

FILED  
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CLERK OF SUPREME COURT  
AUGUST 13, 2010  
STATE OF NORTH DAKOTA

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Eugene Mike Berger,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	Supreme Court No. 20100189
	)	
North Dakota Department of,	)	Morton County No. 30-10-C-212
Transportation,	)	
	)	
Defendant/Appellee.	)	

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BRIEF OF APPELLANT

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Appeal from Judgment, dated and filed May 13, 2010

Entered Upon May 13, 2010, Order for Judgment and

May 10, 2010, Order

Affirming hearing officer's decision

Morton County District Court

South Central Judicial District

The Honorable Donald L. Jorgensen

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[¶2] STATEMENT OF THE CASE

[¶3] On January 9, 2010, Eugene Berger was arrested for driving under the influence and was issued a temporary operator's permit. (Exhibit 1b, Transcript of DOT Administrative Hearing). Mr. Berger timely requested an administrative hearing and the Department of Transportation ("Department" and "DOT") set his hearing for March 1, 2010, at 2:30 p.m., after consulting with Mr. Berger and his counsel. (Exhibit 13, Transcript of DOT Administrative Hearing).

[¶4] Thereafter, the hearing officer twice unilaterally re-scheduled the hearing to accommodate the schedule of the law enforcement officer, but did not consult with Mr. Berger or Berger's counsel. The first hearing date was unilaterally moved up six (6) days sooner than originally scheduled. As a result of the hearing officer's actions, Mr. Berger was unable to attend his own hearing.

[¶5] Berger's counsel lodged repeated objections to the unilateral re-scheduling, but the hearing officer went forward with the hearing without Mr. Berger being able to attend. The hearing officer suspended Mr. Berger's driving privileges for a period of two (2) years. *See* Hearing Officer's Decision (Transcript attachment).

[¶6] On March 8, 2010, Mr. Berger filed a Notice of Appeal and Specifications of Error with the District Court alleging numerous errors in the DOT administrative proceedings. (Appendix ("App.") at 6 and 3-5, respectively). After both Petitioner and Respondent submitted written arguments to the district court, the court issued its Order affirming the decision of the hearing officer. (App. 31-35).

[¶7] On May 14, 2010, the Department mailed Mr. Berger the Judgment, Order for Judgment, and Notice of Entry of Judgment in this matter. (App. 36-38). On June 24,

2010, Berger filed a Notice of Appeal to this Court seeking relief. (App. 39-40). Mr. Berger asks this court to reverse the decision of the district court and to reinstate his driving privileges.

#### [¶8] STATEMENT OF THE ISSUES

- I. The order is not in accordance with the law, the provisions of Chapter 28-32, N.D.C.C. have not been complied with in the proceedings before the agency, and the rules or procedure of the agency have not afforded the appellant a fair hearing
- II. The order is in violation of Mr. Berger's constitutional rights because he was denied due process

#### [¶9] STATEMENT OF THE FACTS

[¶10] On January 9, 2010, at approximately 12:56 a.m., Trooper Shannon Henke of the North Dakota Highway Patrol had contact with Eugene Berger on Highway 1806 in Mandan, ND. (DOT Administrative Hearing Transcript ("Tr.") at 11, lines ("L.") 10-15). Mr. Berger was subsequently placed under arrest for DUI. (Tr. at 16, L. 14-15).

[¶11] Mr. Berger timely requested an administrative hearing regarding the potential suspension of his driving privileges. (Exhibit 1f). On February 10, 2010, the hearing officer, after conferring with Berger's counsel about the availability of Berger and his counsel, mailed out a written Notice of the administrative hearing indicating that the hearing was scheduled for the agreed upon date and time of March 1, 2010, at 2:30 p.m. (Exhibit 13). Subsequently, the hearing officer unilaterally changed the date and time of the hearing after conferring with the trooper, a non-party witness, but not conferring with Berger or Berger's counsel. The hearing officer changed the hearing date

to accommodate the trooper's schedule, but was unconcerned about Mr. Berger's schedule. (Tr. at 9, L. 23-25).

[¶12] The hearing officer unilaterally changed the hearing date to February 23, 2010, at 11:00 a.m., moving it up by one week. (Exhibit 14). The hearing officer explained that he "looked at the calendar" and noticed that Berger's counsel had a different DOT "hearing at 10:00" and so he unilaterally "rescheduled the hearing" for 11:00 a.m., without conferring with Berger or Berger's counsel. (Tr. at 1, L. 16-19). The hearing officer mailed out an amended notice on February 12, 2010 – the Friday before the long President's Day holiday weekend. (Exhibit 14).

[¶13] On February 19, 2010, Berger's counsel sent a letter to the hearing officer stating the following:

"I am writing in response to your changing of the date and time for Mr. Berger's administrative hearing. As you know, after our preliminary discussion we agreed upon a time and date for the hearing and it was set for March 1, 2010, at 2:30 p.m. Mr. Berger then took time off from work so that he could attend the March 1, 2010, hearing. Since you have reset the hearing, Mr. Berger is now unable to attend. Mr. Berger wants to be present.

Accordingly, I am requesting that you place the March 1, 2010, hearing back on the calendar as agreed to."

*See* February 19, 2010, letter to Hearing Officer Vukelic (attached as Petitioner's exhibit A). Not getting any response back from the hearing officer, Berger's counsel showed up at the rescheduled hearing on February 23, 2010, at 11:00 a.m., objected to the hearing, and asked that the hearing be set back to its original date and time. (Tr. at 3, L. 6-15). However, the hearing officer had already given away Mr. Berger's time slot to another Petitioner.

[¶14] The hearing officer then asked Berger's counsel if counsel would be available at 8:00 a.m. on March 1, 2010. (Tr. at 3, L. 21-24). Berger's counsel informed the hearing officer that counsel would be available but he was not sure that Berger was available. The following exchange ensued:

“MR. HERBEL: I want to check with my client to make sure that he can be here. I know he was ... I know he has 2:30 off, for the hearing.

MR. VUKELIC: How soon can you contact him?

MR. HERBEL: I can call him. I should be able to find out over the noon hour today.

MR. VUKELIC: Well, we either have to go forward now at 11:00, or we're going to continue it until Monday. So what are your wishes?

MR. HERBEL: Well ... and just for the record, I ... I didn't not resched ... I did not reset this hearing until today.”

(Tr. at 4, L. 20 – 5, L. 5). Even though this exchange happened between 11:00 a.m. and noon, the hearing officer would not wait and allow Berger's counsel to confer with Berger over the noon hour to check Berger's availability. Instead, the hearing officer ordered the hearing continued until March 1, 2010, at 8:00 a.m. (Tr. at 6, L. 4-6).

[¶15] Early the next morning, on February 24, 2010, Berger's counsel e-mailed the hearing officer and informed him:

“[Mr.Berger] had taken off the afternoon of March 1, 2010, for the hearing. He did not take off the morning. Accordingly, he is available the afternoon of March 1. Please contact me so that we can schedule a hearing for the afternoon of March 1st as originally agreed to.”

*See* February 24, 2010, e-mail to Hearing Officer Vukelic (attached as Petitioner's exhibit B). The hearing officer refused to reschedule the hearing.

[¶16] On March 1, 2010, Mr. Berger's DOT hearing went forward without Mr. Berger being allowed to be present. Berger's counsel noted his continuing objection to the hearing. Despite the objection, the hearing went forward and the hearing officer suspended Mr. Berger's driving privileges for 2 years.

#### [¶17] STANDARD OF REVIEW

[¶18] The Administrative Agencies Practice Act, N.D.C.C. ch 28-32, governs review of an administrative decision to suspend or revoke a driver's license." *See Dworshak v. Moore*, 1998 ND 172, ¶6, 583 N.W.2d 799. "This Court will affirm the agency's decision unless:

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.

N.D.C.C. § 28-32-46." *See Lee v. NDDOT*, 2004 ND 7, ¶8, 673 N.W.2d 245. "In reviewing a license suspension, we give deference to the Department's findings" and



determine “only whether a reasoning mind could have concluded the Department's findings were supported by the weight of the evidence from the entire record.” *See Eriksmoen v. NDDOT*, 2005 ND 206, ¶7, 706 N.W.2d 610. “An agency's decisions on questions of law are fully reviewable.” *See Landsiedel v. Director, North Dakota Department of Transportation*, 2009 ND 196, ¶6, 774 N.W.2d 645.

#### [¶19] LAW AND ARGUMENT

- I. The order is not in accordance with the law, the provisions of Chapter 28-32, N.D.C.C. have not been complied with in the proceedings before the agency, and the rules or procedure of the agency have not afforded the appellant a fair hearing

[¶20] In this case, the hearing officer abandoned his duty under N.D.C.C. § 28-32-31(3) to assure that Mr. Berger’s hearing and related proceedings were conducted in a fair and impartial manner when he twice unilaterally rescheduled Mr. Berger’s hearing after consulting the arresting officer but not consulting with Mr. Berger. As a result, Mr. Berger was not able to attend his own hearing, even though he had specifically expressed to the hearing officer a desire to be present.

[¶21] The district court may reverse a decision of the DOT if “[t]he order is not in accordance with the law.” *See* N.D.C.C. § 28-32-46(1). Section 28-32-31(3), N.D.C.C., directs that the hearing officer shall “[a]ssure that all hearings and related proceedings are conducted in a fair and impartial manner.” The hearing officer in this case twice unilaterally changed the time and date for Mr. Berger’s DOT hearing, without conferring with Berger, and then substituted another driver’s hearing at the time originally set for Mr. Berger’s hearing on the afternoon of March 1<sup>st</sup>, after Mr. Berger had already taken time off from work on the afternoon of March 1<sup>st</sup>. Consequently, Mr.

Berger could not attend his own DOT hearing. The conduct of the hearing officer did not assure that the proceedings were conducted in a fair and impartial manner. Indeed, what the hearing officer did was unfair to Mr. Berger and it secured his absence at his own hearing. Because the hearing officer did not comply with N.D.C.C. § 28-32-31(3), the order is not in accordance with the law and the DOT's decision should be reversed.

[¶22] The district court may also reverse a decision of the DOT if “the provisions of this chapter [Chapter 28-32, N.D.C.C.] have not been complied with in the proceedings before the agency” or if “[t]he rules or procedure of the agency have not afforded the appellant a fair hearing.” *See* N.D.C.C. § 28-32-46(3) and (4). The hearing officer in this case found that “Berger's hearing was re-scheduled for 11:00 a.m. on February 23, 2010 to accommodate ... Mr. Herbel's schedule” and concluded that Berger “argues the arresting officer is not a party and therefore a hearing officer should make no effort to accommodate the arresting officer's schedule.” *See* Hearing Officer's Decision. At first blush, these findings seem inconsistent. In fact, the only thing consistent about the two findings is that each is consistently divorced from the truth. Mr. Berger never argued that the hearing officer should make no effort to accommodate the arresting officer's schedule. The problem here is that the arresting officer's schedule was the only schedule accommodated, such that Mr. Berger was unable to attend his own hearing.

[¶23] The hearing officer also found that “[g]iven a choice of proceeding on February 23 or continuing the matter until March 1, at 8:00 a.m., Mr. Herbel chose the latter.” *See* Hearing Officer's Decision. In reality, the hearing officer chose the morning of March 1<sup>st</sup>, after unilaterally changing the date and time of Mr. Berger's hearing so that Berger was unable to attend his own hearing.

[¶24] The aforementioned evidences that the provisions of Chapter 28-32, N.D.C.C. were not complied with in the proceedings before the agency and that the rules and procedure of the agency did not afford Mr. Berger a fair hearing. *See* N.D.C.C. § 28-32-46(3) and (4). Accordingly, the DOT's decision should be reversed.

[¶25] Additionally, the hearing officer tried to justify his unilateral changing of the calendar by improperly injecting his own self-serving and unsubstantiated testimony at Mr. Berger's hearing and then making findings and conclusions based on that improper testimony. The testimony and corresponding objection were as follows:

“MR. VUKELIC: Now, Mr. Herbel, we have something like 1,700 hearings that we conduct every year, between four full time and two part time hearing officers. As you are well aware, the time constraints are such that we have a very limited amount of time in which we can hold the hearings. We do our very best to accommodate the schedules of not only ourselves, and we have many hearings to hold, but of the attorneys, and of the witnesses and the petitioners. In probably half of the hearings that I hold each year, the petitioner does not attend. Either ...

MR. HERBEL: I would object to this ...

MR. VUKELIC: Excuse me.

MR. HERBEL: ... as testimony.

MR. VUKELIC: Well, you can object, but I'm telling you what is going on and my reasoning for the ruling. Because half of the time the petitioner doesn't come, we have to go forward with the hearings. The statutes in North Dakota contemplate that the arresting officer testify. So they are necessary persons to attend.

...

MR. HERBEL: And I ... I would move to strike the testimony re ... regarding the number of hearings per year, as well as the assertion and testimony that half the people don't attend. I don't ... I think that's testimony from the hearing officer that shouldn't be included in the record.”

(Tr. at 9, L. 6 – 10, L. 15). The hearing officer then used his self-serving testimony as the basis for findings of fact and conclusions of law.

[¶26] Section 28-32-24(5), N.D.C.C., provides that “[a]ll testimony [at a DOT hearing] must be made under oath or affirmation” and that statements “presented by nonparties may be received as evidence” only “if all parties are given an opportunity to cross-examine the nonparty witness or to otherwise challenge or rebut the statements.” Here, the hearing officer was not placed under oath before his testimony and he testified about purported documents not in evidence relating to administrative hearings. Because the hearing officer was not under oath and because no opportunity was provided to cross-exam the hearing officer about his self-serving testimony, unsubstantiated by any documents, the order was therefore not in accordance with the law, the provisions of Chapter 28-32, N.D.C.C. were not complied with in the proceedings before the DOT, and the rules and procedure of the DOT did not afford Mr. Berger a fair hearing. *See* N.D.C.C. § 28-32-46(1), (3), and (4). Accordingly, the DOT’s decision should be reversed. Even with the improper testimony in the record, there is no justification for unilaterally changing Mr. Berger’s hearing so that he could not attend his own hearing.

II. The order is in violation of Mr. Berger’s constitutional rights because he was denied due process

[¶27] “It is well settled that a driver's license is a protectable property interest that may not be suspended or revoked without due process.” *See Morrell v. N. Dak. Dept. of Transportation*, 1999 ND 140, ¶8, 598 N.W.2d 111. “Due process requires notice and an opportunity to be heard.” *See Wolfer v. N.D. Department of Transportation*, 2010 ND

59, ¶11, 780 N.W.2d 645. “Fairness of procedure is due process in the primary sense.” See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161, 71 S.Ct. 624 643, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). “[A] fair trial in a fair tribunal is a basic requirement of due process.” See *Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975).

[¶28] “The requirement of “due process” is not a fair-weather or timid assurance. It must be respected.” See *McGrath*, 341 U.S. at 162. “Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, “due process” is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.” See *id* at 162-63.

[¶29] A driver has a due process right to attend his own DOT administrative hearing and the hearing officer cannot unilaterally change the time for the driver’s hearing so that the driver is thereafter unable to attend his own hearing. Fundamental fairness weighs heavily against such a practice. Because the hearing officer unilaterally rescheduled Mr. Berger’s hearing after consulting the arresting officer but not consulting with Mr. Berger, resulting in Mr. Berger not being able to attend his own hearing after he had specifically expressed to the hearing officer a desire to be present, Mr. Berger was therefore denied due process in his administrative proceedings.

[¶30] Additionally, the unilateral amending of notice in this case amounted to insufficient notice in the context of due process. Furthermore, the resulting inability of Mr. Berger to attend his own hearing because of the hearing officer’s unilateral action deprived Mr. Berger a meaningful opportunity to be heard.

[¶31] The district court may reverse a decision of the DOT if “[t]he order is in violation of the constitutional rights of the appellant. See N.D.C.C. § 28-32-46(1). Since the order of the DOT is in violation of the constitutional rights of Mr. Berger, the DOT’s decision and order should be reversed.

[¶32] CONCLUSION

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

Respectfully submitted  
this 13<sup>th</sup> day of August, 2010.

*/s/ Dan Herbel*

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[¶34] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on August 13, 2010, the BRIEF OF APPELLANT and the APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Michael Pitcher, counsel for Appellee, at the following:

Electronic filing TO: “Michael Pitcher” < [mtpitcher@nd.gov](mailto:mtpitcher@nd.gov) >

Dated this 13<sup>th</sup> day of August, 2010.

*/s/ Dan Herbel*

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Dan Herbel