

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Brandon Wade Lindstrom,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	
	)	
North Dakota Department of	)	Supreme Court No. 20190204
Transportation,	)	
	)	Burleigh County No. 08-2019-CV-00654
Defendant/Appellee.	)	

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REPLY BRIEF OF APPELLANT

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Appeal from Judgment, dated and filed on May 3, 2019

Entered following the District Court's Order Affirming Decision

dated and filed on May 1, 2019

Burleigh County District Court

South Central Judicial District

The Honorable Thomas J. Schneider

\*\*\* **ORAL ARGUMENT REQUESTED** \*\*\*

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[¶1] TABLE OF AUTHORITIES

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## [¶2] LAW AND ARGUMENT

[¶3] The Department of Transportation (DOT) really makes no convincing argument to rebut the prima facie evidence in this case - the postmark on the Report and Notice form. First, DOT argues that, despite the clear February 4 postmark on the form, that evidence is overwhelmed by the conclusory and unsupported testimony of the trooper that he mailed it several days earlier. *See* Brief of Appellee, at p.8, ¶17. This "don't believe your lying eyes" argument is intellectually dissatisfying.<sup>1</sup>

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<sup>1</sup> We do not defer to agency findings of fact if they are, like in this case, not supported by the evidence. *See Henderson v. Director North Dakota Dept. of Transp.*, 2002 ND 44, ¶6, 640 N.W.2d 714.

Last term, the United States Supreme Court signaled the impending death of agency deference (*Auer* and *Chevron* deference) when a conservative bloc of the Court invited another case to take deference off life support. *See Kisor v. Wilkie*, 139 S.Ct. 2400 (2019) (discussing *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). In *Kisor*, the high court narrowly kept alive some semblance of agency deference (to agency regulations) when a liberal bloc of the Court, joined by Chief Justice Roberts, kept a weakened form of *Auer* (but maybe not *Chevron*) deference in force. *See Kisor*, 139 S.Ct. 2400.

In watering down agency deference, the *Kisor* court reminded that "[t]he deference doctrine" is "cabined in its scope" (*See Kisor*, at 2408), and instructed that "a court should decline to defer to a merely convenient litigating position" advanced by an agency. *See Kisor*, at 2417. The Court informed that agency deference is "far from" a blanket solution and lamented the fact that the Court has given "mixed messages" over the years on agency deference. *See id.* at 2414.

Justice Gorsuch characterized the *Kisor* decision as "more a stay of execution than a pardon" and remarked that the agency deference "doctrine emerges maimed." *See Kisor*, at 2425. Gorsuch strongly suggested that agency deference is not "lawful or wise." *See id.* Justice Gorsuch proclaimed: "In the real world the judge uses his traditional interpretive toolkit, full of canons and tiebreaking rules, to reach a decision about the best and fairest reading of the law," without the need to defer to a biased agency position and without treating "the agency's interpretation as controlling even when it is not ... the best one." *See Kisor*, at 2430.

[¶4] The trooper testified that he placed the Report and Notice form in a drop box/bin in house at Highway Patrol, that he "did not take it to the post office," and that he "[d]idn't mail it [in] any government mailbox." (Tr. at 22, L. 22 - 23, L. 19). The trooper also admitted: "I can't testify if the post office picks up directly from the drop box or how that works." (Tr. at 23, L. 6-7) (emphasis added). Based upon this testimony, there is no evidence the post office has any affiliation with Highway Patrol and there is no evidence that the post office picks up any mail from Highway Patrol.

[¶5] Next, DOT argues that the vague work bin at Highway Patrol is "part of the United States Postal service" and part of a "mail route." *See* Brief of Appellee, at p.10, ¶20. There is nothing in the record to support this feeble argument, and DOT never advanced this argument in the district court or in the one-sided tribunal. There is a close competition of whether this argument is more stunning or more infirm. Again, the trooper testified that he "can't testify if the post office picks up" from the drop box and he does not know how the drop bin works. (Tr. at 23, L. 6-7) (there is no evidence the post office has any affiliation or if they even pick up).

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Furthermore, Justice Kavanaugh penned his belief that the agency "deference doctrine should be formally retired." *See Kisor*, at 2448. Kavanaugh continued: "Umpires in games at Wrigley Field do not defer to the Cubs manager's in-game interpretation of Wrigley's ground rules." *See id.*

Both Chief Justice Roberts and Justice Kavanaugh articulated that *Kisor* extended a temporary lifeline to only *Auer* deference (deference to agency interpretations of agency rules and regulations), but not *Chevron* deference (deference to agency interpretations of statutes). *See Kisor*, at 2425 and 2449 ("[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress."). This makes sense, because it is a more difficult argument to make that an agency be accorded deference in the interpretation of statutes that have been crafted by another branch of government - the Legislature.

[¶6] DOT's argument to disregard the clear postmark evidence and pretend that the bin at Highway Patrol is on a mail route, should be given an amusing smile, but little heft. The prima facie evidence clearly shows that the Report and Notice form was mailed and forwarded to DOT on February 4, 2019 - 7 days after issuance of the temporary permit. See Exhibit 1 (page 2 of 6) (Report and Notice form bearing the Department's own evidentiary stamp: "RECEIVED IN ENVELOPE POSTMARKED FEB - 4 2019"). This clearly violates the 5-day forwarding requirement of N.D.C.C. § 39-20-03.1(4).

[¶7] Placing a report in an "in-house bin" does not constitute forwarding or mailing. Rather, it evidences sidelining the report. If there was any evidence that the bin was affiliated with the post office, that would strengthen DOT's argument, but that still may not carry the day. Here, there is no evidence of affiliation for this Court to entertain that hypothetical. The postmark date of mailing, as evidenced on the report, does matter.

[¶8] Lindstrom is unaware of any timeline in the expedited administrative process that is not jurisdictional or imperative.<sup>2</sup> A driver cannot invoke the administrative process unless he requests a hearing within 10 days of being issued the Report and Notice form. This is quasi-jurisdictional. Similarly, the Department should be required to comply with the 5-day requirement to forward to DOT the administrative complaint in order to invoke jurisdiction. The 5-day forwarding requirement, like the 10-day hearing request requirement, is bright-line, strict, basic, and mandatory.

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<sup>2</sup> The Department cites to and argues *Schwind v. Dir., N.D. Dep't of Transp.*, 462 N.W.2d 147 (N.D. 1990) and *Samdahl v. N.D. Dep't of Transp., Dir.*, 518 N.W.2d 714 (N.D. 1994), but neither case involved a date-specific deadline within the expedited administrative process.

[¶9] Like the other date-specific timelines in the expedited administrative process, the five (5) day forwarding requirement of N.D.C.C. § 39-20-03.1(4) is a basic and mandatory statutory requirement (jurisdictional). The date-specific timeline is also imperative within the expedited process.

[¶10] Indeed, every other portion of N.D.C.C. § 39-20-03.1(4) has been declared jurisdictional by this Court. *See Aamodt v. North Dakota Dept. of Transp.*, 2004 ND 134, ¶1, 682 N.W.2d 308 ("the provision ... requiring an officer to issue a certified written report showing reasonable grounds ... is a basic and mandatory provision."); *see also Jorgensen v. North Dakota Dept. of Transp.*, 2005 ND 80, ¶13, 695 N.W.2d 212 ("inclusion of the test result in the officer's certified report to the Department is a basic and mandatory provision of the statute."); *Bosch v. Moore*, 517 N.W.2d 412, 413 (N.D. 1994) ("The statute's command that all tests be forwarded to DOT is basic and mandatory."). This jurisdiction section, N.D.C.C. § 39-20-03.1(4),<sup>3</sup> "establishes the prerequisite for the exercise of DOT's jurisdiction." *See Bosch*, at 413.

[¶11] "The Department's authority to suspend a person's license is given by statute" and, accordingly, "[t]he Department must meet the basic and mandatory provisions of the statute to have authority to suspend a person's driving privileges." *See Aamodt*, 2004 ND 134, at ¶15. Here, the trooper failed to abide by the five (5) day forwarding requirement in N.D.C.C. § 39-20-03.1(4), a basic and mandatory statutory requirement, and therefore DOT's order is not in accordance with the law. The failure to comply with the basic and mandatory statutory requirements of N.D.C.C. § 39-20-03.1(4)

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<sup>3</sup> Formerly N.D.C.C. § 39-20-03.1(3).

deprives DOT of jurisdiction to impose administrative sanctions upon Mr. Lindstrom.  
Therefore, Lindstrom's driving privileges should be reinstated.

[¶12] CONCLUSION

[¶13] For the foregoing reasons, Brandon Lindstrom respectfully requests that  
this Court reverse the decision of the district court and reinstate his driving privileges.

Respectfully submitted  
this 22nd day of October, 2019.

*/s/ Dan Herbel*

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[¶14] CERTIFICATE OF COMPLIANCE

[¶15] The undersigned hereby certifies that this document complies with the page limitation designated in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, and further certifies that this document contains nine (9) pages.

Dated this 22nd day of October, 2019.

*/s/ Dan Herbel*

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[¶16] CERTIFICATE OF SERVICE

[¶17] The undersigned hereby certifies that, on October 22, 2019, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Michael Pitcher, Assistant Attorney General, at the following:

Electronic filing to: “Michael Pitcher” < [mtpitcher@nd.gov](mailto:mtpitcher@nd.gov) >

Dated this 22nd day of October, 2019.

*/s/ Dan Herbel*

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