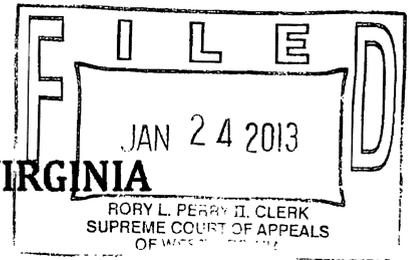


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**CASE NO.: 13-0005**



**STATE OF WEST VIRGINIA, ex rel.  
JOE E. MILLER, Commissioner,  
West Virginia Division of Motor Vehicles,**

**Petitioner,**

vs.)

**DEREK SWOPE,  
Judge of the Circuit Court of Mercer County,**

**Respondent,**

and

**BRANDON WHITE,**

**Party in Interest**

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**SUMMARY RESPONSE TO  
PETITION**

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**Counsel for Party in Interest, Brandon White**

**R. THOMAS CZARNIK & ASSOCIATES**

R. Thomas Czarnik, Esquire, WVSB # 916

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Princeton, WV 24740

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## **REPLY TO PETITION FOR WRIT OF PROHIBITION**

Brandon White, party in interest, petitioner below, by counsel replies to petition as follows.

### **QUESTION PRESENTED**

Whether the Circuit Court of Mercer County had authority to hear an appeal from an administrative agency that was stayed in its effect by the agency for 10 business days, upon filing within 30 days thereafter.

### **REPLY TO PETITION'S "STATEMENT OF THE CASE"**

Brandon White submits amended statement #6 (page 2 of petition) as follows:

6. The Commissioner's Order of Revocations was affirmed by the OAH Case Number 355194A dated July 25, 2012 which did not become final on its terms for "10 business days" from the date of signature(Exhibit 2 of petition).

### **SUMMARY OF ARGUMENT**

The Circuit Court did not violate W.Va. Code Section 29A-5-4, in ruling that the OAH order did not become final on its own terms until 10 business days after signature.

### **ARGUMENT**

1. The Circuit Court of Mercer County, West Virginia pursuant to W.Va. Code Section 29A-5-4(b) had authority to hear this Administrative Appeal, being the county wherein Brandon White, Petitioner below resides. The question is therefore whether Judge Swope excluded his legitimate authority to determine when the "clock began running" on the filing of the petition in the Circuit Court.

As in Petitioner Commissioner's original motions; Brandon Whites reply; the Circuit Court order he Petition herein (page 4; line 4) recognizes that only a final order entered upon the record by the Clerk is appealable. The docketing statements of this Court, and as formulated for administrative appeals, asks the question whether the order appealed from is a "final order" for that reason. If Brandon White had filed his petition before the expiration of the ten (10) business day stay set forth in the Office Administrative Hearings ("OAH", hereafter) order, the DMV would assuredly have argued the appeal was filed to early.

The petition in this case reiterates this erroneous position by citing Conrad vs. Clark; 189 W.Va. 669, 434 SE2d (1993). (Although the [mis]quote, (page 4, of the petition), refers to W.Va. Code Section 56-5-2, it should according to the original case, refer to Section 58-5-4).

2. The Order of the Office of Administrative Appeals on its face stayed finality of the Order pursuant to W.Va. Code Section 29A-5-4 (c) for "10 business" days from the date of signature, exclusive of the day of entry. Although the Order refers to a "Clerk" it does not bear a Clerk's "filed" stamp as to documents filed in a Court case and as in other agencies. In McCourt vs. Oneida Coal; 188 W.Va. 647, 425 SE2d 602 (1992) the Court referred to "unequivocal" notice as commencing the time period. It is proposed, although not of record below, that the OAH has given time for persons to contact their lawyer and get an appointment before the "clock" starts ticking, whether counsel has or has not received the Order as well, to communicate their decision as to appeal or not, and provide costs at least. OAH exercised its statutory jurisdiction to delay finality of its Order by staying its effect, and the 10 business day period was correctly determined by the Court below as delaying the finality of the ruling appealed (See numerous cases cited under W.Va. Code Annotated Sections 58-5-1 and 4, requiring a "final" order). W.Va. Code Section 29A-5-4 also refers to a "final" order. W.Va. Code Section 29A-6-1 gives right of appeal to this Court and sets time limits, from a "final" judgment. Excluding the "10 business days" time period, the petition in the Circuit Court was filed within 30 days.

3. The Due Process Clause, W.Va. Constitution Article III Section 10, applies to DMV proceedings, and proper notice is an element of due process Carpenter vs. Cicchirillo; 222 W.Va. 66, 662 SE2d 508 (2008). Brandon White was not unequivocally on notice of the finality of the ruling until the effective date of the order.
  
4. The petition in this case supposedly states this matter must be reviewed now, as it would possibly cause a conflict in decisions. The DMV is seeking to have this Court to adopt its interpretation of the intent of OAH as to the finality of its order, on a bare record. No irreparable harm would ensue to the DMV, if the Circuit Court below made findings of facts upon a record in the appeal. Counsel would also note that OAH had not yet promulgated any rules of procedure regarding its proceedings at this time of filing, however proposed rules are pending legislative action, according to the Secretary of State.

### **RELIEF REQUESTED**

Brandon White requests the petition be denied and the matter proceed to hearing before the Circuit Court, so a record may be made.



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R. Thomas Czarnik, Esquire  
205 S. Walker St.  
Princeton, WV 24740  
WV State Bar No.: 916  
Counsel for Party in Interest

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.

JOE E. MILLER, COMMISSIONER,

WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

PETITIONER,

VS.

CASE NO.: 13-0005

DEREK SWOPE,

Judge of the Circuit Court of Mercer County,

RESPONDENT,

AND

BRANDON WHITE,

PARTY IN INTEREST.

**VERIFICATION**

STATE OF WEST VIRGINIA

COUNTY OF MERCER

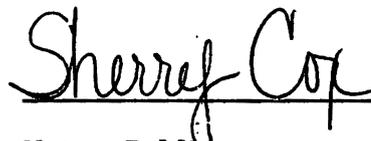
In accordance with the requirements of W.Va. Code Section 53-1-3, the undersigned hereby verifies that the foregoing Answer to the Verified Petition for Writ of Prohibition constitutes a fair and correct statement of the proceedings in the civil action identified in this Answer to the Verified Petition for Writ of Prohibition, based upon his information and belief.



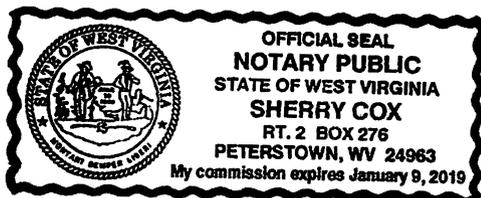
Brandon White, Party in Interest

Subscribed and sworn before me this 22<sup>nd</sup> day of January, 2013.

My commission expires on: January 9, 2019



Notary Public



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

**STATE OF WEST VIRGINIA, ex rel.**

**JOE E. MILLER, COMMISSIONER,**

**WEST VIRGINIA DIVISION OF MOTOR VEHICLES,**

**PETITIONER,**

**VS.**

**CASE NO.: 13-0005**

**DEREK SWOPE,**

**Judge of the Circuit Court of Mercer County,**

**RESPONDENT,**

**AND**

**BRANDON WHITE,**

**PARTY IN INTEREST.**

**CERTIFICATE OF SERVICE**

I, R. Thomas Czarnik, do hereby certify that the foregoing "Answer to the Verified Petition for Writ of Prohibition", was served upon the following by depositing a true copy thereof, certified mail postage prepaid, in the regular course of the United States mail, this 22<sup>nd</sup> day of January, 2013, addressed as follows:

Elaine L. Skorich,  
Assistant Attorney General  
DMV-Office of the Attorney General  
P.O. Box 17220  
Charleston, WV 25317-0010

The Honorable Derek Swope, Judge  
Mercer County Circuit Court  
1501 W. Main St.  
Princeton, WV 24740



R. Thomas Czarnik