

13-1180

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2013 OCT 23 PM 2:40

STEVEN O. DALE, Acting Commissioner,
West Virginia Department of Motor Vehicles,

CATHY S. GAITHER, CLERK
KANAWHA COUNTY CIRCUIT COURT

UHM

Petitioner/Respondent below,

v.

Civil Action No.: 13-AA-69
Honorable Tod J. Kaufman

ROBIN J. RINER,

Respondent/Petitioner below.

FINAL ORDER

Before the Court is Petitioner's Petition for Appeal filed on June 12, 2013. The Petitioner is appealing the order of the Office of Administrative Hearings' (hereinafter "OAH") hearing examiner, which affirmed the Respondent's driver's license revocation for driving under the influence (hereinafter "DUI") but dismissed the revocation for refusal to submit to the secondary chemical test.

Factual and Procedural Background

1. On June 23, 2011, Corporal J. Jones of the Berkeley County Sheriff's Office was on road patrol in Berkeley County, West Virginia, when he observed a motor vehicle cross over the center line on two occasions.
2. Corporal Jones initiated a traffic stop on this motor vehicle, and he identified the driver as Robin J. Riner, the Respondent in this matter.
3. Corporal Jones detected the odor of an alcoholic beverage emitting from within the vehicle. The Respondent advised Corporal Jones that she had consumed one (1) beer.
4. Corporal Jones called for another police officer to assist him, and Deputy A.T. Burns of the

Berkeley County Sheriff's Office, the Investigating Officer (hereinafter "IO") in this matter, arrived at the scene.

5. The IO detected the odor of an alcoholic beverage emitting from the Respondent's breath.
6. The IO detected that the Respondent's eyes were bloodshot. However, the Respondent testified that her eyes are often bloodshot and that this is not due to alcohol consumption.
7. The IO detected that the Respondent's speech was fast but not slurred.
8. The Respondent advised the IO that she had consumed one (1) beer.
9. The IO observed that the Respondent exited the vehicle, walked, and stood normally.
10. The IO administered a series of field sobriety tests to the Respondent, including the horizontal gaze nystagmus, vertical nystagmus, walk-and-turn, and one-leg stand.
11. Prior to the administration of the horizontal nystagmus test, the IO performed a medical assessment of the Respondent's eyes to ensure that her eyes displayed equal pupils and equal tracking and that they did not display resting nystagmus.
12. During the administration of the horizontal gaze nystagmus test, the Respondent's eyes displayed a lack of smooth pursuit, and displayed distinct and sustained nystagmus at maximum deviation.
13. The Respondent's eyes did not display vertical nystagmus.
14. While performing the walk-and-turn test, the Respondent could not keep her balance during the instructions, started the test too soon, missed heel-to-toe, and raised her arms to balance.
15. While performing the one-leg stand, the Respondent swayed while balancing, used her arms to balance, and was unable to keep her foot raised off the ground.
16. The IO administered a preliminary breath test (hereinafter "PBT") to the Respondent;

however, the result of this test does not have any evidentiary weight, as the IO could not adequately demonstrate that he was trained and certified on the PBT testing device, an Alco Sensor PBT.

17. The IO arrested the Respondent for driving under the influence of alcohol on June 23, 2011, in Berkeley County, West Virginia.
18. The IO transported the Respondent to the Berkeley County Sheriff's Office, where he read to the Respondent a written document containing the penalties for refusing to submit to a designated secondary chemical test, required by West Virginia Code § 17C-5-4, and the fifteen-minute time limit for refusal, specified in West Virginia Code § 17C-5-7.
19. The testing instrument used to administer the secondary chemical test—an Intoximeter EC/IR-II, Serial No. 008084—has been approved by the West Virginia Bureau for Public Health for use as a secondary breath testing instrument.
20. The IO asked the Respondent to submit to a secondary chemical test of her breath.
21. The Respondent testified that, prior to being asked to submit a breath sample, the IO advised her three (3) times, "You don't have to take this," and "I almost felt like he was telling me not to do it."
22. The IO testified that he did not advise the Respondent that she did not have to take the test but that it is his practice to always advise test subjects that, "It's their choice. They don't have to if they don't want to."
23. Respondent declined to submit a sample of her breath into the Intoximeter EC/IR-II.
24. In a post-arrest interview conducted by the IO, the Respondent advised that she had consumed alcoholic beverages.
25. In the interview, the IO asked the Respondent, "Are you under the influence of alcohol,

controlled substances, or drugs?" The Respondent replied, "No."

Standard of Review

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

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.

The Court must give deference to the administrative agency's factual findings and reviews 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*, 474 S.E.2d 518, 525 (W.Va. 1996).

Discussion

According to the Petitioner, the hearing examiner exceeded his statutory authority when he rescinded the refusal portion of the Respondent's license revocation because the Respondent's testimony that the IO told her she did not have to take the secondary chemical test.

West Virginia Code § 17C-5-7(a) states that the IO must do the following:

- (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.

According to the IO's testimony and the findings of the hearing examiner, the IO read and provided the Respondent with the Implied Consent Form. However, the hearing examiner concluded that the IO failed to give the Respondent an adequate oral warning because the Respondent testified that the IO told her she did not have to take the secondary chemical test.

Additionally, the IO testified that he always advises people that "It's their choice. That they don't have to if they don't want to." In doing so, the hearing examiner was within his discretion to hear the testimony from both the Respondent and the IO and to determine credibility of the witnesses. Thus, the Court cannot find that the hearing examiner clearly erred or abused his discretion by exceeding his statutory authority.

Ruling

After carefully reviewing the decision below, the Petitioner's brief, the Respondent's brief, the Petitioner's Reply brief, the record, and the relevant law, the Court hereby AFFIRMS the decision of the Board below because the evidence in the record supports the findings of fact and conclusions of law. This case is DISMISSED and STRICKEN from the docket of the Court.

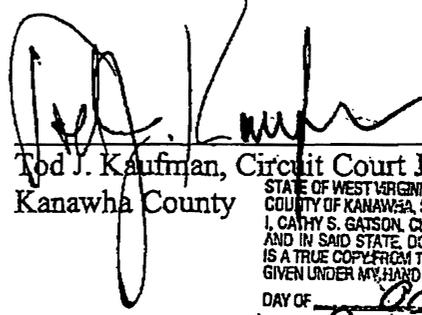
The clerk of the court shall distribute copies of this Order to all counsel of record:

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Office of Administrative Hearings
Kanawha Valley Building
300 Capitol Street, 10th Floor
Charleston, WV 25301

Enter this Order the 23 day of October, 2013.



Todd J. Kaufman, Circuit Court Judge for
Kanawha County

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 24th
DAY OF October 2013
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA UHG

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

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

Petitioner,

v.

ROBIN J. RINER,

Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, 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 20th day of November, 2013, addressed as follows:

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


ELAINE L. SKORICH