

13-0837

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JIMMIE J. SIZEMORE, II,

Petitioner,

v.

JOE E. MILLER, COMMISSIONER
West Virginia Division of Motor Vehicles,

Respondent.

2013 OCT -3 PM 1:35

CATTY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Misc. No.: 11-MISC 153

**OPINION AND ORDER GRANTING WRIT OF PROHIBITION AND APPLICATION
FOR STAY**

This matter came before the Court upon a Writ of Prohibition and Application for Stay to prohibit the Respondent from conducting a second hearing where a properly convened hearing had already taken place. The Court has considered the Writ of Prohibition and Application for Stay, Answer of the Commissioner, the record as a whole, pertinent legal authorities, and has conducted a hearing during which the parties presented oral arguments. As a result of the Court's consideration and deliberation and for the reasons set forth in the following opinion, the Court concludes the writ of prohibition and application for stay should be granted.

STANDARD OF REVIEW

The Court reviews this writ for extraordinary relief to determine whether the lower tribunal exceeded its legitimate powers by considering the five factors set forth in *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). Specifically, the Court has considered the following five factors which it considers to be general guidelines that serve to assist the Court in determining whether a discretionary writ of prohibition should be issued.

Pursuant to the *Hoover* decision, all five factors need not be satisfied, but the existence of clear error in the lower tribunal's order, the third factor, should be given substantial consideration and weight. The five factors include: "(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error manifests persistent disregard for either the procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression". Syllabus Point 4 *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

UNDISPUTED FINDINGS OF FACT

The following allegations were asserted in support of the Writ of Prohibition and Respondent either admits or does not dispute all of the following material facts:

1. On February 24, 2009, Petitioner was arrested for first offense driving under the influence of alcohol by Sergeant R. L. Foster of the Nitro Police Department. A Statement of Arresting Officer was timely forwarded to the Division of Motor Vehicles (hereinafter "DMV").

2. Consequently, the DMV issued an initial order of revocation informing Petitioner that his license would be revoked in the future unless he timely filed a request for an administrative hearing.

3. Petitioner timely and properly requested an administrative hearing pursuant to *W.Va. Code* §17C-5A-2(d). Consequently, the initial order of revocation was stayed.

4. An administrative hearing was scheduled for August 5, 2010 by the DMV.

5. Prior to the hearing, a subpoena was issued and served by the DMV commanding the arresting officer to be present at the administrative hearing on August 5, 2010 at 11:30 a.m. at the DMV's office at the Kanawha Mall.

6. Upon receipt of the subpoena, the arresting officer sought a continuance of the hearing from the Commissioner because the arresting officer had prior plans to be out of town on the date of the hearing.

7. The arresting officer contacted counsel for Petitioner to inquire if Petitioner would consent to the continuance sought by the arresting officer. Petitioner consented to the continuance requested by the arresting officer.

8. Counsel for Petitioner contacted the Commissioner's office and advised that Petitioner had no objection to the hearing continuance requested by the arresting officer.

9. Despite the continuance request and consent of the Petitioner to the motion for continuance, the Commissioner's office denied the arresting officer's request for a continuance.

10. The Petitioner and his counsel appeared for the administrative hearing scheduled on August 5, 2010.

11. On August 5, 2010, an administrative hearing took place. The Petitioner, his Counsel and the Hearing Examiner each appeared. Neither the arresting officer nor any witness or representative for the State appeared.

12. Based on the failure of the arresting officer, or any party for the State, to appear at that hearing, the Petitioner moved for dismissal of the revocation and requested that Petitioner be issued a full and valid license.

13. The Hearing Examiner refused to rule on Petitioner's motion, and instead declared

that the matter would be brought to the Commissioner's attention.

14. The arresting office went on a hunting trip and did not attend the administrative hearing.

15. Absent any motion or action from the State, the Commissioner re-scheduled the administrative hearing for March 31, 2011.

DISCUSSION AND OPINION

Administrative license revocation hearings fall within the purview of the Administrative Procedures Act, *W.Va. Code* §29A-5-1 *et. seq* and *W.Va. Code* §17C-5A-1 *et. seq*. The DMV is required to conduct all hearing in an impartial manner. The procedural rules adopted and implemented by the Commissioner to ensure impartiality in the postponement or continuance of administrative hearings is set forth within CSR §91-1-3.7. Pursuant to that regulation, postponements and continuances "...shall be enforced and applied to all parties equally." If a driver fails to appear at a properly convened hearing, and prior thereto has failed to obtain a continuance or postponement of the hearing, the Commissioner's initial order of revocation is upheld against the driver. CSR §91-1-3.7.1. Conversely, if the arresting officer fails to appear, and the driver appears, as occurred in Petitioner's case, the Division cannot revoke or suspend the driver's license based solely upon the arresting officer's affidavit or other documentary evidence. CSR §91-1-3.7. The DMV may not apply its procedural rules for continuance and postponement in an unequal and disparate manner to the disadvantage of the driver and to the benefit of the DMV.

The regulations allow each party the equal opportunity to request a continuance in writing, based on good cause, at least five days prior to the hearing. Alternatively, the parties

can file an emergency continuance request in writing, which must be received no later than five days following the hearing dates. CSR §91-1-3.8. There is no dispute that the August 5, 2010 hearing was properly noticed and convened. Further, there is no dispute that no continuance or postponement was sought on behalf of the state, for good cause, or on an emergency basis prior to or within five days after the August 5, 2010 hearing. Finally, there is no dispute that Petitioner appeared for the August 5, 2010 hearing but the arresting officer and Respondent did not appear. No regulations or procedural rules allow the Commissioner to conduct a second hearing or reschedule a properly convened and held hearing regarding driving privileges. Allowing the Commissioner to arbitrarily convene a second hearing after a properly convened hearing has been held, without compliance with the regulations established for hearing continuances and postponements would render those regulations meaningless.

The Commissioner may ^{not (8B)} engage in one-sided application of the procedural rules and regulations to favor itself and the State to the detriment of the Petitioner. The West Virginia Supreme Court of Appeals has strictly forbidden such partial, disparate, and non-neutral application of rules and regulations. In that regard, the Supreme Court has stated “especially because the important property interest of a driver’s license is at stake, the DMV must conduct license suspension hearings in a fashion that assures the due process right of licensees to a tribunal where both sides are able to fully and fairly present their evidence before a neutral hearing examiner who does not act to favor or advance the cause of either side.” *David v. Commissioner of the W.Va. DMV*, 219 W.Va. 493, 637 S.E.2d 591 (2006). Thus, the Commissioner’s decision to arbitrarily schedule a second hearing after a properly convened hearing had already occurred was clearly erroneous.

The Court has considered the *Miller v. Hare*, 227 W.Va. 337, 708 S.E.2d 531 (2011) decision and finds the same distinguishable from the facts presented in this case because the arresting officer sought a pre-hearing continuance of the license revocation hearing. Petitioner consented to the continuance, but the Commissioner denied the arresting officer's continuance request. The Commissioner's action in denying the investigating officer's prehearing continuance request, the Commissioner's failure to appear for the hearing and present evidence in support of the State's case, followed by the Commissioner's decision to schedule a second hearing, demonstrates a persistent disregard by the Commissioner of procedural law. While the Commissioner does have the authority to continue a hearing on its own motion, it may not exercise its authority to deny a pre-hearing continuance request and then, post hearing, schedule a second hearing when the first hearing does not proceed in a manner that benefits the Commissioner. Such partial application of the procedural rules violated Petitioner's due process rights.

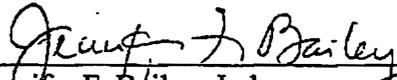
DECISION

Accordingly, the Petition for Writ of Prohibition and Application for Stay should be granted.

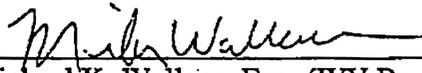
Respondent is prohibited from conducting a second hearing because a properly convened hearing has already taken place and the Commissioner took no action to exercise his power to continue or postpone the hearing before it occurred. This matter shall be DISMISSED and STRICKEN from the docket of this Court. It is further ORDERED that the Circuit Clerk distribute certified copies of this Order to all parties or counsel of record and the West Virginia Division of Motor Vehicles. The Court notes the objection of the party of parties aggrieved by

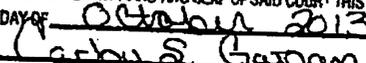
this Order. This is a Final Order.

ENTERED this the 2nd day of October, 2013.


Jennifer F. Bailey, Judge
of the Circuit Court of Kanawha County,
West Virginia

Prepared By:


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Counsel for Petitioner

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 8th
DAY OF October 2013

Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

**STEVEN O. DALE, Acting Commissioner,
Division of Motor Vehicles,**

Respondent below, Petitioner,

v.

JIMMIE J. SIZEMORE, II,

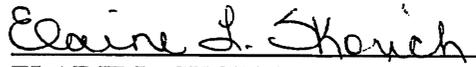
Petitioner below, Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, and counsel for the respondents, do hereby certify that the foregoing *Notice of Appeal* was served upon the opposing party by depositing a true copy thereof, postage prepaid, certified mail, in the regular course of the United States mail, this 22nd day of October, 2013, addressed as follows:

Michael K. Wallace, Esquire
Post Office Box 8980
South Charleston, WV 25303

The Honorable Cathy Gatson
Clerk of the Circuit Court
Kanawha County Courthouse
111 Court Street, Judicial Annex
Charleston, WV 25301


ELAINE L. SKORICH