

20090106

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Larry Sample d/b/a Sample Auto Sales,)
Appellant,)
v.)
North Dakota Department of)
Transportation,)
Appellee.)

Supreme Ct. No. 20090106
District Ct. No. 08-C-02558

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

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HONORABLE GAIL HAGERTY

STATE OF NORTH DAKOTA

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STATEMENT OF ISSUES

I. Sample, a licensed motor vehicle dealer, sold a vehicle to Rhonda Hall and issued her a notary certificate. Sample released the vehicle to Hall after she signed all the title papers, without receiving payment from Hall. Sample did not mail the application and remittance fee to the Department within 30 days after issuing the certificate as required by N.D.C.C. § 39-04-17. The Administrative Law Judge found that Sample willfully violated the statute. Was the Administrative Law Judge's decision reasonable?

II. The Department has authority to suspend a dealer license when a dealer willfully violates a statute related to the sale, distribution, or financing of a motor vehicle. Sample violated N.D.C.C. § 39-04-17 by failing to mail an application and remittance fee to the Department within 30 days after issuing a certificate of notary to a customer. The issuance of a notary certificate coincides with the sale of a motor vehicle. Did the Department have authority to suspend Sample's license?

STATEMENT OF CASE

On June 16, 2008, the North Dakota Department of Transportation (Department) issued an "Intent to Suspend Dealer's License" to Sample for violating N.D.C.C. § 39-04-17. App. 5. The Notice informed Sample of the Department's intent to suspend its dealer license for 3 business days. Id.

Sample requested an administrative hearing. App. 1, Docket (Doc.) 8 at Ex. A., p. 13. It was held on September 4, 2008. App. 1, Doc. 8, at p. 1. The Administrative Law Judge (ALJ) considered the issue of whether Sample violated N.D.C.C. § 39-04-17.

The ALJ issued his recommended findings of fact, conclusions of law, and decision suspending Sample's dealer license for 3 days. App. 7-14. The Department adopted the decision of the ALJ in its "Order of Dealer License

Suspension.” App. 15. Sample appealed that decision to the district court. App. 16-17. Judge Gail Hagerty affirmed the ALJ's decision, and the Order for Judgment was filed on March 10, 2009. App. 19-21. Judgment was entered on March 10, 2009. App. 23.

Sample appealed from the Judgment to this Court. App. 27. The Department asks this Court to affirm the Judgment of the Burleigh County District Court and the administrative suspension of Sample's dealer license for 3 days.

STATEMENT OF FACTS

Larry Sample is a licensed dealer of motor vehicles in North Dakota doing business as Sample Auto Sales in Dickinson, under dealer license number U 1393. App. 1, Doc. 8 at Ex. A, p. 20. On September 15, 2007, Larry Sample, d/b/a Sample Auto Sales sold a 1999 Dodge pickup to Rhonda Hall of Mandaree, North Dakota. Sample issued Hall a “Notary Public or Dealer Certificate of License Application”. Section 39-04-17, N.D.C.C., allows for a temporary paper certificate to be displayed on a vehicle while a title application is being processed. See App. 1, Doc. 8 at Ex. A, p. 3; Ex. 1; State v. Johnson, 2006 ND 248, ¶ 7, 724 N.W.2d 129. Under N.D.C.C. § 39-04-17, a licensed Motor Vehicle Dealer has 30 days in which to mail the application and remittance fee to the Department following issuance of a notary certificate to a purchaser. The issuance of the Certificate to Hall gave Sample until October 15, 2007, to mail the application and \$84 remittance fee to the Department. App. 1, Doc. 8 at pp. 42, 49; Ex. A, p. 15. The Department did not receive the application or remittance fee for the Dodge pickup within 30 days.

On March 12, 2008, Trooper Christopher Pulver of the North Dakota Highway Patrol stopped the 1999 Dodge pickup near milepost 101 on Highway 23 outside of Ryder, North Dakota for speeding. App. 1, Doc. 8 at pp. 7-8. The trooper observed that the vehicle lacked a license plate but saw a notary sticker

in the window. App. 1, Doc. 8 at p. 8. Trooper Pulver saw that the notary sticker was issued on September 15, 2007, by Sample Auto Sales. App. 1, Doc. 8 at pp. 9-10. Trooper Pulver asked Robin Hall, the driver of the vehicle and husband of Rhonda Hall, about the registration of the vehicle. App. 1, Doc. 8 at p. 12. Hall told the trooper that he bought the vehicle from Sample Auto Sales but had not seen the title. App. 1, Doc. 8 at p. 14; Ex. A, p. 4. The trooper ran a registration check on the pickup and it showed the vehicle being registered to a Carson Ryan of Killdeer. App. 1, Doc. 8 at pp. 11-12; Ex. A, p. 6. Trooper Pulver testified that he did not cite Robin Hall for a violation of N.D.C.C. § 39-04-17 because he did not know if Hall or the dealer was at fault for the title and license plate not being on the vehicle. App. 1, Doc. 8 at pp. 15-16.

On March 25, 2008, following the traffic stop on the Hall's vehicle, the Department received the application and remittance fee for the vehicle from Sample, and the Title of the vehicle was transferred into Rhonda Hall's name. App. 1, Doc. 8 at p. 37; Ex. A, pp. 2, 15-19.

It is undisputed that Sample sold the vehicle to Rhonda Hall on September 15, 2007, and issued a Certificate of notary for the vehicle's licensing and registration before Hall left with the vehicle. App. 1, Doc. 8 at pp. 36, 63-65; Ex. A, pp. 3, 9. It was Sample's understanding that Hall would come in the next day with payment, but Hall did not return. App. 1, Doc. 8 at p. 63. Sample testified he tried to contact Hall but could not find her. Id. However, no attempt was made by Sample to contact the Department to remedy the situation he created by issuing the Certificate and releasing the vehicle to Hall before Hall made arrangements to pay for the vehicle in March of 2008.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

In her Order, Judge Gail Hagerty held that the hearing officer could reasonably conclude Sample willfully violated a law related to the sale, distribution, or financing of a motor vehicle when Sample allowed Rhonda Hall, with whom he had agreed to sell a vehicle, to drive the vehicle for several months without remitting the application fee so that the vehicle remained unregistered. Judge Hagerty also found that the criminal penalty of N.D.C.C. § 39-04-17 did not preclude the Department's authority to suspend Sample's dealer license. Judge Hagerty's ruling reads as follows:

Sample argues that he agreed to sell the vehicle to Rhonda Hall on September 15, 2007. He issued a notary public or dealer certificate of license application to her that day. He expected her to return and pay for the vehicle the next day. She did not do so, and Sample did not submit the application or fees to the Department.

Sample argues that the Department lacks authority to suspend his license because Section 39-04-17 of the North Dakota Century Code provides a criminal penalty for failure to mail an application and fee within 30 days of the application. However, Section 39-22-04 of the Century Code provides authority to suspend a dealer's license for "willfully violating a law relating to the sale, distribution, or financing of motor vehicles. . ."

The hearing officer in this matter could reasonably conclude that Sample willfully violated a law relating to the sale of an automobile. The fact that a criminal penalty – a \$50 fine – could be imposed does not preclude suspension of Sample's license.

Sample, through his conduct, permitted an unregistered vehicle to be driven for months.

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. Dir., N.D. Dep't of Transp., 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 ALJ reasonably found that Sample willfully violated N.D.C.C. § 39-04-17 by issuing a notary certificate to Rhonda Hall and not sending the application and remittance fee to the Department within 30 days.**

N.D.C.C. § 39-04-17 reads:

The possession of a certificate made out by a notary public or an authorized agent of a licensed vehicle dealer who took the acknowledgment of the application when the vehicle was first registered or required to be registered under the laws of this state, if such certificate shows the date of application, the make, registered weight, and year model of the motor vehicle, the manufacturer's number of the motor vehicle which such application describes, and further shows that such notary public, or authorized agent of a vehicle dealer, personally mailed the application with the remittance fee, is prima facie evidence of compliance with motor vehicle law with reference to the vehicle therein described, for a period of thirty days from the date of such application. Any violation

of this section is an infraction punishable by a fine of not less than fifty dollars.

This statute places a duty on a licensed motor vehicle dealer or the dealer's agent to personally mail the application and remittance fee to the Motor Vehicle Division of the Department, within 30 days, after issuing a notary certificate. The notary certificate itself also evidences this duty. See App. 1, Doc. 8 at Ex. 1. The question of whether someone willfully violates a legal duty is a factual determination. See ex. Renault v. N.D. Workers Comp. Bur., 1999 ND 187, ¶ 15, 601 N.W.2d 580; Hausauer v. N.D. Workers Comp. Bur., 1997 ND 243, ¶ 19, 572 N.W.2d 426.

This Court acts as an appellate court, not a trial court, in this proceeding. Regarding review of an agency's factual findings, this Court has explained that an appellate court does not make independent findings or substitute its judgment for that of the agency but determines only whether a reasoning mind reasonably could have determined the findings were proven by the weight of the evidence in the record. Stewart v. N.D. Workers Comp. Bur., 1999 ND 174, ¶ 7, 599 N.W.2d 280. "It is the agency's responsibility to assess the credibility of witnesses and resolve conflicts in the evidence." Id. Further, an appellate court must accept a hearing officer's finding of fact if a reasoning mind reasonably could have made the particular finding of fact. See Geiger v. Hjelle, 396 N.W.2d 302, 303 (N.D. 1986) ("When more than one reasonable inference can be made from evidence, a reviewing court must accept the inference made by the trier of fact.") Evidence in the record which could have supported a contrary finding does not justify reversal as long as there is evidence in the record that supports the finding of fact made by the hearing officer. Johnson v. N.D. Dept. of Transp., 530 N.W.2d 359, 361 (N.D. 1995).

The ALJ made the following relevant findings:

18. The evidence at the hearing in this matter shows, by the greater weight of the evidence, that Sample issued the Certificate to Hall on September 15, 2007, for the vehicle pursuant to a sale of the vehicle. Hall did not pay cash for the vehicle the next day as she promised Sample. Sample did not mail the application for registration for the vehicle with the remittance fee to the DOT, Motor Vehicle Division, within thirty days. Neither did Hall mail the application for registration for the vehicle with the remittance fee to the DOT, Motor Vehicle Division, within 30 days. Hall's vehicle was stopped more than 30 days after Sample issued the Certificate to Hall, with the Certificate still affixed to the vehicle and without license plates. The title had not yet been transferred from Sample Auto Sales to Rhonda Hall at that time, but was transferred later.

19. There was no evidence offered at the hearing that Sample called or wrote to the DOT, Motor Vehicle Division, at any time explaining the circumstances regarding him issuing the Certificate and Hall not returning the next day to pay cash for the vehicle. Again, Sample only stated that he unsuccessfully attempted to locate the vehicle when he did not receive payment for the vehicle. In other words, Sample did little to remedy the situation he created by issuing the Certificate and releasing the vehicle to Hall before Hall made arrangements to pay for the vehicle in March of 2008.

App. 10-11.

The ALJ also made the following pertinent conclusions of law:

2. The evidence shows, by the greater weight of the evidence, that Sample issued the Certificate to Rhonda Hall for the vehicle upon a sale that at least he intended to be completed the next day. When Hall did not come in the next day to pay for the vehicle, Sample did nothing with regard to the intended transaction but try to find the vehicle. Sample did not mail the application for registration and the remittance fees to the DOT, Motor Vehicle Division. He did not notify the DOT about the circumstances surrounding the sale of that vehicle, If Sample did not make a sale to Hall on September 15, 2007, and mistakenly issued the Certificate, he should have taken some other kind of action, e.g. at least notifying the DOT.

3. By his actions, Sample either made a sale of the vehicle or acted as if he made a sale of the vehicle to Hall on September 15, 2007. He issued the Certificate to Hall on that date. But, he did not comply with N.D.C.C. section 39-04-17, as the one who issued the Certificate, to mail the application for registration of the vehicle in Hall's name or submit the remittance fee for the vehicle to the DOT. . . . When Sample issued the Certificate to Hall, he was obligated to comply with N.D.C.C. § 39-04-17. He did not. Sample could have required Hall to apply for registration for the vehicle and not have issued the Certificate to Hall, but he did not do that. Sample acted as if a sale had been made on September 15, 2007, and he issued the Certificate accordingly. And, in fact, a sale of the vehicle

was made. Sample did nothing subsequent to the issuing of the Certificate to repudiate or cancel the sale. And, more importantly in this matter, he did not comply with the requirements of the law, once he had issued the Certificate. It became his responsibility to comply with the law regarding the issuance of the Certificate, not Hall's responsibility. Again, if indeed a sale had not been made on September 15, 2007, Sample should have taken other action. Sample intentionally or knowingly issued the Certificate and intentionally or knowingly did not mail in the application and remittance fees. He intentionally or knowingly did nothing in regard to the Certificate had had issued to Hall.

Tr. 11-13 (emphasis added).

Sample argues that because he did not receive payment from Hall he could not remit the fee to the Department, and so he did not willfully violate the statute. Sample Br. 10-11. Sample's argument is misplaced. Willfully is defined as "engaging in conduct 'intentionally, knowingly, or recklessly.'" See N.D.C.C. § 12-02-02. It is undisputed that Sample intentionally sold the 1999 Dodge Pickup to Hall and intentionally issued her a notary certificate. Sample intentionally released the vehicle to Hall after she signed all the title papers. App. 1, Doc. 8 at p. 63. His decision to not mail the application and remittance fee to the Department within 30 days was done intentionally or at least knowingly. Such was the reasonable inference drawn by the ALJ.

Sample knew he had the duty to remit the fees and he chose not to take any action to notify the Department about an inability to receive payment from Hall. See App. 1, Doc. 8 at p. 61 (Sample explaining that he received a previous violation for not remitting fees). See also App. 1, Doc. 8 at pp. 23-26; App. 12-13. Sample could have made efforts to rectify the problem with the Department and did not. From the evidence and testimony presented at the hearing, a reasoning mind reasonably could have determined that Sample willfully failed in his duty as a licensed motor vehicle dealer to mail the application and remittance fee to the Department within 30 days after issuing a notary certificate, and therefore there are grounds to affirm the ALJ's factual finding.

II. The Department has the authority to suspend Sample for violating N.D.C.C. § 39-04-17.

The Department's authority to suspend or revoke a dealer's license is found in N.D.C.C. § 39-22-04. The statute provides in relevant part:

The director may deny an application for a dealer's license or suspend, revoke, or cancel a dealer's license after it has been granted for . . . willfully violating a law relating to the sale, distribution, or financing of motor vehicles

(emphasis added).

Because Sample's violation of N.D.C.C. § 39-04-17 related to the sale and/or distribution of the 1999 Dodge Pickup, N.D.C.C. § 39-22-04 permits the Department to suspend Sample's dealer license. The issuance of a notary certificate coincides with the sale of a motor vehicle. Without the sale of a motor vehicle there is no reason for a notary certificate to be issued by a dealer and affixed to a purchaser's vehicle. The issuance of the notary certificate places a duty on a dealer to take care of registration and licensing of the vehicle for the purchaser.

Sample acknowledged that he sold the vehicle to Rhonda Hall on September 15, 2007. App. 1, Doc. 8 at p. 63, ll. 2-7; p. 65, ll. 21-23; Ex. A, p. 9. Although Sample did not receive payment from Hall on that date, Sample recognized the transaction as a sale of the vehicle. Sample intentionally issued and affixed a notary certificate onto the 1999 Dodge pickup and released it into Hall's possession. By intentionally releasing the vehicle into Mrs. Hall's possession Sample accepted the duty to remit the application and remittance fee to the Department within 30 days. It is undisputed that the fees were not paid until 6 months later, on March 15, 2008.

The ALJ, concluded in relevant part:

5. N.D.C.C. section 39-22-04 authorized the DOT to suspend a dealer's license for willfully violating a law relating to the sale, distribution, or financing of motor vehicles. N.D.C.C. section 39-04-

17 is a law relating to the sale of motor vehicles. The DOT has the authority to suspend Sample's dealer license for a violation of N.D.C.C. section 39-04-17 proven at the hearing. . . . Sample willingly issued the Certificate; he willingly did not mail in the application for registration or the remittance fee for the Hall vehicle. He chose this course of action. That he may have been mistaken as to the result of his actions in that he chose to believe that he had no further obligation or responsibility with regard to issuing the certificate because Hall had not paid him in cash the next day as promised does not mean that Sample's course of action was not willful. Thus, another three day suspension for this second violation is certainly appropriate for this second violation of N.D.C.C. Title 39, relating to the sale of motor vehicles.

App. 13-14 (emphasis added).

Sample further argues that N.D.C.C. § 39-04-17 only gives the Department authority to impose a fine upon him for \$50. Sample's argument is erroneous. As explained above, the Department's authority to suspend Sample comes from N.D.C.C. § 39-22-04. The minimum \$50 fine mentioned in N.D.C.C. § 39-04-17 applies to those in possession of the notary certificate. The two statutes are not in conflict with one another. It is true that Trooper Pulver could have issued a fine to Robin Hall for driving the vehicle with an expired notary certificate, on March 12, 2008, but in his discretion chose not to. However, Hall's violation is not at issue in this case. At issue is whether Sample violated a duty relating to the sale of a motor vehicle under Section 39-22-04, N.D.C.C. As shown above, the issuance of a Certificate of notary under N.D.C.C. § 39-04-17 relates to the sale of a motor vehicle and, therefore, the Department has authority to suspend Sample's license.

In the alternative, even if this Court determines that the language of the minimum \$50 fine applies equally to licensed motor vehicle dealers as it does to owners in possession of the certificate, N.D.C.C. § 39-04-17 does not explicitly prevent the Department from suspending dealers who fail to remit fees. Nothing in the statute specifically deprives the Department from penalizing a dealer over and above that of a \$50 fine. In fact, the statute identifies the \$50 fine as the

minimum punishment. See N.D.C.C. § 39-04-17 (stating, “[a]ny violation of this section is an infraction punishable by a fine of not less than fifty dollars”) (emphasis added).

This Court has observed that “Section 1-02-07 expresses a preference for a ‘special provision’ of the Century Code over a ‘general provision’ of the Century Code when the two provisions are ‘irreconcilable.’” However, section 1-02-07 first requires the general and special provision to be harmonized if possible. Johnson v. N.D. Workers Comp. Bur., 428 N.W.2d 514 (N.D. 1988).

The two statutes are easily harmonized. N.D.C.C. § 39-22-04 is the specific statute and N.D.C.C. § 39-04-17 is the general statute. N.D.C.C. § 39-22-04 is specific to licensed motor vehicle dealers. N.D.C.C. § 30-04-17, on the other hand, applies generally to both the general public and dealer’s alike. Under N.D.C.C. § 39-22-04, the Department has authority to regulate and punish dealers for violating any law relating to the sale, distribution or financing of a motor vehicle. In this case, the law Sample, a license motor vehicle dealer, violated was N.D.C.C. § 39-04-17.

As shown above, Sample violated N.D.C.C. § 39-04-17 as it related to his sale of a motor vehicle to Rhonda Hall. Although, N.D.C.C. § 39-04-17 provides a punishment of a minimum \$50 fine for violating the statute, this fine would be applicable to dealers and non-dealers alike. N.D.C.C. § 39-22-04, on the other hand, only applies to licensed motor vehicle dealers. Because the two statutes are not in conflict and because Sample is a licensed motor vehicle dealer, the provisions of N.D.C.C. § 39-22-04 take precedence over that of N.D.C.C. § 39-04-17. Therefore, the Department had authority to suspend Sample for his conduct.

The legislature has granted the Department the authority to suspend motor vehicle dealer licenses. See N.D.C.C. § 39-22-04. The statute does not


provide any limits or give any directives on the extent or length of suspensions. Thus, the length of the suspension has been left to the sole discretion of the Department. Here, the Department notified Sample that it intended to suspend his dealer license for 3 days. This was not improper under the statute. Therefore, Sample's enhancement argument is erroneous. While the Department chose to seek a 3 day suspension based, in part, on a previous violation, nothing in the statute prevents the Department from doing so. The Department was simply providing justification at the hearing for seeking a 3 day suspension on Sample's notary sticker violation. No improper enhancement took place.

CONCLUSION

The Department respectfully requests that this Court affirm the judgment of the Burleigh County District Court and the Department's decision suspending Sample's dealer license for 3 days.

Dated this 20th day of May, 2009.

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