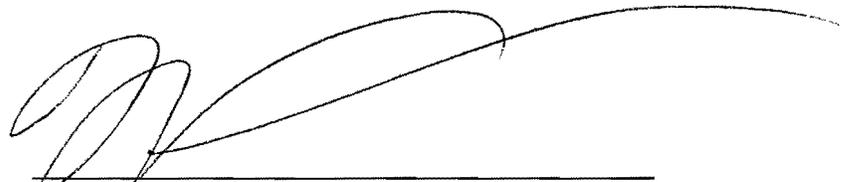


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO: 11-1241

JOHN R. HOLLAND, II, V. JOE E. MILLER, COMMISSIONER, WV DMV

PETITIONER'S REPLY TO RESPONSE BRIEF OF RESPONDENT DMV



William C. Forbes, Esq. (WVSB ID#1238)

FORBES LAW OFFICES, PLLC

1118 Kanawha Boulevard, East

Charleston, WV 25301

Phone: 304-343-4050; Fax: 304-343-7450

e-mail: wcforges@forbeslawwv.com

Counsel of record for the Petitioner, John R. Holland, II

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO: 11-1241

**JOHN R. HOLLAND, II, Petitioner Below,
Petitioner,**

vs.

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

**TABLE OF CONTENTS FOR
PETITIONER'S REPLY TO RESPONSE BRIEF OF RESPONDENT DMV**

	Pages
Argument	1-10

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO: 11-1241

**JOHN R. HOLLAND, II, Petitioner Below,
Petitioner,**

vs.

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

TABLE OF AUTHORITIES

	Page Nos.
1. <i>Miller v. Hare</i> , 708 S.E.2d 531, (W.Va. 2011).	1
2. W.Va. Code § 17C-5A-2	7,8
3. <u>In re Petition of Donley</u> , 217 W.Va. 449 at 453, 618 S.E 458 at 462, (W.Va. 2005).....	8-9
4. <i>Abshire v. Cline</i> , 193 W.Va. 180, 455 S.E.2d 549.....	9

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO: 11-1241

**JOHN R. HOLLAND, II, Petitioner Below,
Appellant/Petitioner, herein,**

vs.

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

PETITIONER'S REPLY TO RESPONSE BRIEF OF RESPONDENT DMV

Argument

Now, comes the Petitioner, John R. Holland, II, by counsel of record, William C. Forbes, Forbes Law Offices, PLLC, and pursuant to this Honorable Court's scheduling order herein, hereby makes and files this reply in objection to the response brief filed by the Respondent DMV in this matter within 20 days of Petitioner's receipt thereof, and hereby states as follows:

The Appellant reasserts and incorporates herein by reference, all of the facts and arguments that distinguish his case from that of *Miller v. Hare*, 708 S.E.2d 531 (W.Va. 2011), which the Appellant presented to this Court in his notice of appeal and his original Brief herein, and therefore, submits that *Hare* is not dispositive of the issues raised herein. In the DMV's response brief, the DMV oversimplifies and misconstrues the Appellant's arguments and the facts of this case in its representations to the Court. The DMV ignores the issues of "notice" and "good cause" advanced by the Appellant upon this appeal, to support the issuance of a writ of prohibition for the DMV's failure to provide

either notice or good cause for their unwarranted and egregious delays herein, therefore the DMV denied the Appellant's constitutional rights to due process of law. The Respondent DMV completely ignores the blatant fact that the actual notices that were sent to Petitioner and counsel fail to state ANY reason or grounds in the body of said notices for said continuances, and thereby the DMV denied Appellant's rights to notice, due process of law and equal protection by failing to inform the Appellant during the administrative process below of the grounds behind the DMV's continual and egregious delays in scheduling and holding an administrative hearing in this matter. **(See notices of rescheduled hearing App'x rec. at 11, 13, 15, 17)**. The DMV now attempts to supply reasons behind the unwarranted and continual lengthy delays that are unsupported by the actual notices of continuance/rescheduling that were provided to Appellant below by the DMV. **(App'x rec. at 11, 13, 15, 17)**. As stated in the Appellant's Brief to this Court, during the administrative process, the Appellant was not privy to the internal memorandum upon which the DMV now relies in a disingenuous attempt to support their arguments, and to supply reasons and grounds for their continual and oppressive delays of holding a hearing in this matter that were not provided to Appellant during the administrative process.

The DMV totally ignores the fact that each and every one of their notices of continuances and rescheduling of hearings fail to state, on the face thereof, the reasons behind the DMV's continual delays in holding an administrative hearing in this matter. **(App'x rec. at 11, 13, 15, 17)**, and therefore,

Appellant was denied due process of law and notice of the reasons behind the continuances below. Thus, the DMV failed to show "good cause" for said continuances below. It is this exact and oft repeated and substantially abused arbitrary and capricious practice utilized by the DMV to continue the administrative hearings of driver's licensees without providing drivers such as Appellant any notice of the reasons or grounds for continuing said hearings, of which the Appellant appeals and seeks to prohibit, because it is this very practice of the DMV which completely denies and substantially denied and substantially prejudiced Appellant's constitutional rights to notice, equal protection and due process of law below. To allow the DMV to operate in this manner makes a mockery of any of the concepts embodied in the U.S. and West Virginia Constitutions and violates all notions of fairness, notice, justice, equal protection, and due process, as the DMV's actions in this regard, failed and will continue to fail to provide the Appellant with any of these rights, if the DMV is not prohibited from holding another administrative hearing in this matter. When the Appellant or others similarly situated request a continuance from the DMV, they must state the reasons behind why they need a continuance on the face of the motion for said continuance, otherwise the same will undoubtedly be denied by the DMV; therefore, to allow the DMV to continue Appellant's hearing in this matter, over and over again without providing Appellant any notice of the grounds behind said continuances, violates equal protection and due process and further fails to establish good cause for said continuances. Additionally, the DMV's rules only allow

Appellant and others similarly situated, one such continuance, while the DMV has no such limitations on how many times they themselves can continue a hearing; and this inequity between the rights of Appellant and the power of the DMV defies all concepts of equal protection and due process.

The DMV also plays semantics with the facts, by stating that they did not request the officer's presence at the first hearing held on June 18, 2009, but they do acknowledge that he was notified of the hearing, but fail to recognize that his notice of said hearing provided him the opportunity to attend if he so desired. The DMV's statement that this notice to the officer of the first hearing was not sent by certified mail, is misleading in that there is no law or regulation which requires the DMV to send such notices to the officer by certified mail. Significantly, the DMV does **not cite** any statute, regulation, or policy requiring sending such notices to the officer by certified mail. The DMV was simply not required to send said notice to the officer by certified mail, and therefore, the officer had notice and the opportunity to attend, despite not being subpoenaed. Furthermore, the record clearly shows that the officer was notified by the DMV of the first hearing scheduled in this matter, which was held on June 18, 2009, and had the opportunity to attend and declined to do so. (App'x Rec. 9).

Additionally, there is no explanation of record, as to why it takes a delay of 3 months before the next hearing date of record for the purpose of rescheduling the hearing in order to subpoena this officer. Furthermore, the DMV issued its notice of hearing on June 30, 2009 for the September 23, 2009

hearing, however, the DMV claims that they erroneously sent the file to Robert Delong, but it apparently took him three months until September 15, 2009, **(App'x rec. 6)** to discover he had been sent the file in error. Then once again, with no notice to the Appellant as to why the DMV was continuing the hearing, since the Appellant below was not provided a copy of the internal memorandum on which the DMV now relies, the DMV again delayed and unnecessarily continued the administrative hearing, with no grounds stated on the notice sent to Appellant below **(App'x rec. 13)**. Furthermore, given that September 15, 2009, was approximately **one full week prior** to the scheduled hearing of September 23, 2009, and given that the investigating police officer had already been subpoenaed, it seriously begs the question as to why the DMV could not simply provide the correct hearing examiner with the file and go forward on that date. Does it really take that long to transfer a file?

The DMV's brief and the appendix record herein, amply illustrate the egregious delay and dilatory mismanagement in the DMV's handling of Appellant's case, and that he was denied due process of law thereby. There is and was no excuse for the extreme dilatory handling of Appellant's case by the DMV. It has now been well over two years since the Appellant initially requested an administrative hearing in this matter, well beyond the statutory mandated time limit of 180 days, and the DMV should be prohibited from holding another administrative hearing herein.

In the response brief, the DMV supplies reasons behind the continuances herein, which do not appear on the notices provided to Appellant and counsel

below, and which should not now be considered upon appeal to constitute good cause due to the lack of notice of the same to Appellant below. *(see App'x rec. 11, 13, 15, 17)*. The DMV entirely misses or chooses to overlook the whole point of this appeal—notice and good cause--that if they felt there were legitimate grounds for the continual and outrageous delays—which, in fact, there were not)--then they should have placed their grounds for the delays on the actual notices provided to Appellant below. *(See App'x rec. at 11, 13, 15, 17)*. The DMV's failure to place the reasons behind the continuances on the notices to Appellant, denied the Appellant his right to due process of law, which requires "notice."

Additionally, the DMV inadvertently advances Appellant's arguments of denial of due process, by citing its internal policy of telephoning the officer when he fails to appear under subpoena; as once again, the DMV fails to follow its own policies and procedures as the record herein fails to show in the appendix record that they followed this policy of telephoning the officer after his first non-appearance under subpoena, and Appellant submits that is because it never occurred.

The record herein clearly shows that the DMV failed to keep track of their own personnel, of which hearing examiner was assigned to Appellant's case, and thereby the DMV continued Appellant's hearing beyond the statutory deadline of 180 without notifying the Appellant of the reasons behind said continuances. Furthermore, there is no explanation in the record, nor in the DMV's brief that explains the delay of time between the first hearing held on

June 18, 2009, and the date of the next hearing scheduled, which was beyond the 180 day deadline, of September 23, 2009.

After the September 23, 2009, was continued, (App'x 13), the next hearing date arbitrarily selected by the DMV was scheduled for February 17, 2010, a delay of almost five full months, with no reasons being given to Appellant below as to why the September 23, 2009, hearing was continued to begin with. (App'x 13, App'x 17). The DMV subpoenaed the officer for the February 17, 2010, hearing and the officer failed to appear, while Appellant and his counsel had appeared and were ready to proceed at said hearing. Thus, once again, the DMV continued the hearing, this time with a new date of September 30, 2010, another unwarranted delay of some 7 ½ months between hearing dates. Significantly, although the DMV knew the officer had failed to appear on February 17, 2010, it then took the DMV another 5 months, until July 27, 2010, prior to the DMV's issuance a new notice of hearing and a new subpoena for the date of September 30, 2010. **(App'x rec. 17)**. Did the DMV simply stick Appellant's file in a cabinet and forget about it? This enormous amount of administrative delay in the rescheduling of Appellant's hearing by the DMV is egregious, oppressive, and offensive, and should not be condoned by this Court, as the 180 day statutory time limit of W.Va. Code § 17C-5A-2, had long since expired. The 180 day deadline for such hearings under W.Va. Code § 17-C-5A-2 is mandatory, and although this Court has approved slight delays and extensions beyond the 180 day period, Appellant submits that the record in this case does not support the deplorable dilatory actions of the DMV

herein. Additionally, despite the fact that the DMV has the authority to continue the hearing to compel the officer's attendance, given the statutory time limit of 180 days to hold such hearings, the delay of some 5 additional months in rescheduling Appellant's hearing in order to compel the officer's attendance upon his failure to appear, cannot and should not be countenanced by this Court. (**App'x 13, 17**). Time deadlines against driver's licensees such as Appellant are strictly enforced by the DMV, therefore, to countenance the DMV's outrageous delays in scheduling Appellant's hearing below would further perpetuate the denial of Appellant's constitutional rights to equal protection and due process of law. Justice Albright eloquently summarized the disparity of the time limits imposed upon driver's licensees versus the time limits imposed upon the DMV in his concurring opinion in the case of **In re Petition of Donley**, 217 W.Va. 449 at 453, 618 S.E 458 at 462, (W.Va. 2005), as follows:

While I concur with the result reached by the majority, I write separately to recognize that principles of fairness suggest that the same promptness concerns that are imposed upon a defendant who requests a hearing in connection with administrative revocation of his operator's license should be similarly imposed upon the West Virginia Department of Motor Vehicles ("DMV"). To permit the DMV to grant itself an extension of the 180-day deadline for revocation hearings that is mandated by West Virginia Code § 17C-5A-2(b) (2004) without providing for any limits on the length of such extensions encourages the establishment of a lopsided system—a system that proves inherently unjust for the defendant whose revocation proceedings are protracted, not because of his requests, but because of lengthy administrative delays. (footnote omitted herein). Barring express legislative amendment on this issue of timely scheduled hearings following the granting of a continuance requested by the DMV,

it is likely that the system will continue to be tilted in favor of the DMV with regard to issues of timely action.

While the DMV had a legitimate basis for continuing the revocation hearing—the unavailability of a hearing examiner on the date originally selected for the hearing--the continuation of the hearing for another six months seems patently unreasonable. A thirty- or sixty-day continuance in this situation might prove acceptable, **but to permit an entire year to pass between the defendant's request for the hearing and the holding of the revocation hearing seems excessive when the legislative scheme involved mandates the holding of such hearings within a 180-day period, barring demonstration of good cause for a continuance.** See W.Va. Code § 17C-5A-2(b). *(emphasis supplied herein).*

This Honorable Court has long recognized and held that “[a] driver’s license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution. Syllabus Pt. 1, ***Abshire v. Cline***, 193 W.Va. 180, 455 S.E.2d 549

Moreover, the internal memorandum of Kathie Holland, the assigned hearing examiner in Appellant’s case, indicates that she was unaware of the procedures to take to compel the officer’s attendance. ***(App’x rec. at 5)***. In its brief, the DMV misconstrues the importance of this memorandum, as said memorandum on its face indicates that the hearing examiner, a crucial member of DMV personnel, had no idea how to compel the officer’s attendance. ***(App’x rec. at 5)***. Said memorandum further indicates by its omission of any reference thereto, that the hearing examiner had no knowledge of the DMV’s own internal policy of telephoning the officer upon his failure to appear, which the DMV mentions in its brief. ***(App’x rec. at 5)***.

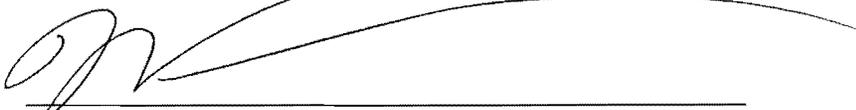
The Appellant has suffered substantial expense in prosecuting his writ of prohibition below, prosecuting this appeal, as well as attorneys fees and costs. Appellant has further been prejudiced by the DMV's delay of this matter for more than 2 years, and the record shows the delays were unjustified, unsupported by notice of good cause, and caused by dilatory administrative mismanagement, which denied Appellant his constitutional rights to notice, due process of law and equal protection. Therefore, Appellant submits that he is entitled to a writ of prohibition and attorneys fees and costs herein.

Wherefore, for all the foregoing reasons, Appellant prays that this Honorable Court will prohibit the DMV from holding another administrative hearing in this matter, order that his driving record be cleared of any reference to these revocation proceedings, and award the Appellant reasonable attorneys fees and costs herein.

Respectfully submitted,

**JOHN R. HOLLAND, II, Appellant,
Petitioner below,**

By Counsel of Record:



William C. Forbes, Esquire (WVSB ID#1238)
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
Phone: 304-343-4050; Fax: 304-343-7450

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court Docket No. 11-1241

**John R. Holland, II.,
Petitioner,**

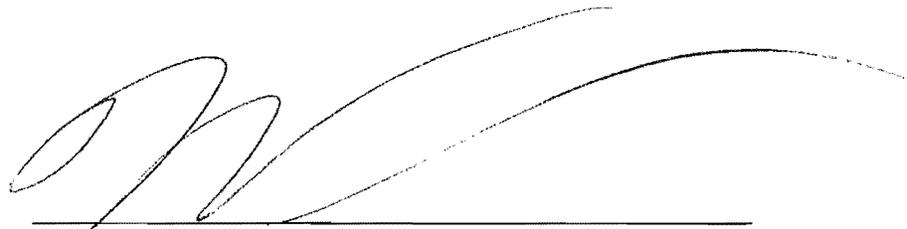
V.

**Joe E. Miller, Commissioner
of the West Virginia
Division of Motor Vehicles,
Respondent.**

CERTIFICATE OF SERVICE

I, William C. Forbes, hereby certify that a true copy of the foregoing "*Petitioner's Reply to Response Brief of Respondent DMV*" was duly served upon counsel of record for the respondent, by depositing the same in the regular U.S. mail, postage pre-paid, on this the 16th day of November, 2011, addressed as follows:

Janet E. James, Esquire
Senior Assistant Attorney General
P.O. Box 17200
Charleston, WV 25317



William C. Forbes, Esquire (WVSB ID#1238)
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
Phone: 304-343-4050; Fax: 304-343-7450
e-mail: wcforges@forbeslawwv.com
Counsel of Record for Petitioner, John R. Holland, II