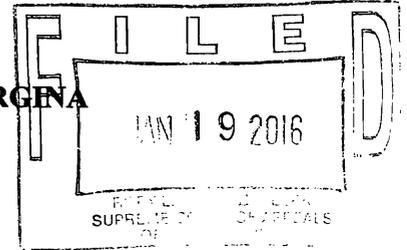


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0865
(Circuit Court Civil Action No. 14-P-14)



**PATRICIA S. REED, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Petitioner,

v.

TAMMY L. ROBBINS,

Respondent.

FROM THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA

SUMMARY RESPONSE

Respectfully submitted,

Tammy L. Robbins,

By Counsel,

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Two assignments of error are argued by the DMV, they are as follows:

- (1) The circuit court was factually wrong regarding which tribunal heard the matter below, and therefore, ignored the authority of the Office of Administrative Hearings' Chief Hearing Examiner to review the hearing examiner's proposed final order and to overrule the same.
- (2) The circuit court ignored the clear evidence of Respondent's driving while under the influence of alcohol, controlled substances, or drugs.

The Respondent would aver and assert the following as the facts for consideration in this matter along with a brief procedural history:

On or about May 20, 2012, Respondent Tammy Robbins was in a vehicular accident following a picnic she attended at Timberline. She was in the vehicular accident at night in Canaan Valley, West Virginia a notorious location for deer crossing the road. The explanation given by the respondent for the accident was that she swerved to miss a deer. The Trooper stated that she had told him that she consumed two glasses of wine at a picnic and had one glass in the car.¹ She was picked up by her friend and taken to her friends home where she consumed 1/3rd of a bottle of Gray Goose Vodka. She was injured to the point that her friend, Angie Shockley elected to take Ms. Robbins to Davis Memorial Hospital for medical care. While there, a state trooper interrogated her about why she was there. He asked her what happened and she indicated that she was in a car wreck. The Trooper indicated that he detected the odor of alcohol on the breath of Ms. Robbins and began an investigation into a possible DUI case. This case arises out of an individual seeking medical help and being charged with a crime and as a result ultimately having her driving privileges revoked or suspended for DUI.²

This matter came before the hearing examiner. Evidence was taken wherein the only testimony was that of the two State Troopers involved and the "friend" of the respondent. No expert testimony was before the hearing examiner. Hearsay evidence³ was presented by the DMV through State Trooper

1 It should be noted that no evidence was presented by the investigations of either the officer as to the duration of the picnic or the amount of time over which the wine was consumed, even taken the allegations in a light most favorable to the petitioner this evidence would not be adequate to prove impairment on the part of Respondent, Tammy Robins.

2 "13. There is no evidence in the record of impaired driving. There are no Field Sobriety Test (FST) results in the record." Page 16 Appendix (Hearing Examiner's Findings of Fact)

3 "4. The blood test results admissibility is moot because they were taken approximately three hours after the Petitioner [Respondent Tammy L. Robbins] had last driven a vehicle and they are not good evidence of the Petitioner's sobriety when she was driving." Page 19 Appendix (Hearing examiner's Conclusions of Law)

Kopec wherein he attempted over the objection of respondent's counsel to opine as to blood alcohol results contained in the medical records from Davis Memorial Hospital. Upon hearing the evidence presented and after the submission of findings of fact and conclusions of law the hearing examiner returned a decision that, "wherefore, based on the findings of fact set forth above, the Hearing Examiner concludes that insufficient evidence was presented to prove, by a preponderance of the evidence standard, that the Petitioner [Respondent Tammy Robbins] committed an offense described in West Virginia Code §17C-5-2, by operating a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs on May 20, 2012." Page 19 Appendix.⁴

DISCUSSION

In the Petitioner's first assignment of error the allegation is that the Honorable Judge Jordan "was factually wrong regarding which tribunal heard the matter below." That is simply without any merit. Clearly, Judge Jordan disagreed with the conclusions drawn by the Chief Hearing Examiner. However, he acknowledge that the Chief Hearing Examiner abused his discretion when reviewing the decision of the Hearing Examiner reversing the same. "... The Circuit Court 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, decisions, or orders are: ... (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.**" *Dean v. W. Va. Dep't of Motor Vehicles*, 195 W. Va. 70, 464 S. E. 2d 589 (1995) (per curiam). Bold Faced Emphasis Added. "Courts are to review the agency's order to ensure that it is

⁴"The Chief Hearing Examiner chose to put more weight upon the fact that Ms. Robbins did not report the accident and did not complete the DUI Information Sheet. DMV's brief says: "The facts of the case did not change between the Hearing Examiner's analysis and CHE's analysis. The only thing that changed was the weight given to the facts."

This Court FINDS that the original Hearing Examiner for DMV got it right. **There was not enough evidence to meet the preponderance of evidence standard in the case.**

This Court FINDS that the Chief Hearing Examiner's decision was **clearly wrong** based upon the evidence and was an **abuse of discretion.**" Page 3 Appendix. (Order of Circuit Court of Tucker County.) Bold faced emphasis added.

not clearly wrong in view of reliable, probative, and substantial evidence on the whole record, and is not arbitrary, capricious, or characterized by abuse of discretion.” See Syl Pt. 2 in part, *Shepherdstown Volunteer Fire Dep't v. State ex rel. State of W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S. E. 2d 342 (1983) (quoting W. Va. Code §29A-5-4(g)).

The Second Assignment of error is that the Judge ignored the clear evidence of Respondent's driving while under the influence of alcohol, controlled substances, or drugs. To the contrary, the Judge reviewed the facts before the Court and applied the settled law. The DMV doesn't agree with the result but that doesn't merit the blanket assertion that the Court ignored the evidence. The record was reviewed on 3 separate occasions: The Hearing Examiner found that the DMV failed to prove that Tammy Robbins operated a motor vehicle under the influence of alcohol. The Chief Hearing Examiner then ignored settled law regarding proof of a violation. The Circuit Judge then reviewed the evidence presented again and found both that the Findings of the the Hearing Examiner to be in accord with settled law and that the Chief Hearing Examiners conclusions to be “clearly wrong” and an “abuse of discretion.” Ultimately, the circuit judge found that the Petitioner, DMV failed to prove by a preponderance of the evidence, that the Respondent, Tammy L. Robbins operated a motor vehicle while under the influence of alcohol. The Circuit Court was presented with Argument of Counsel and furnished the record from the DMV hearing. The Circuit Court reviewed the same and drew the same conclusions as the Hearing Examiner. The questions raised in Assignment of Error 2 are completely based on factual analysis. Disturbing the findings of the Circuit Court would be contrary to law and not serve justice.

Finally, there were assertions by Counsel for DMV regarding the manner in which the Counsel for Tammy L. Robins served papers and handled matters during the adjudication of this case. This certainly didn't prej dice the matters before the Circuit Court and at no time did Counsel intend to proceed in any matter that would demean the process⁵.

⁵ It should be noted that, in fact, the Brief filed by the Attorney General's Office was addressed to Christopher W. Cooper, Esquire, Blackwater Law PLLC, 444 Second Street Suite 1 Parsons, WV 26287. Counsel Cooper hasn't been in the firm

RELIEF SOUGHT

It is the prayer of the Respondent, Tammy L. Robbins that this Court affirm the ruling of the Circuit Court of Tucker County, West Virginia and award such other relief the Court deems proper.

Respectfully submitted,
Tammy L Robbins,
by Counsel,

Christopher W. Cooper

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of Blackwater Law PLLC since December of 2014. Furthermore, the address 444 Second Street Suite 1 Parsons, West Virginia, hasn't ever been used by either Blackwater Law or Counsel.

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FROM THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA

CERTIFICATE OF SERVICE

I, Christopher W. Cooper, Counsel for Tammy L. Robins, do hereby certify that the forgoing *Summary Response* upon the opposing party by depositing a true copy of the same by US Mail postage prepaid on this, 19th day of January, 2015, addressed as follows:

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