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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Paul Alfred Schock, Plaintiff/Appellant, v. North Dakota Department of Transportation, Defendant/Appellee.	)	Supreme Court No. 20110254 Mercer County No. 29-2011-CV-01084

BRIEF OF APPELLANT

Appeal from Judgment, dated and filed August 25, 2011,

Entered Upon the July 28, 2011, Order of Denial (of Reconsideration), and

the July 20, 2011, Order on Appeal, affirming the Hearing Officer's Decision,

all filed in Mercer County District Court

South Central Judicial District

The Honorable Bruce B. Haskell

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[¶2] STATEMENT OF THE CASE

[¶3] On March 13, 2011, Paul Schock was arrested "for driving under the influence of alcohol." (DOT Administrative Hearing Transcript ("Tr.") at 7, lines ("L.") 9-10). Mr. Schock was issued a temporary operator's permit, which showed the time of driving to be 12:54 a.m., and the time of the chemical breath test to be 3:07 a.m. (Appendix ("App.") at 3b) (Exhibit 1b from the hearing). Mr. Schock timely requested an administrative hearing and, on Friday, April 8, 2011, the Department of Transportation ("Department" and "DOT") held a hearing for Mr. Schock "in the jury room of the Mercer County Courthouse in Stanton, North Dakota." (Tr. at 1, L. 5-6).

[¶4] Instead of issuing the administrative decision to Mr. Schock, who was present, the hearing officer left the courthouse and then mailed out his decision on Monday, April 11, 2011 – 3 days later. Despite there being a gap of time between driving and the breath test in excess of three (3) hours, the hearing officer nevertheless determined that the breath "test was conducted within two hours of driving" and suspended Mr. Schock's driving privileges for a period of 180 days. (App. 4).

[¶5] On April 13, 2011, Mr. Schock filed a Notice of Appeal and Specifications of Error with the District Court alleging numerous errors in the DOT administrative proceedings. (App. 5-7). After both Petitioner and Respondent submitted written arguments to the district court, the court issued its Order on Appeal affirming the decision of the hearing officer. (App. 28-29).

[¶6] The day after the district court affirmed the hearing officer's decision, Mr. Schock moved for reconsideration of the court's order. (App. 30-32). The district court

denied Mr. Schock's request for reconsideration without providing any basis for denying said request and without providing any analysis. (App. 36).

[¶7] On August 26, 2011, the Department mailed Schock the Judgment, Order for Judgment, and Notice of Entry of Judgment in this matter. (App. 37-39). On August 31, 2011, Schock filed a Notice of Appeal to this Court seeking relief. (App. 40-41). Schock asks this court to reverse the decision of the district court and to reinstate his driving privileges. Schock also asks this court to determine that attorney's fees and costs are warranted.

[¶8] STATEMENT OF THE ISSUES

I. Because there was no evidence presented establishing that the chemical test was performed within two (2) hours of driving a motor vehicle, the order suspending Mr. Schock's driving privileges is not in accordance with the law

II. The hearing officer's failure to abide by the immediacy requirement of N.D.C.C. § 39-20-05(5) was not in accordance with law

III. The hearing officer's decision is without substantial justification and is so starkly in contravention of North Dakota law as to warrant the imposition of attorney's fees and costs as allowed by N.D.C.C. § 28-32-50

[¶9] STATEMENT OF THE FACTS

[¶10] On March 13, 2011, "at 12:54 in the morning," Officer Hirchert of the Beulah Police Department had "contact with Paul Schock" after performing a stop on Mr. Schock's vehicle for a traffic violation in the City of Beulah, ND. (Tr. at 3, L. 1-12). Mr. Schock was subsequently placed under arrest for DUI. (Tr. at 7, L. 9-10). Mr. Schock provided a breath sample at 3:07 a.m. (App. 3b) (Exhibit 1b from the hearing).

Officer Hirchert then filled out a Report and Notice form, signed it, and "provide[d] a copy of it to Mr. Schock." (Tr. at 9, L. 7-12).

[¶11] At his administrative hearing, Mr. Schock requested that the driver's license matter be dismissed because:

> "[T]here is insufficient evidence in the record to establish that the [breath] test was performed within two hours of driving. The evidence in the record indicates that the test was performed outside of the two-hour timeframe, and that's insufficient to suspend Mr. Schock. We would ask that based upon the insufficiency of the evidence, the inability to establish that testing was performed within two hours of driving, that the matter be dismissed."

(Tr. at 9, L. 7-12). Instead of issuing his decision immediately, the hearing officer mailed out the decision three (3) days later, after back-dating the decision. (App. 4). Although there was no testimony advanced nor any evidence introduced relating to daylight savings time or its effect, if any, on the intoxilyzer machine, the hearing officer found that the breath "test was conducted within two hours of driving" because "[d]aylight savings time took effect at 2:00 a.m. on March 13, 2011." (App. 4). The hearing officer did not make any finding relating to a Chemical Test Operator Manual. (App. 4). The hearing officer suspended Mr. Schock's driving privileges for 180 days. (App. 4).

[¶12] Mr. Schock appealed to the district court and argued that evidence presented at the administrative hearing showed that the chemical test was not performed within two (2) hours of driving and that "there was no testimony advanced nor any other evidence introduced that daylight savings time played any role in the time of the chemical test." (App. 9-10). The DOT responded on brief by continually referring to a Chemical Test Operator Manual that was never offered, admitted, or made part of the administrative record. (App. 17-19). Indeed, the Department argued that, although the

Manual was not offered or admitted, it is nevertheless an item "which the Department could introduce" and one that "may be offered." (App. 18) (emphasis added).

[¶13] The district court relied almost exclusively on the Chemical Test Operator Manual, which was never offered, admitted, or made part of the administrative record, and affirmed the hearing officer's decision. (App. 28-29). The district court also found that because "[t]he hearing officer did orally inform the appellant of his findings and conclusion at the completion of the hearing," it was acceptable that the decision was not immediately issued to Mr. Schock. (App. 29).

[¶14] Mr. Schock then filed a motion to reconsider with the district court and asked the court to reconsider its ruling since it had relied exclusively on evidence that was not in the record, in violation of N.D.C.C. § 28-32-24. (App. 30-31). Mr. Shock also corrected the district court by explaining to the court that the hearing officer did not orally inform the appellant of his findings and conclusions at the completion of the hearing, but instead, immediately left the courthouse in Stanton, ND, and mailed out his decision three (3) days later. (App. 31). The DOT stipulated to the fact that the hearing officer did not orally inform Schock of his findings and conclusions at the completion of the hearing. (App. 34).

[¶15] The district court replied to Schock's motion to reconsider by ruling: "The Appellant's Motion to Reconsider is DENIED." (App. 36). The district court denied Mr. Schock's request for reconsideration without providing any basis for denying the request and without providing any legal analysis. (App. 36).

[¶16] STANDARD OF REVIEW

[¶17] "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. "The interpretation of a statute is a question of law." *See Aamodt v. N.D. Department of Transportation*, 2004 ND 134, ¶14, 682 N.W.2d 308. "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.

[¶18] LAW AND ARGUMENT

I. Because there was no evidence presented establishing that the chemical test was performed within two (2) hours of driving a motor vehicle, the order suspending Mr. Schock's driving privileges is not in accordance with the law

[¶19] The DOT may impose an administrative sanction against a driver, under N.D.C.C. § 39-20-04.1, if "test results show that the arrested person was driving … a vehicle while having an alcohol concentration of at least eight one-hundredths of one percent by weight … at the time of the performance of a test within two hours after driving … a motor vehicle." *See* N.D.C.C. § 39-20-04.1 (emphasis added). Therefore, for a driver's license suspension under N.D.C.C. § 39-20-04.1, there must be proof adduced that a chemical test was performed within two hours of driving. In our case, the police officer did not establish that Mr. Schock's breath test was performed within two hours of driving.

[¶20] "The Department's "Report and Notice Form" … becomes a regularly kept record of the Department, and is admissible as prima facie evidence of its contents once it is forwarded to the director of the Department." *See Maher v. Dept. Of Transportation*, 539 N.W.2d 300, 303 (N.D. 1995). Therefore, the contents of the Report and Notice form alone can establish the time of driving and the time of testing. *See id*. In our case, the Report and Notice form shows that the time of driving was 12:54 a.m., and that the time of testing was 3:07 a.m. – more than two (2) hours apart. (App. 3b) (Exhibit 1b from the hearing). There was no other evidence admitted regarding the time of driving or the time of testing. The DOT has consistently taken the position that the Report and Notice form "is prima facie evidence of the time" of driving, especially when that "evidence was not refuted." *See Pavek v. Moore*, 1997 ND 77, ¶8, 562 N.W.2d 574.

[¶21] Even though the only evidence in the record indicates the testing was not performed within two hours of driving, the hearing officer stunningly found that "[d]aylight savings time took effect at 2:00 a.m. on March 13, 2011," and presumably found that the test was within two hours of driving. However, there was no testimony advanced nor any other evidence introduced that daylight savings time played any role in the time of the chemical test. Indeed, as far as we know, the paperwork was adjusted for daylight savings. Essentially, the hearing officer made up a finding, out of whole cloth, in order to achieve a result.

[¶22] The DOT's post-hearing references, on brief, to a Chemical Test Operator Manual that was never offered, admitted, or made part of the record should not have been considered by the district court. In fact, there was no evidence relating to the manual even offered at the administrative hearing and the hearing officer never relied on, nor even referenced, the manual in his decision. The "manual argument" was concocted by the DOT, post-hearing, and it was endorsed by the district court.

[¶23] Section 28-32-24, N.D.C.C., which applies to DOT hearings, mandates:

> "No information or evidence except that which has been offered, admitted, and made a part of the official record of the proceeding shall be considered by the administrative agency."

See N.D.C.C. § 28-32-24. Therefore, neither the DOT nor the district court should have considered the Operator Manual or anything else outside the record. The hearing officer never supported his decision by referencing the Manual.

[¶24] Because there was no evidence offered, admitted, or made part of the record, establishing that the chemical test was performed within two (2) hours of driving,

the order is not in accordance with the law (N.D.C.C. § 39-20-04.1 and N.D.C.C. § 28-32-24) and the hearing officer's decision should be reversed.

II. The hearing officer's failure to abide by the immediacy requirement of N.D.C.C. § 39-20-05(5) was not in accordance with law

[¶25] Under N.D.C.C. § 39-20-05(5), "[a]t the close of the hearing, the hearing officer shall notify the person of the hearing officer's findings of fact, conclusions of law, and decision based on the findings and conclusions and shall immediately deliver to the person a copy of the decision." *See* N.D.C.C. § 39-20-05(5) (emphasis added). The immediacy requirement is a provision of North Dakota law and it is a basic and mandatory statutory requirement of N.D.C.C. § 39-20-05.

[¶26] In the case at hand, the hearing was held on April 8, 2011. Instead of immediately issuing the decision to Mr. Schock, the hearing officer waited three (3) days, back-dated his decision to suspend, and then mailed it out on April 11, 2011. The hearing officer's back-dating of his decision to make it look like the decision was issued on April 8, 2011, is a practice that should not be condoned. The issuing of the decision three days after the fact was not in accordance with law. Because the hearing officer failed to abide by the immediacy requirement of N.D.C.C. § 39-20-05(5), the DOT's decision should be reversed.

[¶27] Also, "[t]he Department's authority to suspend a person's license is given by statute and is dependent upon the terms of the statute." *See Aamodt v. N.D. Department of Transportation*, 2004 ND 134, ¶14, 682 N.W.2d 308. "The Department must meet the basic and mandatory provisions of the statute to have authority to suspend

a person's driving privileges." *See id.* The immediacy requirement is a basic and mandatory statutory requirement of N.D.C.C. § 39-20-05.

[¶28] "Section 39-20-05(5), N.D.C.C., requires the hearing officer "immediately deliver" a copy of the decision to the driver at the end of the hearing." *See Landsiedel v. Director, North Dakota Department of Transportation*, 2009 ND 196, ¶11, 774 N.W.2d 645. "If the hearing officer decides to suspend or revoke the driver's license, the hearing officer "shall immediately take possession of the person's temporary operator's permit."" *See id*. "If the hearing officer finds in favor of the driver, the hearing officer "shall sign, date, and mark on the person's permit an extension of driving privileges" and "return the permit to the person."" *See id*. N.D.C.C. § 39-20-05(5). Therefore, "[a]n ordinary reading of N.D.C.C. § 39-20-05 demonstrates the Legislature intended for the Department to" immediately act, when a driver is present for his hearing, by either immediately taking the driver's temporary permit or by immediately extending privileges under the driver's temporary permit. *See Landsiedel*, 2009 ND 196 at ¶12.

[¶29] In the case at hand, the transcript clearly indicates that "Mr. Shock is present" for the hearing. (Tr. at 1, L. 3). Mr. Schock's temporary driver's permit (the Report and Notice form) was issued on March 13, 2011, and was valid as a permit "for 25 days from the date issue," until April 7, 2011. (App. 3b) (Exhibit 1b from the hearing). Thereafter, the hearing officer mailed out a notice of the hearing and indicated that "this Notice of Hearing extends the 25-day permit to the hearing date and time," that being April 8, 2011. (App. 3a) (Exhibit 2 from the hearing). After the hearing on April 8, 2011, the hearing officer left the courthouse without issuing a decision and without either immediately taking possession of Schock's temporary operator's permit or

permitting an extension of driving privileges, as required by N.D.C.C. § 39-20-05. Instead, Schock's driving privileges ended on April 8, 2011, without an extension and without a ruling. Essentially, Mr. Schock's driving privileges were extinguished without due process.

[¶30] Furthermore, although the hearing officer, who prepared the transcript (*See* transcript certification), prepared the transcript in such a way as to give the appearance that there was a short recess between the hearing and the hearing officer's findings (Tr. at 34, L. 11-13), the DOT, nevertheless, stipulates to the fact that the hearing officer did not notify or orally inform Schock of his findings and conclusions at the completion of the hearing. (App. 34). Rather, the hearing officer waited three (3) days, until April 11, 2011, to mail out a decision that is questionably dated April 8, 2011.

[¶31] Also, pursuant to N.D.C.C. § 39-20-06, a driver, whose license has been suspended at a DOT hearing, has only seven (7) days "after the date of the hearing under section 39-20-05 as shown by the date of the hearing officer's decision" to appeal that decision." *See* N.D.C.C. § 39-20-06 (emphasis added). Since the hearing officer's decision in this case is dated April 8, 2011, Mr. Schock's time to appeal began to run on April 8, 2011, even though the decision was first mailed out on April 11, 2011. Therefore, Mr. Schock was stripped of at least four (4) days of the 7-day timeframe to appeal the hearing officer's decision to the district court. Had the hearing officer waited an additional three (3) days, Mr. Shock's appeal deadline would have expired.

[¶32] In *Jorgensen v. N.D. Department of Transportation*, this Court decided that the statutory requirement that the officer's certified report show the driver's blood alcohol concentration is a basic and mandatory statutory requirement of N.D.C.C. § 39-

20-3.1. *See Jorgensen*, 2005 ND 80, ¶13, 695 N.W.2d 212. This Court reasoned that since "Section 39-20-05(1), N.D.C.C., gives a driver only a short time—ten days—after the issuance of a temporary operator's permit within which to request a hearing to challenge the suspension of his or her driving privileges," it is therefore "important that a driver facing the loss of driving privileges be able to quickly, conveniently, and certainly know what the officer is relying on" in "determining whether to request a hearing." *See id*. This Court also remarked: "The legislature's intent will be best fulfilled by a bright-line requirement that the report and notice form contain the test result, as specified in N.D.C.C. § 39-20-03.1(3)." *See id*.

[¶33] Like the statute in *Jorgensen*, which gives a driver only a short time (10 days) to request a hearing, the statute in our case, N.D.C.C. § 39-20-06, provides the driver even less time, 7 days, to determine whether to appeal the decision of the hearing officer. It is therefore "important that a driver facing the loss of driving privileges be able to quickly, conveniently, and certainly know what the [hearing] officer is relying on" and to have delivered to him, immediately, a copy of the suspension decision, as required by N.D.C.C. § 39-20-05(5), in "determining whether to" appeal the DOT decision to the district court. *See Jorgensen*, 2005 ND 80 at ¶13. That importance is even more pronounced when the hearing officer issues a decision and then either back-dates the decision or holds the decision for a considerable period of time before mailing it to the driver. "The legislature's intent will be best fulfilled by a bright-line requirement that the" hearing officer's decision by immediately delivered to a present driver, as specified in N.D.C.C. § 39-20-05(5). *See Jorgensen*, 2005 ND 80 at ¶13.

[¶34] The DOT failed to abide by the immediacy requirement of N.D.C.C. § 39-20-05(5). The DOT's failure to comply with the statutory immediacy requirement, a basic and mandatory requirement of N.D.C.C. § 39-20-05(5), deprives the DOT of jurisdiction to impose administrative sanctions upon Mr. Schock. Therefore, the DOT's decision should be reversed.

III. The hearing officer's decision is without substantial justification and is so starkly in contravention of North Dakota law as to warrant the imposition of attorney's fees and costs as allowed by N.D.C.C. § 28-32-50

[¶35] Under N.D.C.C. § 28-32-50, a Court must award a driver costs and attorney's fees if it "determines that the administrative agency acted without substantial justification." *See* N.D.C.C. § 28-32-50. In our case, the DOT's frivolous, capricious, and made-up finding that the chemical test was performed within two hours of driving, coupled with the hearing officer waiting three days to mail out his back-dated decision, is without substantial justification and is so starkly in contravention of North Dakota law as to warrant the imposition of attorney's fees and costs as allowed by N.D.C.C. § 28-32-50. Accordingly, Mr. Schock is entitled to attorney's fees and costs pursuant to N.D.C.C. § 28-32-50.

[¶36] CONCLUSION

[¶37] For the foregoing reasons, Paul Schock respectfully requests that this Court reverse the decision of the district court and reinstate his driving privileges. Mr. Schock also asks this court to determine that attorney's fees and costs are warranted.

Respectfully submitted
this 11th day of October, 2011.

/s/ *Dan Herbel*

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[¶38] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 11, 2011, 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 >

Date this 11th day of October, 2011.

/s/ *Dan Herbel*

_____

Dan Herbel