20190293
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 20, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Kyle Steven Ouradnik, Appellee, vs. Ronald Henke, Interim Director, Department of Transportation, Appellant.	**SUPREME COURT NO. 20190293** Civil No. 09-2019-CV-01615

ON APPEAL FROM AUGUST 5, 2019, JUDGMENT OF THE DISTRICT COURT, CASS COUNTY, NORTH DAKOTA, EAST CENTRAL JUDICIAL DISTRICT THE HONORABLE THOMAS R. OLSON PRESIDING

BRIEF OF APPELLEE

Mark A. Friese (#05646)
Drew J. Hushka (#08230)
VOGEL LAW FIRM
Attorneys for Appellee
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
701.237.6983
Email: mfriese@vogellaw.com
dhushka@vogellaw.com

TABLE OF CONTENTS

Page

Paragraph(s)

TABLE OF AUTHORITIES

Paragraph(s)

Cases

Statutes

Rules

STATEMENT OF ISSUES PRESENTED FOR REVIEW

[¶1] If the evidentiary record does not support an agency's findings of fact, North Dakota law requires reversal of an agency decision. The North Dakota implied consent advisory statute requires law enforcement to advise a motorist of the consequences of refusing a chemical test of breath "or urine." Here, law enforcement omitted "or urine" when providing Appellant the implied consent advisory. Does the evidentiary record support the hearing officer's factual finding that law enforcement provided Appellant the statutory implied consent advisory?

[¶2] A hearing officer may admit the regularly kept records of the Department as *prima facie* evidence of their contents. Someone with authority must certify documents to make them regularly kept records of the Department. Here, the hearing officer admitted documents as regularly kept records of the Department despite a facially false certification. Did the Department carry its burden of establishing the documents as the regularly kept records of the Department?

[¶3] The Department must pay a motorist's costs and attorneys' fees when the Department acts without substantia justification. The Department lacks substantial justification when it lacks a reasonable basis in law or fact. Here, the Department appeals a finding of fact lacking any basis in the evidentiary record, and the admission of documentary evidence lacking foundation. Do these acts warrant an award of Appellant's costs and attorneys' fees?

STATEMENT OF THE CASE

[¶4] On April 5, 2019, North Dakota Highway Patrol Trooper Paul Sova ("Sova") arrested Appellee, Kyle Steven Ouradnik ("Mr. Ouradnik"), for suspicion of driving while under the influence of an intoxicating liquor. Appellant's App'x, at 12. Mr. Ouradnik timely requested, and received, an administrative hearing. *Id.* at 10. At the hearing, the hearing officer admitted documents over Mr. Ouradnik's objection. *Id.* at 12. Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and a decision, suspending Mr. Ouradnik's driving privileges for 91 days. *Id.* at 12-13.

[¶5] Mr. Ouradnik appealed the decision to the district court, arguing the evidentiary record did not support the findings of fact made by the hearing officer, and that the hearing officer erred in admitting the documents. *Id.* at 14-19. The district court reversed the suspension. *Id.* at 20-24. The Department then appealed to this Court. *Id.* at 28-29.

STATEMENT OF THE FACTS

[¶6] On February 12, 2019, the Department placed Glenn Jackson ("Jackson")—previously Director of the Driver's License Division of the North Dakota Department of Transportation—on administrative leave. Appellant's App'x, at 12. Jackson remained on administrative leave at all times relevant to this appeal. *Id.*

[¶7] On April 5, 2019, Sova arrested Mr. Ouradnik for suspicion of DUI. *Id.* at 12. Sova transported Mr. Ouradnik to the Cass County Jail, where Sova provided

Mr. Ouradnik an implied consent advisory omitting the phrase "or urine." Tr., at 34:9-35:22.

[¶8] Mr. Ouradnik requested an administrative hearing. Appellant's App'x, at 10. At the hearing, the hearing officer offered documents purportedly from the Department. Appellant's App'x, at 7. A certification prefaced the documents, stating they were "a true and correct copy of the original as appears in the files and records of the Department." *Id.* But Jackson purportedly made the certification despite being on administrative leave. *Id.* at 7 & 12. So Mr. Ouradnik objected, arguing the documents lacked proper foundation absent a valid certification. *Id.* at 12. The hearing officer overruled the objection, admitting the documents as regularly kept records of the Department. *Id.* at 12-13. Following the hearing, the hearing officer issued his decision. *Id.* Despite Sova admitting he omitted the phrase "or urine" when providing Mr. Ouradnik the implied consent advisory, the hearing officer factually found Sova provided Mr. Ouradnik with the statutory implied consent advisory. *Id.* at 12.

[¶9] Mr. Ouradnik then appealed the decision to the district court. *Id.* at 14-19. In his specification of errors, Mr. Ouradnik clearly specified the hearing officer's findings of fact as an error. *Id.* at 15 & 16. Mr. Ouradnik also alleged the hearing officer erred in admitting the documents without foundation. *Id.* at 15. Mr. Ouradnik and the Department extensively briefed both specifications of error. *See generally* Appellee's App'x. The district court found the evidentiary record did not support the hearing officer's findings of fact, reversing the suspension. Appellant's

App'x, at 20-24. Because the district court found the evidentiary record did not support the hearing officer's findings of fact, it did not reach the issue of the lack of foundation for the documents. *Id.* The Department subsequently appealed the district court's decision to this Court. *Id.* at 30-31.

LAW AND ARGUMENT

[¶10] The Administrative Practices Act governs appeals of driving revocation proceedings. *Rudolph v. North Dakota Dep't of Transp.*, 539 N.W.2d 63, 65 (N.D. 1995). A reviewing court reviews the record complied before the hearing officer. *Zietz v. Hjelle*, 395 N.W.2d 572, 574 (N.D. 1986). Relevant here, the reviewing court must reverse a decision if: "[t]he findings of fact made by the agency are not supported by a preponderance of the evidence[,]" or "[t]he order is not in accordance with the law." *Martin v. North Dakota Dep't of Transp.*, 2009 ND 181, ¶ 33, 773 N.W.2d 190 (citing N.D.C.C. § 28-32-46).

[¶11] Here, a preponderance of the evidence does not support the hearing officer's factual findings. Additionally, the hearing officer's decision is not in accordance with the law because the hearing officer erred in admitting and utilizing evidence lacking foundation. This Court should affirm.

I. The evidentiary record does not support the hearing officer's factual finding that Sova provided an implied consent advisory complying with statute.

A. Sova's implied consent advisory failed to provide the information required by statute by omitting "or urine" from the advisory.

[¶12] The hearing officer found Sova provided Mr. Ouradnik "the statutory implied consent advisory[.]" Appellant's App'x, at 12. Because the evidentiary record does not support this factual finding, this Court should affirm the district court's reversal of Mr. Ouradnik's suspension.

[¶13] When Sova provided Mr. Ouradnik the implied consent advisory, the statute required:

> The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take a chemical test to determine whether the individual is under the influence of alcohol or drugs and that refusal of the individual to submit to a test directed by the law enforcement officer may result in a revocation of the individual's driving privileges for a minimum of one hundred eighty days and up to three years. In addition, the law enforcement officer shall inform the individual refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence. If the officer requests the individual to submit to a blood test, the officer may not inform the individual of any criminal penalties until the officer has first secured a search warrant.

N.D.C.C. § 39-20-01(3)(a) (emphasis added). If law enforcement omits the phrase "or urine," the implied consent advisory fails to comply with statute. *State v. Vigen*, 2019 ND 134, ¶ 11, 927 N.W.2d 430.

[¶14] Here, Sora admitted he omitted the phrase "or urine" when advising Mr. Ouradnik:

> The implied consent that I read was, I must inform you that North Dakota law requires you to take a chemical breath test to determine . . . (INAUDIBLE) . . . under the influence of alcohol or drugs. A refusal to submit to a test directed by a law enforcement officer may result in a revocation of your driving privileges for a minimum of 180 days and up to three years. I must inform you that refusal . . . refusal to take a breath test is a crime punishable in the same manner as driving under the influence. Do you consent to taking a breath test?

Tr., at 34:20-35:4 (ellipses in original). By omitting "or urine," Sova failed to provide Mr. Ouradnik the statutory implied consent advisory. *Vigen*, 2019 ND 134, ¶ 11. Because Sova omitted "or urine," the evidentiary record does not support the hearing officer's finding that Sova provided the required statutory implied consent advisory. This Court should affirm the district court's reversal.

B. Mr. Ouradnik's specification of errors specifically identified the lack of evidentiary support for the hearing officer's findings of fact so as to allow this Court's review.

[¶15] Despite Sova's plainly deficient advisory, the Department argues Mr. Ouradnik's specification of errors failed to identify the issue for review. Appellant's Br., ¶¶ 45-48. The argument lacks basis in fact or law.

[¶16] "[A] person appealing to the district court from the Department's decision to suspend driving privileges must comply with the specification-of-error requirement of N.D.C.C. § 28-32-42(4)." *Rounkles v. Levi*, 2015 ND 128, ¶ 10, 863 N.W.2d 910 (citations omitted). The specification must be "reasonably specific," "detailing which matters are at legal issue, so as to alert the agency, other parties, and the court of the particular errors claimed." *Midthun v. North Dakota Workforce Safety Ins.*,

2009 ND 22, ¶ 7, 761 N.W.2d 572 (citation omitted). Mr. Ouradnik's specification of error complied with statutory requirements.

[¶17] In *Midthun*, when the North Dakota Workforce Safety and Insurance ("WSI") stopped a worker's partial disability benefits, the worker appealed the decision to the district court, "designating as her sole specification of error: 'This appeal is taken upon the grounds that the decision by WSI in its July 20, 2007, Final Order is not in accordance with the law."' *Id.* at ¶ 5. WSI appealed when the district court reversed its decision. *Id.* at ¶ 1.

[¶18] On appeal, this Court considered whether the worker's specification of error met statutory notice requirements. *Id.* at ¶¶ 6-8. The specification incorrectly denoted the issue as legal, despite being a factual issue. *Id.* at ¶ 8. Nevertheless, this Court found the specification satisfied the statutory notice requirements when WSI was aware of the issue raised by the worker. *Id.* This Court so held despite describing the specification of error as "dangerously close to boilerplate." *Id.*

[¶19] Here, Mr. Ouradnik's specification of errors specifically and clearly objected to the hearing officer's factual findings as being unsupported by the evidentiary record. Appellant's App'x, at 15 ("The hearing officer erred in rendering factual findings which were contrary to the record and evidence."); *id.* at 16 ("The hearing officer's findings of fact are not supported by the evidence."). The Department was aware Mr. Ouradnik argued the evidentiary record failed to support for the hearing officer's findings of fact. *See* Appellee's App'x, at 5 ("The hearing officer made findings of fact unsupported by the record to improperly admit the chemical test

results."). And the Department extensively briefed the issue. Appellant's Br., ¶¶ 51-53. Mr. Ouradnik's specification, likewise, alerted the district court with the district court ruling on the issue. Appellant's App'x, at 22-23. Accordingly, Mr. Ouradnik's specification of error preserved the issue of the hearing officer's unsupported findings of fact. *Midthun*, 2009 ND 22, ¶ 8. The district court correctly considered, and this Court should as well, whether the evidentiary record supported the findings.

C. Even if Mr. Ouradnik's specification of errors did not identify the lack of evidentiary support for the hearing officer's findings of fact with exacting specificity, this Court may review the issue because the review does not prejudice the Department.

[¶20] This Court should still review the lack of evidentiary support for the hearing officer's factual findings even if this Court does not believe Mr. Ouradnik's specification identified the issue with exacting specificity. A deficient specification only prevents review of an issue if the deficiency prejudices the opposing party. Because the Department is not prejudiced if this Court considers whether the evidentiary record supports the hearing officer's findings of fact, this Court should consider the issue.

[¶21] Before an administrative hearing, the Administrative Practices Act requires an agency to specify the issues for review at the hearing. *See* N.D.C.C. § 28-32-21(3)(c). This pre-hearing notice allows the challenging party to prepare to present evidence and arguments on those questions under consideration. *Saakian v. North Dakota Workers Comp. Bureau*, 1998 ND 227, ¶ 11, 587 N.W.2d 166.

[¶22] In *Morrell v. North Dakota Department of Transportation*, 1999 ND 140, 598 N.W.2d 111, this Court considered a deficient notice issued by the Department. The Department's Administrative Practices Act specification of issues stated a motorist faced only a 91-day license suspension, and "did not fairly alert [the driver] his prior conviction would be considered for the purpose of enhancing the suspension period." *Id.* at ¶ 10. Nevertheless, in attempting to impose a 365-day suspension, the Department argued the insufficient notice did not matter because the driver "failed to demonstrate any harm suffered as a result of the deficient notice." *Id.* at ¶ 12. While this Court held the Department could not impose the enhanced suspension, it did so only because the lack of notice actually prejudiced the driver. *Id.* at ¶¶ 13-14.

[¶23] Here, the Department cannot show prejudice because the Department cannot change the uncontested facts. Even with infinite time to prepare, the Department cannot change the undeniable truth that Sova provided an advisory failing to comply with statute. *See* Tr., at 34:9-35:22. Moreover, the Department was not prejudiced because it actually argued the issue to both the district court and this Court. Appellant's Br., ¶¶ 51-53; Appellee's App'x., at 19-24. The Department cannot show prejudice when there is no argument the evidentiary record does not support the factual conclusion reached by the hearing officer—that Sova provided an advisory complying with statute.

[¶24] The Department's failure to provide an accurate specification is only actionable if prejudicial. *Morrell*, 1999 ND 140, ¶¶ 13-14. The statutory language

does not support placing a harsher burden on motorists than the Department. *Compare* N.D.C.C. § 28-32-21(3)(c) ("A hearing under this subsection may not be held unless the parties have been properly served with a copy of the notice of hearing as well as a written specification of issues . . . ."), *with* N.D.C.C. § 28-32-42(4) ("An appeal shall be taken by serving a notice of appeal and specifications of error specifying the grounds on which the appeal is taken . . . ."). Because the Department cannot show prejudice, this Court should consider whether the evidentiary record supports the hearing officer's findings of fact. Because the record plainly does not support the findings, this Court should reverse.

D. Because a motorist cannot object at an administrative hearing to factual findings not yet made, Mr. Ouradnik's lack of objection during the administrative hearing does not prevent this Court from considering whether the evidentiary record supported the hearing officer's factual findings.

[¶25] Unable to defend Sova's implied consent advisory on the merits, the Department argues lack of objection during the administrative hearing precludes this Court's review. *See* Appellant's Br., ¶¶ 34-42. Because the Department's argument conflates factual findings with the offering evidence during a hearing, this Court should reject the argument.

[¶26] The Department argues a motorist may only challenge whether the hearing officer properly admitted evidence on appeal if the motorist objected to the introduction of the evidence at the hearing. *Id.* at ¶ 34 (citing N.D.R. Evid. 103(a)(1)). In the abstract, Mr. Ouradnik agrees. But that issue—whether the hearing officer erred in admitting evidence—is not before this Court. Instead, Mr.

Ouradnik argues the evidentiary record does not support the hearing officer's findings of fact—a separate and distinct issue. Rule 103 does not require a party to object to findings of fact at a hearing to preserve the issue for appeal. Notwithstanding what evidence is accepted into the record, factual findings are still set aside if "clearly erroneous." *Cf.* N.D.R. Civ. P. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."). Because the hearing officer's factual finding that Sova provided an advisory complying with statute is clearly erroneous, the issue is ripe for this Court's review.

[¶27] At the administrative hearing, Sova first testified he provided Mr. Ouradnik "the implied consent [advisory] for a breath chemical test." Tr., at 28:21-22. When Mr. Ouradnik was ultimately able to cross-examine Sova, counsel asked Sova what he specifically advised, and Sova responded:

> The implied consent that I read was, I must inform you that North Dakota law requires you to take a chemical breath test to determine . . . (INAUDIBLE) . . . under the influence of alcohol or drugs. A refusal to submit to a test directed by a law enforcement officer may result in a revocation of your driving privileges for a minimum of 180 days and up to three years. I must inform you that refusal . . . refusal to take a breath test is a crime punishable in the same manner as driving under the influence. Do you consent to taking a breath test?

Id. at 34:20-35:4 (ellipses in original). In other words, when provided an opportunity to present evidence, Mr. Ouradnik elicited testimony that Sova did <u>not</u> provide the statutory implied consent advisory, notwithstanding his earlier conclusory testimony.

[¶28] Despite this specific, unimpeached testimony, the hearing officer still found Sova provided the statutory implied consent advisory. Appellant's App'x, at 12. This finding lacks support in the evidentiary record. The Department's concession the failure to say "or urine" when providing an advisory "was not so novel that its legal basis was not reasonably available or foreseeable" only reinforces the hearing officer's finding of fact was clearly erroneous. Appellant's Br., ¶ 40 (emphasis in original). The evidentiary record unequivocally establishes Sova failed to provide Mr. Ouradnik an implied consent warning complying with statute.

[¶29] At an administrative hearing, a motorist cannot object to factual findings not yet made. Mr. Ouradnik's first opportunity to object to the hearing officer's findings was his appeal to the district court. Mr. Ouradnik did precisely that—challenging the factual findings to the district court on appeal. Appellant's App'x, at 15 & 16. Mr. Ouradnik properly raised the issue at the earliest available opportunity. Because the Department cannot defend the implied consent advisory provided by Sova on the merits, this Court should affirm the district court's reversal.

II. The hearing officer erred in admitting facially inaccurate documents.

[¶30] The hearing officer's admission of facially inaccurate documents equally requires reversal.

A. The lack of valid authorized certification prevented the hearing officer from accepting the Intoxilyzer Test Record and Checklist as regularly kept records of the director.

[¶31] When introduced at an administrative hearing, the "regularly kept records of the director" provide *prima facie* evidence of their contents without further

foundation. N.D.C.C. § 39-20-05(4). Statute fails to define the "regularly kept records of the director." *Peterson v. North Dakota Dep't of Transp.*, 518 N.W.2d 690, 693 (N.D. 1994). But statute does reference "copies of certified copies of various documents" as regularly kept records of the director. *Id.* (emphasis in original) (citation omitted). And this Court has stated it is unaware of "any statute defining unsigned, uncertified documents as 'regularly kept records of the director.'" *Id.* (at 694 (citation omitted). Accordingly, to consider a document to be a "regularly kept record of the director," "[t]here must be a prima facie showing, in the form of a certification, that the document is what it purports to be." *Id.* (emphasis added).

[¶32] Here, the hearing officer admitted the Intoxilyzer Test Record and Checklist over objection. Appellant's App'x, at 12-13. Jackson purported to certify the Intoxilyzer Test Record and Checklist. *Id.* at 7. But Jackson did not certify the Intoxilyzer Test Record and Checklist because he was on administrative leave at the time of the purported certification. *Id.* at 12. In other words, the certification to the Intoxilyzer Test Record and Checklist was facially false. But "in order to be admissible as 'regularly kept records of the director,' a document must bear some reliable verifiable indicia that the document is in fact what it purports to be." *Peterson*, 518 N.W.2d at 694. Because the Intoxilyzer Test Record and Checklist bore "no reliable, verifiable indicia that [it is] in fact [a] true and correct cop[y]" from the Department, *id.*, the hearing officer erred in admitting it as a regularly kept record of the department.

[¶33] The hearing officer did not reason the law presumes the Department acts with regularity when admitting the Intoxilyzer Test Record and Checklist as a regularly kept record of the department. *Cf.* Appellant's App'x, at 12-13. Nevertheless, the Department advanced the argument to the district court. North Dakota law does create a disputable presumption of regularity for the Department. *See* N.D.C.C. § 31-11-03(15). A disputable presumption only stands, however, "if uncontradicted," and fails if "contradicted by other evidence." N.D.C.C. § 31-11-03. Here, evidence contradicted the presumption—the facially erroneous certification by "Jackson." The Department cannot legitimately argue a facially false certification is entitled to a presumption of regularity.

[¶34] The hearing officer also did not look to Connecticut law in admitting the Intoxilyzer Test Record and Checklist as a regularly kept record of the department. *Cf.* Appellant's App'x, at 12-13. Nevertheless, the Department argued to the district court that *State v. Verdirome*, 421 A.2d 563 (Conn. Super. Ct. 1980), allows "Jackson" to certify records when not actually authorizing the certification. Even if this Court considered it as persuasive, *Verdirome* fails to support the Department's argument. There, a motorist objected to the Connecticut's motor vehicle department records because "the certification had been placed thereon with a rubber stamp." *Id.* at 565. The court held a rubber stamp could authenticate records, and the commissioner could delegate a staff member to stamp the documents for him. *Id.* at 565-66.

[¶35] But Mr. Ouradnik did not object to the use of a rubber stamp to certify the Intoxilyzer Test Record and Checklist. Rather, Mr. Ouradnik objected that Jackson did not certify or order certification of the document because he was on administrative leave, and the evidentiary record lacked evidence of who actually certified the document and whether this unknown person had authority to certify the document. Tr., at 43:16-44:24. Because the evidence rebuts the presumption of regularity—Jackson's leave—the Department bore the burden of presenting evidence authenticating the Intoxilyzer Test Record and Checklist. *Cf. Kobilansky v. Leffrig*, 358 N.W.2d 781, 790 (N.D. 1984) (the Department bears the burden during administrative hearings). The Department failed to authenticate the Intoxilyzer Test Record and Checklist when it failed to provide evidence of a certification by a person with authority.

[¶36] While lessened, the Department must still meet admissibility requirements to enter a document into evidence at an administrative hearing:

> Although the Legislature has liberalized some evidentiary requirements in administrative driver's license suspension proceedings . . . , [this Court does] not believe the Legislature intended the procedural rules to become so lax as to allow admission of what is essentially an anonymous letter merely because it has found its way into a driver's file at DOT.

Peterson, 518 N.W.2d at 694-95. The Department's failure to provide any evidence of who actually certified the Intoxilyzer Test Record and Checklist, and whatever the person had authority to provide certification, rendered the evidence inadmissible. Because the hearing officer improperly admitted the document, and

because the hearing officer relied on the document in reaching this decision, this Court should reverse.

B. Sova failed to provide foundation to admit the Intoxilyzer Test Record and Checklist absent admission as regularly kept records of the director.

[¶37] The hearing officer also did not find Sova provided separate foundation to admit the Intoxilyzer Test Record and Checklist. *Cf.* Appellant's App'x, at 12-13. Nevertheless, the Department advanced the argument to the district court. Even if this Court allows the Department to advance legal theories for the first time on appeal, the argument lacks merit.

[¶38] The Department argued Section 39-20-07(5) of the North Dakota Century Code allows Sova to provide foundation to admit the Intoxilyzer Test Record and Checklist not as a regularly kept record of the Department. Under Section 39-20-07(5), a hearing officer must admit chemical test results into 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 the 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.

N.D.C.C. § 39-20-07(5). But Sova failed to provide foundation satisfying Section 39-20-07(5). While Sova testified he administered the test in accordance with the approved method, he did so in a conclusory and perfunctory manner. Tr., at 27:18-20. An officer's "conclusory and perfunctory testimony" that he provided a chemical test in accordance with the approved method does "not show scrupulous

compliance with the methods approved by the State Toxicologist or fair administration" of the test. *Schlosser v. North Dakota Dep't of Transp.*, 2009 ND 173, ¶ 13, 775 N.W.2d 695. Sova's testimony, therefore, failed to lay foundation to admit the Intoxilyzer Test Record and Checklist. The Department's argument—raised for the first time on appeal—that Sova provided foundation to admit the Intoxilyzter Test Record and Checklist in accordance with Section 39-20-07(5) fails.

III. The Department's lack of substantial justification in appealing the district court's reversal warrants this Court's awarding of his costs and attorneys' fees to Mr. Ouradnik's.

[¶39] When a motorist successfully appeals a decision of the Department, the reviewing court must award costs and attorneys' fees if the Department acted without substantial justification. N.D.C.C. § 28-32-50(1). The Department lacks substantial justification if a reasonable person would find no reasonable basis in law and fact for the decision. *Tedford v. Workforce Safety & Ins.*, 2007 ND 142, ¶ 25, 738 N.W.2d 29.

[¶40] The Department acted without substantial justification. No evidence in the record supports the hearing officer's finding that Sova provided Mr. Ouradnik the statutory implied consent advisory—the evidence conclusively proves otherwise. Additionally, the hearing officer admitted the Intoxilyzer Test Record and Checklist without any foundation. The Department lacks any justification for arguing for factual findings lacking basis in the record, or for admitting evidence lacking foundation. Accordingly, as the Legislature commands, the Department must

reimburse Mr. Ouradnik for the expense he unnecessarily incurred in defending this appeal. N.D.C.C. § 28-32-50(1).

CONCLUSION

[¶41] Understandably, the Department is used to playing "heads I win, tails you lose." The Department can look at evidence post-hearing to make "readily ascertainable" findings only ascertainable by the Department. *French v. Director, N.D. Dep't of Transp.*, 2018 ND 172, ¶ 15, 930 N.W.2d 84. A motorist must timely request an administrative hearing or appeal an administrative decision, but the Department faces no consequences when it fails to render a timely decision. *Schock v. North Dakota Dep't of Transp.*, 2012 ND 77. The Department also faces no consequences when it fails to provide a transcript in the time mandated by statute. *May v. Spynczynatyk*, 2005 ND 76, 695 N.W.2d 196. A motorist waives issues not raised in his or her specification of errors—despite lacking the ability to review the administrative transcript before filing the specification of errors. *Isaak v. Spynczynatyk*, 2002 ND 64, 642 N.W.2d 860. But the Department is not tethered to the decisions made by a hearing officer—the Department in this very case advances arguments not adopted by the hearing officer.

[¶42] But despite the uneven playing field, the Department cannot escape the hearing officer's errors here. The Administrative Practices Act requires the reversal of the Department's decision if a preponderance of the evidence does not support a hearing officer's findings of fact. Sova provided a statutorily deficient implied consent advisory. Despite this undisputed fact, the hearing officer found Sova

provided an implied consent advisory complying with statute. The Department argues this finding is beyond reproach because Mr. Ouradnik did not "object" during the administrative hearing. Mr. Ouradnik lacked the ability to peer into the future and object to a factual finding the hearing officer had not yet rendered. Once the hearing officer rendered his clearly erroneous factual finding, Mr. Ouradnik did object—immediately challenging the finding to the district court. The issue was ripe for the district court's review, and the district court correctly found the evidentiary record did not support the hearing officer's findings of fact. Accordingly, this Court should affirm the reversal.

Respectfully submitted November 20, 2019.

VOGEL LAW FIRM

/s/ Drew J. Huhska

BY: Mark A. Friese (#05646)
Drew J. Hushka (#08230)
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
701.237.6983
Email: mfriese@vogellaw.com
dhushka@vogellaw.com
ATTORNEYS FOR APPELLEE

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 24 pages.

Dated this 20th day of November, 2019.

VOGEL LAW FIRM

/s/ Drew J. Huhska

BY: Mark A. Friese (#05646)
Drew J. Hushka (#08230)
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
701.237.6983
Email: mfriese@vogellaw.com
dhushka@vogellaw.com
ATTORNEYS FOR APPELLEE

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NORTH DAKOTA

Kyle Steven Ouradnik, Appellee, vs. Ronald Henke, Interim Director, Department of Transportation, Appellant.	**CERTIFICATE OF SERVICE** **Supreme Ct. No. 20190293** **District Ct. No. 09-2019-CV-01615**

I hereby certify that on November 20, 2019, the following documents:

Brief of Appellee
Appellee's Appendix

were filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

Douglas B. Anderson
Attorney for Appellant
dbanders@nd.gov

Dated this 20th day of November, 2019.

VOGEL LAW FIRM

/s/ Drew J. Huhska

BY: Mark A. Friese (#05646)
Drew J. Hushka (#08230)
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
701.237.6983
Email: mfriese@vogellaw.com
dhushka@vogellaw.com
ATTORNEYS FOR APPELLEE