

**ORIGINAL**

**20090025**

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

MAR 02 2009

Kyle Schaaf,

Appellee,

v.

North Dakota Department  
of Transportation,

Appellant.

STATE OF NORTH DAKOTA

Supreme Ct. No. 20090025

District Ct. No. 08-08-C-1818

APPEAL FROM THE DISTRICT COURT  
BURLEIGH COUNTY, NORTH DAKOTA  
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BRUCE B. HASKELL

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**BRIEF OF APPELLANT**

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### **STATEMENT OF ISSUE**

On June 15, 2008, a Report and Notice was issued to Schaaf. Schaaf requested a hearing, and the Department mailed a Notice of Administrative Hearing to Schaaf on June 30, 2008, scheduling the hearing for July 7, 2008. Schaaf alleges that N.D.C.C. § 28-32-21(1)(d) requires 10 days notice for the hearing. Schaaf did not object to the hearing date or argue he was prejudiced by being given only 7 days to prepare for the hearing. Was the Department deprived of jurisdiction to suspend Schaaf's driving privileges?

### **STATEMENT OF CASE**

Officer Brian Thompson of the Mandan Police Department arrested Schaaf for minor in consumption on May 22, 2008. (Appendix ("App.") 6, 15.) Officer Thompson issued a Report and Notice, which included a temporary operator's permit, to Schaaf after a blood test indicated that Schaaf had an alcohol concentration of .03 percent by weight. (App. 15.)

Schaaf requested an administrative hearing. (App. 16.) The hearing occurred on July 7, 2008. (App. 17.) Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Schaaf's driving privileges for 91 days. (App. 13-14.) Schaaf appealed that decision to this court. (App. 19.) Judge Bruce B. Haskell reversed the hearing officer's decision and the Order for Judgment was filed on January 7, 2009. (App. 20-22.) Judgment was entered on January 7, 2009. (App. 23.) The Department appealed from the Judgment to this Court. (App. 24.) The Department asks this Court to reverse the Judgment of the Burleigh County District Court and affirm the administrative suspension of Schaaf's driving privileges for 91 days.

### **STATEMENT OF FACTS**

On May 22, 2008, at approximately 6:16 p.m., Officer Thompson received a report of minors drinking in a parking lot. (App. 3.) Upon arriving at the scene,

officer Thompson observed a red Ford Explorer matching the description of the vehicle reported by the complaining party. (App. 3.) As Officer Thompson pulled up behind the red Ford Explorer, he saw Schaaf exit the driver's seat of the vehicle, walk over to the passenger side of the vehicle, and begin speaking with two males who were in a Chevy S-10 pickup nearby. (App. 3, 6-7.)

Officer Thompson approached Schaaf and asked him if he knew who the red Ford Explorer belonged to. (App. 4.) Schaaf told the officer that he did not know. Id. The officer then asked Schaaf what he was doing in the vehicle if he did not know to whom it belonged. Id. Schaaf told the officer it was his vehicle but it was registered in his parents' names. Id.

After identifying Schaaf, Officer Thompson asked Schaaf if he had any alcohol in the vehicle. (App. 5.) Schaaf said there shouldn't be. Id. When asked how much he had to drink that day, Schaaf said he had nothing to drink. Id. Officer Thompson then asked Schaaf if he would be willing to submit to an S-D2 test and Schaaf agreed. Id. Officer Thompson administered the S-D2 onsite screening test according to the approved method, and the device estimated Schaaf's blood alcohol concentration at .046 percent by weight. Id.

While waiting for the screening device to give its reading, Officer Thompson again asked Schaaf how much he had to drink, and Schaaf said he had one beer which he had taken from a cooler in the back of the vehicle. (App. 6.) Schaaf was placed under arrest for minor in consumption of alcohol. Id.

Officer Thompson searched the Explorer and found two mostly empty beer cans, in the back pocket of the front passenger seat. Id. The officer asked Schaaf if he wished to have his vehicle secured. Id. Schaaf agreed and told the officer his car keys were hanging out of the passenger side door. (App. 6-7.)

Schaaf agreed to provide a blood sample for testing. (App. 7, 15.) The result indicated Schaaf's blood alcohol concentration was .03 percent by weight.

(App. 15.) Schaaf was served with a Report and Notice by Officer Thompson on June 15, 2008. (App. 15.) Schaaf requested a hearing and the Department mailed a Notice of Administrative Hearing to Schaaf on June 30, 2008, which set the hearing time for 4:00 p.m. on July 7, 2008. (App. 17.) No objection to the hearing date was made until closing argument.

### PROCEEDINGS ON APPEAL TO DISTRICT COURT

In his Order reversing the hearing officer's decision, Judge Bruce B. Haskell stated as follows:

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 purposes 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.)

## STANDARD OF REVIEW

“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). “This Court reviews the record of the administrative agency as a basis for its decision rather than the district court decision.” Lamb v. Moore, 539 N.W.2d 862, 863 (N.D. 1995) (citing Erickson v. Dir., N.D. Dep't of Transp., 507 N.W.2d 537, 539 (N.D. 1993). “However, the district court’s analysis is entitled to respect if its reasoning is sound.” Kraft v. State Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572.

This Court’s review “is limited to whether (1) the findings of fact are supported by a preponderance of the evidence; (2) the conclusions of law are sustained by the findings of fact; and (3) the agency’s decision is supported by the conclusions of law.” McPeak, 545 N.W.2d at 762 (citing Zimmerman v. N.D. Dep't of Transp. Dir., 543 N.W.2d 479, 481 (N.D. 1996)).

Findings by an administrative agency are sufficient if the reviewing court is able to understand the basis of the fact finder’s decision. In re Boschee, 347 N.W.2d 331, 336 (N.D. 1984). A court must not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). Rather, a reviewing court determines only “whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record.” Id. (citation omitted).

## LAW AND ARGUMENT

### I. The Department had jurisdiction to suspend Schaa’s driving privileges.

N.D.C.C. § 28-32-21(1)(d) reads in relevant part:

[A]n 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.

Schaaf alleges the Department is deprived of jurisdiction to suspend his driving privileges because the hearing was held less than ten days after he was served with a copy of the notice of hearing. Schaaf's argument is erroneous for two reasons. First, the provisions of N.D.C.C. § 28-32-21 are not applicable to the Department's implied consent license suspension hearings under N.D.C.C. ch. 39-20. Second, even if the ten-day notice requirement is applicable to N.D.C.C. ch. 39-20, the provision is not basic and mandatory to the Department's jurisdiction.

A. The provisions of N.D.C.C. § 28-32-21 are not applicable to alcohol-related driver's license hearings under N.D.C.C. ch. 39-20.

N.D.C.C. § 28-32-21(1)(a)-(h) applies to one type of adjudicative proceeding, and N.D.C.C. § 28-32-21(3)(a)-(d) applies to another type of adjudicative proceeding. Specifically, the type of adjudicative proceeding to which subsection (1) is applicable involves "a hearing on a complaint against a specific-named respondent." On the other hand, subsection (3) provides that if "the adjudicative proceeding does not involve a hearing on a complaint against a specific-named respondent, the provisions of subsection 1 do not apply." (Emphasis added.) Thus, only either subsection (1) or subsection (3) can apply to an adjudicative proceeding.<sup>1</sup>

While the question of whether subsection (1) or subsection (3) applied was not before this Court in Morrell v. North Dakota Dep't of Transp., 1999 ND 140, 598 N.W.2d 111, this Court nonetheless observed as follows: "The due

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<sup>1</sup> This is a further reason why the district court's order was improper because it cited to language from both subsection (1) and (3) of N.D.C.C. § 28-32-21. See (App. 20.)

process requirements for an administrative hearing are embodied in section 28-32-05(3)(c), N.D.C.C.”<sup>2</sup> Id. at ¶ 9. Therefore, this Court implicitly concluded in Morrell that adjudicative proceedings under N.D.C.C. ch. 39-20 do not involve a hearing on a complaint against a specific-named respondent. By implication, thus, Morrell is authority for the proposition that subsection (1) of N.D.C.C. § 28-32-21 is inapplicable to adjudicative proceedings such as this one under N.D.C.C. ch. 39-20.

One of the primary reasons that the provisions of subsection (1) of N.D.C.C. § 28-32-21 seem inapplicable to adjudicative proceedings under N.D.C.C. ch. 39-20 is that subsection (1)(a)-(b) contemplates a complainant filing a complaint with an agency and the agency then serving a copy of the complaint on the respondent. However, under N.D.C.C. § 39-20-03.1, for example, a law enforcement officer is directed to issue a temporary operator's permit, which is part of the officer's "certified written report" or Report and Notice, directly to the driver. There is no provision in N.D.C.C. ch. 39-20 that then requires the Department to serve a copy of the officer's certified written report on the driver.

N.D.C.C. § 39-20-03.1(3) directs that the law enforcement must forward the certified written report or Report and Notice to the Department within five days after issuance of the temporary operator's permit contained therein. Further, N.D.C.C. § 39-20-05(1) provides that a driver may request a hearing within ten days after issuance of the temporary operator's permit. Thus, if the Department were to serve another copy of the certified written report or Report and Notice on the driver, in many instances the driver would not receive the additional copy until the time to request a hearing either had expired or had virtually expired.

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<sup>2</sup> N.D.C.C. § 28-32-05 was renumbered as N.D.C.C. § 28-32-21 in 2001. 2001 N.D. Sess. Laws, ch. 293, § 12.

Under the procedures in N.D.C.C. ch. 39-20, thus, the Department sending a driver another copy of the certified written report or Report and Notice seemingly would be an idle act. As a result, as this Court seemingly implicitly recognized in Morrell, adjudicative proceedings under N.D.C.C. ch. 39-20 are not the type of adjudicative proceedings contemplated and controlled by subsection (1) of N.D.C.C. § 28-32-21. It follows that the provision in N.D.C.C. § 28-32-21(1)(d) relied upon by Schaaf, directing 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 . . . with a copy of a notice of hearing”, is inapplicable to adjudicative proceedings under N.D.C.C. ch. 39-20.

While Morrell implicitly suggests that adjudicative proceedings under N.D.C.C. ch. 39-20 are of the type contemplated by subsection (3) of N.D.C.C. § 28-32-21, the question of whether subsection (3) is applicable was not at the core of the dispute in that case. More particularly, the ramifications of attempting to apply other provisions in subsection (3) of N.D.C.C. § 28-32-21 were not before this Court in Morrell.

Subsection (3)(b) of N.D.C.C. § 28-32-21 provides, in part, that “[t]he administrative agency shall designate the time and place for the hearing and shall serve a copy of the notice of hearing upon all the parties . . . at least twenty days before the hearing.” (Emphasis added.) Under N.D.C.C. § 39-20-05(1), a driver may request a hearing up to ten days after issuance of the temporary operator's permit. If subsection (3) of N.D.C.C. § 28-32-21 were applicable, thus, and drivers started requesting hearings on the tenth day after issuance of temporary operator's permits, the Department would not be able to hold a hearing within thirty days after issuance of the temporary operator's permit.

The problem is that N.D.C.C. § 39-20-05(1) requires the Department to hold the hearing “within thirty days after the date of issuance of the temporary operator’s permit.” This Court has observed that the terms of statutes “must be construed logically . . . .” Samdahl v. N.D. Dep’t of Transp. Dir., 518 N.W.2d 714, 717 (N.D. 1994) (quoting Schwind v. Dir., N.D. Dep’t of Transp., 462 N.W.2d 147, 150 (N.D. 1990)). The interplay of subsection (3) of N.D.C.C. § 28-32-21 and N.D.C.C. § 39-20-05(1) is such that the Department seemingly would have to reinstate the driving privileges of all drivers who waited until the tenth day after issuance of the temporary operator’s permit to make a hearing request because the Department would be unable to hold a timely hearing, which would be an absurd result.

Under these circumstances, the provisions of both subsection (1) and subsection (3) of N.D.C.C. § 28-32-21 should be deemed inapplicable to adjudicative proceedings held under N.D.C.C. ch. 39. N.D.C.C. ch. 39-20 contains a comprehensive procedure for requesting and scheduling administrative hearings. See N.D.C.C. § 39-20-05. In addition, the requirements of procedural due process of law are applicable to determine whether the Department has provided adequate notice of a hearing under N.D.C.C. ch. 39-20.

**B. The ten-day notice provision of N.D.C.C. § 28-32-21(1)(d) is not jurisdictional.**

The Court does not need to consider this argument if it accepts the Department’s first argument set forth above. However, if this Court rejects the Department’s opening argument, this Court still should affirm the administrative suspension of Schaaf’s driving privileges because the ten-day notice provision of N.D.C.C. § 28-32-21(1)(d) is not jurisdictional.

Although this Court has never decided the question of whether the ten-day language in N.D.C.C. § 28-32-21(1)(d) is jurisdictional in nature, it has rejected other jurisdictional arguments involving time frames in N.D.C.C. ch. 39-20. In Greenwood v. Marshall Moore, Dir., N.D. Dep't of Transp., 545 N.W.2d 790 (N.D. 1996), the issue was whether the Department's failure to hold an administrative hearing within the thirty-day limit set forth in N.D.C.C. § 39-20-05(1) was a jurisdictional defect. Greenwood, 545 N.W.2d at 795-96. This Court explained that "the statute does not describe a remedy for the Department's failure to hold a hearing within the time limit. Usually, when no statutory remedy is specified for an agency's failure to meet a time limit, we do not reverse without a showing of prejudice." Id. (emphasis added). The court concluded that "the legislature did not make the time limit jurisdictional." Id. at 796.<sup>3</sup>

This Court applied a similar analysis in Schwind, 462 N.W.2d 147 (N.D. 1990). In Schwind, a driver claimed that the Department lacked jurisdiction to suspend his driving privileges because the law enforcement officer failed to indicate on the Report and Notice whether the driver's license was attached. Id. at 148-49. The law at N.D.C.C. § 39-20-03.1(1)&(3) provides that the law enforcement officer "shall immediately take possession of the person's operator's license if it is then available" and "forward to the director . . . the person's operator's license" if the chemical test results are above the legal limit.

This Court observed that, "[w]hile it is clear that section 39-20-03.1, NDCC, requires the officer to forward the operator's license, the failure to do so does not destroy the Director's jurisdiction to suspend a violator's driving

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<sup>3</sup> Although this Court decided in Greenwood that the time limit in N.D.C.C. § 39-20-05(1) is not jurisdictional, the court reversed the administrative suspension after concluding that, under N.D. Admin. Code § 37-03-03-09, there were no "most compelling reasons" for the hearing not being convened within thirty days after issuance of the Report and Notice. Greenwood, 545 N.W.2d at 796.

privileges.” Schwind, 462 N.W.2d at 150. This Court noted that the driver “had full notice and knowledge of the administrative proceedings and has not been shown to have been prejudiced by the alleged failure to submit the license.” Id. at 151. This Court reasoned that a “contrary holding would defeat the Legislature’s intent to protect the public from potential hazards posed by intoxicated drivers.” Id. at 150.

In Samdahl v. N.D. Dep’t of Transp. Dir., 518 N.W.2d 714 (N.D. 1994), a driver argued that the Department lacked jurisdiction to suspend his driving privileges because the law enforcement officer failed to issue a Report and Notice to Samdahl “immediately” after receiving the blood test results, as required by N.D.C.C. § 39-20-03.1(2). This Court emphasized that “[a]lthough ‘the jurisdiction of an administrative agency is dependent upon the terms of the statute and must meet at least the basic mandatory provisions of the statute before jurisdiction is established,’ the terms of the statute ‘must be construed logically so as not to produce an absurd result.’” Id. at 717 (citation omitted). This Court also observed that “[w]hen adherence to the letter of the law would cause an absurd result, we give effect to the legislative intent even though contrary to the letter of the law.” Id.

Applying these general rules in Samdahl, this Court reasoned that “[a]lthough the unexplained delay of more than one month between the testing of the blood and the giving of notice of intention to suspend driving privileges does not strictly comply with ‘the letter of the law,’ we seek to avoid absurd results.” Id. Pointing out that there was no showing of any harm or prejudice to the driver, this Court upheld the driver’s license suspension. Id.

In this case, N.D.C.C. § 28-32-21(1)(d) does not specify a remedy for a failure to give 10 days notice before holding an implied consent hearing. And there is no evidence that Schaaf suffered any prejudice. The hearing was held

within the thirty-day statutory time period from issuance of the Report and Notice. See N.D.C.C. § 39-20-05(1). Accordingly, as in Greenwood, Schwind, and Samdah], Schaaf's suspension should be upheld regardless of whether Schaaf was served with a notice of hearing a full ten days before the hearing.


Notice requirements are generally analyzed under due process principles and not deemed to be jurisdictional. See CybrCollect, Inc. v. N.D. Dep't of Fin. Insts., 2005 ND 146, ¶ 33, 703 N.W.2d 285, 297-98 (holding that collection agency did not receive adequate notice of a violation of the Fair Dept Collection Practices Act and was prejudiced by the unfair surprise); Morrell v. N.D. Dep't of Transp., 1999 ND 140, ¶ 11, 598 N.W.2d 111 (stating, "[a] determination the administrative hearing notice was constitutionally deficient does not end our inquiry. Generally, there is no right to redress if a party cannot show prejudice resulting from an allegedly defective notice" (citation omitted)); Kautzman v. Kautzman, 2000 ND 190, ¶ 21, 618 N.W.2d 500, 504 (finding party failed to establish prejudice from not being personally served with a notice of sheriff's sale in his individual capacity). Absent actual prejudice, in light of the purpose of N.D.C.C. ch. 39-20, it would be an absurd result to find that the director lacked jurisdiction to suspend Schaaf's driver's license because the hearing was held fewer than ten days after he was served with a copy of a notice for hearing. The language in N.D.C.C. § 28-32-21(1)(d), which Schaaf argues is jurisdictional, is really an issue of due process, not jurisdiction.

### **CONCLUSION**

The Department respectfully requests that this Court reverse the judgment of the Burleigh County District Court and affirm the Department's decision suspending Schaaf's driving privileges for 91 days.

Dated this 2<sup>nd</sup> day of March, 2009.

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Kyle Schaaf,	)	
	)	
Appellee.	)	Supreme Ct. No. 20090025
	)	
v.	)	District Ct. No. 08-08-C-1818
	)	
North Dakota Department	)	
of Transportation,	)	
	)	
Appellant.	)	

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


Melissa Castillo 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.

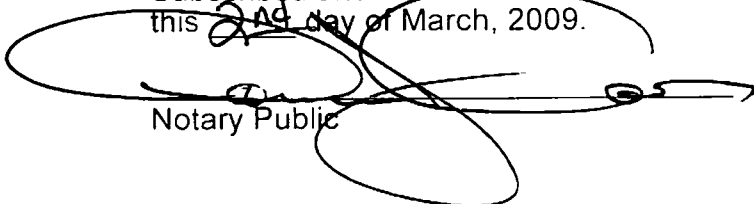
2. I am of legal age and on the 2<sup>nd</sup> day of March, 2009, I served the attached **BRIEF OF APPELLANT and Appendix of Appellant** upon Kyle Schaaf, by and through his attorney Stanley Boehm, by placing a true and correct copy thereof in an envelope addressed as follows:

Stanley Boehm  
Attorney at Law  
233 W. Rosser Ave.  
Bismarck, ND 58501

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

  
Melissa Castillo

Subscribed and sworn to before me  
this 2<sup>nd</sup> day of March, 2009.

  
Notary Public

DONNA J. CONNOR  
Notary Public  
State of North Dakota  
My Commission Expires Aug. 6, 2009