

20140082

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

Adam Paul Frank,

Appellant,

v.

Supreme Court No. 20140082

Director, North Dakota Department  
of Transportation,

Appellee.

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BRIEF OF APPELLANT

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Appeal from Judgment

Burleigh County District Court  
South Central Judicial District  
Civil No. 08-2013-CV-01804

\*\*\*\*\*

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## STATEMENT OF THE ISSUES

### ISSUE FOR REVIEW

The requirements of N.D.C.C. § 39-20-07(5) were not met in that it was not shown that “the director of the state crime laboratory or the director’s designee” approved the methods, devices or the individual who administered the test.

## STATEMENT OF THE CASE

Adam Paul Frank appeals from a district court judgment affirming an administrative suspension of his driving privileges for a period of 91 days (A. 36-37).

## STATEMENT OF THE FACTS

Frank was arrested for DUI by a Burleigh County Deputy. An Intoxilyzer test was done, with results showing an alcohol concentration over the legal limit. An administrative hearing was had and the Hearing Officer's Decision was to suspend Frank's driving privileges for a period of 91 days. (A. 27).

At the hearing, Frank objected to the Intoxilyzer test results under N.D.C.C. § 39-20-07(5), that it was not shown that the methods, devices or the individual who had administered the test had been approved by the director of the state crime laboratory or the director's designee (A. 14-15). Frank's objection was overruled (A. 15). Frank argued, "'39-20-07 hasn't been shown to have been complied with . . . [T]here's no exhibit here reflecting that the Director of the State Crime Laboratory has approved the devices, the method, or persons who conduct the test, or that the Director's designee has done so.'" (A. 20).

## 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

The requirements of N.D.C.C. § 39-20-07(5) were not met in that it was not shown that “the director of the state crime laboratory or the director’s designee” approved the methods, devices or the individual who administered the test.

This case is similar to Painte v. Dep’t of Transportation, 2013 ND 95, 832 N.W.2d 319, except this case involves an Intoxilyzer test instead of a blood test, and therefore this case does not contain an affidavit similar to the affidavit at issue in Painte.

In this case, there are five affidavits (A. 22-26), but none from the director or the director’s designee. Cf. Painte, at ¶¶ 24-25. Therefore, there is no affidavit or evidence to show compliance with N.D.C.C. § 39-20-07(5), that the methods and devices were approved by the director or the director’s designee, and that the testing was done by an individual certified by the director or the director’s designee.

The Department failed to lay proper foundation for admission of the intoxilyzer test into evidence at the administrative hearing.

CONCLUSION

WHEREFORE, Frank requests the Supreme Court of North Dakota to reverse the judgment of the district court, and order the Director to reinstate his driving privileges.

Respectfully submitted this 16<sup>th</sup> day of April 2014.

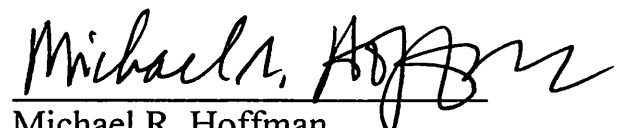
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CERTIFICATE OF SERVICE

I hereby certify that I made service of a true copy of the foregoing Brief of Appellant and Appendix of Appellant, by hand delivery, on this 16<sup>th</sup> day of April 2014, on:

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