

IN THE SUPREME COURT

JUN 28 2017

STATE OF NORTH DAKOTA

Altru Specialty Services, Inc. d/b/a )  
Yorhom Medical Essentials, )  
 )  
Appellee, )  
 )  
v. )  
 )  
North Dakota Department of Human )  
Services and Maggie D. Anderson, in )  
her capacity as Executive Director of )  
North Dakota Department of Human )  
Services, )  
 )  
Appellant. )

STATE OF NORTH DAKOTA

Supreme Ct. No. 20170146

District Ct. No. 08-2016-CV-01115

APPEAL FROM THE DISTRICT COURT  
JUDGMENT DATED MARCH 28, 2017  
BURLEIGH COUNTY, NORTH DAKOTA  
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE GAIL HAGERTY

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REPLY BRIEF OF APPELLANT

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## ARGUMENT

### I. The District Court lacked jurisdiction.

[¶1] Yorhom argues service on the Attorney General's Office accomplished timely service on North Dakota Department of Human Services (DHS) under N.D. R. Civ. P. 5. In the alternative, Yorhom contends an untimely notice served on DHS should be considered timely under N.D. R. Civ. P. 4(d)(2)(G). Neither argument has merit.

#### A. Rule 5's represented-party provisions do not apply.

[¶2] DHS never claimed Yorhom's service on Michael Pitcher (Pitcher) consisted of only one copy of the notice of appeal. Whether Pitcher was served with two copies or a hundred copies is irrelevant to whether Yorhom served a copy "upon the administrative agency concerned." N.D.C.C. § 28-32-42(4).

[¶3] Yorhom acknowledges Rule 5(b)(2)(A) requires service to be made on "the" attorney representing the party. See Appellee's Brief at ¶ 24. Yet Yorhom has not shown Pitcher was "the" attorney representing DHS. As a result, Yorhom relies upon an Administrative Code section generally listing the responsibilities of the civil litigation division (CLD) to contend Pitcher was "the" attorney representing DHS. See id. at ¶¶ 24, 26-27.

[¶4] The fact that CLD's responsibilities include representing state agencies does not establish DHS chose to be represented by CLD in this proceeding, or that Pitcher provided the representation. DHS gave several examples of the perverse consequences of interpreting Rule 5 in the manner suggested by Yorhom. See Appellant's Brief at ¶¶ 44-48. Similar perverse consequences

would result from Yorhom's interpretation of N.D. Admin. Code § 10-01-01-01(2)(e).

[¶5] Frequently, state officers or agencies are adverse parties to each other, requiring the attorney general to "determine which officer the attorney general will represent" so that the "other officer may employ counsel to represent that other officer." N.D.C.C. § 54-12-01(3). In such situations, the entire CLD may be barred from representing an adverse agency. Even in situations where no conflict exists, certain state agencies have statutory authority to choose a special assistant attorney general (SAAG), and the attorney general must honor the choice "[a]bsent good cause." N.D.C.C. § 54-12-08.

[¶6] Under Yorhom's interpretation, CLD attorneys would be representing potentially adverse agencies for purposes of accepting service under N.D.C.C. § 28-32-42(4). This interpretation is fundamentally inconsistent with the manner in which attorney-client relationships between particular agencies and particular attorneys operate, including SAAGs.

[¶7] Suppose an inmate filed a complaint with the State Board of Medicine (BOM) against the penitentiary's physician, Dr. Hagan, and the BOM initiated a disciplinary proceeding. Hagan asked CLD to represent him and established an attorney-client relationship with Pitcher. BOM – unrepresented in its role as adjudicator – determined discipline was warranted, and Hagan asked Pitcher to appeal the decision pursuant to N.D.C.C. § 28-32-42.

[¶8] In Yorhom's view, as a member of CLD "mandated" to represent state agencies in administrative hearings and appeals, Pitcher could serve himself with

his client's notice of appeal and thereby also serve BOM. In fact, Pitcher could also serve himself even if BOM had been represented by a SAAG in the disciplinary hearing.

[¶9] Yorhom's strained interpretation, coupled with its view of the SAAG's role in Sande v. State, 440 N.W.2d 264 (N.D. 1989), would also impose a duty to accept service upon all SAAGs. Under Yorhom's view, opposing counsel could have served himself with DHS's notice of appeal if he had been acting as a SAAG for some other state agency at the time.

[¶10] Yorhom's Code interpretation would also negate the legislature's inclusion of both the attorney general and "the administrative agency concerned" as separate entities under N.D.C.C. § 28-32-42(4). See, e.g., Gaede v. Bertsch, 2017 ND 69, ¶ 11, 891 N.W.2d 760, 764 ("We interpret statutes to give effect to all of their provisions, and no part of the statute is rendered inoperative or superfluous."). Service on an agency could always be accomplished by service on CLD and would render superfluous the legislature's separate agency reference.

[¶11] Finally, Yorhom argues DHS was a "party" under Rule 5(b)(2)(A) because the definitions included in the Administrative Agencies Practices Act (AAPA) indicate an agency "may" be a party to an administrative proceeding. Appellee's Brief at ¶ 28. But the operative issue is not whether DHS was a "party" under the AAPA, but whether it was a "party" under the represented-party provisions of Rule 5(b)(2)(A).

[¶12] The term “party” has different meanings in the AAPA depending upon context. In MacDonald v. North Dakota Commission on Medical Competency, 492 N.W.2d 94 (N.D. 1992), this Court recognized BOM was not a party to the underlying administrative proceeding because it “served only as the adjudicative agency,” but was nevertheless a party that must be named in a notice of appeal to district court. Id. at 96; see also In re Bank of Rhame, 231 N.W.2d 801, 806-08 (N.D. 1975) (limiting its interpretation of the AAPA to determine “who are parties for purposes of seeking a review or an appeal”).

[¶13] Under Rule 5(b)(2)(A), the term “party” may or may not have the same fluid context-specific meaning that it does under the AAPA. Here, the critical moment to determine DHS’s “party” status was the point when Yorhom served CLD. At that point, DHS was not a party because it had “served only as the adjudicative agency” in the underlying administrative proceeding. MacDonald, 492 N.W.2d at 96.

[¶14] In any event, DHS’s *unrepresented status* in the administrative proceeding is dispositive, irrespective of whether DHS may have served a dual role as adjudicatory body and party.

**B. Rule 4’s provisions do not apply.**

[¶15] In the alternative, Yorhom contends it perfected its appeal through an untimely notice of appeal served upon DHS. Specifically, Yorhom relies upon Rule 4(d)(2)(G) which applies when a summons and complaint is initially served “on an agent who is not expressly authorized by appointment or by law to receive



service of process on behalf of the defendant” and then plaintiff must mail or deliver the summons and complaint directly to the defendant within ten days.

[¶16] Rule 4 has no application here. Yorhom untimely served DHS with the notice of appeal required under N.D.C.C. § 28-32-42(4), not a summons and complaint. The issue here is compliance with that statute, not the commencement of an action under Rules 3 or 4.

**II. The administrative decision was in accordance with the law.**

[¶17] Yorhom contends this Court’s statutory deadline decisions “are all distinguishable from the present case as they concern specific duties imposed on the public officer and not on duties imposed on the agency as a whole.” Appellee’s Brief at ¶ 34.

[¶18] This Court has applied the principles announced in Solen Pub. Sch. Dist. No. 3 v. Heisler, 381 N.W.2d 201 (N.D. 1986) to a duty imposed upon an agency as a whole. See, e.g., N.D. Comm’n on Med. Competency v. Racek, 527 N.W.2d 262, 267-68 (N.D. 1995) (citing Solen when discussing the duty of an “administrative agency” to hold investigatory hearings under N.D.C.C. § 28-32-08(1)).

[¶19] This Court frequently refers to an agency’s or political subdivision’s duty as a whole when interpreting a particular officer’s duty. See, e.g., Ramsey Cty. Farm Bureau v. Ramsey Cty., 2008 ND 175, ¶ 14, 755 N.W.2d 920, 924 (referring to “Ramsey County[’s]” substantial compliance when discussing the statutory duty of the “county auditor”); May v. Sprynczynatyk, 2005 ND 76, ¶¶ 7-8, 695 N.W.2d 196, 199 (referring to the “Department’s failure to strictly comply

with the requirements of N.D.C.C. § 39-20-06” when discussing the duty of “the director or the hearing officer who rendered the decision”).

[¶20] This Court has even applied Solen's mandatory-directory dichotomy to duties imposed upon private parties but performed by a public entity. See Frey v. City of Jamestown, 548 N.W.2d 784, 789 (N.D. 1996) (addressing the duty imposed upon annexation petitioners at N.D.C.C. § 40-51.2-05).

[¶21] Yorhom fails to account for the fact that state agencies necessarily act through people. See Hadler v. N.W. Agr., Live Stock & Fair Ass'n, 239 N.W. 736, 739 (N.D. 1931) (indicating state agencies “must act” through their officers); N.D.C.C. § 28-32-01(2) (defining an agency as including the “officers, employees, or other persons directly or indirectly purporting to act on behalf or under authority of the agency”); N.D.C.C. § 28-32-01(3) (vesting a state agency's ultimate legal authority in the agency head). Here, the challenged decision was issued by Maggie Anderson as DHS's Executive Director; Yorhom acknowledged Anderson's involvement by naming her a party in its attempted appeal.

[¶22] Yorhom also contends “DHS incorrectly attributes the burden of proving prejudice on Yorhom.” Appellee's Brief at ¶ 36. In May v. Sprynczynatyk, however, this Court said an agency decision's reversal would be “appropriate only if [the petitioner] shows he was prejudiced by the filing of the transcript a few days late.” 2005 ND 76, ¶ 9, 695 N.W.2d at 200; see also id. at ¶ 15, 695 N.W.2d at 201 (“Because [petitioner] has failed to allege or prove prejudice caused by the two-day delay in filing the transcript, we conclude the Department's failure . . . does not mandate reversal of the decision . . .”)

[¶23] Next, Yorhom employs circular reasoning to explain away the absence of prejudice, relying upon the district court's decision to discredit DHS's description of "interest-free overpayments." Appellee's Brief at ¶ 37. But the decision favoring Yorhom necessarily depended upon first finding prejudice. The alleged prejudice was the delay in repaying funds Yorhom received years earlier. How does the district court's subsequent decision change the fact that Yorhom got to keep funds for an even longer period due to delay?

[¶24] Yorhom further contends DHS admitted to systemic prejudice because there were 78 claims involved in the three appeals DHS received in a two-month span. See Appellee's Brief at ¶ 39. Under this logic, a single failure to meet a deadline would constitute systemic disregard if the first appeal comprised many claims. Here, the single phenomena that led to delay was the receipt of three nearly-simultaneous multi-claim appeals generated by the new RAC audits.

[¶25] In addition, Yorhom must show more than systemic disregard to prevail; it must also prove potential prejudice. May, 2005 ND 76, ¶ 17, 695 N.W.2d at 20. Yorhom cannot show potential prejudice for the same reason it cannot show actual prejudice. Delay in a recoupment proceeding will always inure to the provider's benefit and at the agency's expense. In any event, Yorhom waived this issue in district court by not identifying the issue of prejudice/potential prejudice in its specifications of error or initial brief. See Midthun v. N.D. Workforce Safety Ins., 2009 ND 22, ¶ 7, 761 N.W.2d 572, 575 ("When a party does not enumerate an issue in their specifications of error, we will not consider that issue on appeal.").

**III. A remand to the district court is unwarranted.**

[¶26] Finally, a remand is not appropriate if the district court had jurisdiction but erred on the timeliness issue. Unlike the decisions Yorhom cites at ¶ 18 of its brief, where this Court reversed jurisdictional dismissals and remanded for decisions on the merits, the district court here has already issued a merits decision under one of the enumerated grounds in N.D.C.C. § 28-32-46, i.e., that the decision was “not in accordance with the law.” See Midthun, 2009 ND 22, ¶ 15, 761 N.W.2d at 577 (reversing a district court’s conclusion that an agency decision was “not in accordance with the law” without a remand, and reinstating the agency’s decision).

[¶27] Furthermore, by failing to oppose DHS’s merits position on appeal, Yorhom has conceded the agency’s underlying decision was correct. See Smith v. City of Grand Forks, 478 N.W.2d 370, 371 (N.D. 1991) (indicating an opposing party’s failure to respond to an argument is an admission the argument is well-founded).

**CONCLUSION**

[¶28] DHS respectfully requests this Court determine the district court lacked jurisdiction over Yorhom’s appeal. In the alternative, DHS requests this Court reverse the district court’s judgment and reinstate DHS’s administrative decision.

Dated this 23<sup>th</sup> day of June, 2017.

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Altru Specialty Services, Inc. d/b/a	)	
Yorhom Medical Essentials,	)	<b>AFFIDAVIT OF SERVICE BY MAIL</b>
	)	
Appellee,	)	<b>Supreme Ct. No. 20170146</b>
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v.	)	<b>District Ct. No. 08-2016-CV-01115</b>
	)	
North Dakota Department of Human	)	
Services and Maggie D. Anderson, in	)	
her capacity as Executive Director of	)	
North Dakota Department of Human	)	
Services,	)	
	)	
Appellant.	)	

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

[¶1] Donna J. Connor states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

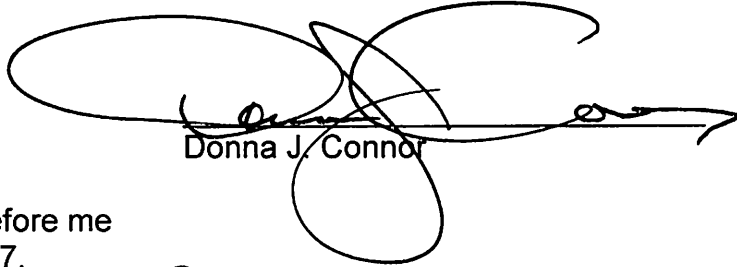
[¶3] I am of legal age and on the 28<sup>th</sup> day of June, 2017, I served the attached **REPLY BRIEF OF APPELLANT** upon Justin J. Hagel by placing a true and correct copy thereof in an envelope addressed as follows:

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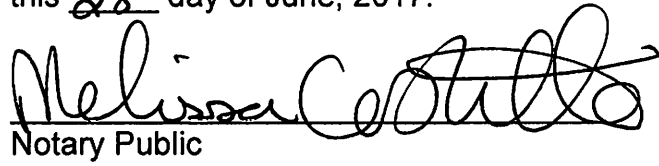
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and depositing the same, with postage prepaid, in the United States mail at Bismarck,  
North Dakota.



Donna J. Connor

Subscribed and sworn to before me  
this 28<sup>th</sup> day of June, 2017.



Notary Public

