

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Brandon Wade Lindstrom,)	
)	
Appellant,)	Supreme Ct. No. 20190204
)	
v.)	District Ct. No. 08-2019-CV-00654
)	
North Dakota Department of)	ORAL ARGUMENT REQUESTED
Transportation,)	
)	
Appellee.)	

**APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED MAY 3, 2019
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT**

HONORABLE THOMAS J. SCHNEIDER

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

[¶1] The hearing officer's finding that Trooper Mayer forwarded the Report and Notice to the Department within five days of its issuance is supported by the weight of the evidence.

[¶2] The Department had jurisdiction to suspend Lindstrom's driving privileges regardless of whether Trooper Mayer failed to forward the Report and Notice to the Department within five days of its issuance to Lindstrom.

STATEMENT OF CASE

[¶3] Trooper Steven Mayer (Trooper Mayer) of the Bismarck Police Department arrested Brandon Wade Lindstrom (Lindstrom) on January 28, 2019, for the offense of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor. Transcript (Tr.) at Exhibit (Ex.) 1, at 2. A Report and Notice, including a temporary operator's permit, was issued to Lindstrom after chemical Intoxilyzer test results indicated Lindstrom's alcohol concentration was .22 percent by weight. Id. The Report and Notice notified Lindstrom of the Department's intent to suspend his driving privileges. Id.

[¶4] In response to the Report and Notice, Lindstrom requested an administrative hearing. Tr. Ex. 1, at 5. The hearing was held on February 27, 2019. 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) Whether 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) Whether the person was placed under arrest;
- (3) Whether the person was tested in accordance with N.D.C.C. section 39-20-01 and, if applicable, section 39-20-02; and;
- (4) Whether the test results show the person had an alcohol concentration of at least eight one-hundredths of one percent but less than eighteen one-hundredths of one percent by weight.

Tr. 1; Tr. Ex. 2.

[¶5] Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision suspending Lindstrom's driving privileges for a period of 180 days. Appendix to Brief of Appellant (App.) 6. Lindstrom requested judicial review of the hearing officer's decision. App. 8.

REQUEST FOR ORAL ARGUMENT

[¶6] The Department requests the Court schedule oral argument in this case under N.D. R. App. P. 28(h). This matter involves a question of whether the statutory provision in N.D.C.C. § 39-20-03.1(4) requiring law enforcement to forward the Report and Notice to the Department within five days of the issuance of the temporary operator's permit is a basic and mandatory provision providing the Department with jurisdiction to suspend a motorist's driving privileges. Oral argument would be helpful in the Court's review of the District Court's decision and the Hearing Officer's decision.

STATEMENT OF FACTS

[¶7] The facts regarding Trooper Mayer's contact with Lindstrom, his reasonable grounds to believe Lindstrom had been driving or was in actual physical control of vehicle while under the influence of intoxicating liquor, Lindstrom's arrest for driving

under the influence, and Lindstrom's chemical testing which showed an alcohol concentration of 0.22 percent by weight within two hours of driving are not in dispute and can be found in the hearing officer's decision. App. 6. It is further undisputed that following Lindstrom's chemical testing, Trooper Mayer filled out a Report and Notice and issued Lindstrom a temporary operator's permit, which is a part of the drivers copy of the Report and Notice. Appellant's Br. ¶ 8.

[¶8] On January 29, 2019, Trooper Mayer forwarded the "drivers license division" copy of the Report and Notice to the Department by placing the Report and Notice in a drop box for "in-house mail through the highway patrol's US Postal Service." Tr. 13, l. 21 – Tr. 14, l. 3. The Report and Notice was received by the Department on February 6, 2019 at 10:46 a.m., in an envelope postmarked February 4, 2019. Tr. Ex. 1, at 2.

STATEMENT OF ADMINISTRATIVE PROCEEDING

[¶9] At the hearing Lindstrom objected to the Department's jurisdiction to suspend his driving privileges on the basis that the five day forwarding requirement of N.D.C.C. § 39-20-03.1 was not complied with by Trooper Mayer. Tr. 2, l. 17 – Tr. 3, l. 4. The hearing officer overruled the objection noting that the forwarding requirement would need to be established on the record through evidence. Tr. 3, ll. 5-7. After testimony was provided by Trooper Mayer regarding the forwarding of the Report and Notice, the hearing officer determined:

Trooper Mayer forwarded the report and notice form and the test results to the Department by placing them in the mail on January 29, 2019. The report and notice indicates that the Department received the report and notice and teste (sic) results on February 6, 2019 in an envelope postmarked on February 4, 2019.

App. 6. The hearing officer concluded

Mr. Lindstrom first argues that this matter must be dismissed on jurisdictional grounds as the report and notice on the face of it does not indicate that it was forwarded to the Department within five days after issuance. NDCC section 39-20-03.1(4) requires that within five days of the issuance of the temporary operator's permit, law enforcement shall forward to the director a certified written report. The argument that the report and notice that is forwarded must show on the face of the document that it was forwarded is not to be found. Further it is noted for the record that the report and notice does not have a certificate of mailing, nor is there a place[] to indicate the date of mailing. Mr. Lindstrom is relying on the postmark exclusively for support of his argument. However the date an item is placed in the mail is not always the date that is postmarked. For illustrative purposes only for example, the Department has a blue postal box into which you could place an item on Friday afternoon and the earliest it would be collected and postmarked would be the next Monday, a full three days after the envelope had been placed in the mail. This being said, this is why the determination of whether the report and notice and test results were forwarded to the department is a factual determination which may require additional testimony. In the case at hand Trooper Mayer stated he placed the documents in an envelope addressed to the Department and placed them into the mail on January 29, 2019. Therefore the greater weight of the evidence shows that the report and notice and test results were properly forwarded to the director within five days of the issuance of the temporary operators permit as is required.

Id.

[¶10] Lindstrom requested judicial review of the Hearing Officer's decision alleging:

- A. The order is not in accordance with the law; specifically, the law enforcement officer did not forward the Report and Notice form to DOT with five (5) days of issuance of the temporary operator's permit as required by N.D.C.C. § 39-20-03.1(4). The five (5) day forwarding requirement is a basic and mandatory statutory requirement. The failure to comply with the basic and mandatory statutory requirements of N.D.C.C. § 39-20-03.1(4) deprives DOT of jurisdiction to impose administrative sanctions upon Mr. Lindstrom.
- B. The findings of fact made by the agency are not supported by a preponderance of the evidence; specifically, the finding that

“Trooper Mayer forwarded the report and notice form and the test results to the Department by placing them in the mail on January 29, 2019” is not supported by the evidence, and only a biased hearing officer could arrive at that determination.

- C. DOT employs an awkward format with “Case Analysis” that contains little of no worthwhile analysis. Within this section, DOT writes, without labeling it a finding or a conclusion:

“Trooper Mayer stated he placed the documents in an envelope addressed to the Department and placed them in the mail on January 29, 2019. Therefore the greater weight of the evidence shows that the report and notice and test results were properly forwarded within five days of the issuance of the temporary operators permit as is required.”

Whether this is finding of fact or conclusion of law, it is, either way, defective. A finding that “Trooper Mayer stated he placed the documents in an envelope addressed to the Department and placed them in the mail on January 29, 2019,” is not supported by a preponderance of the evidence.

Similarly, a Conclusion of Law that “the greater weight of the evidence shows that that [sic] report and notice and test results were properly forwarded within five days of the issuance of the temporary operator’s permit as is required,” is not supported by an unprejudiced view of the facts.

App. 9.

[¶11] Judge Thomas J. Schneider affirmed the hearing officer’s decision finding that the Department had jurisdiction to suspend Lindstrom’s driving privileges.

App. 25. Judge Schneider issued his Order Affirming Hearing Officer’s Decision on May 1, 2019. Id. Judgment was entered on May 3, 2019. App. 27. Notice of Entry of Judgment was entered the same day. App. 28. Lindstrom appealed from the Judgment to this Court. App. 29. The Department asks this Court to affirm the judgment of the Burleigh County District Court and the administrative suspension of Lindstrom’s driving privileges for a period of 180 days.

STANDARD OF REVIEW

[¶12] The Administrative Agencies Practices Act governs an appeal from an administrative hearing officer's decision suspending a license. N.D.C.C. ch. 28-32; N.D.C.C. ch. 39-20. The appeal is civil in nature. Knoll v. N.D. Dep't of Transp., 2002 ND 84, ¶ 16, 644 N.W.2d 191. And it is separate and distinct from any criminal matter that may ensue. Id. The North Dakota Century Code provides, in relevant part, that a court must affirm an agency's order except in the event of any of the following:

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.

[¶13] "When reviewing the agency's factual findings, [the Court] do[es] not make independent findings of fact or substitute [its] judgment for that [of the] agency, but

determine[s] only whether a reasoning mind reasonably could have determined the factual conclusions were proven by the weight of the evidence from the entire record.” Ringsaker v. Dir., N.D. Dep’t of Transp., 1999 ND 127, ¶ 5, 596 N.W.2d 328. “When an ‘appeal involves the interpretation of a statute, a legal question, this Court will affirm the agency’s order unless it finds the agency’s order is not in accordance with the law.’” Harter v. N.D. Dep’t of Transp., 2005 ND 70, ¶ 7, 694 N.W.2d 677 (quoting Phipps v. N.D. Dep’t of Transp., 2002 ND 112, ¶ 7, 646 N.W.2d 704). The “interpretation of a statute is a question of law fully reviewable on appeal.” State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60.

LAW AND ARGUMENT

The Department had jurisdiction to suspend Lindstrom’s driving privileges for 180 days.

[¶14] The suspension should be upheld for either of two alternative reasons involving this issue. First, the hearing officer reasonably found that Trooper Mayer forwarded the report and notice to the Department within five days after issuance to Lindstrom. App. 6. Alternatively, regardless of whether the report and notice was forwarded to the Department within five days of issuance, the statutory provision is not jurisdictional and there was no prejudice.

- A. The hearing officer reasonably found that Trooper Mayer forwarded the Report and Notice to the Department within five days after issuance.

[¶15] Lindstrom contends the hearing officer erred in finding Trooper Mayer forwarded the report and notice to the Department within five days after issuance. Appellant’s Br. at ¶ 22. Under N.D.C.C. § 39-20-03.1(4), a law enforcement officer must forward the report and notice to the Department within five days after its

issuance to the driver.

[¶16] The issue of whether a law enforcement officer forwarded a report and notice to the Department within five days of issuance is a question of fact. Nelson v. Dir., N.D. Dep't of Transp., 1997 ND 81, ¶ 15, 562 N.W.2d 562. “To ‘forward’ means ‘to send forward; to send toward the place of destination; to transmit.’” Black’s Law Dictionary 655 (6th ed. 1990). A reviewing court must give “great deference” to the hearing officer’s findings of fact and may not make independent findings or substitute its judgment for that of the Department. Henderson v. Dir., N.D. Dep't of Transp., 2002 ND 44, ¶ 6, 640 N.W.2d 714. A reviewing court must determine only “whether a reasoning mind reasonably could have concluded the Department’s findings were supported by the weight of the evidence from the entire record.” Id. “When more than one reasonable inference can be made from evidence, the reviewing court must accept the inference made by the trier of fact.” Geiger v. Hjelle, 396 N.W.2d 302, 303 (N.D. 1986).

[¶17] In this case, the hearing officer reasonably found that the report and notice was forwarded to the Department within five days. Although the date stamp on the report and notice shows it was “received in envelope postmarked FEB – 4 2019” the trooper testified he placed the Report and Notice in the Highway Patrol Office United States mail receptacle/drop box on January 29, 2019. Tr. 13, l. 21 – Tr. 14, l. 3 (emphasis added). The hearing officer’s finding relying on the officer’s testimony is reasonable and should not be disturbed.

[¶18] Yet, Lindstrom alleges the prima facie evidence of the Report and Notice shows it was “mailed and forwarded to DOT on February 4, 2019 – 7 days after

issuance of the temporary permit.” Appellant’s Br. ¶ 21. Lindstrom’s argument is meritless because he incorrectly delineates what constitutes “mailing”.

[¶19] The Report and Notice has two stamps located on the upper right hand corner which indicate that the Department received the Report and Notice on February 6, 2019 in an envelope postmarked on February 4, 2019. Tr. Ex. 1, page 2. Lindstrom asserts the postmark date is prima facie evidence of the date the Report and Notice was mailed. Appellant’s Br. ¶ 21. While Title 39, N.D.C.C. does not define the term “forward”, it does define the term “mail.” Mail is defined as follows:

39. “Mail” means to deposit mail properly addressed and with postage prepaid with the United States postal service.

N.D.C.C. § 39-01-01(3). Nothing in either N.D.C.C. ch. 39-20 or the definition of mailing in N.D.C.C. § 39-01-01 indicates that a document is mailed when the US postal service places a post mark stamp on the document. Further there is nothing in the statute that requires the Report and Notice to indicate on its face the date the report was forwarded. Therefore, the forwarding requirement is a factual determination as correctly determined by the hearing officer. In this regard, the hearing officer reasoned:

Mr. Lindstrom first argues that this matter must be dismissed on jurisdictional grounds as the report and notice on the face of it does not indicated that it was forwarded to the Department within five days after issuance. NDCC section 39-20-03.1(4) requires that within five days of the issuance of the temporary operator’s permit, law enforcement shall forward to the director a certified written report. The argument that the report and notice that is forwarded must show on the face of the document that it was forwarded is not to be found. Further it is noted for the record that the report and notice does not have a certificate of mailing, nor is there a place[] to indicate the date of mailing. Mr. Lindstrom is relying on the postmark exclusively for

support of his argument. However the date an item is placed in the mail is not always the date that is postmarked. For illustrative purposes only for example, the Department has a blue postal box into which you could place an item on Friday afternoon and the earliest it would be collected and postmarked would be the next Monday, a full three days after the envelope had been placed in the mail. This being said, this is why the determination of whether the report and notice and test results were forwarded to the department is a factual determination which may require additional testimony. In the case at hand Trooper Mayer stated he placed the documents in an envelope addressed to the Department and placed them into the mail on January 29, 2019. Therefore the greater weight of the evidence shows that the report and notice and test results were properly forwarded to the director within five days of the issuance of the temporary operators permit as is required.

App. 6.

[¶20] In Nelson this Court noted that “[a] requirement to ‘forward’ is met by placing the papers in the mail.” Nelson, 1997 ND 81 ¶ 14, 562 N.W.2d 562. United States Supreme Court case law supports that the mail receptacle/drop box at the Highway Patrol building is considered part of the United States postal service. In United States Postal Service v. Council of Greenburgh Civic Ass’ns, the Supreme Court stated as follows:

“By regulation, the postal Service has also provided that “[every] letter box or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, highway contract route, or other mail route is designated an authorized depository for mail within the meaning of 18 U.S.C. § 1725” DMM 151.1. A letterbox provided by a postal customer which meets the Postal Service’s specifications not only becomes part of the Postal Service’s nationwide system for the receipt and delivery of mail, but is also afforded the protection of the federal statutes prohibiting the damaging or destruction of mail deposited therein. See 18 U.S.C. §§ 1702, 1705, and 1708.

453 U.S. 114 (1981).

[¶21] Here, Trooper Mayer testified the Report and Notice “was forwarded by in-

house mail through the highway patrol's US Postal Service." As such there is evidence in the record that the drop box used was part of the US postal service and therefore, Trooper Mayer's uncontroverted testimony shows the Report and Notice was forwarded to the DOT within five days of the issuance of the temporary operator's permit to Lindstrom.

[¶22] Further, simply because forwarding is "met" by placing in the mail does not mean that forwarding is only equivalent to "mailing." If the legislature intended law enforcement to mail the Report and Notice to the Department it could have easily used that term. However, the legislature chose to use the term "forward" rather than "mail" or "postmark," suggesting that something less than mailing may satisfy the directive. Therefore, even if this court cannot determine whether the drop box Trooper Mayer placed the Report and Notice in on January 29, 2019 was a valid US postal box, it is clear that the regular highway patrol procedure for having Report and Notices mailed out to the Department is for a trooper to place them in the drop box. Therefore, even if this does not constitute "mailing" it would constitute "forwarding" as Trooper Mayer took direct action, according to regular business practice of the Highway Patrol, to have the Report and Notice sent to the Department. Nothing more is required by the statute.

- B. Alternatively, regardless of whether the report and notice was forwarded to the Department within five days after issuance, the suspension should be upheld because the forwarding requirement is not jurisdictional and there was no prejudice.

[¶23] Although the Supreme Court has never decided the question of whether the directive in N.D.C.C. § 39-20-03.1(4) is jurisdictional in nature, it has rejected similar jurisdiction arguments involving N.D.C.C. ch. 39-20. See Nelson, 1997 ND

81, ¶ 15, 562 N.W.2d 562 (finding the hearing officer could have reasonably found that the report and notice was forwarded within five days of issuance rather than addressing the jurisdictional argument). In Greenwood v. Marshall Moore, Dir., N.D. Dep't of Transp., 545 N.W.2d 790 (N.D. 1996), the issue was whether the Department's failure to hold an administrative hearing within the thirty day limit set forth in N.D.C.C. § 39-20-05(1) was a jurisdictional defect. Id. at 795-96. The Supreme Court explained that "the statute does not describe a remedy for the Department's failure to hold a hearing within the time limit. *Usually, when no statutory remedy is specified for an agency's failure to meet a time limit, we do not reverse without a showing of prejudice.*" Id. (emphasis added). The Court concluded that "the legislature did not make the time limit jurisdictional." Id. at 796. (Emphasis added).¹

[¶24] This Court applied a similar analysis in Schwind v. Dir., N.D. Dep't of Transp., 462 N.W.2d 147 (N.D. 1990). In Schwind, a driver claimed the Department lacked jurisdiction to suspend his driving privileges because the law enforcement officer failed to indicate on the report and notice whether the driver's license was attached. Id. at 148-49. The court referenced N.D.C.C. § 39-20-03.1(1)&(3), which at the time provided that law enforcement officers "shall immediately take possession of the person's operator's license if it is then available" and "forward to the [director] . . . the person's operator's license" if the

¹ Although the Supreme Court decided in Greenwood that the time limit in N.D.C.C. § 39-20-05(1) is not jurisdictional, the court reversed the administrative suspension after concluding that, under N.D. Admin. Code § 37-03-03-09, there were no "most compelling reasons" for the hearing not being convened within thirty days after issuance of the Report and Notice. Id. at 796.

chemical test results are above .08 percent. Id. at 149.

[¶25] The court in Schwind explained that, “[w]hile it is clear that section 39-20-03.1, NDCC, requires the officer to forward the operator’s license, the failure to do so does not destroy the Director’s jurisdiction to suspend a violator’s driving privileges.” Schwind, 462 N.W.2d at 150. The court noted that the driver “had full notice and knowledge of the administrative proceedings and has not been shown to have been prejudiced by the alleged failure to submit the license.” Id. at 151. The court reasoned that a “contrary holding would defeat the Legislature’s intent to protect the public from potential hazards posed by intoxicated drivers.” Id. at 150.

[¶26] In Samdahl v. N.D. Dep’t of Transp., Dir., 518 N.W.2d 714 (N.D. 1994), a driver argued that the Department lacked jurisdiction to suspend his driving privileges because the law enforcement officer failed to issue a report and notice to Samdahl “immediately” after receiving the blood test results, as required by N.D.C.C. § 39-20-03.1(2). The court emphasized that “[a]lthough ‘[t]he jurisdiction of an administrative agency is dependent upon the terms of the statute and must meet at least the basic mandatory provisions of the statute before jurisdiction is established,’ the terms of the statute ‘must be construed logically so as not to produce an absurd result.’” Id. at 717 (citation omitted). The court also observed that “[w]hen adherence to the letter of the law would cause an absurd result, we give effect to the legislative intent even though contrary to the letter of the law.” Id.

[¶27] Applying these general rules, the court in Samdahl reasoned that “[a]lthough the unexplained delay of more than one month between the testing of

the blood and the giving of notice of intention to suspend driving privileges does not strictly comply with ‘the letter of the law,’ we seek to avoid absurd results.” Id. Pointing out that there was no showing of any harm or prejudice to the driver, the court upheld the driver’s license suspension. Id.

[¶28] In this case, N.D.C.C. § 39-20-03.1(4) does not specify a remedy for a failure to forward the report and notice to the Department within five days after its issuance. And there is no evidence that Lindstrom suffered *any* prejudice. Lindstrom timely requested a hearing, and the hearing was held within the thirty-day statutory time period from issuance of the report and notice. See N.D.C.C. § 39-20-05(1). Accordingly, like in Greenwood, Schwind, and Samdahl, Lindstrom’s suspension should be upheld regardless of whether the report and notice was forwarded within the five-day period.

CONCLUSION

[¶29] The Department respectfully requests this Court affirm the judgment of the Burleigh County District Court and the Department’s decision suspending Lindstrom’s driving privileges for a period of 180 days.

Dated this 20th day of September, 2019.

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v.)	District Ct. No. 08-2019-CV-00654
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North Dakota Department of)	
Transportation,)	CERTIFICATE OF COMPLIANCE
)	
Appellee.)	

¶1 The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), that the Brief of Appellee contains 15 pages.

¶2 This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 word processing software in Arial 12 point font.

Dated this 20th day of September, 2019.

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Transportation,)	CERTIFICATE OF SERVICE
)	
Appellee.)	

¶1 I hereby certify that on September 20, 2019, the following documents:
BRIEF OF APPELLEE and CERTIFICATE OF COMPLIANCE were filed through
electronic filing and served upon Dan Herbel at herbellawfirm@yahoo.com.

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