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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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STEVEN O. DALE, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

CATHY S. BAIRD, CLERK
KANAWHA COUNTY CIRCUIT COURT

Petitioner,

v.

Civil Action No. 13-AA-105
Judge James C. Stucky

DUSTIN HALL,

Respondent.

FINAL ORDER

This matter comes before the Court on Petitioner Steven O. Dale's¹, Commissioner of the West Virginia Division of Motor Vehicles (*hereinafter* "Petitioner"), "Petition for Appeal" filed August 28, 2013, from a final decision of the Chief Hearing Examiner of the Office of Administrative Hearings (*hereinafter* "Examiner"). After reviewing the Petition, the entire record, and the applicable legal authority, this Court **AFFIRMS** the decision of the Examiner.

FACTS AND PROCEDURAL HISTORY

On February 3, 2011, Officer N. W. Harden (*hereinafter* "Investigating Officer"), the investigating officer in this matter, overheard a radio call from the Kanawha County 911 Center advising officers of a received complaint stating a motor vehicle was being driven the wrong way on MacCorkle Avenue and was approaching Montrose Drive. June Trans., p. 14.

Shortly thereafter, the Investigating Officer observed a 2005 Chevrolet truck traveling south in the northbound traffic lanes of Montrose Drive. The Officer pursued the vehicle and stopped it on the eastbound entrance ramp to Interstate 64. *Id.* Upon stopping the vehicle, the

¹ Acting Commissioner, Steven O. Dale, replaced the former commissioner as the named party. See W. Va. R. App. Proc. 41(c).

Investigating Officer identified the driver as Dustin Hall (*hereinafter* "Respondent"), the Respondent herein. Following the traffic stop, the Respondent had difficulty location his driver's license. *Id.* at p. 16. The Respondent informed the Investigating Officer that he was coming from work in Wyoming County. *Id.*

The Investigating Officer requested that the Respondent exit the vehicle and walk to the back of the truck. The Respondent then advised Officer A. J. Davis, an officer assisting with the stop, that he had been drinking alcohol earlier. Oct. Trans., p. 12.

The Investigating Officer completed a medical assessment of the Respondent's eyes to ensure the test would render valid results. Following the assessment, the Investigating Officer administered a horizontal gaze nystagmus test to the Respondent, during which time the Respondent's eyes could not smoothly follow a stimulus moved along a horizontal plane, exhibited nystagmus at less than forty-five degrees from forward and exhibited the presence of distinct nystagmus at maximum deviation from forward gaze. Examiner's Decision, p. 3. The Respondent advised the Investigating Officer that he thought the tests were a "runaround". June Trans., p. 19.

The Investigating Officer arrested the Respondent for driving a motor vehicle in this State while under the influence of alcohol on February 3, 2011, at 3:17 AM. The Investigating Officer then transferred custody to Officer J. D. Keeney, who transported the Respondent to the police department's headquarters.

At the South Charleston Police Department (*hereinafter* "Department"), Officer J A. Bailes read and gave to the Respondent a West Virginia Implied Consent Statement containing the penalties for refusing to submit to a designated secondary chemical test and the fifteen-minute time limit for recantation of an initial refusal specified in West Virginia Code § 17C-5-7.

The Respondent advised Officer Bailes that he did not want a secondary chemical test of his breath; instead, he wanted a blood test. Oct. Trans., p. 7. After fifteen minutes, the Respondent was asked again if he wished to submit to a secondary chemical test of the breath or whether he wanted blood drawn, and the Respondent indicated that he wanted a blood test. June Trans., p. 21.

The Investigating Officer transported the Respondent to Thomas Memorial Hospital in South Charleston, where Andrea Gray withdrew blood specimens from the Respondent and placed them in a box. The Investigating Officer transported the Respondent's blood specimen to the Department and placed them in an evidence locker. *Id.* at p. 22.

Several months prior to the June 27, 2012 hearing, the Investigating Officer contacted the Department's evidence technician to inquire about the Respondent's blood specimen. The evidence technician informed the Investigating Officer that the specimens had not been submitted because the West Virginia State Police laboratory was not accepting blood specimens at this time.

An administrative hearing was held on June 27, 2012, and October 17, 2012, arising from an Order of Revocation entered by the Petitioner on February 9, 2011, revoking the driving privileges of the Respondent for the offense of driving a motor vehicle in this State while under the influence of alcohol and, after being lawfully arrested for that offense, refusing to submit to a designated secondary chemical test.

The Examiner reversed Petitioner's Order of Revocation, finding that the Respondent's request for an independent blood test was effectively denied by the Investigating Officer's failure to submit the blood specimen to a qualified laboratory for analysis. Additionally, the Examiner held the denial of the Respondent's right to an independent blood test violates his due process

rights.

STANDARD OF REVIEW

This Court's review is governed by the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-1 *et seq.* W. Va. Code § 29A-5-4(g) states the following:

The Court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

“[A] reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations.” Syl. pt. 2, in part, *Cahill v. Mercer County Board of Education*, 208 W. Va. 177, 539 S.E.2d 437 (2000).

The Court must give deference to the administrative agency's factual findings and review those findings under a clearly wrong standard. Further, the Court applies a *de novo* standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 196 W. Va. 588, 595, 474 S.E.2d 518, 525 (1996).

“The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” *Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311 (2008) (per curiam) (quoting Syl. pt. 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483

(1996)).

DISCUSSION

Petitioner contends that the Examiner erred in rescinding the revocation and disqualification of Respondent's licenses on the basis that he refused to submit to a designated secondary test.

West Virginia law provides that any person who drives a motor vehicle in this State is considered to have given his or her implied consent to tests to determine whether or not they are under the influence. W. Va. Code §17C-5-4 provides, in pertinent part, the following:

(a) Any person who drives a motor vehicle in this state is considered to have given his or her consent by the operation of the motor vehicle to a preliminary breath analysis and a secondary chemical test of either his or her blood or breath to determine the alcohol concentration in his or her blood, or the concentration in the person's body of a controlled substance, drug, or any combination thereof.

(c) A secondary test of blood or breath is incidental to a lawful arrest and is to be administered at the direction of the arresting law-enforcement officer having probable cause to believe the person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

(d) The law-enforcement agency that employs the arresting law-enforcement officer shall designate the secondary tests to be administered: Notwithstanding the provisions of section seven of this article, the refusal to submit to a blood test only may not result in the revocation of the arrested person's license to operate a motor vehicle in this state.

In West Virginia, failure to submit to a secondary chemical test could result in the forfeiture of driving privileges. W. Va. Code § 17C-5-7(a) provides the following:

(a) If any person under arrest as specified in section four of this article refuses to submit to any secondary chemical test, the tests shall not be given. Provided, that prior to the refusal, the person is given an oral warning and a written statement advising him or her that his or her refusal to submit to the secondary test *finally designated* will result in the revocation of his or her license to operate a motor vehicle in this state for a period of at least forty-five days and up to life; and that after fifteen minutes following the warnings the refusal is considered final.

(Emphasis added.)

In this case, the Examiner held that the dialogue regarding the secondary chemical testing led the Respondent to believe that he had a choice of taking a breath or blood test. The pertinent testimony in the record provides the following:

Officer Harden: . . . I was informed that Mr. Hall didn't want to take the Breathalyzer, but wished to have blood drawn. So right before he left, I asked him again for the 15 minutes if he wanted to take it *or* have blood drawn. He would have *rather* had blood drawn.

June Trans, p. 21. (Emphasis added.)

Here, the testimony provides that the Investigating Officer asked the Respondent whether he wanted a breath or blood test. Thereafter, custody of the Respondent was transferred to Officer Keeney, and he was transported to the Department. At the Department, Officer Bailes read the Implied Consent Statement to the Respondent. The record is devoid of any evidence that the Respondent was advised that the secondary chemical test of the breath is the Department's designated test, and although he is entitled to a blood test, his license could be revoked without submitting to the breath test. In fact, the testimony provided is suggestive of the Respondent having a choice between the tests. As a result, this argument is without merit.

Petitioner contends that the Examiner erred in rescinding the revocation and disqualification of Respondent's licenses because the Respondent requested and did not receive a blood test, and in turn, applied the exclusionary rule.

The West Virginia Supreme Court of Appeals has held that "[t]he judicially-created exclusionary rule is not applicable in a civil, administrative driver's license revocation or suspension proceeding." Syl. pt. 3, *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012); *Miller v. Smith*, 229 W. Va. 478, 484, 729 S.E.2d 800, 806 (2012).

The principal determination to be made at a Department of Motor Vehicles hearing for driver's license revocation for driving under the influence is "whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs." W. Va. Code § 17C-5A-2(e). Moreover, in a case where a person is accused of driving a motor vehicle while under the influence of alcohol, the Examiner is required to make specific findings as to:

(1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs, or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or to have been driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight but less than eight hundredths of one percent, by weight; (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test: Provided, That this element shall be waived in cases where no arrest occurred due to driver incapacitation; (3) *whether the person committed an offense involving driving under the influence of alcohol, controlled substances or drugs;* and (4) *whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.*

W. Va. Code § 17C-5A-2(f) (emphasis added).

In this matter, the Examiner held that the Investigating Officer failed to comply with W. Va. Code § 17C-5-9, in that the Investigating Officer did not make certain ". . . that a chemical test thereof be made. . ." As a result, the Examiner is unable to make a specific finding as such.

Accordingly, W. Va. Code § 17C-5-9 requires that a chemical test be made of the blood sample – it was not. Therefore, the Court concludes that the Examiner was not clearly wrong in reversing the Commissioner's Order of Revocation.²

² In *Clower v. West Virginia Department of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009), the West Virginia Supreme Court of Appeals held that the circuit court did not abuse its discretion in reversing the Commissioner's Order suspending Mr. Clower's license to operate a motor vehicle. In *Clower*, Mr. Clower was pulled over for a traffic violation. Following the traffic stop, Mr. Clower was arrested for driving under the influence in violation of W. Va. Code § 17C-5-2. The circuit court concluded that Mr. Clower was not lawfully placed under arrest because the Trooper did not have articulable reasonable suspicion to initiate a traffic stop of Mr. Clower's vehicle. The circuit court held that W. Va. Code § 17C-

RULING

Accordingly, the Court orders the following: the decision of the Examiner is **AFFIRMED**. This matter is **DISMISSED** and **STRICKEN** from the docket of the Court. The Clerk of the Court shall send copies of this Order to

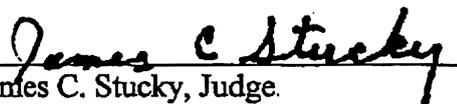
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509 Whisper Road
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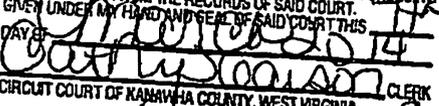
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Enter this Order the 6th day of March, 2014.


James C. Stucky, Judge.
Thirteenth Judicial Circuit

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
DAY OF MARCH 2014

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

5A-2(e) (2004) required that Mr. Clower's have been lawfully arrested. Accordingly, the Supreme Court concluded that the circuit court did not abuse its discretion in reversing the Commissioner's Order of Revocation.

NO.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STEVEN O. DALE, ACTING COMMISSIONER OF THE
WEST VIRGINIA DIVISION OF MOTOR VEHICLES, AND
SUCCESSOR TO JOE E. MILLER, AS COMMISSIONER,

Petitioner,

v.

DUSTIN HALL,

Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing *Notice of Appeal* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 4th day of April 2014, addressed as follows:

William C. Forbes, Esquire
1118 Kanawha Blvd., East
Charleston, WV 25301

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



Janet E. James