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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

Supreme Court No. 20090056

Darren Jay Landsiedel,

Appellant,

v.

Director, North Dakota Department
of Transportation,

Appellee.

BRIEF OF APPELLANT

Appeal from Judgment

McLean County District Court
South Central Judicial District
Civil No. 08 C 00150

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STATEMENT OF THE ISSUES

ISSUE FOR REVIEW NO. 1

Was Landsiedel's hearing conducted in violation of law?

ISSUE FOR REVIEW NO. 2

Was Exhibit 1b inadmissible, requiring reversal?

ISSUE FOR REVIEW NO. 3

Did the Hearing Officer's use of Exhibit 1b violate N.D.C.C. § 28-32-

35?

STATEMENT OF THE CASE

Darren Jay Landsiedel appeals from a district court judgment affirming an administrative revocation of his driving privileges for a period of one year (A. 38, 48, 50).

Exhibit 2 (A. 36) reflects that Landsiedel's administrative hearing was originally scheduled for July 11, 2008, "in the SHERIFF'S OFFICE, MCLEAN COUNTY COURTHOUSE". At the bottom of that notice, the Hearing Officer wrote, "I will be calling the sheriff's office to take testimony telephonically."

Exhibit 2A (A. 37) is the Amended Notice of Administrative Hearing showing the change of Landsiedel's administrative hearing to July 8, 2008, "in the SHERIFF'S OFFICE, MCLEAN COUNTY COURTHOUSE". There was no note at the bottom of Exhibit 2A as there was at the bottom of Exhibit 2.

On July 8, 2008, Landsiedel, his counsel, and witnesses, Deputy Sheriff Terry Mehlhoff and civilian Elmer Hinsz, appeared in person at the McLean County Courthouse at the scheduled time for the hearing. The Hearing Officer did not. The Hearing Officer telephoned the courthouse, and the hearing was held in the courtroom of the McLean County Courthouse with the Hearing Officer on a speaker telephone. (A. 6).

Landsiedel objected to the Hearing Officer being on the telephone:

MR. MICHAEL HOFFMAN: . . . I object to this method with you being on the telephone. . . . There's original exhibits that we're entitled to see, but, more importantly, perhaps, is the fact that the hearing officers have to judge credibility of witnesses. We not only have a deputy in this case, but we have a lay witness as well. That's . . . (INAUDIBLE) . . . entitled to have this hearing being done in person. That's the way it was scheduled. I assumed that the hearing officer would be here for the hearing.

(A. 6)

The Hearing Officer responded by pointing to the original notice of hearing and his handwritten note at the bottom of that notice stating, "I will be calling the sheriff's office to take testimony telephonically." (A. 6). The Hearing Officer also stated that state statute permits the Department of Transportation to hold hearings telephonically (A. 7). The Hearing Officer construed Landsiedel's objection as a motion to dismiss and stated that the motion was denied (A. 7).

Landsiedel was allowed to answer:

MR. HOFFMAN: . . . [T]he original notice that was sent out where you made that notation about telephonically, . . . I had no idea what that meant. It doesn't say that the hearing officer is not going to be present. I assumed

from the fact that we were all going to be here in Washburn. I had no idea what that note meant.

. . . [W]hen it was rescheduled for today, I specifically recall stating to you on the telephone that I wanted the hearing in person in Washburn. There was no mention that you were not going to be here personally.

(A. 8).

The Hearing Officer overruled Landsiedel's objection to the hearing and proceeded with the hearing (A. 8).

Civilian witness Hinsz testified first (A. 11-12). Hinsz identified Landsiedel as a person he observed on the night in question, beginning at about 11:00 PM, getting out of a pickup, walking to and around a lady's house, and then driving the pickup, on the street where Hinsz lived in Riverdale, North Dakota (A. 12-14). During his testimony, Deputy Mehlhoff showed him Mehlhoff's police report in an attempt to correct his testimony about the time. Landsiedel objected, and the Hearing Officer sustained the objection and instructed Mehlhoff not to contact Hinsz during his testimony. (A. 14).

Hinsz testified that Landsiedel got out of the pickup a second time and went behind the lady's house again. When going back to his pickup this time he either tripped or stumbled. He drove away again. (A. 14-15).

Landsiedel returned and parked the pickup on the street again, walked to the lady's house again, went into the house and right back out, and then left again in the pickup (A. 15). Landsiedel then returned, got out of the pickup, looked in a window of the lady's house, and then went back to the pickup (A. 15-16). Landsiedel then "pulled . . . a case of beer or something" out of the back of his pickup, entered the pickup, reclined back and laid down (A. 15-16). Hinsz called the sheriff's department. This was at 1:13 AM. (A. 16).

Deputy Mehlhoff testified he received a dispatch in this case at 1:14 AM (A. 20). He responded to the dispatch and found Landsiedel sleeping in the driver's seat. Mehlhoff knocked on the window, and Landsiedel woke, opened the door and they spoke. Mehlhoff testified he smelled a strong odor of alcohol on Landsiedel's breath (A. 20-21).

Landsiedel said he was "at a friend's." (A. 21). Landsiedel told Mehlhoff that he knew the lady who lived at the house (A. 29-30).

Mehlhoff told Landsiedel that he wanted him to perform some sobriety tests. Landsiedel stated, "I'm not driving". Mehlhoff told him that he was in control of a vehicle with alcohol on his breath. Landsiedel responded, "there's no keys in the ignition". (A. 21; see A. 24-25). Mehlhoff recalled Landsiedel stating that he left his keys in the lady's house

(A. 31, lines 7-13). Mehlhoff did not recall Landsiedel stating that he locked them in the lady's house (A. 31, lines 3-6).

Following some sobriety tests, Mehlhoff arrested Landsiedel for being in actual physical control of a vehicle while under the influence (A. 22-25). Mehlhoff took Landsiedel to the jail in Washburn. Mehlhoff testified that, at the jail, Landsiedel refused the chemical test (A. 25-26). When asked when this occurred, Mehlhoff responded, "It would have been just before 3:00 a.m. We arrived at the Washburn Jail at 2:28 a.m. He was taken home at 3:10 a.m. So it would have been about 2:40." (A. 31). Mehlhoff testified that Landsiedel did not slur his words and his speech was not bad; Landsiedel was just adamant that there were no keys in the ignition and he was not driving (A. 27).

The Hearing Officer asked Deputy Mehlhoff, "Do you have a document with you today that has the letter b in the lower right-hand corner?" Mehlhoff responded, "No, I don't. I left that in the sheriff's office down the hall." (A. 27). The Hearing Officer asked Mehlhoff to retrieve the document, and after a pause in the record the Hearing Officer asked, "Deputy, do you have a copy of the Report and Notice form that you issued in this case?" Mehlhoff responded, "Yes, I do." (A. 27). Landsiedel objected on the basis that the deputy simply pulled a Report and Notice form

out of his file which was not marked as an exhibit. The objection was overruled. (A. 28).

The Hearing Officer then questioned the deputy about the document the deputy had in his possession, and then offered into evidence Exhibit 1, which included page b (A. 28). Landsiedel objected, “I can’t see the original. I object to the officer testifying from a document that’s not before him as an exhibit. This hearing is unfair and contrary to statute.” The objections was overruled. (A. 29).

STANDARD OF REVIEW

In Morrell v. N. Dak. Dept. of Transportation, 1999 ND 140, ¶ 6, 598 N.W.2d 111, the Court wrote:

The Administrative Agencies Practices Act, N.D.C.C. ch. 28-32, governs the review of an administrative decision to suspend or revoke a driver’s license. Dworshak v. Moore, 1999 ND 172, ¶ 6, 583 N.W.2d 799. When reviewing a driver’s license suspension, we review the agency’s decision, not the district court’s decision. Id. We affirm the agency’s decision unless: 1) a preponderance of the evidence does not support the agency’s findings; 2) the agency’s findings of fact do not support its conclusions of law and its decision; 3) the agency’s decision violates the constitutional rights of the

appellant; 4) the agency did not comply with the Administrative Agencies Practice Act in the proceedings; 5) the agency's rules and procedures have not afforded the appellant a fair hearing; or 6) the agency's decision is not in accordance with the law. Id. When reviewing the findings of an administrative agency, we do not substitute our own judgment for that of the agency, but instead determine whether a reasonable mind could have determined that the factual conclusions were proven by the weight of the evidence presented. Stanton v. Moore, 1998 ND 213, ¶ 10, 587 N.W.2d 148.

ARGUMENT

ISSUE FOR REVIEW NO. 1

Was Landsiedel's hearing conducted in violation of law?

N.D.C.C. § 28-32-35 provides:

28-32-35. Procedure at hearing. The person presiding at a hearing shall regulate the course of the hearing in conformity with this chapter and any rules adopted under this chapter by an administrative agency, any other applicable laws, and any prehearing order. To the extent necessary for full disclosure of all relevant facts and issues, the person presiding at the hearing shall afford to all parties and other persons allowed to participate the opportunity to respond, present evidence and argument, conduct cross-

examination, and submit rebuttal evidence, except as restricted or conditioned by a grant of intervention or by a prehearing order. A hearing may be conducted in total or in part by making use of telephone, television, facsimile services, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if practicable, to see the entire proceeding while it is taking place, and if such use does not substantially prejudice or infringe on the rights and interests of any party. (See Addendum).

Additionally, in Lawrence v. Delkamp, 2008 ND 111, ¶ 24, 750 N.W.2d 452, Sandstrom, J., dissenting, wrote:

I agree with the specially concurring opinion that the proceeding in the district court was fundamentally unfair. Because the proceeding was fundamentally unfair, we should reverse the district court even if we think the result may have been the same had the proceedings been fair. Sandbeck v. Rockwell, 524 N.W.2d 846, 853 (N.D. 1994) (Sandstrom, J., dissenting) (“Procedural due process requires notice and a meaningful opportunity for a hearing appropriate to the nature of the case.” State v. One Black 1989 Cadillac, 522 N.W.2d 457, 463 (N.D. 1994)). “Respect for law and human dignity can best be fostered by a process that is fair and just.” Rockwell, at 852.

(Emphasis added). See also Morrell v. N. Dak. Dept. of Transportation, 1999 ND 140, ¶ 6, 598 N.W.2d 111 (appellant is entitled to a fair hearing); Berger v. State Highway Commissioner, 394 N.W.2d 678, 681 (N.D. 1986) (appellant is entitled to procedural fairness in his administrative hearing).

Here, in the telephone call with the Hearing Officer to reschedule the hearing, Landsiedel specifically requested an in person hearing. There was no mention by the hearing officer that he was not going to be personally present. (A. 8, lines 3-6). The notice which followed made no mention of the hearing officer appearing by telephone (A. 37).

At the hearing, there were questions regarding whether the vehicle in question was operable, Hawes v. N.D. Dept. of Transportation, 2007 ND 177, 741 N.W.2d 202 (2007), and the two hour time limit, Krehlik v. Moore, 542 N.W.2d 443 (N.D. 1996) (A. 3, 32). Credibility of witnesses and their testimony was inherent in the proceedings, overall and specifically in regard to those two questions.

In Lawrence v. Delkamp, supra at ¶ 10, the Court discussed the “shortcomings of telephonic testimony.” Quoting Gust v. Gust, 345 N.W.2d 42, 45 (N.D. 1984), the Court wrote:

In testimony by telephone the image of the witness cannot be seen nor does it disclose if the witness is using or relying upon any notes or

documents and, as a result, meaningful communication is effectively curtailed or prevented. . . . Above all, in testimony by telephone the trier of facts is put in a difficult, if not impossible, position to take into account the demeanor of the witness in determining the witness' credibility.

Quoting the advisory committee notes to F.R.Civ.P. 43, the Court also wrote:

The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. When telephonic testimony is allowed, "[s]afeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness."

Here, Landsiedel was present with the witnesses and actually had to object to an attempt by Deputy Mehlhoff to influence civilian witness Hinsz. That appears to have been prevented, but it remained that the Hearing Officer was not able to judge the demeanor of the witnesses face-to-face.

There was no explanation why the Hearing Officer appeared only by telephone. Was there a need or was it a matter of mere convenience? There was also no explanation why the hearing was rescheduled, or why it could not be scheduled at a time when the Hearing Officer could be personally present. This does not exude confidence in a process which is “fair and just”.

Landsiedel contends that the record supports the conclusion that the Hearing Officer’s use of the telephone to appear at his hearing substantially prejudiced and infringed on his rights and interests, including his right to a fair hearing.

ISSUE FOR REVIEW NO. 2

Was Exhibit 1b inadmissible, requiring reversal?

Here, the Hearing Officer asked Deputy Mehlhoff to identify Exhibit 1b to establish foundation. The Hearing Officer had Exhibit 1b wherever he was on the telephone. Mehlhoff did not have Exhibit 1b or a copy of Exhibit 1b. Over objection, the Hearing Officer allowed Mehlhoff to testify from a document allegedly pulled from the Sheriff’s Office in McLean County and which was not marked as an exhibit.

Mehlhoff, therefore, never identified Exhibit 1b as a document prepared in Landsiedel’s case. This was a failure of authenticity and

foundation, and therefore relevance was not established. See R&D Amusement Corp. v. Christianson, 392 N.W.2d 380 (N.D. 1986). Exhibit 1b was improperly admitted, and on this basis this matter must be reversed.

ISSUE FOR REVIEW NO. 3

Did the Hearing Officer's use of Exhibit 1b violate N.D.C.C. § 28-32-35?

Under N.D.C.C. § 28-32-35, the Hearing Officer may have been able to make use of facsimile services to provide Mehlhoff with a copy of Exhibit 1b. This was not done.

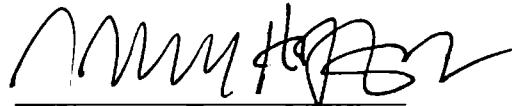
The fact that Mehlhoff did not have Exhibit 1b, by the fact that this hearing was conducted by telephone, is in and of itself a circumstance which substantially prejudiced and infringed on the rights and interests of Landsiedel and was thus a violation of N.D.C.C. § 28-32-35.

CONCLUSION

WHEREFORE, Landsiedel requests the Supreme Court of North Dakota to reverse the judgment of the district court.

Respectfully submitted this 16 day of March 2009.

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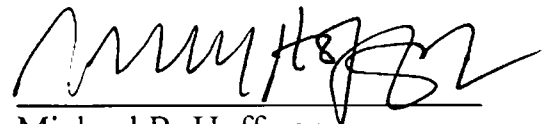


Michael R. Hoffman

CERTIFICATE OF SERVICE

I hereby certify that I made service of a true copy of the foregoing brief, along with a true copy of the Appendix, by hand delivery, on this 16 day of March 2009, on:

Douglas B. Anderson
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Michael R. Hoffman