

20140082

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

MAY 19 2014

STATE OF NORTH DAKOTA

Adam Paul Frank, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 Director, North Dakota Department )  
 of Transportation, )  
 )  
 Appellee. )

Supreme Ct. No. 20140082

District Ct. No. 08-2013-CV-01804

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

HONORABLE GAIL HAGERTY

---

BRIEF OF APPELLEE

---

State of North Dakota  
Wayne Stenehjem  
Attorney General

By: Michael Pitcher  
Assistant Attorney General  
State Bar ID No. 06369  
Office of Attorney General  
500 North 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300  
mtpitcher@nd.gov

Attorneys for Appellee.

## TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| Table of Authorities .....  | ii          |
| Statement of Issue .....  | 1           |
| Whether the Department laid the proper foundation<br>for the admission of Frank's chemical test for<br>intoxication? .....        | 1           |
| Statement of Case .....   | 1           |
| Statement of Facts .....  | 2           |
| Proceedings on Appeal to District Court .....   | 3           |
| Standard of Review .....  | 4           |
| Law and Argument .....  | 5           |
| The hearing officer did not abuse her discretion in<br>admitting Frank's chemical Intoxilyzer test records<br>into evidence. .... | 5           |
| Conclusion .....  | 13          |

## TABLE OF AUTHORITIES

| <u>Cases</u>   | <u>Page(s)</u> |
|--|----------------|
| <u>Berger v. State Highway Comm’r,</u><br>394 N.W.2d 678 (N.D. 1986) .....           | 8              |
| <u>Bryl v. Backes,</u><br>477 N.W.2d 809 (N.D. 1991) .....                           | 5              |
| <u>Buchholtz v. Dir., N.D. Dep’t of Transp.,</u><br>2008 ND 53, 746 N.W.2d 181 ..... | 5-6, 7, 11     |
| <u>Buchholz v. N.D. Dep’t of Transp.,</u><br>2002 ND 23, 639 N.W.2d 490 .....        | 7              |
| <u>Doll v. N.D. Dep’t of Transp.,</u><br>2005 ND 62, 693 N.W.2d 627 .....            | 6              |
| <u>Erickson v. Dir., N.D. Dep’t of Transp.,</u><br>507 N.W.2d 537 (N.D. 1993) .....  | 4-5            |
| <u>Frost v. N.D. Dep’t of Transp.,</u><br>487 N.W.2d 6 (N.D. 1992) .....             | 8              |
| <u>Gieger v. Hjelle,</u><br>396 N.W.2d 302 (N.D. 1986) .....                         | 8              |
| <u>In re Boschee,</u><br>347 N.W.2d 331 (N.D. 1984) .....                            | 5              |
| <u>Knudson v. Dir., N.D. Dept. of Transp.,</u><br>530 N.W.2d 313 (N.D. 1995) .....   | 5              |
| <u>Kraft v. State Bd. of Nursing,</u><br>2001 ND 131, 631 N.W.2d 572 .....           | 5              |
| <u>Lamb v. Moore,</u><br>539 N.W.2d 862 (N.D. 1995) .....                            | 4              |
| <u>McPeak v. Moore,</u><br>545 N.W.2d 761 (N.D. 1996) .....                          | 4, 5           |
| <u>Olson v. N.D. Dep’t of Transp.,</u><br>2013 ND 104, 831 N.W.2d 742 .....          | 8              |

|   |       |
|---|-------|
| <u>Painte v. Dir., Dep't of Transp.,</u><br>2013 ND 95, 832 N.W.2d 319 .....          | 4, 11 |
| <u>Pladson v. Hjelle,</u><br>368 N.W.2d 508 (N.D. 1985) .....                         | 8     |
| <u>R &amp; D Amusement Corp. v. Christianson,</u><br>392 N.W.2d 385 (N.D. 1986) ..... | 7     |
| <u>Salter v. Hjelle,</u><br>415 N.W.2d 801 (N.D. 1987) .....                          | 7     |
| <u>State, ex. rel. Roseland v. Herauf,</u><br>2012 ND 151, 819 N.W.2d 546 .....       | 11    |
| <u>State v. Jordheim,</u><br>508 N.W.2d 878 (N.D. 1993) .....                         | 8     |
| <u>State v. Schwalk,</u><br>430 N.W.2d 317 (N.D. 1988) .....                          | 7     |
| <u>State v. Stroh,</u><br>2011 ND 139, 800 N.W.2d 276 .....                           | 11    |
| <u>Steinmeyer v. Dep't of Transp.,</u><br>2009 ND 126, 768 N.W.2d 491 .....           | 5     |
| <u>Zimmerman v. N.D. Dep't of Transp. Dir.,</u><br>543 N.W.2d 479 (N.D. 1996) .....   | 5     |
| <br><b><u>Statutes and Other Authorities</u></b>                                      |       |
| N.D.C.C. ch. 28-32 .....  | 4     |
| N.D.C.C. § 39-08-01 .....   | 1     |
| N.D.C.C. § 39-20-01 .....   | 1     |
| N.D.C.C. § 39-20-02 .....   | 1     |
| N.D.C.C. § 39-20-03 .....   | 1     |
| N.D.C.C. § 39-20-05(2) .....  | 1     |
| N.D.C.C. § 39-20-05(4) .....  | 8     |

|   |             |
|---|-------------|
| N.D.C.C. § 39-20-07 .....   | 4, 6, 7     |
| N.D.C.C. § 39-20-07(5) .....  | 3, 4, 5, 11 |
| N.D.C.C. § 39-20-07(7) .....  | 4, 8, 9     |
| N.D.C.C. § 39-20-07(8) .....  | 11          |
| N.D.C.C. § 39-20-07(10) .....   | 11          |
| N.D.R.Ev. 902(10).....  | 8           |
| 2005 N.D. Sess. Laws ch. 195.....   | 6           |
| <u>Hearing before House Standing Comm. on H.B. 1088,</u><br>59 <sup>th</sup> N.D. Legis. Sess. (Jan. 10, 2005)<br>(written testimony of Hope Olson) ..... | 7           |

## STATEMENT OF ISSUE

Whether the Department laid the proper foundation for the admission of Frank's chemical test for intoxication?

## STATEMENT OF CASE

On July 12, 2013, Deputy Danny Lemieux (Deputy Lemieux) of the Burleigh County Sheriff's Department arrested Adam Paul Frank (Frank) for the offense of driving a vehicle while under the influence of intoxicating liquor (DUI). Transcript ("Tr.") at Exhibit ("Ex.") 1b. A Report and Notice, including a temporary operator's permit, was issued to Frank after Intoxilyzer test results indicated Frank's alcohol concentration was .124 percent by weight. Id. The Report and Notice notified Frank of the Department's intent to suspend his driving privileges. Id.

In response to the Report and Notice, Frank requested an administrative hearing. Tr. Ex. 1d. The hearing was held on August 12, 2013. Tr. 1; Ex. 2. In accordance with N.D.C.C. § 39-20-05(2) the hearing officer considered four broad issues, as follows:

- (1) [w]hether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of N.D.C.C. section 39-08-01 or equivalent ordinance;
- (2) [w]hether the person was placed under arrest;
- (3) [w]hether the person was tested in accordance with N.D.C.C. section 39-20-01 or 39-20-03 and, if applicable, section 39-20-02; and;
- (4) [w]hether the test results show the person had an alcohol concentration of at least eight one-hundredths of one

percent by weight but less than eighteen one-hundredths of one percent by weight.

Tr. 1; Tr. Ex. 2.

Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision suspending Frank's driving privileges for a period of 91 days. Tr. 18. Frank requested judicial review of the hearing officer's decision. Judge Gail Hagerty affirmed the hearing officer's decision. Appendix (App.) 30-35. The Judgment was entered January 8, 2014. App. 36. Notice of Entry of Judgment was provided on January 15, 2014. App. 2, at Doc. 30. Frank appealed from the Judgment to this Court. App. 37. The Department asks this Court to affirm the Judgment of the Burleigh County District Court and the administrative suspension of Frank's driving privileges for 91 days.

#### **STATEMENT OF FACTS**

The Facts regarding the stop of Frank's vehicle, Frank's arrest for Driving Under the Influence (DUI), and his submission to chemical Intoxilyzer testing are uncontested and can be found in the hearing officer's decision. See App. 27. At the hearing Frank objected to the introduction of Exhibit 1, which includes Frank's Intoxilyzer test record and checklist, arguing that Department did not lay the proper foundation because it was not shown the methods, devices, or the individual who had administered the test (Deputy Lemieux) had been approved by the director of the state crime laboratory or the director's designee. App. 14, I. 19 – App. 15, I. 3. The hearing officer overruled the objection. App. 15, II. 17-19.

The Department introduced certified copies of a List of Certified Chemical Test Operators (App. 23), a List of Approved Chemical Testing Devices (App.

24), the Approved Method to Conduct Breath Test with Intoxilyzer 8000 (App. 25), and an Ethanol Breath Standard Analytical Report, Lot No. 16512080A2 (App. 9). These documents were all certified by Charles E. Eder, the State Toxicologist, with a notarized statement reading, "I Charles E. Eder, do hereby certify that I am a duly-appointed State Toxicologist for the State of North Dakota . . . ." Also, Exhibit 4 - the Approved Method for Operating the Alco-Sensor FST (BRS-006) Revision Number 0.0 (October 1, 2012), and Exhibit 8, the Approved Method to Conduct Breath Tests With The Intoxilyzer 8000 (BRS-001) (Revision Number 0.0) (April 19, 2012), each indicate (on the second page) who edited the respective method and show it was signed "Approved by: Charles E. Eder" and signed "authorized By: Hope Olson."

The Department also introduced a copy of Frank's Intoxilyzer Test Record and Checklist, certified by operator, Danny Lemeiux Jr. Tr. Ex. 1c. Deputy Lemieux's certification indicates that he "followed the Approved Method and the instructions displayed by the Intoxilyzer in conducting [Frank's] test." Id.

#### **PROCEEDINGS ON APPEAL TO DISTRICT COURT**

Frank appealed the administrative decision to the Burleigh County District Court, specifying three errors. App. 28-29. With respect to Frank's argument that the requirements of N.D.C.C. § 39-20-07(5) were not met because 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, the hearing officer disagreed and ruled that "Frank was properly tested to determine



his alcohol concentration after the arrest, and had an alcohol concentration of at least .08%.” App. 27.

Judge Hagerty affirmed the hearing officer’s decision finding Frank’s chemical Intoxilyzer test was properly administered. App. 30-35. In regards to Frank’s argument that the Department did not meet the foundational requirements for admitting the chemical test records, Judge Hagerty wrote:

North Dakota Century Code § 39-20-07(7) provides that “copies of the crime laboratory certified records referred to in subsection 5 and 6 that have been electronically posted with the state crime laboratory division of the attorney general at the attorney general website must be admitted as prima facie evidence of the matters stated in the records.” However, in a recent case, the North Dakota Supreme Court held that an affidavit submitted by a designee of the Director of the State Crime Laboratory was sufficient for establishing prima facie evidence of her status and not contrary to statute. **See** North Dakota Century Code § 39-20-07. **Painte v. Dir., Dept’ of Transp.**, 832 N.W.2d 319 (2013). Just as the designee did in **Painte**, Charles E. Eder submitted an affidavit declaring his position as the “duly appointed State Toxicologist for the State of North Dakota . . . .” Exhibit 9. In accordance with **Painte**, the statute is satisfied and the foundational requirements for North Dakota Century Code § 39-20-07(5) are satisfied.

App. 14. Frank has not appealed to this Court from his other two specified errors.

#### **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. N.D. Dep’t of Transp. Dir., 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**

### **The hearing officer did not abuse her discretion in admitting Frank’s chemical Intoxilyzer test records into evidence.**

“Given the discretion afforded to hearing officers in the exclusion and admission of evidence, [the Supreme Court has] conclude[d] it appropriate to apply the abuse of discretion standard to those evidentiary rulings.” Knudson v. Dir., N.D. Dep’t of Transp., 530 N.W.2d 313, 317 (N.D. 1995). The admissibility of an Intoxilyzer test result is governed by N.D.C.C. § 39-20-07(5). See Steinmeyer v. Dep’t of Transp., 2009 ND 126, ¶ 9, 768 N.W.2d 491; Buchholtz v.

Dir., N.D. Dep't of Transp., 2008 ND 53, ¶ 10, 746 N.W.2d 181; Doll v. N.D. Dep't of Transp., 2005 ND 62, ¶ 9, 693 N.W.2d 627. Section 39-20-07, N.D.C.C., provides:

Upon the trial of any civil . . . action or proceeding arising out of acts alleged to have been committed by any individual while driving . . . a motor vehicle while under the influence of intoxicating liquor . . . , evidence of the amount of alcohol concentration. . . in the individual's blood . . . at the time of the act alleged as shown by a chemical analysis of the blood . . . is admissible. For the purpose of this section:

. . .

5. The results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with devices approved by the director of the state crime laboratory or the director's designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director's designee. The director of the state crime laboratory or the director's designee is authorized to approve satisfactory devices and methods of chemical analysis and determine the qualifications of individuals to conduct such analysis, and shall issue a certificate to all qualified operators who exhibit the certificate upon demand of the individual requested to take the chemical test.

N.D.C.C. § 39-20-07 (emphasis added). This statute was amended by the North Dakota Legislature in 2005. See 2005 N.D. Sess. Laws ch. 195, § 20. The Legislature added the language “the director of the state crime laboratory or the director's designee” in place of “the state toxicologist” formerly designated in the statute. The purpose of the Legislative change was to “enable the crime laboratory to operate more efficiently by allowing the Director of the Crime

Laboratory to delegate the State Toxicologist's responsibilities to the crime laboratory personnel if [the State Toxicologist] is absent from work. Hearing before House Standing Comm. on H.B. 1088, 59<sup>th</sup> N.D. Legis. Sess. (Jan. 10, 2005) (written testimony of Hope Olson).

"The purpose of Section 39-20-07 is 'to ease the requirements for admissibility of chemical test results while ensuring that the test upon which the results are based is fairly administered. The legislature has struck a balance between procedural efficiency and substantive reliability.'" State v. Schwalk, 430 N.W.2d 317, 322 (N.D. 1988) (quoting Salter v. Hjelle, 415 N.W.2d 801, 803 (N.D. 1987)). The North Dakota Supreme Court also has observed that "[f]air administration of [a Chemical] test may be established by proof that the method approved by the State Toxicologist for conducting the test has been scrupulously followed.'" Buchholtz, 2008 ND 53 at ¶ 10, (quoting Buchholz v. N.D. Dep't of Transp., 2002 ND 23, ¶ 7, 639 N.W.2d 490) (emphasis added). However, the Supreme Court has noted, "'scrupulous' compliance does not mean 'hypertechnical' compliance." Buchholtz, 2008 ND 53 at ¶ 10 (external citations omitted.)

A proper foundation for admissibility of Frank's Intoxilyzer test results was established by compliance with N.D.C.C. § 39-20-07. Generally, before documentary evidence is admissible it must be authenticated. R & D Amusement Corp. v. Christianson, 392 N.W.2d 385, 386 (N.D. 1986). "Authentication is simply identification. Identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter

in question is what its proponent claims.” Frost v. N.D. Dep’t of Transp., 487 N.W.2d 6, 8 (N.D. 1992) (internal citations omitted). Additionally, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to signatures, documents, or other matters declared by statute to be presumptively or prima facie genuine or authentic. N.D.R.Ev. 902(10).

Under N.D.C.C. § 39-20-05(4), a certified copy of the Intoxilyzer Test Record and Checklist is prima facie evidence of its contents without further foundation. See Olson v. N.D. Dep’t of Transp., 2013 ND 104; ¶ 10, 831 N.W.2d 742; Geiger v. Hjelle, 396 N.W.2d 302, 302-03 (N.D. 1986). For a driver to discredit the prima facie accuracy of the testing information, it is the driver’s responsibility to produce evidence the test was not fairly or adequately administered. Berger v. State Highway Comm’r, 394 N.W.2d 678, 688 (N.D. 1986); see also Pladson v. Hjelle, 368 N.W.2d 508, 512-13 (N.D. 1985).

In this case, the Department introduced certified copies of a List of Certified Chemical Test Operators, a List of Approved Chemical Testing Devices, the Approved Method to Conduct Breath Test with Intoxilyzer 8000, and an Ethanol Breath Standard Analytical Report, Lot No. 16512080A2. These documents were all certified by Charles E. Eder, the State Toxicologist. In accordance with N.D.C.C. § 39-20-07(7) these documents are all electronically posted with the state crime laboratory division of the attorney general at the attorney general website and must be admitted as prima facie evidence of the matters stated in the records. Accord State v. Jordheim, 508 N.W.2d 878, 881 (N.D. 1993) (stating, “[t]he approved methods, devices, and person certified to

administer the test can be shown by introducing copies of records [in accordance with N.D.C.C. 39-20-07(7)].”

The Department also introduced a copy of Frank’s Intoxilyzer Test Record and Checklist, certified by operator, Danny Lemieux Jr. Tr. Ex. 1c. Deputy Lemieux’s certification indicates that he “followed the Approved Method and the instructions displayed by the Intoxilyzer in conducting [Frank’s] test.” Id. Thus, the Department established a prima facie case of fair administration of Frank’s Intoxilyzer test.

Frank alleges, however, the proper foundation for the admission of his chemical test for intoxication was not met because there allegedly was no evidence that State Toxicologist, Charles E. Eder (Eder), was a designee of the Director of the State Crime Laboratory for purposes of approving methods, devices, and persons performing chemical tests. The basis for Frank’s argument is that the hearing officer did not introduce a copy of a Crime Laboratory Director’s Memo which conclusively shows Eder has been appointed as a designee of the Director of the State Crime Laboratory, for the purposes of approving methods, devices, and qualifying individuals to perform chemical analyses.

Frank was put on notice, prior to the hearing, that the Department was going to be offering copies of his Intoxilyzer Test Record and Checklist certified by Deputy Lemieux. The Notice of Administrative Hearing with the statement of “[t]he issues to be considered and decided at the administrative hearing” and the Notice with copies of documents to be “offered into evidence regarding the

issues to be determined at the hearing" were mailed to Frank's counsel on July 24, 2013, nineteen days prior to Frank's scheduled hearing. Tr. Ex. 2; Tr. Ex. 3. The documents of significance accompanying the Notice included the Department's copy of the Report and Notice Form, the Intoxilyzer Test Record and Checklist, which informed Frank of the Department's prima facie evidence of the fair administration of his Intoxilyzer test. Tr. Ex. 3.

Additionally, the Notice also included information regarding boiler plate exhibits which the Department could introduce at the hearing but which would not be mailed to counsel prior to the hearing. Regarding these boiler plate exhibits the Notice states:

Regularly kept records received by NDDOT from the State Crime Laboratory may be offered as foundational evidence concerning testing for alcohol concentration. Copies of these documents can be inspected during business hours at NDDOT central office in Bismarck, at NDDOT district offices in Fargo and Devil's Lake, or at the offices of the county recorder or other official designated by the county commissioners. Documents from the State Crime Laboratory can be found at <http://www.ag.nd.gov/CrimeLab/CrimeLab.htm>.

Id. The memos appointing Charles E. Eder, as State Toxicologist, and designating him as a designee of the Director of the State Crime Laboratory, for the purpose of approving devices, methods, and operators for chemical analysis, are some of these boiler plate exhibits available to Frank at the website specified. Frank does not contest the authenticity of the documents on the attorney general's website or that Eder is in fact a proper designee of the Director of the State Crime Laboratory. Frank's only argument is that the Department needed to make these documents a part of the hearing record.

Even though the Department did not include the memo designating Eder as a designee of the director of the state crime laboratory, evidence in the record received at the hearing provided a basis for determining Eder was a proper designee of the Department for purposes of approving methods, devices, and persons qualified to perform chemical tests. Exhibits 4, 5, 6, 8, and 9 each include an affidavit from Eder wherein he identifies himself as “the duly-appointed State Toxicologist for the State of North Dakota and an official custodian of the records and files of the office thereof . . . .” See App. 22-26. These exhibits were received into evidence without objection. App. 5. As in Painte v. Director, Department of Transportation, 2013 ND 95, 832 N.W.2d 319, Eder’s similarly signed and notarized affidavit satisfies the foundational requirements of N.D.C.C. § 39-20-07(5). Frank failed to introduce any evidence to dispute Eder’s certification that he is the State Toxicologist.

Further, since the Legislature revised the statute in 2005, this Court has continued to impliedly recognize the State Toxicologist as a proper designee for approving chemical testing methods, devices and operators. See Buchholtz, 2008 ND 53 at ¶ 11 (stating, “[t]he issue in this case is the State Toxicologist’s approved method for administering a breath test with an Intoxilyzer . . . .”); State v. Stroh, 2011 ND 139, ¶ 4, 800 N.W.2d 276 (stating, “Fair administration of an Intoxilyzer test may be established by proof the State Toxicologist’s approved method for conducting the test has been “scrupulously followed.”); State, ex. rel. Roseland v. Herauf, 2012 ND 151, ¶ 12, 819 N.W.2d 546 (stating, “Under [N.D.C.C. § 39-20-07(5), (8), and (10)] an analytical report is admissible if the



State can establish: . . . (3) the method and devices used in testing the sample were approved by the State Toxicologist; and (4) the blood test was performed by an authorized individual or by a person certified by the State Toxicologist as qualified to perform the test.”). Based on this Court’s precedent, a reasoning mind reasonably could determine Eder was a proper designee for purposes of approving the method, device, and individual performing Frank’s Intoxilyzer test. And, it appears evident that because Eder, as the state toxicologist signed and certified Exhibits 4, 5, 6, 8, and 9, as well as the majority of all other documents posted on the AG website he would be a proper designee of the director of the state crime laboratory. Otherwise, why would Eder be approving these documents?

Additionally, and perhaps most importantly, Exhibit 4, the Approved Method for Operating the Alco-Sensor FST (BRS-006) Revision Number 0.0 (October 1, 2012), and Exhibit 8, the Approved Method to Conduct Breath Tests With The Intoxilyzer 8000 (BRS-001) (Revision Number 0.0) (April 19, 2012), both have additional information beyond the certification page signed by “Charles E. Eder, State Toxicologist” which lead to the reasonable conclusion that Eder is a designee of the director of the state crime laboratory. It is significant that the second page of both Exhibit 4 and Exhibit 8 indicates who edited the respective method showing it was signed “Approved by: Charles E. Eder” and signed “authorized By: Hope Olson.” It is apparent that Crime Lab Director Hope Olson has authorized State Toxicologist Eder, as designee, to approve such documents. This document along with the other documents mentioned above

which were certified by State Toxicologist Eder and the reasonable inferences therefrom show that Eder, as the State Toxicologist appointed by the Attorney General, is a designee authorized by the State Crime Laboratory Director Hope Olson to approve methods, operators and devices.

Under the totality of the record, and the reasonable inferences drawn therefrom, it was not an abuse of discretion for the hearing officer to determine that Eder was an appointed designee of the Director of the State Crime Laboratory for purposes of approving methods, devices, and operators for chemical testing. The Department, therefore, showed that Frank's chemical Intoxilyzer test was fairly administered.

#### CONCLUSION

The Department respectfully requests that this Court affirm judgment of the Burleigh County District Court and affirm the hearing officer's decision suspending Frank's driving privileges for a period of 91 days.

Dated this 19<sup>th</sup> day of May, 2014.

State of North Dakota  
Wayne Stenehjem  
Attorney General

By:  \_\_\_\_\_

Michael Pitcher  
Assistant Attorney General  
State Bar ID No. 06369  
mtpitcher@nd.gov  
Office of Attorney General  
500 North 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300

Attorneys for Appellant.

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Adam Paul Frank, )  
)  
Appellant, ) **Supreme Ct. No. 20140082**  
)  
v. ) **District Ct. No. 08-2013-CV-01804**  
)  
Director, North Dakota Department )  
of Transportation, )  
)  
Appellee. )

---

STATE OF NORTH DAKOTA )  
) ss.  
COUNTY OF BURLEIGH )

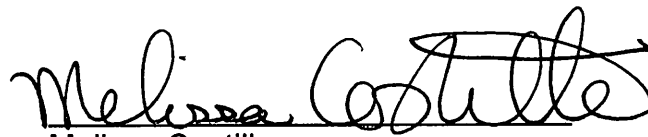
Melissa Castillo states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

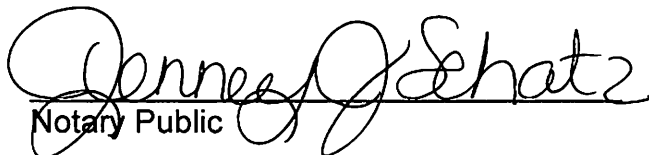
2. I am of legal age and on the 19<sup>th</sup> day of May, 2014, I served the attached **BRIEF OF APPELLEE** upon Adam Paul Frank, by and through his attorney Michael R. Hoffman, by placing a true and correct copy thereof in an envelope addressed as follows:

Michael R. Hoffman  
Attorney at Law  
P.O. Box 1056  
Bismarck, ND 58502-1056

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

  
Melissa Castillo

Subscribed and sworn to before me  
this 19<sup>th</sup> day of May, 2014.

  
Notary Public

