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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Robert Martinie Goff, Appellant, vs. William Panos, Director Department of Transportation, Appellee.	**SUPREME COURT NO. 20230115** Civil No. 09-2022-CV-00248

ON APPEAL FROM ORDER DENYING REQUEST FOR
COSTS AND ATTORNEY'S FEES DATED APRIL 6, 2023
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
HONORABLE STEVEN E. MCCULLOUGH PRESIDING

REPLY BRIEF OF APPELLANT

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INTRODUCTION

[¶1] The Department suspended Mr. Goff's driving privileges for being in physical control of a vehicle in a private area which the public had a right to access for vehicular use while over the legal limit. Specifically, the hearing officer determined the parking lot of Mr. Goff's apartment complex was private property which the public had a right to access for vehicular use.

[¶2] But Section 8-1011 of the Fargo Municipal Code prohibits the public from "driving or parking a motor vehicle . . . upon private property . . . where there is displayed upon said property a sign containing the words 'Private Property' or 'Private Parking', without first obtaining permission in writing from the owner or lessee thereof." *Goff v. Panos*, 2022 ND 186, ¶ 12, 981 N.W.2d 909 (quoting Fargo Municipal Code § 8-1011). Mr. Goff's apartment complex had a sign reading "private property, private drive." *Id.* at ¶ 3. Despite the plain language of Section 8-1011, applicable because of the sign, the hearing officer found the public had the right to acces the parking lot for vehicular use because "people would not be in violation of th[is] ordinance unless they parked." (R20:2)

[¶3] The Department has never defended the hearing officer's interpretation of Section 8-1011, nor its application to the parking lot. It cannot. No reasonable person could interpret Section 8-1011 as only prohibiting the public from parking in the parking lot. Because a reasonable person could not find a reasonable basis for the Department's decision, the district court abused its discretion in refusing to award Mr. Goff his costs and fees.

LAW AND ARGUMENT

I. The district court misapplied the substantial justification standard in finding the Department was substantially justified by making "good faith and facially reasonable arguments[.]"

[¶4] Below, the district court held the Department's initial suspension of Mr. Goff's license was substantially justified because, "[a]lthough the Department was ultimately incorrect, it nonetheless made good faith and facially reasonable arguments based on facts that were supported by case law and, therefore, it acted with substantial justification." (R58:¶6) By analyzing whether the Department's decision was made in bad faith or was facially unreasonable, the district court incorrectly applied a frivolousness standard of review, thus abusing its discretion. *Cf. State v. Tyler*, 2019 ND 246, ¶ 5, 933 N.W.2d 918 ("An abuse of discretion may occur when the district court misinterprets or misapplies the law, or when the district court acts in an arbitrary, unreasonable, or capricious manner." (citation omitted)).

[¶5] The Department takes umbrage with Mr. Goff's identification that the district court—in effect—applied an incorrect standard of review. Specifically, the Department avers "[n]owhere in Judge McCullough's decision does he use the term frivolous as impliedly claimed by [Mr.] Goff." Br. of Appellee, at ¶ 9. The term "frivolous" does not appear in the district court's decision. (R58) But the absence of the word from the district court's decision does not mean the district court—in practice—applied the correct standard of review.

[¶6] That is because the crux of the district court's decision was the Department was "substantially justified" because its arguments were "made in good faith and

facially reasonable[.]" (R58:¶6). But even the Department admits "good faith" and "facial reasonableness" is not the proper test for substantial justification. *Cf.* Br. of Appellee, at ¶ 6 ("'An administrative agency's position is substantially justified . . . if a reasonable person could think the position is correct and the position has a reasonable basis in law and fact.'" (citation omitted) (omission in original)). Instead, whether an argument is advanced in "good faith" or is "facially reasonable" is the test for determining frivolousness. *See Black's Law Dictionary* 739 (9th ed. 2009) (defining "frivolous" as "[l]acking a legal basis or legal merit; not serious; not reasonably purposeful"); *id.* at 113 (defining "frivolous appeal" as "[a]n appeal having no legal basis, usu. filed for delay to induce a judgment creditor to settle or to avoid payment of a judgment"); *cf. also Holbach v. Holbach*, 2010 ND 116, ¶ 17, 784 N.W.2d 472 ("'An appeal is frivolous if it is fragrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which evidences bad faith.'" (citation omitted)). Because the district court found "substantial justification" due to "good faith" and "facially reasonable" arguments, the district court—in practice—misapplied the standard of review, abusing its discretion. *Cf. Tyler*, 2019 ND 246, ¶ 5 ("An abuse of discretion may occur when the district court misinterprets or misapplies the law[.]" (citation omitted)).

II. The district court abused its discretion in finding the hearing officer's decision was facially reasonable.

[¶7] Even if "substantial justification" only required a "good faith" and "facially reasonable" argument, the district court still erred because the hearing officer's

decision was not a facially reasonable application of the law and the facts. Accordingly, the district court abused its discretion.

[¶8] In refusing the award costs and fees, the district court reasoned the hearing officer acted it good faith because he "did not believe that the law was clear [regarding private property where the public had a right to access for vehicular use], given th[is] Court's recent" precedent. (R58:¶6) Echoing this, the Department now argues that "[a]t the time the Department made its argument to the district court the law was not settled regarding whether an apartment complex's private parking lot was a private area to which the public had a right of access for vehicular use." Appellee's Br., at ¶ 17. But this framing misstates the nature of the hearing officer's decision. The hearing officer was not determining whether—in the abstract—an apartment complex's private parking lot could be a private area to which the public had a right to access for vehicular use based on the factors identified by this Court. Instead, the hearing officer was determining whether the particular parking lot at issue was private property which the public had a right to access for vehicular based on the facts developed at the administrative hearing. Based on the facts developed at the administrative hearing, it was not facially reasonable for the hearing officer to find the public had the legal right to access the particular parking lot at issue for vehicular use.

A. The hearing officer's interpretation that Section 8-1011 of the Fargo Municipal Code only prohibited the public from parking in the parking lot was not facially reasonable.

[¶9] Primarily, Section 8-1011 of the Fargo Municipal Code made it facially unreasonable to believe the public had the right to access's Mr. Goff's parking lot for vehicular use. Because a sign reading "private property, private drive" was displayed at the apartment complex, the plain language of Section 8-1011 prohibited the public from "driving or parking a motor vehicle" in the parking lot. *See* Fargo Municipal Code § 8-1011. Yet the hearing officer ignored the unambiguous language of Section 8-1011, finding it only prohibited the public from parking vehicles in the parking lot. (R20:2)

[¶10] The Department fails to explain how a reasonable person could interpret the phrase "driving or parking" to only prohibit parking. *See* Br. of Appellee. Indeed, the Department has never defended the hearing officer's interpretation. (R26:¶47 (arguing Section 8-1011 did not apply the to the parking lot because the sign was not sufficiently displayed)) It cannot. Rather, as explained by this Court, "[i]n the context of the ordinance, the sign in this case establishes that the public has no right of access to this particular parking lot for vehicular use." *Goff*, 2022 ND 186, ¶ 15. No reasonable person could interpret Section 8-1011's prohibition of "driving or parking a motor vehicle" as only prohibiting the public from parking in the parking lot. *Cf. Lamplighter Lounge, Inc., v. State ex rel. Heitkamp*, 523 N.W.2d 73, 75 (N.D. 1994) ("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." (citation

omitted)). The hearing officer failed to make a facially reasonable interpretation of Section 8-1011. And in doing so, the hearing officer's decision lacked substantially justification. *See Patrick v. Shinseki*, 668 F.3d 1325, 1331 (Fed. Cir. 2011) (Government is not substantially justified in interpreting statute in a manner contrary to its plain language and unsupported by legislative history).[1]

B. The hearing officer's finding that visitors and deliverers regularly accessed the parking lot for vehicular use was not facially reasonable.

[¶11] Secondarily, even absent the incorrect interpretation of Section 8-1011, the hearing officer's decision still was not facially reasonable. Specifically, the hearing officer reasoned the public had a right to access the parking lot for vehicular use because "[v]isitors, delivery people, emergency personnel, or people mistakenly taking a wrong turn are able to access the area." (R20:2) There was no basis in the record for this finding. *Cf. Goff*, 2022 ND 186, ¶ 13 ("To the extent the hearing officer found this factor weighed against Goff, we conclude this finding is not supported by the evidence.").

[¶12] As already outlined by this Court, John Goff's "uncontradicted testimony does not support a finding that there is routine use of the parking lot by the public not specifically invited to use the property." *Id.* It was not reasonable to find the public had a right to access the parking lot for vehicular use. Indeed, if it was, this

[1] Because Section 25-32-50 is based on the EAJA, federal interpretations of the EAJA are persuasive authority. *See Rojas v. Workforce Safety & Ins.*, 2006 ND 221, ¶ 17, 723 N.W.2d 403.

Court would necessarily have deferred to the hearing officer's factual findings. *Cf. id.* at ¶ 6 ("We only determine whether 'a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record.'" (citation omitted)). The hearing officer's decision was not substantially justified when it ignored John Goff's uncontradicted testimony. *Cf. Golembiewski v. Barnhart*, 382 F.3d 721, 724 (7th Cir. 2004) (finding the commissioner's position was not substantially justified when "the ALJ ignored significant evidence supporting [the plaintiff's] claim").

CONCLUSION

[¶13] The Department argues the district court did not err in refusing to award costs and fees because Mr. Goff failed to prove the Department's lack of substantial justification. *See* Br. of Appellee, at ¶ 16 (Mr. "Goff must show that the Department acted without substantial justification."). The district court appears to also have placed the burden on Mr. Goff. (R58:¶4 (Mr. "Goff argues that the Department's position is not substantially justified because . . . .")) This is another misapplication of the law. The plain language of Section 28-32-50 makes the imposition of costs and fees mandatory when an agency acts without substantial justification. *See* N.D.C.C. § 28-32-50(1). This mandatory nature stems from the purpose of the law—"to ensure that private parties are not deterred from challenging unreasonable government action because of the expense involved, and to deter an administrative agency from taking a position that lacks substantial justification." *Rojas v. Workforce Safety & Ins.*, 2006 ND 221, ¶ 15, 723 N.W.2d 403 (citation omitted).

As such, "the burden is on the agency to prove it acted with substantial justification." *Id.* at ¶ 17. The Department bore the burden of proving the hearing officer was substantially justified in finding the public had the right to access the parking lot because Section 8-1011 only prohibited the public from parking in the parking lot.

[¶14] Never once has the Department attempted to carry its burden, and explain how the hearing officer's decision was substantially justified. Nor did the district court explain how the hearing officer was substantially justified in misapplying the plain, unambiguous language of Section 8-1011. Instead, without analyzing the specifics of this hearing officer's decision, the district court found the decision to be "substantially justified" because the Department advanced "facially reasonable" arguments in "good faith."

[¶15] The Department and district court have not defended the specifics of the hearing officer's decision because the specifics are indefensible. An adjudicator has a duty "to follow the law as it is written in all cases under all circumstances, without fear and without regard to public clamor or personal consequences." *Sweeney v. Sweeney*, 2005 ND 47, ¶ 15, 693 N.W.2d 29 (citation omitted). In this case, the hearing officer failed that duty. Rather than following Section 8-1011 as written, the hearing officer unjustifiably ignored the plain language of the ordinance. *Patrick*, 668 F.3d at 1331 (agency not substantially justified in interpreting statute in a manner contrary to its plain language and unsupported by legislative history).

[¶16] Because the hearing officer's findings were not facially reasonable, and because facially reasonableness was not the appropriate standard of review, the

district court abused its discretion. This Court should reverse, and grant Mr. Goff his costs and fees.

Respectfully submitted June 2, 2023.

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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 12 pages.

Dated this 2nd day of June, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2023, the following document:

Reply Brief of Appellant

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Dated this 2nd day of June, 2023.

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