

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Kyle Al Christianson,)	
)	
Appellant,)	Supreme Court No.
)	20190348
vs.)	
)	
Ronald Henke, Interim Director,)	Burleigh County Case No.
Department of Transportation,)	08-2019-CV-02172
)	
Appellee.)	

ON APPEAL FROM A JUDGMENT ENTERED SEPTEMBER 16, 2019 AFFIRMING THE DECISION OF THE DEPARTMENT OF TRANSPORTATION SUSPENDING THE APPELLANT’S NON-COMMERCIAL AND COMMERCIAL DRIVING PRIVILEGES FROM THE DISTRICT COURT FOR THE SOUTH CENTRAL JUDICIAL DISTRICT BURLEIGH COUNTY, NORTH DAKOTA, THE HONORABLE JOHN GRINSTEINER, PRESIDING.

**REPLY BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED**

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[¶1] **ARGUMENT**

[¶2] **I. The hearing officer erred when he admitted Exhibit 1 into the record.**

[¶3] The Department argues that a rubber-stamp certification and signature can be used and is sufficient to meet the evidentiary requirements under Rule 902, N.D.R.Ev. Appellee's Br. at ¶ 33. In support of the Department's position, they rely on State v. Obrigewitch, 356 N.W.2d 105, (N.D. 1984). However, the Department fails to fully analyze the decision of the North Dakota Supreme Court in Obrigewitch.

[¶4] In Obrigewitch, the North Dakota Supreme Court did in fact conclude that "the rubber-stamp certification and signature **as used in this case** is sufficient to meet the evidentiary requirements of Rule 902, N.D.R.Ev." Obrigewitch, 356 N.W.2d at 108 (Emphasis added). The Court did this "intend[ing] to further the policy of avoiding the waste of time and money that would result in requiring manual signing of every record certified from the Driver's License Division." Id. However, the Court recognized that a rubber stamp certification may not always meet the evidentiary requirements of Rule 902, N.D.R.Ev. Id.

[¶5] The Court stated: "Obrigewitch **failed to present any evidence going to the issue of genuineness of the State's exhibits** but instead attacked only the method of certification of those documents by the Drivers License Division." Obrigewitch, at 108. As a result, they concluded that Obrigewitch "failed to rebut the presumption of authenticity for public records found in Rule 902, N.D.R.Ev." Id.

[¶6] The present case is distinguishable from Obrigewitch. Here, Mr. Christianson did far more than only attack the method of certification. Instead, Mr. Christianson offered

several exhibits, without objection, that attacked Exhibit 1's genuineness. Appendix 9-33. Further, as noted by the Department, the hearing officer also stated that he was aware that Mr. Jackson was on administrative leave. Appellee's Br. at ¶ 38, Tr. at 17:17-17:22. Mr. Christianson provided sufficient evidence questioning the genuineness of Exhibit 1. As a result, Mr. Christianson successfully rebutted the presumption of authenticity for public records found in Rule 902, N.D.R.Ev., which required the Department to prove that Exhibit 1 was authentic. However, the Department failed to produce Mr. Jackson or any other evidence that established Exhibit 1's authentication.

[¶7] Further, the Department asserts that Exhibit 1 is a regularly kept record of the Department. Appellee's Br. at ¶ 44. They further assert that the exhibit was admissible because Mr. Christianson failed to present evidence to overcome the disputable presumption that the certification was made by Mr. Jackson or that it was stamped with his authority. Id. However, North Dakota law does create a disputable presumption of regularity for the Department. N.D.C.C. § 31-11-03(15). Disputable presumptions are satisfactory only if they are uncontradicted. N.D.C.C. § 31-11-03. Disputable presumptions may be contradicted by other evidence. Id. Here, there was evidence that contradicted the presumption that Exhibit 1 was properly certified. The hearing officer knew that Mr. Jackson was on administrative leave. Tr. at 17:17-17:22. Further, Mr. Christianson presented exhibits that established that Mr. Jackson was being investigated and on administrative leave. Appendix 9-33. Because contradictory evidence was presented that the certification of Exhibit 1 was facially false, the Department cannot rely upon the presumption of regularity.

[¶8] The evidence in the present case rebuts the presumption of regularity. As the North Dakota Supreme Court has recognized: “It is well-settled that the moving party, here the Department, has the burden of proof in an administrative hearing. Morrell v. North Dakota Dep't of Transp., 1999 ND 140, ¶ 14, 598 N.W.2d 111. As a result, after Mr. Christianson contradicted the presumption of regularity, the Department had the burden of presenting evidence authenticating Exhibit 1. However, the Department failed to provide any evidence, witnesses, or testimony that authenticated Exhibit 1. Therefore, Exhibit 1 was inadmissible and the hearing officer’s decision should be overturned and Mr. Christianson’s non-commercial and commercial driving privileges should be reinstated.

[¶9] II. The Department failed to meet the requirements of N.D.C.C §§ 39-06-32(4) and 39-06.2-10(8).

[¶10] When the North Dakota Supreme Court construes a statute, the goal is to ascertain the legislature's intent. Greenwood v. Moore, 545 N.W.2d 790, 794 (N.D. 1996). The Court first looks to the plain language of a statute for legislative intent, and the legislative intent is presumed to be clear if the language is clear and unambiguous. Id. “Words used in a statute are to be understood in their ordinary sense.” Id. The North Dakota Supreme Court has used aids such as Black’s Law Dictionary to determine the definition of words. Id.; Bienek v. Department of Transp., 2007 ND 117, ¶ 10, 736 N.W.2d 492.

[¶11] A. The Department lacked authority and jurisdiction to suspend Mr. Christianson’s non-commercial driving privileges because there was not an administrative decision as required by N.D.C.C. § 39-06-32(4).

[¶12] Under N.D.C.C. § 39-06-32(4), the director may suspend an operator’s license based on:

An **administrative decision** on an Indian reservation or in another state that the licensee's privilege to drive on that Indian reservation or in that state is suspended or revoked because of a violation of that Indian reservation's or state's law forbidding motor vehicle operation with an alcohol concentration of at least eight one-hundredths of one percent by weight or, with respect to a person under twenty-one years of age, an alcohol concentration of at least two one-hundredths of one percent by weight, or because of a violation of that Indian reservation's or state's law forbidding the driving or being in actual physical control of a commercial motor vehicle while having an alcohol concentration of at least four one-hundredths of one percent by weight.

N.D.C.C. § 39-06-32(4) (Emphasis added). The Department states “The term “administrative decision” has been held to be compatible with the word “conviction” and cites to Holen v. Hjelle, 396 N.W.2d 290, 293 (N.D. 1986). Appellee’s Br. at ¶ 47. While the Court in Holen did recognize that the statutes were compatible, the Court never alluded to the fact that the terms were interchangeable. Holen, 396 N.W.2d at 293. A closer look at the two statutes, shows that the two terms are not interchangeable.

[¶13] N.D.C.C. § 39-06-27 provides the Department with the authority to suspend or revoke an individual’s driving privileges based on a conviction in a tribal court or another state. On the other hand, N.D.C.C. § 39-06-32 provides the Department with the authority to suspend an individual’s driving privileges based on an administrative decision on an Indian reservation or in another state. North Dakota law under Chapter 39 defines a conviction as:

[A] final order or judgment or conviction by the North Dakota supreme court, any lower court having jurisdiction, a tribal court, or a court in another state if an appeal is not pending and the time for filing a notice of appeal has elapsed.

N.D.C.C. § 39-01-01(13). However, North Dakota law does not define “administrative decision.”

[¶14] In the present case, the Department sought to suspend Mr. Christianson's non-commercial driving privileges under N.D.C.C. § 39-06-32(4), not N.D.C.C. § 39-06-27. Appendix, 8. The hearing officer never offered or produced a "conviction" from another state in this matter. The only document that the hearing officer offered in Mr. Christianson's non-commercial driver's license hearing was a notice of suspension form. This is not a "conviction" as defined by N.D.C.C. § 39-01-01(13). Further, the mere fact that Mr. Christianson was allegedly arrested for a violation of the Criminal Code of Canada for having a blood alcohol concentration above the legal limit is not a conviction because it is not a final order, judgment or conviction by a court in another state.

[¶15] As a result, the Court must look at whether there was an administrative decision. As previously stated, North Dakota law does not define "administrative decision." However, as recognized by the statutes, an administrative decision is different than a criminal conviction. N.D.C.C. §§ 39-06-27, 39-06-32, 39-01-01(13).

[¶16] "Administrative agency" is defined as "[E]ach board, bureau, commission, department, or other administrative unit of the executive branch of state government, including one or more 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(2). A "decision" is defined as "A judicial determination after consideration of the facts and the law; a ruling, order, or judgment pronounced by a court when considering or disposing of a case" Black's Law Dictionary, 414 (7th ed. 1999).

[¶17] The Department lacked the authority and jurisdiction to suspend Mr. Christianson's non-commercial driving privileges because there was not an administrative decision as required by the statute. The only document provided by the Department was a notice of suspension. Appendix, 5. This notice was completed by a peace officer. There is nothing in the record that indicates that there was a judicial determination to suspend Mr. Christianson's license by way of a ruling, order, or judgment issued. A notice of suspension is not an administrative decision. Therefore, the hearing officer's decision should be reversed and Mr. Christianson's non-commercial license should be reinstated.

[¶18] B. There was not a valid conviction under N.D.C.C. § 39-06.2-10(8) that warranted the disqualification of Mr. Christianson's commercial driving privileges.

[¶19] Chapter 39-06.2, which deals with commercial driver's licenses, defines a conviction as "an unvacated adjudication of guilt, or a determination that an individual has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal..." N.D.C.C. § 39-06.2-02(8). "The definition of "conviction" in N.D.C.C. § 39-06.2-02(8) is a special provision applicable to commercial driver's licenses that conflicts with the definition of "conviction" in N.D.C.C. § 39-06-30, a general provision applicable to motor vehicle operator's licenses." Bienek, 2007 ND at ¶ 9. "Under statutory construction principles, the definition of "conviction" found in N.D.C.C. § 39-06.2-02(8) prevails over the definition of "conviction" found in N.D.C.C. § 39-06-30." Id. "Therefore, the definition of "conviction" found in N.D.C.C. § 39-06.2-02(8) must be used when interpreting N.D.C.C. § 39-06.2-10(8)." Id.

[¶20] As the North Dakota Supreme Court has recognized, it is important to look at the term “conviction” based upon whether it involves an individual's non-commercial or commercial driving privileges. Thus, the Department first errors by attempting to analyze these issues together. Appellee’s Br. at ¶ 51. The issue of whether there was a conviction as it pertains to Mr. Christianson’s commercial driving privileges is separate and distinct from whether there was a conviction for the purpose of his non-commercial driving privileges. Nonetheless, the Department claims that the notice of suspension is a “conviction” as it pertains to Mr. Christianson’s commercial driving privileges. Appellee’s Br. at ¶ 51. However, the Department overlooks the definition of conviction under the commercial driver’s license chapter of the North Dakota Century Code.

[¶21] First, the Department failed to establish that the notice of suspension was an unvacated adjudication of guilt. The Department did not establish that Mr. Christianson’s right to appeal had expired nor did they produce any other evidence of an unvacated adjudication of guilt. Instead, the Department asserts that the notice of suspension in the present case was a determination by an authorized administrative tribunal.

[¶22] However, like “administrative decision,” the term “authorized administrative tribunal” is not defined by Chapter 39-06.2 or any other chapter under Title 39. *See Bienek*, 2007 ND at ¶ 10 (Bienek does argue “authorized administrative tribunal” is not defined under chapter 39–06.2,...). While “administrative” is defined under Chapter 28-32, “tribunal” is not defined under Title 39 or the Administrative Agencies Practice Act. N.D.C.C. § 28-32-01(2). However, Black’s Law Dictionary defines “tribunal” as: “A court or other adjudicatory body.” Black’s Law Dictionary, 1512 (7th ed. 1999).

[¶23] As defined, the notice of suspension would not be a determination by an authorized administrative tribunal. Here, a peace officer issued Mr. Christianson a notice of suspension. Appendix, 5. A peace officer is not “A court or other adjudicatory body.” The Department failed to provide any evidence that there was a proper determination from an authorized administrative tribunal. Instead, the only document presented by the Department was a notice of suspension from a peace officer claiming that he suspended Mr. Christianson’s license. This is not sufficient under the statute. Therefore, the Court should reverse the hearing officer’s decision and reinstate Mr. Christianson’s commercial driving privileges.

[¶24] **CONCLUSION**

[¶25] Under Title 39 the Legislature has enacted statutes that allows the Department to skirt some of the Rules of Evidence. However, in order for the Department to utilize these statutory shortcuts, there are certain requirements they must meet. One of those requirements is that the records from the foreign state must be certified copies by the Department. In the present case, Mr. Christianson contradicted the presumption of regularity in regards to the Departments certified records by presenting evidence that Mr. Jackson was on administrative leave. As a result, the Department had the burden of presenting evidence authenticating Exhibit 1 and could not rely upon the statutory shortcuts under Title 39. Because the Department failed to establish Exhibit 1’s authentication, the hearing officer erred in admitting Exhibit 1 into evidence.

[¶26] Further, the Department failed to meet the requirements of N.D.C.C §§ 39-06-32(4) and 39-06.2-10(8). Under N.D.C.C. 39-06-32(4) there was not an

administrative decision that gave the department the authority or jurisdiction to suspended Mr. Christianson's non-commercial driving privileges. Additionally, under N.D.C.C. 39-06.2-10(8) there was not a conviction because an authorized administrative tribunal did not issue a determination that Mr. Christianson's driving privileges should be suspended. Therefore, for the foregoing reasons, the Court should reverse the hearing officer's decision and reinstate Mr. Christianson's commercial and non-commercial driving privileges.

[¶27] Dated this 4th day of February, 2020.

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[¶28] **CERTIFICATE OF COMPLIANCE**

[¶29] The undersigned, as attorney representing Appellant Kyle Al Christianson, and author of the Reply Brief of Appellant, hereby certifies that said reply brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that the number of pages from cover page to conclusion totals 12 pages and does not exceed 12 pages. This count is automatically calculated by electronic document.

[¶30] Dated this 4th day of February, 2020.

/s/ Adam Justinger

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CERTIFICATE OF SERVICE

[¶1] I, Adam Justinger, an attorney licensed in the State of North Dakota, hereby certify that on **February 4, 2020**, the following documents were filed with the North Dakota Supreme Clerk of Court:

- 1. Reply Brief of Appellant;and**
- 2. Certificate of Service.**

[¶2] Copies of these documents were served electronically on all separately represented parties at the e-mail addresses listed below:

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¶3 Dated: February 4, 2020.

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