1) Nature of the Case**

Kyle R. Schaaf is asking that this Court affirm and uphold the decision of Honorable Bruce B. Haskell, Burleigh County District Court reversing the decision of the administrative hearing officer of the N.D.D.O.T to suspend his driving privileges for 91 days.

### **(2) Course of Proceedings.**

After being served with a Report and Notice by Officer Brian Thompson on June 15<sup>th</sup>, 2008. (Appendix("App.") 15) Kyle R. Schaaf requested a hearing on the suspension of his driving privileges by mail on June 18<sup>th</sup>. 2008. which was received by the DOT on June 23<sup>rd</sup>, 2008 (App. 16). Mailed by the DOT on June 30<sup>th</sup>, 2008, and received by Counsel for Mr. Schaaf on or around July 1<sup>st</sup>, 2008. a Notice of Administrative Hearing was sent with a hearing date of Monday, July 7<sup>th</sup>. 2008, at 4:00 p.m. (App. 17).

(3) During the administrative hearing, counsel for Schaaf objected to the validity of the hearing due to the fact that Mr. Schaaf did not receive ten days notice of the hearing as required by statute. The Hearing Officer's Decision, dated July 9<sup>th</sup>, 2008 (App. 18) was received by Mr. Schaaf and his counsel within the next couple days with Hearing Officer Vukelic's decision to suspend Schaaf's driving privileges for 91 days. Schaaf appealed that decision to the Burleigh County District Court and the hearing officer's decision was reversed by Honorable Bruce B. Haskell with an Order for Judgment and Judgment filed with the court on January 7<sup>th</sup>, 2009. (App.

22) Schaaf now asks that this Court affirm and uphold the decision and Judgment of Honorable Bruce B. Haskell and the Burleigh County District Court.

**FACTUAL AND PROCEDURAL BACKGROUND:**

(4) Appellee, Kyle Schaaf, does not dispute the facts involved in this Appeal.

(5) In his Order reversing the hearing officer's decision, Judge Bruce B. Haskell states:

The facts involved in this appeal from the decision of the administrative hearing officer are undisputed as they relate to the dispositive issue – whether the State complied with the notice requirement found at N.D.C.C. §28-32-21(1)(d). Said statute reads. in relevant part:

“However, an administrative hearing regarding the renewal, suspension, or revocation of a license may [sic] not be held fewer than ten days after the licensee has been served, personally or by certified mail, with a copy of a notice for hearing with an affidavit, complaint, specification of issues or other document alleging violations upon which the license hearing is based.”

The State does not dispute that the Department of Transportation held the hearing in fewer than ten days from the time of the service of the notice upon the appellant. The State argues that the statute is not jurisdictional because it is not “basic and mandatory.” However, the language of the statute is clear – the hearing may not be held

fewer than ten days after the licensee has been served. Further, N.D.C.C. §28-32-21(3)(c) reads, in relevant part, “[A] hearing under this subsection may not be held unless the parties have been properly served...”

The appellant was not properly served. The applicable statutes are mandatory. The underlying purpose of the statutes are clear – to provide clear notice of the issues to be addressed at the administrative hearing and to afford the licensee enough time to prepare for the hearing. The Court finds that the notice requirement is basic and mandatory, and is therefore jurisdictional.

The decision of the administrative hearing officer is REVERSED and the appellant’s privilege to operate a motor vehicle is reinstated.

(App. 20-21)

### **LAW AND ARGUMENT**

**ISSUE: WHETHER THE N.D.D.O.T. HEARING OFFICER’S DECISION IS VALID BECAUSE OF THE HEARING OFFICER’S FAILURE TO CARRY OUT DUTIES REQUIRED BY STATUTE.**

(6) “An appeal from a district court decision reviewing an administrative license suspension is governed by the Administrative Agencies Practice Act, Chapter 28-32, N.D.C.C.” McPeak v. Moore, 545 N.W.2d 761, 762 (N.D. 1996). The hearing officer in this matter did not follow the statutes covered in the Administrative Agencies Practice Act.

**(7) N.D.C.C. § 28-32-21. Adjudicative proceedings – Procedures.** N.D.C.C. § 28-32-21(1)(d) specifies that “an administrative hearing regarding the renewal, suspension, or revocation of a license may not be held fewer than ten days after the licensee has been served, personally or by certified mail, with a copy of a **notice for hearing** with an affidavit, complaint, specification of issues, or other document alleging violations upon which the license hearing is based.” (emphasis added). The Department of Transportation has argued that a Report and Notice serve this purpose. A Report and Notice has no hearing date, only a suggestion that a hearing may be requested. This does not constitute a “notice for hearing”.

**(8) N.D.C.C. § 28-32-31. Duties of hearing officers.** States that: “**All hearing officers shall:**

- 1. Assure that proper notice has been given as required by law.**
- 2. Conduct only hearings and related proceedings for which proper notice has been given.**
- 3. Assure that all hearings and related proceedings are conducted in a fair and impartial manner.” Etc...**

(emphasis added.)

Notice in this case was received on or after July 1<sup>st</sup>, 2008, with the hearing was scheduled for July 7<sup>th</sup>, 2008, only six days later (App.17)

**(9) N.D.C.C.28-32-46. Scope of and procedure on appeal from determination of administrative agency.** Provides that: “A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed



with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, **the court must affirm the order of the agency unless it finds that any of the following are present:**

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."

(emphasis added.)

In this matter, N.D.C.C. 28-32-46(1 - 4) are proven and fully supported by the facts of this case, which are not in dispute by Schaaf or the North Dakota Department of Transportation. The provisions of chapter 28 of the N.D.C.C. were NOT complied

with in this proceeding, therefore, the decision of the hearing officer is NOT in accordance with the law, the order suspending Schaaf's driving privileges is in violation of his constitutional rights. the provisions of this chapter have not been complied with in the proceedings before the agency, and the rules or procedure of the agency have not afforded Mr. Schaaf a fair hearing

### CONCLUSION

(10) In this case, Counsel for Mr. Schaaf did object during the administrative hearing based on the fact that proper notice was not given. (Tr. P. 11 LL 20-25. P. 12 L 1) Although the hearing officer states he will take the argument into consideration in reaching a decision. (Tr. P. 12 LL 22-23) all relevant statutes and procedures dictated by these statutes were ignored.

(11) WHEREFORE, based upon the foregoing, Kyle R. Schaaf respectfully requests that this Court uphold and confirm the Burleigh County District Court Judgment by Honorable Bruce B. Haskell reversing the N.D.D.O.T.'s decision suspending his driving privileges.

Respectfully submitted this 3<sup>rd</sup> day of April, 2009.

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