

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20180410

Benjamin James French,)
)
)
 Petitioner and Appellee,)
)
 vs.)
)
 Director, N.D. Dept. of Transp.,)
)
 Respondent and Appellant.)

APPELLEE’S BRIEF

Benjamin James French v. Director, North Dakota Department of Transportation,
Appeal from the October 26, 2018, Amended Judgment of the District Court of
Traill County, North Dakota, East Central Judicial District

Charles J. Sheeley, NDID #06383
SHEELEY LAW, P.C.
3332 4th Avenue South, Ste. 2B
Fargo, North Dakota 58103
(701) 356-4207
sheeleylawnd@gmail.com

ATTORNEY FOR APPELLEE

¶ 1 TABLE OF CONTENTS

	<u>Paragraph No.</u>
Table of Contents	¶ 1
Table of Authorities.....	2
Statement of Facts	4
Law and Argument.....	6
I. Whether the Department’s records contained sufficient information required under N.D.C.C. § 39-20-04.1 to impose a 365-day license suspension.	7
II. The district court did not abuse its discretion when it awarded attorney fees pursuant to under N.D.C.C. § 28-32-50(1).	13
Conclusion.....	14
Certificate of Service.....	17

[¶ 2] **TABLE OF AUTHORITIES**

Paragraph No.

North Dakota Cases

Ertelt v. Director, N.D. Dept. of Transp., 491 N.W.2d 736 (N.D. 1992) ¶ 9, 10

Drayton v. Workforce Safety and Ins., 2008 ND 178, ¶ 38, 756 N.W.2d 320. ¶ 13

North Dakota Century Code

N.D.C.C. § 28-32-50 ¶ 13

N.D.C.C. § 39-06-27 ¶ 8

N.D.C.C. § 39-06-32 ¶ 8

N.D.C.C. § 39-08-01 ¶ 7

N.D.C.C. § 39-20-03.1 ¶ 8

N.D.C.C. § 39-20-04 ¶ 8

N.D.C.C. § 39-20-04.1 ¶ 7, 8

[¶ 3] STATEMENT OF THE ISSUES

- I. Whether the Department's records contained sufficient information required under N.D.C.C. § 39-20-04.1 to impose a 365-day license suspension.**

- II. The district court did not abuse its discretion when it awarded attorney fees pursuant to under N.D.C.C. § 28-32-50(1).**

[¶ 4] **FACTS**

[¶ 5] Mr. French was stopped and arrested for Driving Under the Influence by Trooper Kyle Stern in Traill County on June 10, 2018. (Tr. p. 4, l. 16). Following his arrest, Mr. French submitted to an Intoxilyzer 8000 breath test. (Tr. p. 17, l. 13). The test result was a 0.161. (Tr. p. 17, l. 15). Mr. French timely requested a hearing and a hearing was held on July 9, 2018. (Appx. p. 10). A 365-day suspension was proposed as it was alleged Mr. French had one qualifying prior offense. (Appx. p. 8). The proposed 365-day suspension was based on the following notation on Mr. French's driving record:

VIOLATIONS/CONVICTIONS

REVO 5 08/18/11 REFUSED CHEMICAL TEST 0001Y L
08/18/11 L R 08/18/12 0001

HEARING NOTICES

HEAR 5 07/24/11 Suspended – Hearing Held Refused
Chemical Test – PER 001 Y

(Appx. p. 7). At the hearing, the Department's lone witness could not identify the substance of the notation. His testimony provided:

MR. SHEELEY: I am showing what's marked, well, its (sic) page five of five Exhibit 1, you've seen these before; right?

TROOPER STERN: Yes

MR. SHEELEY: This is what?

TROOPER STERN: It's a copy of the driver's abstract.

MR. SHEELEY: And you heard the hearing officer say it shows a prior refusal; correct? Did you hear him say that?

TROOPER STERN: No, I didn't hear that, I'm sorry.

MR. SHEELEY: Well, I'll tell you, it's being alleged there was a prior refusal from July 24, 2011. Do you see that notation there?

TROOPER STERN: Yes.

MR. SHEELEY: Where is ... what county is that out of?

TROOPER STERN: I couldn't tell you.

MR. SHEELEY: You couldn't even tell me what state it's from, could you?

TROOPER STERN: No.

(Tr. pp. 18-19). Mr. French objected to the proposed 365-day suspension and argued the appropriate suspension was 91 days. (Tr. pp. 19-21). Nonetheless, the hearing officer issued his decision on July 10, 2018, suspending Mr. French's driving privileges for 365 days. Mr. French timely appealed to the district court. (Appx. p. 12). The district court reversed the hearing officer decision, reduced the suspension from 365 days to 91 days, and awarded Mr. French attorney fees. (Appx. p. 14). The Department filed a notice of appeal on November 19, 2018.

[¶ 6] **LAW AND ARGUMENT**

I. The Department's records did not support a 365-day license suspension.

[¶ 7] The Department erred when its hearing officer suspended Mr. French's driving privileges for 365 days. An individual's driving privileges shall be suspended "for three hundred sixty-five days if the person's driving record shows that, within the seven years preceding the date of arrest, the person has once previously violated section 39-08-01 or equivalent ordinance or *the person's operator's license has once previously been suspended or revoked under this chapter* with the last violation of suspension for an alcohol concentration under eighteen one-hundredths of one percent by weight." N.D.C.C. § 39-20-04.1(1)(c) (emphasis added). Mr. French's driving record did not show a prior conviction for a violation of N.D.C.C. § 39-08-01 or equivalent ordinance. Therefore, the enhanced suspension was based on the Department's assertion that the Department records proved by preponderance of evidence that Mr. French's license has once previously been suspended or revoked *under N.D.C.C. ch. 39-20*. The Department's records failed to establish there was a prior suspension or revocation under N.D.C.C. ch. 39-20. The district court's judgment reversing the hearing officer must be affirmed.

1. Mr. French's driving record does not support an enhanced suspension.

[¶ 8] The Department's records must prove by preponderance of evidence that a prior offense was for a suspension or revocation imposed under N.D.C.C. ch. 39-

20. Chapter 39-20, N.D.C.C., provides the foundation for license suspension and revocations for alcohol-related offenses committed in North Dakota. The process is commenced with a licensed peace officer providing a driver a temporary operator's permit and report and notice form; that form provides the driver with notice that his or her license will be suspended by the Department. See N.D.C.C. § 39-20-03.1(1) and 39-20-04(1). That form must then be forwarded by the law enforcement officer to the director of the Department to initiate the license suspension process. See N.D.C.C. § 39-20-03.1(4) and 29-20-04(1). In this case, the Department's file failed to prove by a preponderance of evidence that any prior suspension or revocation was imposed pursuant to this process. N.D.C.C. § 39-20-04.1(1)(c). The Department's evidence included the following ambiguous notations on Mr. French's driving record:

VIOLETIONS/CONVICTIONS

REVO 5 08/18/11 REFUSED CHEMICAL TEST 0001Y L
08/18/11 L R 08/18/12 0001

HEARING NOTICES

HEAR 5 07/24/11 Suspended – Hearing Held Refused
Chemical Test – PER 001 Y

There was no corresponding criminal conviction for driving under the influence noted on the driving record. Further, there was no other criminal conviction such as reckless driving, nor was there a noncriminal traffic violation noted as an offense for that date. Instead of ensuring the Department prove its suspension with the admitted documents, the hearing officer drew on his own apparent expertise in

reviewing driving abstracts. In support of the 365-day suspension, the hearing determined:

The hearing officer is familiar with the DLD format of Mr. French's driving record and can infer from the administrative record that the 2011 1-year revocation of his driver's license for refusing a chemical test was conducted under North Dakota Century Code Chapter 39-20.

In other words, the hearing officer himself provided evidentiary support for the suspension or revocation based on subjective knowledge allegedly learned as an employee of the Department. This is absurd. There are other, legitimate reasons why an individual's license could be suspended or revoked for "refusal." For example, "[t]he director may suspend or revoke the operator's license of any resident of this state ... upon receiving notice of the conviction of that individual in a tribal court or in another state of an offense, which if committed in this state, would be grounds for the suspension or revocation of an operator's license of an operator." N.D.C.C. § 39-06-27. In addition, the director may suspend an operator's license of an individual if the Department receives information that the individual refused to submit to a chemical test on an Indian reservation or in another state. N.D.C.C. § 39-06-32(1). While the latter only provides for authority for a suspension versus revocation, the director has clear authority to revoke driving privileges under N.D.C.C. § 39-06-27 for incidents that occur outside the purview of N.D.C.C. ch. 39-20. Without additional documentation from the Department, the hearing officer's reliance on his own personal knowledge for the basis for a prior offense

was an error. The record did not establish by preponderance of evidence that Mr. French's driving abstract included a prior offense under N.D.C.C. ch. 39-20.

[¶ 9] This case is similar in two respects to Ertelt v. N.D. Dept. of Transp., 491 N.W.2d 736 (N.D. 1992). In Ertelt, a driver (Ertelt) was charged with actual physical control of a motor vehicle while under the influence of alcohol. Ertelt, 491 N.W.2d 736, 737. An administrative hearing was held on July 3, 1991. Id. at 738. Ertelt's driving privileges were suspended for 91 days following the hearing. Id. Later in July 1991, the Department issued Ertelt a notice to suspend his driving privileges for failure to file proof of financial responsibility following the accident related to the actual physical control arrest. Id. The case was ultimately overturned due to the hearing officer's admittance of a Department crash report without proper disclosure to Ertelt. Id. at 740. However, the Court also found it improper for the hearing officer who presided over the implied consent hearing to preside over the proof of financial responsibility hearing because the hearing officer based her decision to file the subsequent suspension on her personal knowledge of the prior implied consent hearing. Id. at 740. In other words, the hearing officer used her personal knowledge from working prior Department cases in order to justify a suspension against Ertelt. The Court ordered on remand that the same hearing officer could not preside pursuant to N.D.C.C. § 28-32-38 (separation of functions) (statute previously found at N.D.C.C. § 28-32-12.2). While not identical to the facts of Ertelt, the supposed-impartial hearing officer in this case based his decision to enhance the decision on his "familia[rity] with the drivers' license division format."

In other words, the hearing officer used his experience as an employee of the Department to establish evidence that the vague notation on the driving record was a “prior offense.” Instead of interjecting his own subject beliefs, the hearing officer should have decided the matter on the record before him. Like the hearing officer in Ertelt, this hearing officer erred by abandoning his impartialness, overstepping his authority, and relying on matters not in the record.

[¶ 10] In addition, the vagueness of the drivers’ license record was an issue in Ertelt. To suspend for failure to file proof of financial responsibility, the Department records at the time had to prove damage in excess of \$400. Id. at 738. After the crash report was inadmissible, the only proof of damages was found on the driving record abstract. Id. The driving record abstract contained the following notation:

“ACC 1 06/02/91 PROP. DAMAGE FR-RPT 07/21/91
CRASH 068537 DAMAGES 02000 01000”

Ertelt, 491 N.W.2d 736, fn. 2. The Court noted “[t]here is no explanation on the record of what any of these figures mean. Absent an explanation, we do not view this as evidence of the amount of damages to the vehicle.” Id. In Ertelt, the hearing officer possibly could have drawn on her experience to attempt to decipher what the ambiguous entry meant. However, like here, Department hearing officers should only consider matters in the record. Like the notation in Ertelt, the notation on the driving record here was vague. Even the Department’s own witness, a North Dakota Highway Patrol Trooper with over twenty years of experience, could not provide any favorable testimony to the Department on the meaning of the notation. (Tr. p.

3, 1. 25). For whatever reason, the legislature has required - when there is no prior driving under the influence criminal conviction - that any prior suspension or revocation used to enhance be imposed pursuant to N.D.C.C. ch. 39-20. The Department records in this case fail to provide the additional information required by the legislature.

[¶ 11] The Department again misconstrued the issue in its brief to this Court. The Department argued since the driving record was created by the Department, there is a rebuttable presumption of its regularity. (Appellant's Br. ¶¶ 22-29). The issue, however, is not whether the driving abstract is a regularly kept record of the Department. The issue is that the contents of the record were insufficient to establish a prima facie case for an enhanced suspension required by the legislature under N.D.C.C. § 39-20-04.1(1)(c). Additional information should have been provided to meet the legislative requirements required under N.D.C.C. ch. 39-20-04.1. The district court was correct when it determined the records did not support the enhanced suspension and no reasonable, impartial mind could infer such from the Department's record. The district court's judgment should be affirmed.

2. The Department will not be overly burdened going forward.

[¶ 12] If the prior offense alleged on Mr. French's record was indeed imposed pursuant to N.D.C.C. ch. 39-20, there should be a corresponding report and notice form or hearing officer decision in the Department's records. See Hearing Officer Decision ("Mr. French's driving record shows that he requested and received a

NDDOT administrative hearing. ...” The hearing officer exaggerated the burden to the Department in his decision:

To require that a Drivers (sic) License Division (DLD) representative appear live for each administrative hearing where the driving record was relevant to the period of suspension or revocation would be a waste of resources that is not required to provide the administrative process that drivers are due under the statute.

A suspension or revocation under N.D.C.C. ch. 39-20 is commenced when the temporary driver’s permit is forwarded by the law enforcement officer to the director of the Department. See N.D.C.C. § 39-20-03.1(4) and 29-20-04(1). That form becomes part of the Department’s records. These documents self-authenticate as records of the Department without need for further foundational testimony. It was disingenuous for the hearing officer to claim an employee would have to “appear live” for the hearing as the Department should already have the records in its possession. If a prior suspension was imposed to N.D.C.C. ch. 39-20, the Department can simply forward a record already in its possession to the hearing officer. In this case, the hearing officer improperly drew on his own expertise and alleged Mr. French had a hearing pursuant to N.D.C.C. § 39-20; if so, the Department records should include a Department decision which would unequivocally show whether that hearing was held pursuant to N.D.C.C. ch. 39-20. The Department failed to provide that information. The hearing officer’s subjective, purported knowledge of what a driver’s license record might look like is insufficient for the Department to meet its burden in this case. The district court correctly

determined the enhanced suspension was not supported by the record and its judgment should be affirmed.

II. The district court did not abuse its discretion when it awarded attorney fees pursuant to under N.D.C.C. § 28-32-50(1).

[¶ 13] The district court found the Department acted without substantial justification and awarded attorney fees to Mr. French pursuant to N.D.C.C. § 28-32-50(1). (Appx. p. 17). A district court's order of attorney fees is reviewed under an abuse of discretion standard. Drayton v. Workforce Safety and Ins., 2008 ND 178, ¶ 38, 756 N.W.2d 320. Here, the hearing officer attempted to use his own experience to obtain the desired result for the Department. Further, the hearing officer exaggerated the hardship to the Department to help prove the Department's case. The Department ignored and misapplied the law and acted without substantial justification. The district court made explicit findings regarding the clarity of the statute and found the Department acted without substantial justification. (Appx. p. 17). The district court did not abuse its discretion when it awarded attorney fees and the order should be affirmed.

(¶14) **CONCLUSION**

[¶ 15] The records of the Department did not justify a 365-day suspension as the records were insufficient to prove a "prior offense" under North Dakota law. The hearing officer's decision was contrary to law and the facts were not supported by a preponderance of evidence. The district court correctly applied the law and its judgment should be affirmed.

[¶ 16] The Department acted without substantial justification when it suspended Mr. French's driving privileges. The district court did not abuse its discretion when it awarded attorney fees and the order should be affirmed.

Dated this 24th day of January, 2019.

/s/ Charles Sheeley
Charles J. Sheeley (#06383)
SHEELEY LAW, P.C.
3332 4TH Avenue South, Suite 2B
Fargo, ND 58103
Phone: (701) 356-4207
Facsimile: (701) 356-4209
sheeleylawnd@gmail.com

ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

[¶ 17] A true and correct copy of the foregoing document was sent by e-mail on this 24th day of January, 2019, to: Douglas Anderson, Office of Attorney General, at dbanders@nd.gov.

/s/ Sara Gilbertson
Sara Gilbertson