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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Larry William Hewitt, Appellant, v. Ronald Henke, Interim Director, Department of Transportation, Appellee.	**Supreme Ct. No. 20190389** **District Court No. 47-2019-CV-00296** **ORAL ARGUMENT REQUESTED**

APPEAL FROM THE NOVEMBER 26, 2019,
JUDGMENT OF THE DISTRICT COURT
STUTSMAN COUNTY, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT

HONORABLE TROY J. LEFEVRE

BRIEF OF APPELLEE

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[¶2] Whether the determination of the issue of whether the hearing officer acted within his discretion when he admitted the Department's regularly kept records comprising Exhibit 1.1 into evidence is unnecessary to the resolution of this appeal due to the fact the identical records comprised Exhibit 1.2 and Hewitt suffered no prejudice as the result of the admission of Exhibit 1.1.

[¶3] Whether Hewitt's right to a fair hearing and/or his right to due process were violated by the admission of Exhibit 1.1 and Exhibit 1.2.

[¶4] Whether the revocation of Hewitt's driving privileges is barred by the doctrine of equitable estoppel and whether the issue is outside the scope of an administrative suspension hearing under N.D.C.C. § 39-20-05.

[¶5] Whether the Department engaged in a persistent pattern of improper agency conduct or systemically disregarded the law so as to warrant the reversal of the revocation of Hewitt's driving privileges.

[¶6] Whether Hewitt is entitled to an award of attorney fees and costs under N.D.C.C. § 28-32-50(1).

STATEMENT OF CASE

[¶7] North Dakota Highway Patrol Trooper Thomas Herzig ("Trooper Herzig") arrested Hewitt on April 14, 2019, for the offense of driving while under the influence of intoxicating liquor. Appendix to Brief of Appellant ("App.") at 57. After

the conclusion of the May 9, 2019, administrative hearing, the hearing officer issued his findings of fact, conclusions of law, and decision revoking Hewitt's driving privileges for a period of two years. Id. at 57-58.

[¶8] Hewitt requested judicial review of the Hearing Officer's Decision by the District Court. Id. at 59-62. The District Court affirmed the Hearing Officer's Decision. Id. at 64-69. Hewitt has appealed the District Court's Judgment. Id. at 71-72.

STATEMENT OF FACTS

[¶9] On April 14, 2019, at 1:53 a.m., Trooper Herzig observed a vehicle that was being operated by Hewitt make a turn that the law enforcement officer described as being a "bit wide." Transcript ("Tr.") at 4, l. 25 – 5, l. 15. Trooper Herzig testified "[t]he vehicle turned and instead of following a route that a typical vehicle would follow, this one created a little bit more distance between my car and his car. Again, not off the driving lane by any means, just a bit unusual and enough to cause suspicion and enough for me to turn around then." Id. at 6, ll. 5-9.

[¶10] Trooper Herzig stated that while following Hewitt's vehicle, he observed "the vehicle was weaving within its lane, not crossing the center line, not crossing … well, there is no fog line, but not bumping the curb." Id. at 6, ll. 21-25. Trooper Herzig explained that "where typical travel goes there isn't dust that's raised from … at loose sediment along the curb edge. This one here was closer to the curb to where it raised dust. Again, not hitting the curb. But building my suspicion." Id. at 6, l. 25 – 7, l. 4.

[¶11] Trooper Herzig stated he continued to follow Hewitt's vehicle and after the vehicle "turned west there is a fog line there and it drove onto the fog line, failing to maintain its lane. Shortly thereafter, I activated top lights for a traffic stop." Id. at 7, ll. 6-10. Trooper Herzig explained "[t]he fact is he's not within his lane and there's true violation to trip the red lights." Id. at 28, ll. 18-19.

[¶12] After observing indicia of Hewitt's intoxication and administering field sobriety tests, which indicated Hewitt was under the influence of alcohol, Trooper Herzig placed Hewitt under arrest for the offense of driving while under the influence of intoxicating liquor. Id. at 9, l. 17 – 13, l. 23. After transporting Hewitt to the Stutsman County Correctional Center and informing him of the implied consent advisory, Trooper Herzig requested Hewitt submit to an Intoxilyzer test, however, Hewitt refused the test. Id. at 14, ll. 5-15. Trooper Herzig testified "[a]nd the driver without hesitation said no." Id. at 32, l. 21.

STATEMENT OF PROCEEDINGS BEFORE THE ADMINISTRATIVE HEARING OFFICER

[¶13] Hewitt requested an administrative hearing under N.D.C.C. § 39-20-05 with respect to the proposed administrative sanction, which was scheduled for May 9, 2019. App. at 9, 16. The hearing officer issued a Notice of Information enclosing a copy of the proposed "Exhibit 1, which [the Notice advised] is the hearing file prepared by NDDOT Drivers License Division. Exhibit 1 contains regularly kept records of the NDDOT Director that will be offered into evidence regarding the issues to be determined at the hearing." Id. at 6. Exhibit 1 consisted of a Certification of the Department's records bearing the name Glenn Jackson, as the Division Director of the Department's Drivers License Division and dated April 24,

2019. Id. at 7. The records accompanying the Certification consisted of the Report and Notice that was issued to Hewitt, Hewitt's hearing request, and Hewitt's driver's license record. Id. at 8-11.

[¶14] On May 8, 2019, Hewitt submitted a "formal discovery request" to the Department asking for documentation regarding Glenn Jackson's employment status as it related to "his February 2019 forced leave of absence, a/k/a suspension, and subsequent resignation." Id. at 12-13.

[¶15] At the administrative hearing, the hearing officer offered into evidence "two versions" of Exhibit 1 stating:

> I've got two versions of it, marked 1.1 and the other 1.2. 1.1 has five pages marked in the lower right hand corner with a notation page 1 of 5 through page 5 of 5. It has a certification page on the front transmitting five pages on April 24, 2019 signed by Glenn Jackson. 1.2 has the same documents but a different certification page. This one indicates five pages transmitted May 8th, 2019 signed by Robin Rehborg, interim Division Director of Driver's License Division.

Tr. at 15, ll. 4-11. The hearing officer explained

> For both Exhibits 1.1 and 1.2 page 2 is the Report and Notice. Page 3 is the request for hearing from Mr. Heck. Page 4 is the first page of Mr. Hewitt's driving record indicating a suspension for driving with a BAC over the legal limits for violation occurring July 15th, 2018. And page 5 is a second page of Mr. Hewitt's driving record. At this time maybe we should just do them one at a time. I'll start with Exhibit 1.1. Mr. Heck, objection?

Id. at 16, ll. 7-14.

[¶16] Hewitt objected to the proposed Exhibit 1.1 based on N.D.R.Ev. 902 and under "a theory of equitable estoppel." Id. at 16, ll. 15-17. Hewitt stated that Glenn Jackson was "not active at the Department" on the date of the Certification, and consequently, he "did not have the official authority and capacity to certify the

document at that point." Id. at 16, ll. 18-22. Hewitt claimed the Certification was a misrepresentation "because it was done under the guise that Glenn Jackson certified it when he was suspended, until he resigned . . . ." Id. at 17, ll. 11-14. The hearing officer overruled Hewitt's objection and admitted Exhibit 1.1 into evidence. Id. at 17, ll. 16-17.

[¶17] The hearing officer offered Exhibit 1.2. Id. at 17, ll. 17-18. Hewitt again objected "under North Dakota Century Code section 44-01-05 as well as North Dakota rules of evidence 902 and 803, that specifically under 44-01-05 of the North Dakota Century Code it requires that each civil officer in the state before entering of duties of their office shall take and subscribe the oath, prescribed in Section 4, Article 11 of the Constitution of North Dakota." Id. at 19, ll. 8-14. Hewitt claimed that "[t]he individual who signed 1.2 there's no documentary evidence to support that they are acting with the authority that's allowed by the Department of Transportation to certify documents either." Id. at 20, ll. 2-5. The hearing officer admitted Exhibit 1.2 into evidence. Id. at 25, l. 4.

[¶18] Following the hearing, Hewitt submitted a written summation, inclusive of five exhibits, which was entered into the administrative record as Exhibit 17. App. at 19-56. The exhibits included (1) an April 8, 2019, "Final Report to Director Tom Sorel" regarding a workplace investigation of Glenn Jackson; (2) a May 3, 2019, Retirement Notice signed by Glenn Jackson; (3) a February 12, 2019, letter to Glenn Jackson placing him on paid administrative leave; and (4) the Department's Answer to Hewitt's Discovery Request seeking an oath and statement sworn to by Robin Rehborg. Id. at 27-52.

[¶19] The hearing officer issued his findings of fact, conclusions of law, and decision revoking Hewitt's driving privileges for a period of two years. Id. at 57-58. With respect to Hewitt's objections to Exhibit 1.1 and Exhibit 1.2, the hearing officer determined:

> At the time of the Hewitt certification, April 29th, Jackson held the title of Director, Driver's License Division for NDDOT. Hewitt did not offer any evidence to challenge the authenticity of the documents certified by Exhibit 1, page 1 of 6. Counsel further argues that N.D.C.C. § 44-01-05 requires the filing of an oath before Rehborg can certify a hearing file for an administrative driver's license hearing. The certification statute and the cases construing are not that demanding.

Id. at 58.

STATEMENT OF PROCEEDINGS ON APPEAL BEFORE THE DISTRICT COURT

[¶20] Hewitt requested judicial review of the Hearing Officer's Decision by the District Court. App. at 59-62. On November 22, 2019, the District Court issued its Memorandum Opinion and Order Affirming the Decision of the Hearing Officer. Id. at 64-69. The District Court stated "[t]his appeal involves six issues" being:

> (1) Whether North Dakota Highway Patrol Sergeant Thomas Herzig ("Sgt. Herzig") had a reasonable and articulable suspicion to stop Hewitt's vehicle;
>
> (2) Whether Hewitt's rights of due process were violated by the admission of Exhibit 1.1 and Exhibit 1.2;
>
> (3) Whether the hearing officer acted within his discretion in admitting Hewitt's Report and Notice under Rule 901(b)(1), N.D.R.Ev., and Exhibit 1.2 under Rule 902(4)(A), N.D.R.Ev.;
>
> (4) Whether the revocation of Hewitt's driving privileges is barred by the doctrine of equitable estoppel;
>
> (5) Whether the Department engaged in a persistent pattern of improper agency conduct so as to deny Hewitt a fair hearing

and warrant the reversal of the revocation of Hewitt's driving privileges; and

(6) Whether Hewitt is entitled to an award of attorney fees and costs.

Id. at 64-65.

[¶21] Among other matters, the District Court rejected Hewitt's claim that "his due process rights were violated by the admission of Exhibit 1.1 and Exhibit 1.2." Id. at 67. The Court stated:

> The record reflects that the Department served a Notice of Administrative Hearing on Hewitt on April 29, 2019. The notice explains the issues to be determined at the hearing. Hewitt was also provided copies of documents marked as Exhibit 1.1 and Exhibit 1.2. The only difference between the two documents was the certification page. Hewitt has failed to show that he suffered any prejudice as a result of the admission of Exhibit 1.1 and 1.2.

Id.

[¶22] The District Court rejected Hewitt's claim that Exhibit 1.2 "was improperly admitted because there was no oath of office for Robin Rehborg, the Interim Division Director of the Department's Drivers License Division." Id. at 67. The Court determined "Rehborg had legal custody of the documents that she certified. Accordingly, the hearing officer did not err by admitting the exhibits." Id. at 68.

[¶23] The District Court rejected Hewitt's claim that "the revocation of his driving privileges is barred by the doctrine of equitable estoppel." Id. The Court stated "[its] review is limited to the agency record that was filed and making determinations of equitable estoppel is outside the limited authority of this reviewing Court." Id.

[¶24] The District Court also rejected Hewitt's "claims that the Department has

systemically disregarded the law and it requires the reversal of the revocation of Hewitt's driving privileges." Id. The Court stated that:

> As the Department has pointed out, Hewitt has failed to cite any case law that would have advised the Department that such conduct was improper. The Department did not engage in a persistent pattern of improper agency conduct that would warrant a reversal of the hearing officer's decision.

Id. The Court determined that "[s]ince Hewitt has not prevailed, he will not be awarded his attorney's fees." Id. at 69.

[¶25] Judgment was entered on November 26, 2019. Id. at 70. Hewitt appealed the Judgment to the North Dakota Supreme Court.[1] Id. at 71-72. The Department requests this Court affirm the Judgment of the Stutsman County District Court and affirm the Hearing Officer's Decision revoking Hewitt's driving privileges for a period of two years.

REQUEST FOR ORAL ARGUMENT

[¶26] The Department requests the Court schedule oral argument in this case under N.D.R.App.P. 28(h). This matter involves significant questions regarding the requirements for the authentication and admissibility of documents under the Rules of Evidence with respect to the Department's regularly kept records. Oral argument would be helpful in the Court's review of the Hearing Officer's Decision and the District Court's decision affirming the administrative decision.

[1]Hewitt's specifications of error include the claim that "[t]he Department erred in concluding that law enforcement had reasonable suspicion to conduct a traffic stop of the vehicle driven by Mr. Hewitt." App. at 72. Hewitt, however, did not brief the issue on appeal to the Supreme Court and has abandoned that argument. See State v. Johnson, 2009 ND 186, ¶ 1, 2009 WL 3838648 ("When an appellant fails to raise an issue in an appellate brief to this Court, the appellant abandons it."). Consequently, the Department does not address the matter.

STANDARD OF REVIEW

[¶27] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to [suspend] driving privileges." Haynes v. Dir., Dep't of Transp., 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court must affirm an administrative agency's order unless one of the following is present:

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.

[¶28] "In an appeal from a district court's review of an administrative agency's decision, [the Court] review[s] the agency's decision." Haynes, 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court "do[es] not make independent findings of fact or substitute [its] judgment for that of the agency; instead, [it] determine[s] whether a

reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." Id.

[¶29] "Statutory interpretation is a question of law, fully reviewable on appeal." DeForest v. N.D. Dep't of Transp., 2018 ND 224, ¶ 8, 918 N.W.2d 43 (quoting Teigen v. State, 2008 ND 88, ¶ 19, 749 N.W.2d 505).

LAW AND ARGUMENT

I. The hearing officer acted within his discretion when he admitted the Department's regularly kept records comprising Exhibit 1.2 into evidence under N.D.R.Ev. 902(4)(A).

A. The abuse of discretion standard.

[¶30] "Generally, [the Court] review[s] a trial court's evidentiary ruling under an abuse of discretion standard." Knudson v. Dir., N.D. Dep't of Transp., 530 N.W.2d 313, 316 (N.D. 1995) (citing Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401 (N.D. 1994); State v. Whalen, 520 N.W.2d 830 (N.D. 1994)). "A trial court abuses its discretion when it acts in an arbitrary, unreasonable or capricious manner or misinterprets or misapplies the law." Id. (internal and external citations omitted). "The basis of this deferential review is the wide discretion afforded to trial courts to control the introduction of evidence at trial." Id. (citing Williams Cty. Soc. Serv. Bd. v. Falcon, 367 N.W.2d 170, 178 (N.D. 1985)).

[¶31] "Ordinarily, [the court] do[es] not reverse an evidentiary miscue, particularly, in a nonjury case, when that error causes no prejudice." Madison v. N.D. Dep't of Transp., 503 N.W.2d 243, 246 (N.D. 1993) (citing Domres v. Backes, 487 N.W.2d 605 (N.D. 1992)). "An appealing party has the burden 'of establishing not only that the trial court erred but that such error was highly prejudicial to his cause.'"

Olander Contracting Co. v. Gail Wachter Invs., 2002 ND 65, ¶ 26, 643 N.W.2d 29 (quoting Filloon v. Stenseth, 498 N.W.2d 353, 356 (N.D. 1993) (quoting Allen v. Kleven, 306 N.W.2d 629, 634 (N.D. 1981))).

B. The Department's regularly kept records comprising Exhibit 1.2 were properly authenticated under N.D.R.Ev. 902(4)(A).

[¶32] "Generally, before documentary evidence is admissible it must be authenticated." Frost v. N.D. Dep't of Transp., 487 N.W.2d 6, 8 (N.D. 1992) (citing R & D Amusement Corp. v. Christianson, 392 N.W.2d 385, 386 (N.D. 1986)). "Issues regarding authentication are 'primarily within the discretion of the district court, and [the appellate court] will not reverse the [trial] court's decision absent an abuse of discretion.'" State v. Carlson, 2016 ND 130, ¶ 13, 881 N.W.2d 649 (quoting State v. Thompson, 2010 ND 10, ¶ 23, 777 N.W.2d 617).

[¶33] "Authentication is simply identification." Frost, 487 N.W.2d at 8 (citing Black's Law Dictionary 671 (5th ed. 1978)). "Identification 'as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.'" Id. (quoting N.D.R.Ev. 901(a)). "Evidence that a purported public record is from the public office where items of that nature are kept, and methods of identification authorized by statute conform with Rule 901(a)." Id. (citing N.D.R.Ev. 901(b)(7) & (10)). "Additionally, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to signatures, documents, or other matters declared by statute to be presumptively or prima facie genuine or authentic." Id. at 8-9 (citing N.D.R.Ev. 902(10)).

[¶34] "At a hearing under [section 39-20-05], the regularly kept records of the director and state crime laboratory may be introduced. Those records establish prima facie their contents without further foundation." N.D.C.C. § 39-20-05(4). "[I]n 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 v. N.D. Dep't of Transp., 518 N.W.2d 690, 694 (N.D. 1994). "If the documents are not admissible as 'regularly kept records,' DOT must establish their authenticity with extrinsic evidence under Rule 901, N.D.R.Evid., or as self-authenticating documents under Rule 902, N.D.R.Evid." Id. at 695.

[¶35] Under Rule 902(4)(A), "[a] copy of an official record, or a copy of a document that was recorded or filed in a public office as authorized by law, if the copy is certified as correct by . . . (A) *the custodian or another person authorized to make the certification*." N.D.R.Ev. 902(4)(A) (emphasis added). See also City of Jamestown v. Neumiller, 2000 ND 11, ¶ 7, n.1, 604 N.W.2d 441 ("The record [] certified by a Department of Transportation employee charged with the control of such records . . . . satisfie[d] the authenticity requirement of N.D.R.Ev. 902(4).").

[¶36] "Generally, in the absence of a statute providing otherwise, a signature may be affixed to a document by writing by hand, by printing, by stamping, or by other means." State v. Obrigewitch, 356 N.W.2d 105, 108 (N.D. 1984) (citations omitted). "The evidentiary rule requiring authentication and certification of records is designed to avert the inconvenience and occasional impossibility of producing original documents in court." Id. "North Dakota does not have a specific statute requiring signatures to be made in any certain form." Id. The Court "conclude[d]

that the rubber-stamp certification and signature as used . . . [was] sufficient to meet the evidentiary requirements of Rule 902, N.D.R.Ev." Id. "By so concluding [the Court] intend[ed] to further the policy of avoiding waste of time and money that would result in requiring manual signing of every record certified from the Drivers License Division." Id.

[¶37] Furthermore, in a case that cited Obrigewitch, the Indiana Court of Appeals stated that such a "*signature, however affixed, is clothed with a presumption the certifying officer stamped it as his signature or that it was stamped with his authority . . . unless the record affirmatively shows evidence to the contrary*." James v. State ex rel. Comm'r of Motor Vehicles, 475 N.E.2d 1164, 1166 (Ind. Ct. App. 1985) (citations omitted) (emphasis added). "[A]bsent evidence to the contrary, the trial court should presume that what purports to be an official signature certifying a document is in fact a valid signature even if the signature is a stamped facsimile." Id.

[¶38] In addition, in State v. Verdirome, the Connecticut Court of Appeals held that "[t]he certification of a copy [of motor vehicle records] is not a 'peculiarly personal' act required to be performed by the designated individual or official himself, such as taking an oath or the performance of a quasi-judicial duty." 421 A.2d 563, 566 (Conn. Super. Ct. 1980). "The state was entitled to rely upon this presumption as establishing prima facie that the certification had been made by the commissioner, and was not bound to offer testimony to such effect." Id. "This presumption permits the inference that the rubber-stamp signature of the commissioner was placed on the certification by an employee of the motor vehicle

department duly authorized by the commissioner to perform that function." Id.

[¶39] In this case, Hewitt challenges the admissibility of the Department's regularly kept records comprising Exhibit 1.2 based on Robin Rehborg's Certification of Exhibit 1.2 by citing the requirement that "'before entering upon the duties of that individual's office[,]' a civil officer 'shall take and subscribe the oath prescribed in section 4 of article XI of the Constitution of North Dakota.'" Appellant's Brief ("Br."). at ¶ 26 (quoting N.D.C.C. § 44-01-05). Hewitt alleges:

> Mr. Hewitt sought proof Rehborg took the required oath to act as Interim Director of the Driver's License Division of the Department. Appellant's App'x, at 4[9]. The Department candidly answered it possessed no evidence Rehborg met the mandatory duties to act as Interim Director. *Id.* In other words, the Department admitted Rehborg lacked authority to act as Interim Director.

Id.

[¶40] Hewitt relies on the Department's May 13, 2019, Answer to Discovery Request seeking "a copy of the oath of office and statement sworn to by the interim director (Robin Rehborg), along with proof of filing of the same with the North Dakota Secretary of State's office." App. at 49. The Department responded "[t]he Department has no records that meet the discovery request." Id.

[¶41] Hewitt's reliance on the Department's response as a purported admission that Rehborg lacked the authority to act as Interim Director is incorrect. Section 44-01-05, N.D.C.C., provides:

> Each civil officer in this state before entering upon the duties of that individual's office shall take and subscribe the oath prescribed in section 4 of article XI of the Constitution of North Dakota. The oath must be endorsed upon the back of, or attached to, the commission, appointment, or certificate of election. *The term civil officer includes every **elected** official and any individual **appointed** by such elected official; any individual **appointed** by the governor and required by*

> *section 16.1-09-02 to file a statement of interests with the secretary of state;* ***appointed*** *member of any state authority, board, bureau, commission, and council; and the* ***appointed*** *head of any state agency and agency division, whether the individual serves with or without compensation*. . . . For purposes of this chapter and chapter 44-05, *the term civil officer has the same meaning as public officer*.

N.D.C.C. § 44-01-05 (emphasis added). Section 44-05-04, N.D.C.C., further provides "[u]nless otherwise provided by law, any civil or public officer required by section 44-01-05 or any other provision of law to take an oath of office must file the original oath as follows: 1. *If a state official or member of a state board, with the secretary of state*." N.D.C.C. § 44-05-04(1) (emphasis added).

[¶42] Hewitt did not request the information from the Secretary of State, where -- if an oath did in fact exist -- it would have been required to have been filed. *Hewitt's request to the Department is insufficient to establish that any oath of office had not been filed with the Secretary of State as required by section 44-05-04(1)*.

[¶43] More significantly, however, the plain language of section 44-01-05 only requires ***an elected or appointed civil or public officer*** to take an oath of office. See, e.g., State v. Cahill, 49 ND 895, 193 NW 938, Syllabus by the Court (1923) ("The failure of an appointive member of the board of administration to file his oath of office with the Secretary of State within the time prescribed by law creates a vacancy in such office and works a forfeiture of all right thereto on the part of the person who has so neglected to file his oath of office."); see also State v. Bloom, 49 N.D. 890, 193 NW 940, Syllabus by the Court (1922) (Defendant asserting "claim to the office of game and fish commissioner . . . . never qualified by filing with the secretary of state an oath of office. Hence his office became vacant, and the Governor had a legal right to fill the vacancy."); Wolfgram v. Hall, 79 N.D. 138,

138, 54 N.W.2d 896 (1952) ("A regularly appointed member of a board of village trustees, in possession of such office and discharging the duties thereof before filing his oath of office, is a de facto officer.").

[¶44] In addition, *the disputable presumption of regularity under N.D.C.C. § 31-11-03(15) that an "official duty has been performed regularly" serves as a basis to impose on the party challenging an officer's conduct, the burden to prove the officer not only did not take and subscribe the prescribed oath, but that the individual was an elected or appointed civil or public officer who was required by law to take an oath of office*. See, e.g., Macias v. State, 539 S.W.3d 410, 420-21 (Tex. Ct. App. 2017) ("Because appellant has pointed to no evidence in the record that Judge Clark did not take the oaths of office, we hold that appellant has not overcome the presumption of regularity of the trial court judgment and proceedings."); People v Dominique, 684 N.E.2d 27, 28 (N.Y. Ct. App. 1997) ("In the absence of any specific proof, the law presumes that the statutory requirements were satisfied. Under this 'presumption of regularity' the law further presumes that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done. Substantial evidence is necessary to overcome that presumption."). See also James, 475 N.E.2d at 1166 (relying on the presumption that "the certifying officer stamped it as his signature or that it was stamped with his authority"); Verdirome, 421 A.2d at 566 ("The state was entitled to rely upon this presumption as establishing prima facie that the certification had been made by the commissioner, and was not bound to offer testimony to such effect.")

[¶45] Hewitt presented no evidence that Robin Rehborg is an elected or appointed civil or public officer who was required to take an oath of office. In fact, the Director is the ***only*** individual within the Department "who [by statute] must be appointed by, and serve at the pleasure of, the governor" and who "shall take the oath of office required of civil officers by section 44-01-05." N.D.C.C. § 24-02-01.3.

[¶46] As an appointed officer, the Director is subject to removal by the Governor under the provisions of N.D.C.C. § 44-11-01. Nothing in the administrative record regarding the workplace investigation of Glenn Jackson indicates that the position of the Division Director of the Department's Drivers License Division is an appointed position that is subject to removal by the Governor. App. at 27-52.

[¶47] A disputable presumption of regularity serves as the basis that (1) on May 8, 2019, Robin Rehborg served as the Interim Division Director of Driver's License Division; (2) Rehborg was the custodian of the Department's regularly kept records; (3) Rehborg placed the *apparent* stamp with her signature on the Certification or that it was stamped with her authority; and (4) Rehborg was not an elected or appointed civil or public officer who was required to take and file an oath of office. Hewitt failed to present evidence to overcome these presumptions.

[¶48] The hearing officer acted within his discretion when he admitted the Department's regularly kept records comprising Exhibit 1.2 into evidence under N.D.R.Ev. 902(4)(A).

II. The determination of the issue of whether the hearing officer acted within his discretion when he admitted the Department's regularly kept records comprising Exhibit 1.1 into evidence is unnecessary to the resolution of this appeal due to the fact the identical records comprised Exhibit 1.2 and Hewitt suffered no prejudice as the result of the admission of Exhibit 1.1.

A. The hearing officer acted within his discretion when he admitted the Department's regularly kept records comprising Exhibit 1.1 into evidence.

[¶49] The Department maintains that the hearing officer acted within his discretion when he admitted the Department's regularly kept records comprising Exhibit 1.1 into evidence. "Rule 901(a), N.D.R.Ev., provides that '[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.'" Farm Credit Bank of St. Paul v. Huether, 454 N.W.2d 710, 713 (N.D. 1990). "In R & D Amusement Corp., [the Court] said:

> N.D.R.Ev. 901(a) treats questions of authentication as matters of conditional relevance to be determined according to N.D.R.Ev. 104(b). Explanatory Note to N.D.R.Ev. 901, N.D. Court Rules 1986 Desk Copy. The relevancy of a document is conditioned upon its authenticity. *Thus, when a document is offered, a judge must make a preliminary determination whether sufficient proof has been introduced to allow a reasonable fact finder to conclude the document is authentic, i.e., it is what its proponent claims it to be*. If so, the judge must admit the evidence and the question of its weight and prosecutive force is one for the jury. N.D.R.Ev. 104(b); State v. Vetsch, 368 N.W.2d 547 (N.D. 1985); see generally 11 Moore's Fed.Prac. § 901.03; 5 Weinstein's Evidence ¶ 901(a)[01].
>
> "***The question whether evidence should be excluded for lack of authentication is primarily within the sound discretion of the trial court***. See State v. Schneider, 389 N.W.2d 604 (N.D. 1986). An abuse of discretion implies an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Lange v. Cusey, 379 N.W.2d 775 (N.D. 1985)."

Id. (quoting R & D Amusement Corp., 392 N.W.2d at 386) (emphasis added). "Consequently, to constitute reversible error, the trial court must have abused its discretion . . . in concluding that the [document] was adequately authenticated." R & D Amusement Corp., 392 N.W.2d at 386.

[¶50] In Schneider, the defendant argued "the lower court erred in admitting an uncertified copy of a State Laboratories' report determining the nature of the substance taken from Schneider by the search." 389 N.W.2d at 605-06. "Both sides agree[d] that because of the lack of certification, Section 19-03.1-37(4), N.D.C.C.,[2] does not require admission of the report." Id. at 606. "Although the preferable method of providing adequate foundation in this type of case is to comply with the requirements of Section 19-03.1-37(4), *that rule of admissibility is independent of our Rules of Evidence and is perforce not exclusive*." Id. (citing State v. Vetsch, 368 N.W.2d 547 (N.D. 1985)) (emphasis added).

[¶51] "As [the Court] stated in Ned Nastrom Mot. v. Nastrom-Peterson-Neubauer, 338 N.W.2d 64, 66 (N.D. 1983), 'whether or not an exhibit should have been excluded on the basis that it lacked adequate foundation is primarily within the sound discretion of the trial court, ...'" Schneider, 389 N.W.2d at 606. "According

[2] Section 19-03.1-37(4) provides "[i]n all prosecutions under [the Uniform Controlled Substances Act] involving the analysis of a substance or sample thereof, *a certified copy of the analytical report signed by the director of the state crime laboratory or the director's designee*, or electronically posted by the director of the state crime laboratory or the director's designee on the crime laboratory information management system and certified by a law enforcement officer or individual who has authorized access to the crime laboratory information management system through the criminal justice data information sharing system, *must be accepted as prima facie evidence of the results of the analytical findings*." N.D.C.C. § 19-03.1-37(4) (emphasis added).

to Rule 901(a), N.D.R.Ev., the requirement of authentication 'is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.'" Id. The Court stated that "[p]rior to admitting the document under this rule, the lower court received evidence from an officer who stated that she delivered the substance to the State Laboratories, from an officer who stated that he received the copy of the report (ostensibly from the State Laboratories) by mail, and from an officer who stated that he obtained the substance back from the State Laboratories following testing." Id. "The State Laboratories letterhead is contained at the top of the copy, and the report is signed by a State chemist who apparently conducted the testing." Id. The Court concluded that "[u]nder these circumstances, we cannot say that the trial court abused its discretion in concluding that the document is a report from the State Laboratories (albeit without certification) and admitting the document." Id. (citing Farmers Union Oil Co. of Dickinson v. Wood, 301 N.W.2d 129 (N.D. 1980)).

[¶52] In this case, at the beginning of the administrative hearing, the hearing officer advised Hewitt "[t]he Department of Transportation submitted to me certified copies of regularly kept records of the department that it wishes to offer as evidence. They include a certified hearing file." Tr. at 1, ll. 19-22. A*lthough Hewitt claims the Department falsely certified the documents in the name of Glenn Jackson,* ***Hewitt does not claim the records did not originate from the Department****.* See Appellant's Br. at ¶ 19 ("[The Department still repeatedly provided documents with false certifications made in Jackson's name."). As determined by the hearing officer, "*Hewitt did not offer any evidence to challenge*

the authenticity of the documents certified by Exhibit 1, page 1 of 6." App. at 58 (emphasis added).

[¶53] The Certification – regardless of Glenn Jackson's signature – provided indicia that the document had been generated by the Department. App. at 7. Trooper Herzig testified that the Report and Notice that was included with Exhibit 1.1 was "an exact duplicate of the Report and Notice" the officer had provided to Hewitt. Tr. at 16, ll. 3-6. The Report and Notice was properly authenticated -- apart from Exhibit 1.1 -- through the testimony of Trooper Herzig under N.D.R.Ev. 901(b)(1). The Report and Notice also displayed a stamp showing it had been received by the Drivers License Division. App. at 8. The next document consisted of Hewitt's request for a hearing. Id. at 9. The final document showed it was from the Drivers License Division. Id. at 10-11.

[¶54] Apart from the requirements under N.D.C.C. 39-20-05(4), the evidence was sufficient to support a finding that the records comprising Exhibit 1.1 were what the Department claimed the records to be under N.D.R.Ev. 901. The hearing officer acted within his discretion when he admitted the Department's regularly kept records comprising Exhibit 1.1 into evidence.

B. The determination of the issue of whether the hearing officer acted within his discretion when he admitted the Department's regularly kept records comprising Exhibit 1.1 into evidence is unnecessary to the resolution of this appeal.

[¶55] Without waiving the Department's position, two principles guide whether the determination of that issue is necessary due to the fact the identical records comprised Exhibit 1.2 and Hewitt suffered no prejudice as the result of the

admission of Exhibit 1.1.

[¶56] First, "[o]rdinarily, [the court] do[es] not reverse an evidentiary miscue, particularly, in a nonjury case, when that error causes no prejudice." Madison, 503 N.W.2d at 246 (citation omitted). Second, "[the Court] need not address questions, the answers to which are unnecessary for the determination of an appeal." Martin v. Berg, 2005 ND 108, ¶ 15, 697 N.W.2d 723 (quoting Huff v. N.D. State Bd. of Med. Exam'rs, 2004 ND 225, ¶ 15, 690 N.W.2d 221).

[¶57] In this case, the Department's regularly kept records comprising Exhibit 1.1 are the identical records comprising Exhibit 1.2. As argued in the preceding Section, the hearing officer acted within his discretion when he admitted the Department's regularly kept records comprising Exhibit 1.2 into evidence. As argued in the following Sections -- regardless of whether the hearing officer acted within his discretion when he admitted the Department's regularly kept records comprising Exhibit 1.1 into evidence -- Hewitt can claim no prejudice.

[¶58] The determination of the issue of whether the hearing officer acted within his discretion when he admitted Exhibit 1.1 into evidence is unnecessary to the resolution of this appeal.

III. Hewitt's right to a fair hearing and/or his right to due process were not violated by the admission of Exhibit 1.1 and Exhibit 1.2.

[¶59] "Due process requires a participant in an administrative proceeding be given notice of the general nature of the questions to be heard, and an opportunity to prepare and be heard on those questions." Morrell v. N.D. Dep't of Transp., 1999 ND 140, ¶ 9, 598 N.W.2d 111 (citing Saakian v. N.D. Workers Comp. Bur., 1998 ND 227, ¶ 11, 587 N.W.2d 166). "Notice is sufficient if it informs the party of

the nature of the proceedings so there is no unfair surprise." Id. (citing Saakian, at ¶ 11). "The due process requirements for an administrative hearing are embodied in section [28-32-21(3)(c)], N.D.C.C." Id.

[¶60] "The statute provides:

> 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 for hearing or other document indicating the issues to be considered and determined at the hearing. In lieu of, or in addition to, a specification of issues or other document, an explanation about the nature of the hearing and the issues to be considered and determined at the hearing may be contained in the notice."

Morrell, 1999 ND 140, ¶ 9, 598 N.W.2d 111 (quoting renumbered N.D.C.C. § 28-32-21(3)(c)). "Basic notions of fundamental fairness also require a person challenging an agency action be adequately informed in advance of the questions to be addressed at the hearing so the person can be prepared to present evidence and arguments on those questions." Id. (citing Saakian, 1998 ND 227, ¶ 11, 587 N.W.2d 166). "A determination the administrative hearing notice was constitutionally deficient does not end our inquiry." Id. at ¶ 11. "Generally, there is no right to redress if a party cannot show prejudice resulting from an allegedly defective notice." Id.

[¶61] In this case, Hewitt claims he did not receive reasonable notice or opportunity to know of the Department's claims and an opportunity to meet them because of the admission of both Exhibit 1.1 and Exhibit 1.2. Appellant's Br. at ¶ 29. Hewitt alleges "counsel specifically asked the hearing officer during the administrative hearing which exhibit supported the proposed revocation. The hearing officer candidly admitted: 'I don't know.'" Id. (citations omitted).

[¶62] The Department served a Notice of Administrative Hearing on Hewitt that explained the issues to be determined at the administrative hearing. App. at 5. At the hearing, the hearing officer advised Hewitt that "[t]he issues are: whether the law enforcement officer had reasonable grounds to believe that Mr. Hewitt had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug or substance in violation of North Dakota Century Code section 39-08-01; whether Mr. Hewitt was placed under arrest; and whether he refused to submit to the test or tests requested." Tr. at 1, ll. 11-18. The statement of issues met the requirements of N.D.C.C. § 28-32-21(3)(c)).

[¶63] Hewitt was provided with copies of documents to be offered as Exhibit 1.1 and Exhibit 1.2. At the administrative hearing, the hearing officer offered into evidence "two versions" of Exhibit 1 stating:

> I've got two versions of it, marked 1.1 and the other 1.2. 1.1 has five pages marked in the lower right hand corner with a notation page 1 of 5 through page 5 of 5. It has a certification page on the front transmitting five pages on April 24, 2019 signed by Glenn Jackson. 1.2 has the same documents but a different certification page. This one indicates five pages transmitted May 8th, 2019 signed by Robin Rehborg, Interim Division Director of Driver's License Division.

Tr. at 15, ll. 4-11. The hearing officer explained

> For both Exhibits 1.1 and 1.2 page 2 is the Report and Notice. Page 3 is the request for hearing from Mr. Heck. Page 4 is the first page of Mr. Hewitt's driving record indicating a suspension for driving with a BAC over the legal limits for violation occurring July 15th, 2018. And page 5 is a second page of Mr. Hewitt's driving record. . . .

Id. at 16, ll. 7-12.

[¶64] Hewitt does not articulate how his proposed revocation would have differed had the hearing officer relied on the records presented by Exhibit 1.1, rather than

on the identical records presented by Exhibit 1.2. Hewitt suffered no prejudice by the admission of two exhibits, which, but for the certification page, contained the identical documents. Hewitt's right to a fair hearing and/or his right to due process were not violated by the admission of Exhibit 1.1 and Exhibit 1.2.

IV. The revocation of Hewitt's driving privileges is not barred by the doctrine of equitable estoppel and the issue is outside the scope of an administrative suspension hearing under N.D.C.C. § 39-20-05.

[¶65] "Equitable estoppel is codified in N.D.C.C. § 31-11-06, which provides that '[w]hen a party, by that party's own declaration, act, or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief, that party shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission.'" Nelson v. Johnson, 2010 ND 23, ¶ 30 778 N.W.2d 773 (quoting N.D.C.C. § 31-11-06). "Estoppel is ordinarily a question of fact." Id. (citing Peterson Mech., Inc. v. Nereson, 466 N.W.2d 568, 571 (N.D. 1991)).

[¶66] "In Farmers Cooperative Association of Churchs Ferry v. Cole, 239 N.W.2d 808, 809 (N.D. 1976), at syllabus 4, [the Court] set forth the basic elements of estoppel that must be met as to the person being estopped and as to the person claiming the estoppel." Blocker Drilling Canada, Ltd. v. Conrad, 354 N.W.2d 912, 920 (N.D. 1984). "As to the person being estopped the elements are: 1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than those which the party subsequently attempts to assert; 2) the intention, or at least the expectation, that such conduct will be acted upon by, or will influence the

other party or persons; and 3) knowledge, actual or constructive, of the real facts." Id.

[¶67] "As to the person claiming estoppel the elements are: 1) lack of knowledge and the means of knowledge of the truth as to the facts in question; 2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and 3) action or inaction based thereon, of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice." Blocker Drilling, 354 N.W.2d at 920.

[¶68] "Estoppel is not favored and the burden of proving each element of an estoppel is on the party asserting it." St. John Pub. Sch. Dist. No. 3 v. Engineers-Architects, P.C., 414 N.W.2d 285, 286 (N.D. 1987) (citing Johnson v. Northwestern Bell Tel. Co., 338 N.W.2d 622 (N.D. 1983)). "[E]stoppel against the government is not absolutely barred as a matter of law . . . ." Blocker Drilling, 354 N.W.2d at 920. "[T]he doctrine is not one which should be applied freely against the government, but likewise it is not one which should never be available. It is a doctrine which must be applied on a case-by-case basis with a careful weighing of the inequities that would result if the doctrine is *not* applied versus the public interest at stake and the resulting harm to that interest if the doctrine *is* applied." Id. (emphasis in original).

[¶69] In this case, Hewitt claims "[t]he hearing officer incorrectly refused to consider the doctrine's application to an administrative proceeding." Appellant's Br. at ¶ 30. Hewitt alleges "the evidentiary record plainly contains at least some evidence supporting equitable estoppel. It is beyond dispute Jackson did not

certify Exhibit 1.1, or direct its certification." Id. at ¶ 33 (emphasis in original). Hewitt, however, does not consider the other elements required to demonstrate equitable estoppel.

[¶70] The scope of an administrative hearing to suspend a driver's license for driving with a blood alcohol concentration of 0.08 percent or greater is limited to four issues enumerated in N.D.C.C. § 39-20-05(2). These issues do not include making findings of fact and conclusions of law regarding equitable estoppel.

V. The Department did not engage in a persistent pattern of improper agency conduct nor did it systemically disregard the law so as to warrant the reversal of the revocation of Hewitt's driving privileges.

[¶71] "To warrant a reversal based on [statutory] noncompliance . . ., a defendant must show either prejudice caused by the delay or the Department systemically disregarded the requirements of the law." Bayles v. N.D. Dep't of Transp., 2015 ND 298, ¶ 9, 872 N.W.2d 626 (citing May v. Sprynczynatyk, 2005 ND 76, ¶¶ 15, 17-18, 695 N.W.2d 196 ("When a governmental agency systemically disregards the requirements of the law, a court may reverse a decision in favor of the government to prophylactically ensure that the government acts consistently and predictably in accordance with the law.")). "To establish a systemic disregard, *a party must demonstrate some persistent pattern of improper agency conduct*, and more than a single miscue by the government is required to evidence institutional noncompliance which amounts to systemic disregard of the law." Id. (quoting May, at ¶ 17) (emphasis added). "Reversal for conduct which is merely potentially prejudicial, without a showing of actual prejudice, may be warranted as a sanction

for institutional noncompliance and systemic disregard of the law if the conduct is commonplace." Id. (quoting May, at ¶ 17).

[¶72] "The word 'persistent' is defined by lexicographers as 'refusing to relent; continuing, *especially in the face of opposition* . . . stubborn; persevering . . . constantly repeated.'" Governing Bd. of the Oakdale Union Sch. Dist. v. Seaman, 104 Cal. Rptr. 64, 67 (Cal. Ct. App. 1972) (citations omitted) (emphasis added). That characterization of "persistent" is reflected in North Dakota precedent where systemic disregard has become evident with reversals occurring after a court previously advised the agency conduct was improper. See Madison, 503 N.W.2d at 246 ("[T]he Department has continued to waive the Rules of Evidence despite district court instructions to the contrary.").

[¶73] In this case, Hewitt claims "[t]he Department systemically disregard of the law by offering as certified records of the Department documents falsely certified in the name of Jackson." Appellant's Br. at Section I. Hewitt, however, cites no Supreme Court determinations regarding the certifications in the name of Glenn Jackson, which the Department then disregarded.

[¶74] The Department did not engage in a persistent pattern of improper agency conduct nor did it systemically disregard the law so as to warrant the reversal of the revocation of Hewitt's driving privileges.

VI. Hewitt is not entitled to an award of attorney fees and costs under N.D.C.C. § 28-32-50(1).

[¶75] "[Section 28-32-50, N.D.C.C.,] sets forth a two-part test which must be met in order to properly award attorney fees: first, the nonadministrative party must prevail, and second, the agency must have acted without 'substantial justification.'"

Kroschel v. Levi, 2015 ND 185, ¶ 35, 866 N.W.2d 109 (quoting Lamplighter Lounge, Inc. v. State, 523 N.W.2d 73, 75 (N.D. 1994)) (alteration in Kroschel). As "summarized in Lamplighter Lounge, Inc. v. State:

> . . . The second requirement is shaped by our definition of substantial justification. In defining this term we have been guided by the United States Supreme Court's definition of the term 'substantially justified.' There it was said that substantially justified means 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person. A position may be justified, despite being incorrect, so long as a reasonable person could think that it has a reasonable basis in law and fact. Substantial justification represents a middle ground between the automatic award of fees to the prevailing party on one side, and awarding fees only when a position is frivolous or completely without merit on the other."

Id. (quoting Lamplighter Lounge, 523 N.W.2d at 75 (original internal citations and quotation marks omitted in Kroschel). "Merely because an administrative agency's actions are not upheld by a court does not mean that the agency's action was not substantially justified." Id. (quoting Tedford v. Workforce Safety & Ins., 2007 ND 142, ¶ 25, 738 N.W.2d 29).

[¶76] In this case, Hewitt did not prevail before the hearing officer or the District Court. On appeal, the Department has presented good faith arguments supported by caselaw in opposing Hewitt's claims. Hewitt is not entitled to an award of attorney fees and costs under N.D.C.C. § 28-32-50(1).

CONCLUSION

[¶77] The Department requests this Court affirm the Judgment of the Stutsman County District Court and affirm the Hearing Officer's Decision revoking Hewitt's driving privileges for a period of two years.

Dated this 5th day of February, 2020.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Larry William Hewitt, Appellant, v. Ronald Henke, Interim Director, Department of Transportation, Appellee.	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20190389** **District Court No. 47-2019-CV-00296**

[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Appellee contains 37 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 5th day of February, 2020.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Larry William Hewitt, Appellant, v. Ronald Henke, Interim Director, Department of Transportation, Appellee.	**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL** **Supreme Ct. No. 20190389** **District Court No. 47-2019-CV-00296**

[¶1] I hereby certify that on February 5, 2020, the following documents: **BRIEF OF APPELLEE and CERTIFICATE OF COMPLIANCE** were filed electronically with the Clerk of Supreme Court. Service is being accomplished upon Larry William Hewitt, by and through his attorneys, Luke T. Heck at lheck@vogellaw.com and Drew J. Hushka at dhushka@vogellaw.com.

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