

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

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

**Petitioner,**

**v.**

**No. 11-1726**

**ELIZABETH A. DIVITA,**

**Respondent.**

**PETITIONER'S REPLY BRIEF**

**Respectfully submitted,**

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

**By counsel,**

**DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL**

**JANET E. JAMES #4904  
SENIOR ASSISTANT ATTORNEY GENERAL  
DMV - Office of the Attorney General  
Post Office Box 17200  
Charleston, West Virginia 25317  
(304) 926-3874**

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
ARGUMENT .....	1
A.    RESPONDENT INCORRECTLY POSITS THAT THIS MATTER IS AN APPEAL OF A CONTESTED CASE .....	1
B.    RESPONDENT IS INCORRECT IN ARGUING THAT THE PROPER REVOCATION PERIOD OF HER LICENSE WAS 15 DAYS FOLLOWED BY PARTICIPATION IN THE TEST AND LOCK PROGRAM .....	2
C.    THE COMMISSIONER DOES NOT CONTROL DEFERRAL, WHICH IS, BY DEFINITION, THE PROVINCE OF THE MAGISTRATE; CONVERSELY, THE COMMISSIONER IS MANDATED TO APPLY THE REVOCATION PERIOD CONSISTENT WITH THE DRIVER'S FILE, AND THIS MANDATE CANNOT BE ALTERED BY THE ACTIONS OF THE MAGISTRATE .....	4
CONCLUSION .....	6

## TABLE OF AUTHORITIES

### Page

#### CASES:

<u>Carroll v. Stump,</u> 217 W. Va. 748, 619 S.E.2d 261 (2005) .....	3
<u>State ex rel. Baker v. Bolyard,</u> 221 W. Va. 713, 656 S.E.2d 464 (2007) .....	4

#### STATUTES:

W. Va. Code §17C-5-2b .....	5
W. Va. Code §17C-5A-1 .....	3, 4, 5
W. Va. Code §17C-5A-2 .....	5
W. Va. Code §17C-5A-2(k)(1) .....	4
W. Va. Code §17C-5A-1a .....	3, 4
W. Va. Code §17C-5A-2 .....	3

#### MISCELLANEOUS:

91 C.S.R. § 5-16 .....	2
91 C.S.R. § 5-16.2.f .....	2

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

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

**Petitioner,**

v.

**No. 11-1726**

**ELIZABETH A. DIVITA,**

**Respondent.**

**PETITIONER'S REPLY BRIEF**

Now comes Petitioner, Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division"), by counsel, Janet E. James, Senior Assistant Attorney General, and submits this reply brief in response to *Respondent's Brief*.

**ARGUMENT**

**A. RESPONDENT INCORRECTLY POSITS THAT THIS  
MATTER IS AN APPEAL OF A CONTESTED CASE.**

Respondent erroneously contends that the case before the circuit court was an appeal of the administrative Final Order issued by the Petitioner. However, the merits of the Final Order were not ultimately litigated; the entirety of the case turned on whether the magistrate court has the power to supercede the Commissioner's statutory duty to regulate driver's license suspension and impose the legally mandated revocation period. Respondent abandoned any challenge to the primary evidentiary question at the administrative proceeding: she did not contest that she was driving under the influence ("DUI").

Therefore, this was not a "contested case" as defined in the Administrative Procedures Act; the basis for the Division's determination of Respondent's legal rights, duties, interests or privileges,

determined after an agency hearing, was not litigated. Rather, Respondent made a collateral attack on a ministerial function by the Commissioner. In the absence of a good faith challenge to the DUI, this matter is not subject to judicial review under the Administrative Procedures Act because the remaining relief sought is extraordinary.

Respondent's action was an attempt to enforce a less stringent revocation period (for non-aggravated DUI) than the one she received (aggravated DUI). She did so not by challenging the merits of the Final Order, but by collaterally attacking the revocation period with the plea agreement made in Magistrate Court. App'x. At 63-65, 95-100. The circuit court order under appeal in this matter *compels* the Division to alter its mandatory revocation period based upon the plea accepted by the Monongalia County Magistrate Court.

**B. RESPONDENT IS INCORRECT IN ARGUING THAT THE PROPER REVOCATION PERIOD OF HER LICENSE WAS 15 DAYS FOLLOWED BY PARTICIPATION IN THE TEST AND LOCK PROGRAM.**

Respondent's complaint at footnote one of her brief is a reference to the fact that participation in the test and lock program is not possible when the revocation is still being litigated. The legislative rules pertaining to the test and lock program are found at 91 C.S.R. § 5-16. Subsection 91 C.S.R. § 5-16.2. f. defines "Final Revocation" thus: "Means a license suspension or revocation which has run the full course of administrative and or judicial review. In the context of this section, a person may not participate in the program if the person has any action pending on the offense either criminally or administratively. The revocation must be final." Thus, if a person is required to participate in the test and lock program as a condition of reinstatement, as Respondent is, all actions must be concluded prior to the person's admission into the program.

The revocation of Respondent's license was not based upon any criminal charge or conviction. It was initially based upon the DUI Information Sheet submitted by the investigating officer, pursuant to W. Va. Code § 17C-5A-1. App'x. At 1-5. The revocation for aggravated DUI was affirmed, following an evidentiary hearing, in the Final Order of the Commissioner, pursuant to W. Va. Code §§ 17C-5A-2. App'x. At 8-14. The various charges in the magistrate court do not have any bearing on the DMV's revocation of her license.

This Court has recognized the distinction between revocation based on the administrative record, and revocation based upon a criminal conviction. In *Carroll v. Stump*, 217 W.Va. 748, 619 S.E.2d 261 (2005), the Court held that the institution of a criminal action is not a prerequisite to license revocation for the same offense:

Administrative license revocation proceedings for driving a motor vehicle under the influence of alcohol, controlled substances or drugs which are initiated pursuant to Chapter 17C of the West Virginia Code are proceedings separate and distinct from criminal proceedings arising from driving a motor vehicle under the influence of alcohol, controlled substances or drugs. The presentation of a sworn complaint before a magistrate and the magistrate's finding of probable cause and issuance of a warrant are not jurisdictional prerequisites to the commencement of administrative license revocation proceedings pursuant to Chapter 17C of the West Virginia Code.

Syl. Pt. 3, *Carroll v. Stump*, 217 W.Va. 748, 619 S.E.2d 261 (2005).

And, the provisions of W. Va. Code § 17C-5A-1a, which provides for revocation upon conviction, were never "triggered" in this case:

Accordingly, Appellant's plea of *nolo contendere* to criminal DUI charges triggered a change in which statutory provisions governed Appellee's actions relative to the revocation or suspension of Appellant's license to operate a motor vehicle in this State. Prior to entry of the *nolo contendere* plea, Appellee's actions relative to

revocation or suspension of Appellant's license were governed by W. Va. Code § 17C-5A-1, which provides for an administrative hearing and determination. However, once Appellant pled *nolo contendere* to the criminal DUI charges, the mandatory revocation provisions of W. Va. Code § 17C-5A.-1a were triggered, thus changing the applicable statute under which the Appellee was authorized and required to proceed. Thus, Appellant's arguments regarding a violation of his due process rights by the Appellee's actions in revoking his license to operate a motor vehicle in this state are without merit. By entering his *nolo contendere* plea, Appellant was convicted of criminal DUI charges, thus, he was no longer statutorily entitled to an administrative hearing to challenge the revocation of his license.

*State ex rel. Baker v. Bolyard* 221 W.Va. 713, 718, 656 S.E.2d 464, 469 (2007).

**C. THE COMMISSIONER DOES NOT CONTROL DEFERRAL, WHICH IS, BY DEFINITION, THE PROVINCE OF THE MAGISTRATE; CONVERSELY, THE COMMISSIONER IS MANDATED TO APPLY THE REVOCATION PERIOD CONSISTENT WITH THE DRIVER'S FILE, AND THIS MANDATE CANNOT BE ALTERED BY THE ACTIONS OF THE MAGISTRATE.**

The Division's revocation of Respondent's license was pursuant to W. Va. Code § 17C-5A-1 and -2(k)(1)[2008], the latter section of which provides:

If in addition to finding by a preponderance of the evidence that the person did drive a motor vehicle while under the influence of alcohol, controlled substance or drugs, the commissioner also finds by a preponderance of the evidence that the person did drive a motor vehicle while having an alcohol concentration in the person's blood of fifteen hundredths of one percent or more, by weight, the commissioner **shall revoke** the person's license for a period of forty-five days with an additional two hundred and seventy days of participation in the Motor Vehicle Alcohol Test and Lock Program in accordance with the provisions of article three-a, article five-a, chapter seventeen-c of this code: ...

(Emphasis added).

In the Final Order, the Commissioner found that “Respondent drove a motor vehicle in this state while under the influence of alcohol and with a blood alcohol concentration of fifteen-hundredths of one percent (0.15), or more by weight.” App’x. At 13. The statute provides for a *mandatory revocation* of 45 days with 270 days of participation in the Interlock program. This is the basis for Respondent’s revocation, not the criminal charges.

The Division’s submission of the “Eligibility Assessment for DUI Deferral” form (App’x. At 95) simply advised the Magistrate of the Respondent’s eligibility for deferral of the criminal proceedings. This form was created with the assistance of this Court’s Administrative Office, which oversees the magistrate courts. The Administrative Office distributes the eligibility form to the magistrates. The form was created by the Division at the request of the Administrative Office, to facilitate the execution of the provisions of W. Va. Code §17C-5-2b, and is provided as a courtesy to the magistrates, who do not have access to driver records.

By use of this form, the Division in no way usurps the power of the magistrate court to defer further proceedings pursuant to W. Va. Code § 17C-5-2b. Deferral of criminal proceedings does not have a licensing component; that is the province of the Commissioner. Conversely, the Commissioner has no authority to dictate to a magistrate whether to defer criminal proceedings. The Petitioner contends that the placing of Respondent into deferral was incorrect in this case (*See*, Pet. Brf. At 11), but cannot change the actions of the magistrate. Likewise, the Division’s determination, by its own records, that Respondent committed the offense of aggravated DUI, cannot be set aside by the magistrate, or by the circuit court based upon the magistrate’s actions. The commissioner is obligated to revoke in accordance with the provisions of W. Va. Code §§ 17C-5A-1 and -2.

There is no “deferral program,” as the Respondent refers to in her brief. The deferral statute provides for a magistrate to accept a guilty plea to DUI, to place the driver on probation conditioned upon her successful completion of the Interlock Program and to ultimately expunge the conviction. The statute does *not* change the Division’s normal requirements for revocation. The Division does not place drivers on deferral: nor could it, inasmuch as that which is deferred is the criminal proceeding.

Thus, for the circuit court to compel the Division to act in contravention of the mandates of its statute based on the actions of the magistrate court, is in error.

**CONCLUSION**

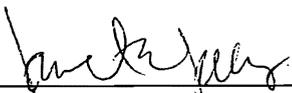
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, the Petitioner hereby respectfully requests the *Order Following Hearing on Petitioner’s Petition for Judicial Review and Respondent’s Motion to Dismiss and ex Parte Stay* entered by the circuit court of Monongalia County on November 17, 2011 be reversed by this Court.

**Respectfully submitted,**

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

**By counsel,**

**DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL**

  
\_\_\_\_\_  
**JANET E. JAMES #4904  
SENIOR ASSISTANT ATTORNEY GENERAL  
DMV - Office of the Attorney General  
Post Office Box 17200  
Charleston, West Virginia 25317  
(304) 926-3874**

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

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

**Petitioner,**

**v.**

**No. 11-1726**

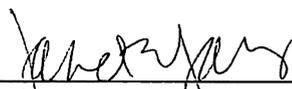
**ELIZABETH A. DIVITA,**

**Respondent.**

**CERTIFICATE OF SERVICE**

I, Janet E. James, Senior Assistant Attorney General, and counsel for the respondents, do hereby certify that the foregoing *Petitioner's Reply Brief* was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 4th day of June, 2012, addressed as follows:

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

  
\_\_\_\_\_  
JANET E. JAMES