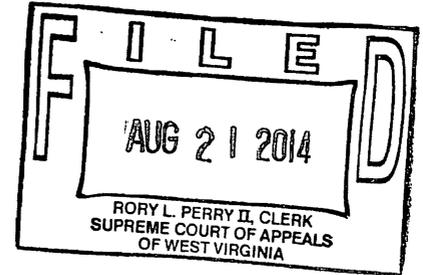


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0342

STEVEN O. DALE, ACTING COMMISSIONER,  
WEST VIRGINIA DIVISION OF MOTOR VEHICLES  
Petitioner, petitioner below.



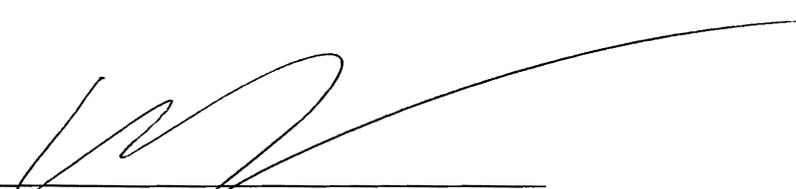
Vs.

DUSTIN HALL,  
Respondent, respondent below.

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**RESPONDENT'S BRIEF**

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**RESPONDENT'S BRIEF**

Now, comes the Respondent, DUSTIN HALL, by counsel of record, William C. Forbes, Forbes Law Offices, PLLC, and pursuant to the Scheduling Order of this Honorable Court, and the Rules of Appellate Procedure, hereby timely submits his brief in the above-styled matter.

The Circuit Court Order, which is the subject of this appeal, affirmed the well-reasoned Office of Administrative Hearings, (hereinafter OAH), Order, and the Circuit Court's Order, likewise should be affirmed by this Honorable Court as no error of fact or law was made therein, and said Order is supported by the reliable, probative, and substantial evidence on the whole record.

Herein, Respondent makes citations to the Appendix Record as A.R. p. \_\_. <sup>1</sup>

**III. RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR**

**Respondent has not restated the petitioner's assignments of error in this section of his brief, but submits that no error of fact or law was made by the Circuit Court in upholding the OAH order which rescinded the DMV's license revocation and disqualification; the findings of fact were clearly supported by the evidence of record, and no abuse of discretion occurred; therefore, the petitioner's assignments of error are without merit, and the Circuit Court's order should be affirmed upon this appeal. Moreover, petitioner's assignments of error all basically allege the same issue.**

**IV. STATEMENT OF THE CASE**

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<sup>1</sup> As Respondent herein, Dustin Hall, was the Petitioner at the administrative level, the DMV Petitioner herein is sometimes simply referenced as the DMV.

On February 3, 2011, Respondent, Dustin Hall, was arrested by Patrolman Harden of the South Charleston Police Department for driving under the influence of alcohol at approximately 3:17 a.m. (AR p. 66). The DMV issued an order of revocation on February 9, 2011, which set forth driving under the influence and alleged refusal to submit to the designated chemical test as grounds for the revocation, and said revocation order also indicated the revocation periods would run concurrently. (AR pp. 75). Respondent is licensed to drive commercial vehicles. (AR p. 66). The DMV's disqualification order stated that the written statement of the arresting officer stated that Respondent refused to submit to the secondary chemical test "finally" designated, and disqualified Respondent from driving commercial vehicles for a period of one year. (AR p. 74). Respondent timely requested an administrative hearing challenging the DMV's orders of revocation and disqualification, and was afforded an administrative hearing(s), and hearings were convened on June 27, 2012, and October 17, 2012. (AR pp. 16, 18, 293-323, 331-350).

Respondent informed Ptlm. Harden that he was coming from work in Wyoming County as the Circuit Court correctly found. (A.R. p. 2, p. 308). Upon his arrest, Respondent exercised his statutory rights and demanded that a blood test be conducted to determine any alcohol concentration in his blood, and blood was drawn for this purpose by Andrea Gray at Thomas Memorial Hospital at approximately 4:26 a.m. (AR p. 69). Further, Ptlm. Harden indicated in the WV DUI Information Sheet that an analysis of Respondent's blood would be performed by the WV State Police Laboratory, but he admitted at the June 27, 2012, administrative hearing that such analysis was never performed. (A.R. p. 69, AR pp. 313-315). However, despite the blood being drawn at Thomas Memorial Hospital, a medical facility, which was more than qualified to conduct any requisite testing for any alcohol content in Respondent's blood under the applicable WV Bureau of Public Health standards, and W.Va. Code § 17C-5-6, Ptlm. Harden

as the investigating/arresting officer failed to have the blood analyzed at Thomas Memorial at that time at his direction as required by statute, W.Va. Code § 17C-5-9, §17C-5-6. *Id.* Ptlm. Harden admitted in his testimony that Respondent had demanded a blood test, and his testimony further indicated that Respondent had already conveyed his demand for a blood test to Ptlm. Bailes. (A.R. p.313, lines 1-7; p. 315). Ptlm. Harden further admitted in his testimony that he never directed any qualified facility to analyze the Respondent's blood for alcohol concentration. (A.R. pp. 313-315). Most importantly, Ptlm. Harden's testimony indicated that said arresting officer led Respondent to believe that he had a choice between a blood or a breath test, as both the OAH and the Circuit Court correctly found. (AR pp. 6, 313, 171-172). Thus, the OAH findings in this regard were not clearly wrong, and the Circuit Court was bound by statute and the authority of this Court to affirm the same. Respondent was denied his statutory rights under W.Va. Code §17C-5-9, to receive a blood test upon his demand for the same. Pursuant to the plain language of W.Va. Code §17C-5-9, Respondent clearly had and has a clear statutory right to demand and receive a secondary chemical test of his blood to determine if any alcohol concentration exists in his blood, and although he demanded such a blood test, he never received the same.

The clear, unambiguous and plain language of the current version of W.Va. Code § 17C-5-9, reads as follows:

§17C-5-9 Right to demand test.

Any person lawfully arrested for driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs **shall have the right to demand that a sample or specimen of his or her blood or breath to determine the alcohol concentration of his or her blood be taken within two hours from and after the time of arrest and a sample or specimen of his or her blood or breath to determine the controlled substance or drug content of his or her blood, be taken within four hours from and after the time of arrest, and that a chemical test thereof be made. The analysis disclosed by such chemical test**

**shall be made available to such arrested person forthwith upon demand. (emphasis added herein).**

The plain language of the statute mandates that the chemical analysis be performed. *Id.*

However, instead of complying with the plain and unambiguous provisions of W.Va. Code § 17C-5-9, the OAH correctly found that the testimony of Ptlm. Harden indicated that he took the blood sample with him after it was drawn at the hospital without having it chemically tested at Thomas Memorial Hospital, and then he placed it in an evidence locker at the South Charleston Police Department, and thereafter, Ptlm. Harden never directed that Respondent's blood sample be sent out for chemical analysis to any qualified facility. (A.R. pp. 313-315, 115-116, 119-120). The Circuit Court found that the OAH's evidentiary findings were not clearly wrong. (AR pp. 1-8).

At the administrative level, Respondent timely notified the DMV Petitioner that he intended to challenge any and all secondary chemical tests (blood, breath, urine, field sobriety), requested discovery and a copy of the DMV file in this matter, and thereby requested copies of any results of the analysis of his blood that was taken herein. (A.R. pp. 16, 18). Moreover, in the hearing request form, Respondent demanded the right to cross-examine and issuance of subpoena to the individual(s) who performed the chemical analysis of his blood sample. (AR p. 16) However, the Petitioner was completely unable to produce the results of the secondary chemical analysis of Respondent's blood, or an individual for cross-examination with respect to such analysis, because the blood analysis/testing was never conducted to determine if any alcohol concentration existed in Respondent's blood. (AR pp. 313-315). Moreover, the hearing request form submitted by Respondent indicated by checking the requisite box that Respondent wished to cross-examine the individual(s) who either administered the secondary chemical test of blood... or who performed the chemical analysis of the test, the form indicated that a subpoena

would issue upon this request, but such subpoena was never issued. (AR p. 16). Therefore, Respondent had clearly demanded the results of such chemical analysis and the opportunity to cross-examine the individual who performed such chemical tests. *Id.* Thus, the Circuit Court found that the OAH order was **not** clearly wrong in finding that Ptlm. Harden's actions and/or inactions violated W.Va. Code § 17C-5-4 and W.Va. Code §17C-5-9, relating to the implied consent form and Respondent's demand to **receive** a blood test, and that Ptlm. Harden had led Respondent to believe he had a choice between a blood or breath test. (AR pp. 1-8, 112-126). Further, the Circuit Court's order properly found that there was no evidence of record indicating that the breath test was the "finally" designated test due to the evidence; therefore, the OAH order was not clearly wrong in rescinding the revocation and disqualification on the basis of refusing to submit to the breathalyzer, and the Circuit Court appropriately affirmed the same. *Id.* The Circuit Court further appropriately held that the OAH order was not clearly wrong in finding that by Ptlm. Harden's actions and/or inactions, in failing to have the blood analyzed or tested pursuant to the mandates of W.Va. Code § 17C-5-9, violated the Respondent's procedural and substantive rights to due process of law, and the right to obtain evidence in his favor, as the Respondent's request for an independent blood test was effectively denied. *Id.*

At the June 27, 2012, administrative hearing, it was noted on the record that Respondent resides in Mount Nebo, located in Nicholas County, West Virginia. (A.R. pp. 297-298). Thus, Respondent, Dustin Hall, is not from the South Charleston area.

Ptlm. Harden submitted a sworn WV DUI Information Sheet, which appeared to indicate that he had read the implied consent form and provided a copy to Respondent; however, no written copy of the implied consent form was included with the WV DUI Sheet submitted to the DMV. (A.R. pp. 66-71). At the first administrative hearing held herein, the hearing examiner

noted that a copy of the implied consent statement was not submitted to the DMV with the DUI Information Sheet. (A.R. 301, lines 9-14). Furthermore, no copy of the Implied Consent Form was provided to Respondent by the DMV or Counsel for the DMV upon Respondent's request for the file and discovery of evidence in this matter, therefore, Respondent objected to its admission as evidence, but such objection was overruled. (A.R. pp. 299-303). Moreover, the record indicates that the DMV's counsel secured a copy of the implied consent form prior to the administrative hearing, but failed to provide a copy to counsel for Respondent prior to the hearing. *Id.* .

At the first administrative hearing, Ptlm. Harden testified that he completed the WV DUI Information Sheet and that it contained a true and accurate reflection of the events on the night of Respondent's arrest. (A.R. p. pp. 66-71). However, the DUI Information Sheet is incomplete; inaccurate on material facts, and thus the face of the document itself contradicts his testimony as to its truth and accuracy. *Id.* Ptlm. Harden's testimony to this effect was contradicted by the documentary evidence contained on the face of the DUI Information Sheet, itself, with respect to the implied consent form, which was not included with the DUI Information Sheet, but was later admitted into evidence during the testimony of Officer Bailes. (A.R. pp. 66-71, p. 315, p. 338). Ptlm. Harden later contradicts his own testimony as to the truth and accuracy of the DUI Sheet, as he later admitted that he, himself, did not read and give a copy of the implied consent form to the Respondent, but instead Ptlm. Harden testified that a different officer's signature appears on the implied consent form that of Ptlm. J.A. Bailes, who was not present at the June 27, 2012, hearing, despite being under lawful subpoena to appear. (A.R. p. 315, lines 3-6, 315-316, 318-319). Thus, Ptlm. Harden's testimony that J.A. Bailes' signature appeared on the implied consent form was in conflict with the sworn written statements Ptlm. Harden made in the WV DUI

Information Sheet, which appeared to indicate that he, himself, had performed the mandatory duties under W.Va. Code 17C-5-4, of reading and providing a written copy of the implied consent form to Respondent. (A.R. pp. 69, pp. 315, lines 3-6). Respondent's counsel had objected to the admission of the implied consent form, but such objection was overruled, counsel noted his exception to the hearing examiner's ruling, thereby preserving said objection. (A.R. pp. 298-302). Subsequent to Ptlm. Harden's admission that he did not sign the implied consent form, the DMV's counsel did not move its admission at the first hearing, due to the absence of Ptlm. J.A. Bailes; (A.R. pp. 315-320). There are numerous copies of Ptlm. Harden's WV DUI Information Sheet on the record, and none of those copies contained a copy of the implied consent form. (A.R. pp. 66-72, 182-188, 194-200). The implied consent form is of record at (AR p. 291). The OAH's findings regarding the implied consent form were proper and appropriate given the conflicts in the documentary and testimonial evidence regarding the same, and the Circuit Court accordingly upheld the same. (A.R. pp. 1-8, 112-126). The OAH further found that the requirements of W.Va. 17C-5-4, were not met by Ptlm. Harden as he led Respondent to believe he had a choice between a blood or breath test as the secondary chemical test, and the Circuit Court properly gave this finding the deference it deserved, and further noted that the breathalyzer was not "finally" designated as required by statute due to the evidence and testimony of record. *Id.*

Ptlm. Harden's testimony regarding the implied consent form and the Respondent's demand for a blood test, indicate that Ptlm. Harden led Respondent to believe he had a choice in which secondary chemical test to undergo to determine if what, if any alcohol concentration existed in respondent's blood. (A.R. p. 313, lines 1-7; and p. 315, lines 2-6)

Ptlm. Harden testified that ... "I had gotten back to our headquarters, I was informed that Mr. Hall didn't want to take the breathalyzer, **but wished to have**

**blood drawn.** So right before we 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. (AR p. 313, see also lines 8-18). (*emphasis added herein*).

Thus, the arresting officer's own testimony clearly supported the OAH's finding that Respondent was led to believe he had a choice. *Id.* Therefore, the Circuit Court properly gave the OAH's evidentiary findings the deference to which such findings of fact are entitled, and affirmed the same since such findings were completely supported by the testimonial evidence of Ptlm. Harden, the arresting officer. (*Id.* and AR 1-8, 112-126). Respondent did not refuse to take the finally designated secondary chemical test, but rather was led to believe he had a choice, and exercised his statutory rights under W.Va. Code § 17C-5-9, to demand that a secondary chemical test for alcohol concentration be performed in a blood test, which statutory right was denied to him by the actions and/or inactions of Ptlm. Harden. (A.R. pp. 313-315, 1-8, 112-126). Ptlm. Harden admitted that he did not direct Thomas Memorial to conduct a chemical test of Respondent's blood, and that he took Respondent's blood sample with him and placed it in an evidence locker at approximately 5:41 a.m., and thereafter, never directed any other qualified facility to conduct a chemical analysis thereof. (AR pp. 313-315). Therefore, the Circuit Court properly found that the OAH order was not clearly wrong in determining that the DMV could not automatically revoke Respondent's driving privileges as he did not refuse to take the "finally" designated secondary chemical test but was led to believe he had a choice of tests. The Circuit Court properly affirmed the OAH findings regarding the secondary chemical test of Respondent's blood, to which Respondent was statutorily entitled upon demand, was denied to him as said secondary chemical analysis/testing of his blood was never conducted at the direction of Ptlm. Harden. (AR pp. 1-8, 112-126). This Honorable Court should not disturb the

evidentiary findings of fact made at the administrative level, as the same are completely supported by the testimony and evidence of record, as the Circuit Court properly found.

## V. SUMMARY OF ARGUMENT

The Circuit Court correctly followed the mandates of W.Va. Code § 29A-5-1 et seq. and W.Va. Code § 29A-5-4(g), with respect to administrative appeals, as well as the authority of this Court governing the deference to be afforded to the findings of fact and credibility determinations made by the hearing examiner at the administrative level. Therefore, the Circuit Court properly upheld the evidentiary factual findings of the OAH's well-reasoned decision, as said findings of fact were clearly supported by the testimony and evidence of record, and the OAH's view of the evidence and determinations with respect to the credibility of witnesses, which found Respondent was led to believe he had a choice between a blood test and a breathalyzer test, which was clearly supported by the testimony of the arresting officer, Ptlm. Harden. Therefore, the evidence of record clearly supported such a finding, and the Circuit Court properly upheld the administrative findings. Moreover, W.Va. Code § 17C-5-9, states in clear unambiguous and plain language that drivers arrested for DUI have the right to demand and receive a blood test within mandatory time periods of their arrest, and the investigating officer denied Respondent his clear statutory and due process right to receive the same by failing to have the Respondent's blood analyzed for alcohol concentration. The DMV's arguments ignore the plain language of the statutes, and the violation of these statutes by the investigating officer, which resulted in denial of substantial statutory, substantive, constitutional rights to confront his accusers, due process and equal protections rights of the Respondent. The denial of Respondent's statutory rights to receive a blood test effectively denied Respondent any opportunity to confront his accusers with exculpatory or impeachment evidence relating to

driving under the influence, therefore, the OAH appropriately reversed the DMV orders of revocation and disqualification on this basis as well, and the Circuit Court was correct in ruling that such findings were not clearly wrong. Moreover, the DMV's brief ignores that Ptlm. Harden as the investigating officer had submitted a West Virginia DUI Information Sheet, which was contradicted by his own testimony and the testimony of Patrolman Bailes, as to who read or explained the Implied Consent Form and purportedly provided a written copy to Respondent. The DMV further ignores the mandates of W.Va. Code §17C-5A-1(b), which provide that Ptlm. Harden's submission of an inaccurate DUI Information Sheet constitutes false swearing, and thereby called his credibility into question at the administrative level. The OAH's findings of fact were not clearly wrong, and therefore, the Circuit Court properly afforded these findings the requisite deference to which such findings were entitled, and appropriately affirmed the OAH Order. Likewise, this Honorable Court should affirm the decision of the Circuit Court.

## **VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument pursuant to Revised R.A.P. 19 is appropriate in this matter and argument may assist the Court in rendering its decision upon this appeal. Respondent disagrees with petitioner that the law is settled on the issues presented upon this appeal, and thus a memorandum decision may not be appropriate.

## **VII. ARGUMENT**

### **I. Standards of Review**

“On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va.Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syllabus point 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

“[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, *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (W.Va. 2000). “Credibility determinations made by an administrative law judge are entitled to deference.” Syl. Pt. 1, in part, *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (W.Va. 2000).

**Response to Assignment of Error: II.** The Circuit Court did NOT err in affirming the OAH’s order Rescinding the Revocation and Disqualification for DUI and Refusal on the Basis that the Investigating/Arresting Officer did not have the blood sample analyzed. Ptlm. Harden clearly testified that he never had the blood sample analyzed as the OAH found and the Circuit Court affirmed. W.Va. Code § 17C-5-9 would be rendered meaningless if the blood samples of drivers such as Respondent were never analyzed.

**Response to Assignment of Error III.** The Circuit Court did NOT err in affirming the OAH’s evidentiary finding that Ptlm. Harden led the Respondent to believe he had a Choice Between a Breath Test and a Blood Test as such evidentiary finding was clearly supported by the testimony of Ptlm. Harden, therefore, the Circuit Court appropriately affirmed the decision of the OAH in reversing the revocation for alleged refusal to submit to the breath test as it was not shown that the statutory requirements of W.Va. Code § 17C-5-4 and § 17C-5-7 were met, and Respondent was misled as to the consequences of not taking the breath test. See *Butcher v. Miller*, 212 W.Va. 13, 569 S.E.2d 89 (W.Va. 2002)(per curiam).

**Response to assignment of error: IV.** Contrary to petitioner’s assignment of error, the arresting/investigating office did have an obligation and duty to have the Respondent’s blood sample tested, and the officer’s violation of Respondent’s statutory rights thereto warranted the OAH’s rescission of the license revocation, as Respondent lost any opportunity to meaningfully confront his accusers on the issue of intoxication by the denial of this statutory right. W.Va. Code § 17C-5-9 would be rendered meaningless if such a duty was not required.

This Honorable Court has held that “[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syllabus point 5, *State v. General*

*Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959). W.Va. Code § 17C-5-9, states in clear, unambiguous and plain language that drivers arrested for DUI have the right to demand and receive a blood test within mandatory time periods of their arrest, and Respondent herein was denied his clear statutory right to receive the same. The Legislature plainly intended that driver's such as Respondent have a mandatory right to demand and **receive** a chemical analysis of his blood within the statutory time periods set forth in W.Va. Code § 17C-5-9, and Ptlm. Harden herein failed to comply with the same. The Legislature's use of the word shall in W.Va. Code §17C-5-9 must be given its plain ordinary meaning which is that of a mandatory directive rather than a discretionary one. In *State v. Allen*, 208 W.Va. 144, 153, 539 S.E.2d 87, 96, the West Virginia Supreme Court of Appeals discussed the use of the word "shall" as it relates to legislative intent as follows:

Generally, "shall" commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary." ***See Syllabus pt. 1, E.H. v. Matin***, 201 W.Va. 463, 498 S.E.2d 35 (1997). ('It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.' Syllabus Point 1, ***Nelson v. West Virginia Public Employees Insurance Board***, 171 W.Va. 445, 300 S.E.2d 86 (1982).'); Syl. pt. 9, ***State ex rel. Goff v. Merrifield***, 191 W.Va. 473, 446 S.E.2d 695 (1994).

The OAH applied the clear and unambiguous provisions of W.Va. 17C-5-9, in conjunction with W.Va. Code § 17C-5-4, and determined that the violation of said statutory provisions warranted the reversal of the DMV's orders of revocation and disqualification, and the Circuit Court correctly affirmed the decision of the OAH. (A.R. pp. 112-126, 1-8). As the OAH's findings were clearly supported by the testimony and evidence of record, the Circuit Court properly ruled that the same were not clearly wrong. (AR pp. 1-8). Therefore, the Circuit Court's order, which

affirmed the OAH order rescinding the revocation and disqualification of Respondent's driving privileges, should be upheld and affirmed by this Honorable Court as no error of fact or law was made therein. The Circuit Court properly affirmed the OAH's well-reasoned and articulate decision, which properly analyzed credibility, conflicts in the documentary and testimonial evidence, and appropriately weighed and considered the same, therefore, the OAH's analysis thereof provided rational grounds for its decision as required under the mandates of Syl. Pt. 6, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (W.Va. 1996), and the Circuit Court acted accordingly in affirming the same. (AR pp. 1-8, pp. 112-126).

Respondent had a clear statutory right under W.Va. Code §17C-5-9 to demand **and receive a blood test** for alcohol concentration in his blood, and he was denied this statutory right by the actions and/or inactions of Ptlm. Harden, and thereby he was denied his substantive and procedural rights to equal protection and due process of law. In Syllabus 1, *State v. York*, 175 W.Va. 740, 338 S.E.2d 219 (W.Va. 1985), the West Virginia Supreme Court of Appeals held that "W.Va.Code 17C-5-9 [1983] accords an individual arrested for driving under the influence of alcohol, controlled substances, or drugs a **right to demand and receive a blood test within two hours of arrest.**" *Id.* Herein, Respondent was completely denied his statutory right to **receive a blood test** at all, as Ptlm. Harden never submitted the blood for analysis, despite having the opportunity and authority under W.Va. Code § 17C-5-6 to have the blood tested at Thomas Memorial at the time it was drawn. Moreover, in *State v. York, supra*, the West Virginia Supreme Court of Appeals further indicated that a denial of the **statutory right to demand and receive a blood test** pursuant to W.Va. §17C-5-9, would constitute a denial of due process of law to the driver, as follows:

...W.Va.Code 17C-5-9 [1983] accords an individual arrested for driving under the influence of alcohol, controlled substances, or drugs a **right to demand and**

**receive a blood test within two hours of his arrest.** Furthermore, this statutory right is hardly a new development. Historically, one charged with intoxication has enjoyed a constitutional right to summon a physician at his own expense to conduct a test for alcohol in his system. **To deny this right would be to deny due process of law because such a denial would bar the accused from obtaining evidence necessary to his defense.** Application of Newbern, 175 Cal.App.2d 862, 1 Cal.Rptr. 80 (1959); Brown v. Municipal Court for Los Angeles Judicial Dist., 86 Cal.App.3d 357, 150 Cal.Rptr. 216 (1978). See also Annot., 78 A.L.R.2d 901 (1961). **The defendant's right to request and receive a blood test is an important procedural right that goes directly to a court's truth-finding function.** *State v. York*, 175 W.Va. at 741, 338 S.E.2d at 221(W.Va. 1985).  
*(emphasis added herein).*

Additionally, the West Virginia Supreme Court of Appeals has held that the plain language of W.Va. Code 17C-5-6, must be read in *pari materia* with W.Va. Code 17C-5-9, (*see In re Burks, infra*); and when read in conjunction, it is clear that Ptlm. Harden violated the Respondent's rights to receive a blood test which would have had evidentiary value. The plain language of W.Va. Code § 17C-5-6, indicates that Ptlm. Harden's failure to direct Thomas Memorial to analyze the blood sample within the mandatory time constraints of 17C-5-9, violated Respondent's statutory rights thereunder. The West Virginia Supreme Court in its decision of *In Re Burks*, 206 W.Va. 429, 525 S.E.2d 310 (W.Va. 1999), stated and held as follows:

We observe that the repeated amendment of our DUI statutes has left them somewhat complex and overlapping—with several statutes frequently addressing the same issue. This appears to be the case in the "blood-test request" provisions of *W.Va.Code*, 17C-5-6 [1981] and -9 [1983]. And these provisions, in turn, must be parsed and read in conjunction with other parts of the statutory criminal and administrative DUI law.

A detailed exegesis of these numerous statutes here would serve little purpose. Taken together, and in light of our previous decisions, we agree with Burks that under our DUI scheme, a DUI-arrested driver is deprived of a significant right if he or she requests a blood test, and is given only an opportunity to have a blood test that does not meet statutory evidentiary standards. There is little point in having the right to demand a potentially exculpatory blood test, if the test that is given is not up to the evidentiary standard for blood tests set forth in the statutes.

**We therefore hold that a person who is arrested for driving under the influence who requests and is entitled to a blood test, pursuant to *W.Va.Code*,**

**17C-5-9 [1983], must be given the opportunity, with the assistance and if necessary the direction of the arresting law enforcement entity, to have a blood test that insofar as possible meets the evidentiary standards of 17C-5-6 [1981]. *In re Burks*, 206 W.Va. 429, 525 S.E.2d 310 at 314 (W.Va. 1999) (emphasis added herein).**

Additionally, the plain language of W.Va. Code § 17C-5-6, reads as follows:

§ 17C-5-6 **How blood test administered; .....**

Only a doctor of medicine or osteopathy, or registered nurse, or trained medical technician at the place of his employment, acting at the request and direction of the law-enforcement officer, may withdraw blood for the purpose of determining the alcoholic content thereof. These limitations shall not apply to the taking of a breath test or a urine specimen. In withdrawing blood for the purpose of determining the alcoholic content thereof, only a previously unused and sterile needle and sterile vessel may be utilized and the withdrawal shall otherwise be in strict accord with accepted medical practices. A nonalcoholic antiseptic shall be used for cleansing the skin prior to venapuncture. The person tested may, at his own expense, have a doctor of medicine or osteopathy, or registered nurse, or trained medical technician at the place of his employment, of his own choosing, administer a chemical test in addition to the test administered at the direction of the law-enforcement officer. Upon the request of the person who is tested, full information concerning the test taken at the direction of the law-enforcement officer shall be made available to him. No person who administers any such test upon the request of a law-enforcement officer as herein defined, no hospital in or with which such person is employed or is otherwise associated or in which such test is administered, and no other person, firm or corporation by whom or with which such person is employed or is in any way associated, shall be in anywise criminally liable for the administration of such test, or civilly liable in damages to the person tested unless for gross negligence or willful or wanton injury

Thus, pursuant to the plain language of W.Va. Code §17C-5-6 and the above-cited authority of *In re Burks, supra*, Ptlm. Harden could have and should have directed Thomas Memorial to perform the chemical analysis of Respondent's blood, but he did not do so. Moreover, the West Virginia Supreme Court of Appeals has held that:

" W.Va.Code 17C-5-9 [1983] accords an individual arrested for driving under the influence of alcohol, controlled substances, or drugs a right to demand **and receive a blood test within two hours of arrest.**" Syl. pt. 1, *State v. York*, 175 W.Va. 740, 338 S.E.2d 219 (1985) as cited in Syl. Pt. 1 of *State ex rel. King v. MacQueen*, 182 W.Va. 162, 386 S.E.2d 819 (W.Va. 1986).

Therefore, pursuant to above-cited authority as set forth in *Burks, supra, York, supra, and State ex rel. King v. MacQueen, infra*, and the plain language of said statutes, the legislature clearly contemplated that the chemical analysis of blood be performed at the direction of law enforcement under facts and circumstances as existed herein, and Ptlm. Harden utterly failed to comply with said mandatory statutory provisions, thereby violating Respondent's constitutional rights to meaningfully cross-examine and confront his accusers, equal protection and due process of law.

**IV. Contrary to petitioner's assignment of error, the arresting/investigating office did have an obligation and duty to have the Respondent's blood sample tested, and the officer's violation of Respondent's statutory rights thereto warranted the OAH's rescission of the license revocation, as Respondent lost any opportunity to meaningfully confront his accusers on the issue of intoxication by the denial of this statutory right. W.Va. Code § 17C-5-9 would be rendered meaningless if such a duty was not required.**

Contrary to Petitioner's assertions, Ptlm. Harden did have a duty to have Respondent's blood analyzed, because if no such duty existed, then the provisions of W.Va. Code § 17C-5-9, would be rendered meaningless. **"It is always presumed that the legislature will not enact a meaningless or useless statute."** Syllabus point 4, *State ex rel Hardesty v. Aracoma-Chief Logan No. 4523, Veterans of Foreign Wars of the United States, Inc.*, 147 W.Va. 645, 129 S.E.2d 921 (1963). "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syllabus Point 2, *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E. 350 (1938). Petitioner's proposed construction of W.Va. Code § 17C-5-9, would result in the absurdity of driver's such as Respondent, routinely never being afforded the results of a blood test for alcohol concentration upon their demand for the same. If the legislature did not intend to grant driver's such as Respondent the right to demand and receive a secondary chemical test by blood, then the legislature would and could have repealed W.Va. Code 17C-5-9, but to date, the legislature has not repealed this statutory substantive due process right, and therefore, it remains in full force and effect.

If the constitutional rights to confront one's accusers, due process and equal protection of law are to retain any meaning in driver's revocation proceedings, the denial of statutory, substantive, and procedural rights cannot and should not be allowed to support DMV license revocations. Therefore, the Circuit Court's affirmation of the OAH order was entirely appropriate and further correctly applied the plain language of W.Va. Code § 17C-5-9 and §17C-5-4, and the authorities of *York, infra, and In re Burks, infra., State ex rel. King v. MacQueen, infra*, when it determined that the Petitioner's revocation and disqualification orders were issued upon unlawful procedures as the mandates of W.Va. Code § 17C-5-9 and other statutory provisions were not met by Ptlm. Harden. The Circuit Court affirmed the OAH's correct finding that Respondent demanded a blood test and never received one, and therefore, the DMV's revocation and disqualification of respondent's driving privileges were properly rescinded by the OAH and the Circuit Court's order which affirmed the OAH decision should be affirmed upon this appeal.

The DMV clearly ignores the plain language of W.Va. Code §17C-5-9, and the authority cited herein which clearly indicates that the mandatory statutory rights conferred to the Respondent under said statute gives him **both the right to demand and to receive** a blood test for alcohol concentration, which the Circuit Court and the OAH correctly found said statutory right to receive such blood testing was denied to Respondent herein, which required reversal of the DMV's revocation and disqualification orders of his driving privileges. Herein, Ptlm. Harden admitted in his testimony that Respondent demanded a blood test and his testimony further indicated that Respondent had previously conveyed his demand for a blood test to Ptlm. Bailes. (A.R. 71, p. 21). Ptlm. Harden further admitted that the chemical analysis of the Respondent's blood was never conducted. (A.R. 71, p. 21-23). Ptlm. Harden's failure to observe

the Respondent's statutory, substantive and procedural right to RECEIVE a secondary chemical test of his blood required the OAH to reverse the DMV's license revocations and disqualifications of Respondent's driving privileges as his constitutional rights to due process and equal protection of law were denied.

Petitioner's argument that no sanction should be imposed upon the DMV for the violation of Respondent's statutory rights under W.Va. Code § 17C-5-9 to receive a blood test, is without merit. In *State ex rel. King v. MacQueen, supra*, the West Virginia Supreme Court clearly indicated that a remedy should be crafted by the trial court, for the denial of the statutory right to receive a blood test, by stating as follows: **"Specifically, the circuit court must rule on the remedy where a person is not given a blood test which he or she requests pursuant to West Virginia Code § 17C-5-9. (emphasis added, footnote 7 omitted herein, but cites to York, supra).** Herein, the OAH was acting as the trier of fact/trial court, and appropriately crafted such a remedy supported by its articulate reasoning and evidentiary findings of fact, which the Circuit Court properly affirmed.

Further, Petitioner ignores that the West Virginia Supreme Court of Appeals has held that "[a] cardinal rule of statutory interpretation is that code sections are not to be read in isolation but construed in context." Syl. Pt. 5, *State v. Stone*, 229 W.Va. 271, 728 S.E.2d 155 (W.Va. 2012). Clearly, Chapter 17C of the West Virginia Code defines blood analysis/testing as one of the secondary chemical tests for the purpose of determining the alcoholic concentration in the blood of a driver suspected of DUI, such as Respondent herein. Additionally, W.Va. Code § 17C-5-4 provides in part, as follows:

**§17C-5-4 Implied consent to test; administration at direction of law enforcement officer; designation of type of test; definition of law enforcement officer.**

(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.

As the first paragraph of 17C-5-4 utilizes the word “or”, when read in conjunction with 17C-5-9 it implies a choice between a blood or breath test. “We have customarily stated that where the disjunctive ‘or’ is used, it ordinarily connotes an alternative between the two clauses it connects.” *State v. Rummer*, 189 W.Va. 369, 377, 432 S.E.2d 39, 47 (1993) (internal quotations and citations omitted). Furthermore, the hearing examiner observed and heard Ptlm. Harden’s testimony and in weighing and considering the conflicts between his testimony and his written statements in the WV DUI Sheet, and Ptlm. Bailes’ testimony as to the implied consent form, and weighing the conflicts and credibility of the same, the OAH found that Ptlm. Harden had led Respondent to believe he had a choice between the breathalyzer and the blood test. (A.R. 29, pp. 11-12). “Credibility determinations made by an administrative law judge are entitled to deference.” Syl. Pt. 1, in part, *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (W.Va. 2000).

Additionally, pursuant to W.Va. Code § 17C-5A-1(b), the WV DUI Information Sheet is a sworn statement, and a fair reading of said statute indicates that both the implied consent form and any results of the secondary chemical test of Respondent’s blood, (which was never conducted), should have been included with the WV DUI Information Sheet that Ptlm. Harden submitted to the DMV, but were not. Further, the conflict between Ptlm. Harden’s written statements in the DUI Information Sheet with respect to the implied consent form created a credibility issue, which the OAH correctly resolved against him, and the Circuit Court appropriately affirmed.

§17C-5A-1 Implied consent to administrative procedure; revocation for driving under the influence of alcohol, controlled substances or drugs or refusal to submit to secondary chemical test.....

(b) Any law-enforcement officer investigating a person for an offense described in section two, article five of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section shall report to the Commissioner of the Division of Motor Vehicles by written statement within forty-eight hours of the conclusion of the investigation the name and address of the person believed to have committed the offense. **The report shall include the specific offense with which the person is charged and, if applicable, a copy of the results of any secondary tests of blood, breath or urine. The signing of the statement required to be signed by this subsection constitutes an oath or affirmation by the person signing the statement that the statements contained in the statement are true and that any copy filed is a true copy. The statement shall contain upon its face a warning to the officer signing that to willfully sign a statement containing false information concerning any matter or thing, material or not material, is false swearing and is a misdemeanor.**

Moreover, Ptlm. Harden's failure to have Respondent's blood analyzed or tested for alcohol concentration within 2 hours may have rendered the same worthless as evidence in his defense pursuant to W.Va. Code § 17C-5-8 and the rules and regulations relating to such testing promulgated by the WV Bureau of Public Health in W.Va. C.S.R. §64-10, et seq. In Syllabus Point 5, *Sims v. Miller*, 227 W.Va. 395 at 400, 709 S.E.2d 750 at 755 (2011), the West Virginia Supreme Court of Appeals quoted the language of W.Va. Code 17C-5-8(a) (2004)(Rep. Vol. 2009), and upon evaluation of the same found such language to be plain and unambiguous

W.Va.Code § 17C-5-8(a) states, in relevant part,

[u]pon trial for the offense of driving a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by a chemical analysis of his or her blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of arrest *or* of the acts alleged.**(Emphasis added herein).** We find this language to be clear, and therefore not subject to our interpretation. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." *Huffman v. Goals Coal Co.*, 223 W.Va. 724, 729, 679 S.E.2d 323, 328 (2009) (quoting Syl. pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968)). The above-quoted language plainly allows the admission of evidence resulting from a chemical analysis of blood, breath, or urine, so long

as the sample or specimen tested was taken within two hours of the time of arrest or of the acts alleged. “We have customarily stated that where the disjunctive ‘or’ is used, it ordinarily connotes an alternative between the two clauses it connects.” *State v. Rummer*, 189 W.Va. 369, 377, 432 S.E.2d 39, 47 (1993) (internal quotations and citations omitted). Accordingly, we now hold that W.Va.Code § 17C-5-8(a) (2004) (Repl.Vol.2009) allows the admission of evidence of a chemical analysis performed on a specimen that was collected within two hours of either the acts alleged or the time of the arrest.

As found by the OAH, Ptlm. Harden led Respondent to believe he had a choice between the breathalyzer or a blood test, therefore, Respondent did not refuse to take a secondary chemical test, but instead demanded the same be performed upon a chemical analysis of his blood, and he never received such testing and/or analysis. Clearly, the Legislature could have repealed W.Va. Code § 17C-5-9, if it did not intend for drivers, such as Respondent, to be able to demand and receive a secondary chemical analysis by blood. When the provisions of W.Va. Code §17C-5-9 and W.Va. Code §17C-5-4 are read together and the word “or” is given its plain ordinary meaning, a fair construction of the Act indicates that drivers, such as Respondent should have a right to choose a blood test as a secondary chemical test without the consequence of automatic revocation of their license by the DMV.

Absent a duty upon the arresting officer to have the blood analysis performed, and the statutory construction proposed herein, W.Va. Code § 17C-5-9 would be a meaningless statute, as Ptlm. Harden, would be allowed to violate Respondent’s statutory rights to demand and receive a blood test, and thereby deny Respondent’s constitutional rights to obtain equal protection and due process of law. Respondent was in police custody, he had no ability to at the time of his arrest to direct Thomas hospital to perform the analysis of his blood, and even if he had had such ability, Ptlm. Harden also took custody of the Respondent’s blood sample, thereby denying Respondent any opportunity to have the blood tested himself. Therefore, given the constitutional due process considerations set forth in *York, supra, State ex rel. King v.*

*MacQueen, In Re Burks*, and other authorities cited herein with respect to statutory construction, a good faith argument exists that the decision of *Moczec v. Bechtold*, 178 W.Va. 553, 363 S.E.2d 238 (W.Va. 1987), should be revisited, as substantial portions of the statutory language of W.Va. Code § 17C-5-4 (1983), relied upon therein have since been redacted from said statute, through the Legislature's subsequent amendments thereto.

Alternatively, the holding in *Moczec* is inapplicable herein as the facts and circumstances are highly distinguishable. The facts herein are distinguishable from those in *Moczec, supra*, as therein the officer had not already transported the driver to a hospital nor already had the blood drawn, and upon inquiry therein the driver refused to pay for said blood test, so none was conducted; however, the Court held that upon equal protection considerations, the County should in the future pay for such tests in the first instance and if the driver were found guilty the costs should then be assessed to him. Moreover, in *Mozcek*, there was no evidence that the officer had led the driver therein to believe he had a choice of tests as the OAH found Ptlm. Harden did herein, and the Circuit Court correctly ruled that such findings were supported by Ptlm. Harden's testimony and thus not clearly wrong. (A.R. pp. 112-126, 1-8). Herein, the OAH found that Ptlm. Harden had led Respondent to believe he had a choice of which secondary chemical test to take, and Ptlm. Harden already transported Respondent to Thomas Memorial, had a sample of his blood drawn, but never directed Thomas Memorial to analyze the same, and thereafter never directed any other qualified facility to perform the chemical analysis of the Respondent's blood sample, of which he retained possession, custody and control. Thus, Respondent was completely precluded from obtaining potential exculpatory evidence in his defense as Ptlm. Harden NEVER directed Thomas Memorial, the State Police Lab, and/or any other qualified facility to perform the chemical analysis of Respondent's blood for alcohol concentration, and the OAH determined

that the appropriate remedy for this statutory violation was to rescind the DMV's orders of revocation and disqualification.

Moreover, W.Va. Code § 17C-5-6, gave Ptlm. Harden the authority to direct Thomas Memorial Hospital to analyze the Respondent's blood to determine if any alcohol concentration existed therein, and Ptlm. Harden instead of having the blood analyzed at Thomas Memorial violated the statutory provisions of W.Va. Code 17C-5-9 and 17C-5-6 by failing to direct Andrea Gray, and/or (an)other qualified employee(s) of Thomas Memorial to do so.

Additionally, as to the DMV's erroneous contention that Respondent refused to take a secondary chemical test, the plain language of W.Va. Code § 17C-5-7 (2010), clearly contemplates that the "arresting officer," explain and provide the implied consent form, as said officer must submit a sworn statement to the DMV to that effect; therefore, the OAH correctly found that the requirements for automatic revocation were not met by Ptlm. Harden herein. W.Va. Code § 17C-5-7, provides as follows:

**§17C-5-7 Refusal to submit to tests; revocation of license or privilege; consent not withdrawn if person arrested is incapable of refusal; hearing.**  
(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. The arresting officer after that period of time expires has no further duty to provide the person with an opportunity to take the secondary test. The officer shall, within forty-eight hours of the refusal, sign and submit to the Commissioner of Motor Vehicles a written statement of the officer that: (1) He or she had probable cause to believe the person had been driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (2) the person was lawfully placed under arrest for an offense relating to driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (3) the person refused to submit to the secondary chemical test finally designated in the manner provided in section four of this article; and (4) the person was given**

**a written statement advising him or her that his or her license to operate a motor vehicle in this state would be revoked for a period of at least forty-five days and up to life if he or she refused to submit to the secondary test finally designated in the manner provided in section four of this article. The signing of the statement required to be signed by this section constitutes an oath or affirmation by the person signing the statement that the statements contained in the statement are true and that any copy filed is a true copy. The statement shall contain upon its face a warning to the officer signing that to willfully sign a statement containing false information concerning any matter or thing, material or not material, is false swearing and is a misdemeanor. Upon receiving the statement the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state for the period prescribed by this section.**

The OAH and the Circuit Court in upholding the OAH decision both found that Ptlm. Harden's testimony indicated that said arresting officer led Respondent to believe he had a choice between a blood test and a breath test, therefore, the statutory requirements were not met for automatic revocation of Respondent's license for refusal to submit to the breathalyzer. (AR pp. 1-8, 112-126). Moreover, this Honorable Court addressed the mandatory requirements of W.Va. Code § 17C-5-7 in *Butcher v. Miller*, 212 W.Va. 13, 569 S.E.2d 89 at 93 (W.Va. 2002), as follows:

We are not persuaded by the "substantial" compliance authorities cited by the Commissioner. The pertinent language of W.Va. Code § 17C-5-7(a) is clear and unambiguous. "[A] statute which is clear and unambiguous should be applied by the courts and not construed or interpreted." *Carper v. Kanawha Banking & Trust Co.*, 157 W.Va. 477, 517, 207 S.E.2d 897, 921 (1974) (citation omitted). Under the statute, an officer making a DUI arrest must inform the arrestee that a refusal to submit to a chemical breath test "will" result in a license suspension.

Here, Mr. Butcher was never informed that his license "will" be suspended for refusing to take the chemical breath test. Instead, Mr. Butcher was erroneously told that his license "may" be suspended. Our cases have held that "[t]he word 'may' generally... connotes discretion." *State v. Hedrick*, 204 W.Va. 547, 552, 514 S.E.2d 397, 402 (1999) (citations omitted). No discretion existed. Mr. Butcher's license was automatically suspended when the Commissioner received the report from deputy Kastigar. We are unable to determine from the record what course Mr. Butcher would have taken had he been properly advised of the consequences of his refusal to take the chemical breath test. As Mr. Butcher was unable to make an intelligent decision because of the erroneous warning given to him, we reverse the circuit court's order.

Mr. Butcher's driver's license was suspended as a result of his being given an inaccurate and misleading warning regarding the consequences of his refusal to take a chemical breath test. Therefore, we reverse the circuit court's affirmance of the suspension. We further order that Mr. Butcher's driver's license be restored. *Butcher, supra*, 569 S.E.2d at 93

Similarly, herein, Respondent was misled into believing he had a choice between a blood and a breath test, and therefore was misled as to the consequences of refusing the breath test and choosing a blood test. (AR pp. 1-8, 112-126, 313). Therefore, the Circuit Court appropriately upheld the OAH's findings of fact that Respondent was led to believe he had a choice, and that the same failed to comport with the statutory requirements of W.Va. Code § 17C-5-7, and pursuant to this Court's reasoning in *Butcher, supra*, the Circuit Court's decision should be affirmed herein allowing Respondent to retain his driver's license and commercial driving privileges.

Ptln. Harden was the arresting officer herein, and was the arresting officer who signed the sworn statements relating to the implied consent form; however, he admitted that he did not provide a copy of the implied consent form to Respondent, rather that was performed by Ptln. Bailes. (A.R. p. 313). Ptln. Bailes did not submit the WV DUI Information Sheet in this matter, Ptln. Harden did. (AR pp. 66-71). Therefore, the Circuit Court properly affirmed the OAH's evidentiary findings, which correctly found that the pre-requisites for automatic revocation for refusal to take the secondary chemical test were not met herein, and the Circuit Court properly determined that the OAH's evidentiary findings as the same were not clearly wrong. Upon this appeal, the DMV appears to have abandoned its arguments relating to the exclusionary rule made below; but regardless the same are simply inapplicable herein and are further without merit as the Circuit Court appropriately found. (AR p. 6-7). As the OAH correctly posited and the Circuit Court affirmed, this case is factually similar to the facts in *State ex rel. King v. MacQueen*,

*supra*, wherein the driver demanded a blood test and never received one, and the trial court was left to craft a remedy for the violation of the statutory provisions of W.Va. Code 17C-5-9.

Therefore the OAH correctly drafted a remedy herein, that being rescinding the DMV's order, and as the OAH findings were clearly supported by the testimony of Ptlm. Harden and other evidence of record, the Circuit Court properly affirmed the OAH ruling. (A.R. pp. 112-126, 1-8).

Moreover, Respondent was seeking admission of the blood test results, not exclusion, and as his statutory right to receive such blood analysis results was denied, he was further denied his opportunity to meaningfully cross-examine and confront his accusers on the issue of driving under the influence and denied the opportunity to present impeachment and/or exculpatory evidence on this issue in his defense. (AR pp. 1-8, 112-126). Respondent had demanded copies of the blood analysis and a subpoena for the appearance of the person(s) who performed such tests, but no subpoena was ever issued, therefore, the DMV's arguments that Respondent never demanded the results of the blood test are without merit. (AR pp. 16, 18). With respect to the failure to provide evidence requested by a driver, in *White v. Miller*, 228 W.Va. 797, 724 S.E.2d 768 (W.Va. 2012), wherein the driver had challenged the constitutionality of a sobriety checkpoint, and timely advised the DMV of such challenge, but the DMV and/or the officer failed/refused to provide the driver with a copy of the operational guidelines for such checkpoint, the W.Va. Supreme Court of Appeals, reversed the Circuit Court on this basis, and stated as follows:

In the case at bar, White provided the required advance notice that the MacCorkle Avenue checkpoint would be challenged.<sup>12</sup> However, although Sergeant Williams testified that the checkpoint was established and conducted pursuant to standardized, predetermined guidelines, no guidelines were provided to White, despite White's repeated requests, or submitted to the Commissioner at the administrative hearing. In fact, Officer Lightner, who conducted the case on behalf of the State, objected when White's counsel asked to be "provided copies of the operational guidelines and the operational plan with respect to

checkpoints.” Instead, the record indicates that, during the administrative hearing, the officers provided White with a one-page list of “talking points” written to assist the officers with their testimony concerning the checkpoint on MacCorkle Avenue.

In his petition filed in this Court, White describes the consequences of not receiving the standardized, predetermined guidelines: **“By refusing to submit a copy of the predetermined guidelines, the State denied Petitioner an opportunity to challenge and establish that the DUI checkpoint was not operated according to those guidelines and/or to impeach Sgt. Williams.”** One matter in controversy during the administrative hearing, for example, was whether Sergeant Williams' e-mail to the media concerning the MacCorkle Avenue checkpoint sufficiently alerted motorists, in compliance with police guidelines, that the designated alternative route would be along Kanawha Boulevard. **Without the standardized, predetermined guidelines, such issues cannot be resolved.** Therefore, the finding of the Commissioner that Sergeant Williams set up the checkpoint in accordance with standardized guidelines is clearly wrong.<sup>13</sup> Syllabus point 6 of *Muscatell, supra*, holds:

Where there is a direct conflict in the critical evidence upon which an agency proposes to act, the agency may not select one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court. *In accord*, syl. pt. 1, *Choma v. Division of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2001). *White v. Miller*, 724 S.E.2d at 778-779 (footnotes in original decision omitted herein).

Thus, the Supreme Court found that the denial of the driver’s requests for discovery of a copy of the standardized checkpoint guidelines was improper, and required reversal. Herein, Respondent was denied the opportunity to confront his accusers, and denied his opportunity to impeach Ptlm. Harden on the issue of his intoxication due to Ptlm. Harden’s failure to direct any qualified facility to analyze Respondent’s blood.

The Circuit Court found that the OAH’s findings of fact were not clearly wrong, were supported by the testimony and evidence of record and therefore, this Court should affirm the Circuit Court’s order upholding the same. (AR pp. 1-8, 112-126). “Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong.” Syl. pt. 1, *Francis O. Day Co. v. Director of Environmental Protection*, 191 W.Va. 134, 443 S.E.2d 602 (1994). With respect to the alleged refusal to take the secondary chemical test the OAH found as

follows: “Moreover, from reviewing the Investigating Officer’s testimony on this subject his dialogue with Petitioner[respondent herein], with respect to submitting to a secondary breath test suggests that Petitioner may have been given a choice, or at least led to believe he had a choice, as to whether he wanted to take a breath test or whether he wanted to take a blood test.” Moreover, the OAH found that there was a conflict between the testimony of Officer Davis and the documentary evidence contained in Ptlm. Harden’s WV DUI Information Sheet, wherein Harden had noted the lack of any odor of alcoholic beverage upon Respondent’s breath, and further found that these conflicts remained unresolved due to Ptlm. Harden’s failure have the chemical analysis of Respondent’s blood conducted. (AR pp. 121-122). The Circuit Court found that the OAH’s evidentiary findings in this regard were supported by the evidence and not clearly wrong. (AR pp. 1-8).

The Circuit Court found that the OAH Order correctly applied the statutory authority relating to the implied consent form and the alleged refusal of the secondary chemical test. W.Va. Code §17C-5-4, 17C-5-7. When these statutes are read in *pari materia* with 17C-5A-1, and other applicable provisions of Chapter 17C, cited herein, shows that the OAH correctly applied said statutes, and further resolved the credibility issues relating to the DUI Information Sheet, and the Circuit Court appropriately affirmed the OAH’s decision. Further, pursuant to the foregoing, it is evident that the Legislature contemplated that the implied consent form be read/explained and a copy provided by the investigating/arresting officer, and the evidence of record overwhelmingly showed that Ptlm. Harden as the arresting officer herein did not do so. Therefore, the Circuit Order affirmed the OAH Order evidentiary findings that the evidence of record indicated that the investigating officer herein did not comply with the statutory provisions relating to the implied consent form, and therefore automatic revocation of Respondent’s driving

privileges was not warranted. (A.R. pp. 1-8, 112-126). Instead Officer Bailes allegedly read and gave the Respondent a copy of the implied consent form. (A.R. pp. 336-337), but significantly a copy of the “Implied Consent Form” was NOT submitted as part of Ptlm. Harden’s WV DUI Information Sheet, which was submitted to the DMV Petitioner, and upon which the DMV relied and based its orders of revocation and disqualification. In short, the DMV’s orders revoking Respondent’s driving privileges also denied the Respondent his constitutional right to equal protection of law, as Ptlm. Harden violated the statutory provisions of W.Va. Code § 17C-5-9, §17C-5-6, and if said violations were without consequence, Respondent would be denied equal protection and due process of law. Therefore, the OAH’s decision and the Circuit Court order affirming the same, correctly determined that the DMV’s orders should be reversed and the Respondent’s driving privileges reinstated. (AR pp. 1-8, 112-126).

The Circuit Court affirmed the OAH’s findings that the Respondent was led to believe he had a choice between the breath test or a blood test, and demanded a blood test as a secondary chemical test, but never received a blood test for alcohol concentration in his blood. Further, in reviewing the OAH order, the Circuit Court found that “[t]he record was devoid of any evidence that Respondent was advised that the secondary chemical test of the breath is the [South Charleston Police] Department’s designated test, and although he is entitled to a blood test, his license could be revoked without submitting to the breath test.” (AR p. 6). Since Ptlm. Harden gave Respondent a choice between the breath test or a blood test, the breathalyzer was not the “finally” designated test, therefore, the OAH decision was not clearly wrong, and the Circuit Court properly affirmed the same. (AR pp. 1-8)

The Circuit Court’s Order should be affirmed upon this appeal, as none of the criteria necessary to reverse, vacate, or modify the OAH order were present in this matter.

A review of W.Va. Code § 29A-5-4(g), which provides the standard of review applicable to the Circuit Court's review of the administrative proceeding, indicates that the OAH order at issue was properly affirmed.

West Virginia Code § 29A-5-4(g) (1998) (Repl. Vol. 2007) provides as follows: 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.

Likewise this Court has held that the standard of review upon this administrative appeal is governed by statutory constraints, as follows:

“On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va.Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syllabus point 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

The OAH findings of fact were not clearly wrong, its decision was not arbitrary or capricious, and the Circuit Court correctly applied the statutory standard of review pursuant to W.Va. Code 29-A-5-4(g) and the applicable authority of this Court governing the deference to administrative findings of fact and determinations of credibility, and properly affirmed the OAH's decision. Therefore, pursuant to W.Va. Code § 29A-5-4(a), the Circuit Court's order should be affirmed upon this appeal.

## IX. CONCLUSION

Wherefore, for all the foregoing reasons, the Respondent, Dustin Hall, prays that this Honorable Court will affirm the Circuit Court's Order herein, order the DMV to pay Respondent's reasonable attorneys fees and expenses incurred in defending this action, and dismiss this appeal from the Docket of the Court. In the alternative, the Respondent prays that this matter be remanded for further administrative proceedings and evidentiary hearing in order to secure a chemical analysis of his blood sample. Respondent prays for all such further relief as the Court deems fair just and appropriate.

**Respectfully submitted,  
DUSTIN HALL, Respondent,  
By Counsel of Record:**



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO. 14-0342**

**STEVEN O. DALE, Acting Commissioner of the  
WEST VIRGINIA DIVISION OF MOTOR VEHICLES,  
Petitioner, petitioner below.**

v.

**DUSTIN HALL,  
Respondent, respondent below.**

**CERTIFICATE OF SERVICE**

I, William C. Forbes, counsel of record for the Respondent, DUSTIN HALL, hereby certify that a true copy of the foregoing "*Respondent's Brief*" was duly served upon counsel of record for Petitioner, by depositing the same in the first-class, U.S. mail, postage pre-paid on this the 21<sup>ST</sup> day of August, 2014, addressed as follows:

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