

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 4, 2010
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Christian Robert Wolfer,)	
)	
Plaintiff/Appellant,)	
)	
v.)	Supreme Court No. 20090346
)	
North Dakota Department of,)	Burleigh County No. 08-09-C-1291
Transportation,)	
)	
Defendant/Appellee.)	

REPLY BRIEF OF APPELLANT

Appeal from Judgment, dated and filed September 18, 2009

Entered Upon September 17, 2009, Order for Judgment and

September 15, 2009, Memorandum Opinion and Order

Affirming hearing officer's decision

Burleigh County District Court

South Central Judicial District

The Honorable David E. Reich

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[¶1] TABLE OF AUTHORITIES

North Dakota statutes

N.D.C.C. § 28-32-35 ¶¶5-6

N.D.C.C. § 39-20-05 ¶¶3, 5

North Dakota cases

Landsiedel v. Director, North Dakota Department of Transportation,
2009 ND 196, 774 N.W.2d 645 ¶¶3-6, 12

Morrell v. N. Dak. Dept. of Transportation,
1999 ND 140, 598 N.W.2d 111 ¶¶7-10

[¶2] LAW AND ARGUMENT

[¶3] The Department essentially argues that the DOT’s unilateral determination to conduct Mr. Wolfer’s hearing telephonically did not violate N.D.C.C. § 39-20-05, because *Landseidel v. Director, NDDOT* only requires that the hearing officer and the driver be in-person. However, this is not in accord with the holding in *Landsiedel*. In *Landsiedel*, this Court held that “the Legislature intended for the Department to conduct in-person hearings” as opposed to telephonic hearings. *See Landsiedel v. Director, North Dakota Department of Transportation*, 2009 ND 196, ¶12, 774 N.W.2d 645. This Court did not articulate any special exception for law enforcement officers to appear telephonically. Indeed, what good is an “in-person” hearing if the lone witness is sequestered away in a remote location, accessible only by telephone, and testifying from undisclosed documents?

[¶4] The *Landsiedel* court held that “the Department cannot unilaterally determine hearings will be conducted telephonically.” *See Landsiedel*, 2009 ND 196 at ¶12. In our case, because the Department’s hearing officer unilaterally determined that Mr. Wolfer’s hearing would be conducted telephonically and thereafter conducted the hearing telephonically over Mr. Wolfer’s objection, “the Department failed to conduct” Mr. Wolfer’s administrative hearing “in accordance with the law.” *See Landsiedel*, 2009 ND 196 at ¶15.

[¶5] The holding in *Landsiedel* controls here. Yet, time and again the Department argues that N.D.C.C. § 28-32-35 controls and that it permitted the DOT to unilaterally determine that Mr. Wolfer’s hearing would be conducted telephonically. However, the *Landsiedel* court stated unequivocally: “Because N.D.C.C. § 39-20-05

does not permit the Department to unilaterally determine hearings will be telephonic, N.D.C.C. § 28-32-35 also prohibits the Department from making such determinations.” See *Landsiedel*, 2009 ND 196 at ¶13.

[¶6] In fact, in the district court’s pre-*Landsiedel* decision, Judge Reich relied heavily upon N.D.C.C. § 28-32-35 and his own belief that the Department’s unilateral determination to conduct telephonic hearings was permissive. This was a misapplication of the law.

[¶7] Also, the Department really did not address the notice irregularity or deficiency in this case and the fact that Wolfer was unfairly surprised by the last-minute telephonic hearing. “Due process requires a participant in an administrative proceeding be given notice of the general nature of the questions to be heard, and an opportunity to prepare and be heard on those questions.” See *Morrell v. N. Dak. Dept. of Transportation*, 1999 ND 140, ¶9, 598 N.W.2d 111. Notice is sufficient only “if it informs the party of the nature of the proceedings so there is no unfair surprise.” See *id.* Mr. Wolfer was unfairly surprised when he arrived at the hearing and learned that the lone witness against him was appearing from Devils Lake without any such notice. Notice was not sufficient here.

[¶8] Instead, the Department argues that “by choosing to proceed with the administrative hearing without requesting a continuance of the hearing to allow the personal attendance of the arresting officer, Wolfer waived any claim of irregularity.” See Appellee’s Brief at 10. However, the Department made a similar argument in *Morrell v. N. Dak. Dept. of Transportation* that did not succeed before this Court. See *Morrell v. N. Dak. Dept. of Transp*, 1999 ND 140, 598 N.W.2d 111. In *Morrell*, this

Court instructed the DOT that “[i]n raising this argument, the Department attempts to place the burden on Morrell to request a continuance.” *See id* at ¶12 (emphasis added).

Here, like in *Morrell*, “[b]ecause it was the hearing officer who sent the improper notice to [Wolfer], if a continuance were to be requested, it was the Department or the hearing officer who should have” requested a continuance.” *See id* at ¶14. It was not Mr.

Wolfer’s burden to request a continuance.

[¶9] Indeed, the hearing officer attempted to shift the burden for his improper and inadequate notice to Mr. Wolfer as follows:

“MR. VUKELIC: ... Now you have objected to this hearing going forward today, telephonically, and I’m offering you the opportunity for a continuance.

...

MR. HERBEL: “You’re offering me an opportunity to request a continuance?”

(DOT Administrative Hearing Transcript (“Tr.”) at 5, lines (“L.”) 20-25). Also, the hearing officer’s decision states that Wolfer “did not request a continuance though one was offered.” (Hearing Officer’s Decision, attached to Transcript of DOT Administrative Hearing). Like in *Morrell*, “the Department attempts to place the burden on” Wolfer “to request a continuance.” *See Morrell*, 1999 ND 140 at ¶12.

[¶10] However, like noted in *Morrell*, “[a] continuance could create problems with the timing of the administrative hearing.” *See Morrell*, 1999 ND 140 at ¶14, fn.1. In our case, like *Morrell*, the date of the hearing was on the 27th day following the issuance of the temporary operator’s permit. *See id*. Therefore, there were only three days remaining to complete the hearing.

[¶11] Mr. Wolfer took time off from work for the hearing only to find that the hearing officer had made a unilateral arrangement with the trooper for a telephonic hearing. When Mr. Wolfer objected to the hearing that was already postured against him, the hearing officer placed the burden on Mr. Wolfer to immediately arrange for more time off in order to rectify the hearing officer's deficient notice. When Mr. Wolfer could not immediately provide time off in the next two days, the hearing officer went forward with the telephonic hearing. The Department did not request or order a continuance. This gotcha!-style process does not resemble due process. Mr. Wolfer was not treated fairly and this Court should not condone the procedure in this case.

[¶12] The Department argues on appeal that Wolfer waived his right to due process. However, neither the hearing officer nor the district court concluded that Wolfer waived his right to due process. In fact the hearing officer determined that "Wolfer was not denied due process" because "[s]everal district court decisions have upheld taking of testimony by telephone at implied consent hearings." (Hearing Officer's Decision, attached to Transcript of DOT Administrative Hearing). The hearing officer's decision, as well as the decision of the district court, was issued before *Landsiedel*. It is clear now that *Landsiedel* controls. See *Landsiedel*, 2009 ND 196.

[¶13] CONCLUSION

[¶14] For the foregoing reasons, Christian Wolfer respectfully requests that this Court reverse the decision of the district court and reinstate his driving privileges.

Respectfully submitted
this 4th day of February, 2010.

/s/ Dan Herbel

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[¶15] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on February 4, 2010, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Michael Pitcher, counsel for Appellee, at the following:

Electronic filing TO: "Michael Pitcher" < mtpitcher@nd.gov >

Dated this 4th day of February, 2010.

/s/ Dan Herbel

Dan Herbel