

11-1726

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

**ELIZABETH A. DIVITA**  
Petitioner,

v.

**PETITION NO.: 11-CAP-22**  
**File No. 346515A**

**JOE E. MILLER, COMMISSIONER,**  
**WEST VIRGINIA DIVISION OF**  
**MOTOR VEHICLES**  
Respondent.

**ORDER FOLLOWING HEARING ON PETITIONER'S PETITION FOR JUDICIAL REVIEW AND RESPONDENTS MOTION TO DISMISS AND EX PARTE STAY**

On August 4, 2011 came the Parties before this Court pursuant to the Petitioner's *Petition for Judicial Review and Respondent's Motion to Dismiss and ex Parte Stay*. The Court, after reviewing the evidence and hearing the arguments of the Parties, makes the following **FINDINGS OF FACT and CONCLUSIONS OF LAW** follows:

1. That when considering the Respondent's Motion to Dismiss and ex Parte Stay, the Court must consider the evidence in the light most favorable to the Petitioner;
2. The Petition for Judicial Review of the West Virginia Division of Motor Vehicles decision that Petitioner is ineligible for entry into the deferral program pursuant to West Virginia Code 17C-5-2b is appropriately before this Court.
3. The Petitioner was initially charged with a violation of West Virginia Code Section 17C-5-2(e) on December 5, 2009, after which both administrative and criminal proceedings were initiated.
4. The Petitioner requested an administrative hearing to contest the revocation proceedings, and said hearing was held on October 27, 2010. However, the West Virginia Division of Motor Vehicles (hereinafter "DMV") did not issue a decision at that time, nor at any time prior

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to the filing of the Petitioner's application to the deferral program under West Virginia Code 17C-5-2b.

5. On March 17, 2011, prior to any decision from the DMV relative to the administrative revocation proceedings, the Petitioner's pending criminal case based upon the December 5, 2009 incident was dismissed and re-filed as a criminal complaint charging Ms. DiVita with non-aggravated driving under the influence of alcohol in violation of W.Va. Code §17C-5-2(d).

6. On March 17, 2011, the Petitioner gave notice of her intent to participate in the deferral program outlined in West Virginia Code Section 17C-5-2b and pled to the charge against her so that she could qualify for the program. In doing so, the Petitioner waived her right to any possible favorable decision that might have been issued by the DMV in the administrative proceeding still pending final decision. The Magistrate Court of Monongalia County accordingly found that the Petitioner had met the criteria to be permitted into the deferral program pursuant to West Virginia Code Section 17C-5-2b, and accepted the Petitioner's application for said program, which it forwarded to the DMV for processing.

7. In June of 2011, nearly three months after receipt of the Petitioner's application for the deferral program from the Monongalia County Magistrate Court, the DMV issued a Final Order in the earlier case, revoking Ms. DiVita's license and denying her admission to the Deferral Program based on the Commissioner's finding that she was charged with a violation other than one encompassed by subsection (d).

8. The Magistrate Court of Monongalia County rightfully allowed the Petitioner entry into the deferral program pursuant to West Virginia Code Section 17C-5-2b because the Petitioner was charged with simple driving under the influence of alcohol under West Virginia Code Section 17C-5-2, she gave notice of her intent to participate in said deferral program on the day that she was

charged, and she waived her right to contest the DMV's suspension of her license as part of her participation in the deferral program as mandated by West Virginia Code Section 17C-5-2b.

9. The DMV did not have the authority to deny the Petitioner entry into the deferral program pursuant to West Virginia Code Section 17C-5-2b.

10. The DMV did not have the authority to impose a greater term of drivers license suspension upon the Petitioner than that set forth in West Virginia Code Section 17C-5-2b.

Based upon these findings, the Court hereby **ORDERS** as follows:

1. The *Respondent's Motion to Dismiss and ex Parte Stay* are denied.
2. The West Virginia Division of Motor Vehicles shall admit Petitioner into the Deferral Program established under W.Va Code § 17C-5-2b and shall accordingly allow the Petitioner's participation in the Motor Vehicle Alcohol Test and Lock Program as contemplated by W.Va Code § 17C-5-2b;
3. The total period of drivers license suspension imposed by the West Virginia Division of Motor Vehicles shall not exceed the period set forth in W.Va Code § 17C-5-2b, specifically fifteen (15) days of license suspension followed by a period of at least one hundred and sixty-five (165) days participation in the Motor Vehicle Alcohol Test and Lock Program.
4. The Court notes and saves the objection of the DMV to the findings and Orders of this Court in this matter..

It is further **ORDERED** that the Clerk of this Court shall provide a copy of this Order to: Natalie J. Sal, Esq.; to Janet James, Esq., Assistant Attorney General; to the Monongalia County Magistrate Court; and to the West Virginia Division of Motor Vehicles.

ENTERED: this 17<sup>th</sup> day of November, 2011

Susan B. Tucker  
SUSAN B. TUCKER, JUDGE

The foregoing Order Prepared by:

Natalie J. Sal  
Natalie J. Sal, Esq. (WVSB #6603)  
Sal Sellaro Culpepper Legal Group, PLLC  
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Morgantown, WV 26505  
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Counsel for Petitioner DiVita

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State of West Virginia, do hereby certify that the attached Order was entered by said Court.

Jean Friend  
Circuit Clerk

Agreed as to form only by:

Janet James  
Janet James, Esq.  
Assistant Attorney General  
Counsel for West Virginia Division of Motor Vehicles

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. \_\_\_\_\_

**JOE E. MILLER, Commissioner,  
Division of Motor Vehicles,**

**Respondent below, Petitioner,**

v.

**ELIZABETH A. DIVITA,**

**Petitioner below, Respondent.**

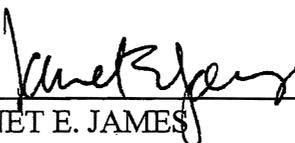
**CERTIFICATE OF SERVICE**

I, Janet E. James, Senior Assistant Attorney General, and counsel for the respondents, do hereby certify that the foregoing *Notice of Appeal* was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 16th day of December, 2011, addressed as follows:

Natalie J. Sal, Esquire  
430 Spruce Street, Suite 3  
Morgantown, WV 26505

The Honorable Jean Friend  
Clerk of the Circuit Court  
Monongalia County Courthouse  
243 High Street  
Morgantown, WV 26505

Kristen S. Justice, Court Reporter  
Post Office Box 4643  
Morgantown, WV 26504

  
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JANET E. JAMES