

14-0214

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IN THE CIRCUIT COURT OF WAYNE COUNTY, WEST VIRGINIA

FILED
CIRCUIT CLERK'S OFFICE
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BY [Signature]
WAYNE COUNTY, WV

JASON L. THOMPSON
Petitioner,

vs.

CASE NO: 13-P-038
Judge: ~~Barrett Bratt~~
DMVAG

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

FEB 3 2014

OPINION ORDER

On August 13, 2013, this matter came on for hearing upon Petition for Judicial Review of the decision of the Commissioner of the West Virginia Division of Motor Vehicles, by order entered on June 28, 2013, that suspended the driver's license of Petitioner. The Petitioner was represented by Sean Bartram, Esq., and the administrative agency was represented by Elaine Skorish, Esq., Asst. Attorney General.

The Petitioner challenges the Revised Order of the Hearing Examiner and Revised Final Order of the Chief Hearing Examiner of The Office of Administrative Hearings entered on June 28, 2013 that reversed an Order of the Hearing Examiner entered on May 15, 2013, and Final Order of the Chief Hearing Examiner entered on May 16, 2013. Petitioner's appeal is based on the following:

1. Petitioner's Due Process Rights were violated in that the Division of Motor Vehicles shifted the burden of proof upon the Petitioner.
2. The Revised Order of the Hearing Examiner and Revised Final Order of the Chief Hearing Examiner was arbitrary and capricious;

3. If the Revised Order of the Hearing Examiner and Revised Final Order of the Chief Hearing Examiner was entered pursuant to a Rule 59(e) motion, it was improper in that it was entered post final judgment;
4. If the Revised Order was entered pursuant to a Rule 60(b) Motion, it was improper in that said motion was nothing more than a request that the Court change its mind;

PARAMETERS OF REVIEW

This Court is of the opinion that a Judicial Review is not the appropriate forum to second guess the decision of the Hearing Examiner as to whether or not the Petitioner committed the offense of Driving Under the Influence. In this case, I am of the opinion that the Petitioner presented sufficient evidence to support the finding of the Hearing Examiner reflected in the Order entered on May 16, 2013 that reversed the Commissioner's revocation of Petitioner's license. Likewise, this Court is of the opinion that the investigating officer presented sufficient evidence to support the finding of the Hearing Examiner reflected in the Order entered on June 28, 2013 that reinstated the Commissioner's revocation of Petitioner's license. The evidence of the investigating officer and the Petitioner are conflicting, and the Hearing Examiner has broad discretion in making findings of fact. This Court cannot substitute its opinion on the evidence for that of the Hearing Examiner. *Muscatell v. Cline* 196 W.Va. 588, 474 S.E.2d 518 (1996), *Billings v. Civil Service Commission*, 154 W.Va. 688, 178 S.E.2d 801 (1971)

FINDING OF FACT

- On April 2, 2012, the Petitioner was arrested and charged with DUI.
- On May 4, 2012, a Notice of License Revocation was filed with an effective date of June 8, 2012, and sent to Rural Rt. 2 Box 287 A, Salt Rock, WV address;
- On May 22, 2012, the Petitioner filed a Request for Administrative Hearing.

- On July 28, 2013, the Revised Decision was served by certified mail to Petitioner, Jason Thompson, at the Salt Rock address.

CONCLUSIONS OF LAW

West Virginia Administrative Procedures Act, *W.Va. Code §29A-5-4*, West Virginia Code §17C-5A-2 and the Code of State Rules (CSR) §91-1-3 do not provide for modification of a Final order of Chief Hearing Examiner by way of a Motion for Reconsideration. However, if it is permissible by means of Rule 59 or Rule 60 of the West Virginia Rules of Civil Procedure, the Constitutional guarantee of a meaningful opportunity to be heard, as well as revised findings and conclusions, should be satisfied before a reversal of the Final Order of the Chief Hearing Examiner could be valid. *W.Va. CONST. Art.3 §10, Miller v. Wood 229 W.Va. 545, 729 S.E2d 867, U.S.C.A. CONST AMEND. XIV.*

West Virginia CSR §91-1-3(3.6.2) requires a Notice of Hearing to state a date, time and place of hearing , as well as a statement of the issues to be addressed and a statement of the consequences for failing to appear.

West Virginia Code §17C-5A-2 and West Virginia CSR §91-1-3 requires a recording of the hearing be made and a certified transcript be available for Judicial Review. *W.Va. CSR §91-1-3; W.Va. Code 17C-5A-2; Rule 4(b) & (c) Rules of Procedure for Administrative Appeals.*

West Virginia Code §29A-5-4(g) of the West Virginia Administrative Procedures Act, states that a Circuit Court, upon Judicial Review of the decision of an administrative agency shall reverse, vacate or modify the decision of the agency if the substantial rights of the Petitioner have been prejudiced because the administrative findings and decisions or order are:

1. In violation of constitutional or statutory provisions; or
2. In excess of statutory authority or jurisdiction of the agency; or

3. Made upon unlawful procedures; or
4. Affected by other error of law; or
5. Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
6. Arbitrary or capricious or characterized as an abused of discretion.

Miller v. Moredock, 229 W.Va. 66, 726 Se2d. 34 (2011).

DISCUSSION

This Court is of the Opinion that its review must be upon the record of the administrative hearing conducted by the Hearing Examiner and must focus on the procedures following the May 16, 2013 Final Order of the Chief Hearing Examiner. Upon Review of the records presented in this case, the Court can find no evidence of a Notice of Hearing upon the Amended Motion for Reconsideration, and no evidence of a transcript of a hearing conducted upon the Amended Notice for Reconsideration, and no proof of service upon the Petitioner, at his designated change of address, of a Notice containing a date, time and place for hearing upon the Notice for Reconsideration.

The Hearing Examiner made appropriate findings of fact and conclusions of law in the decision that was reflected in the Final Order of the Chief Hearing Examiner entered on May 16, 2013. The Hearing Examiner has broad discretion in making finds of fact, unless those findings are clearly erroneous. *Id. Muscatell*. The Petitioner presented testimony that his wife was driving the vehicle on the night in question. The Hearing Examiner chose to accept Petitioner's testimony, and the fact that the investigating officer found two (2) open containers of beer, as sufficient evidence that two people were in the truck. In light of conflicting testimony of the investigating officer, the Hearing Examiner resolved the issue by a reasoned and articulate

decision. *Id Muscatell*. Therefore, the Hearing Examiner's finding that the Respondent failed to meet its burden of proof, and the reversal of the revocation of the Petitioner's license is supported by evidence, and not a clearly erroneous finding of fact.

The record reflects that the Respondent filed an Amended Motion for Reconsideration on May 25, 2013. The record does not reflect a Notice of Hearing stating a date, time and place for the reconsideration. The record does not reflect that the Amended Motion for Reconsideration was served on the Petitioner at his Bronson Court, Huntington address or that a Notice of Hearing was ever served on the Petitioner at that address. Furthermore, the record does not reflect that a hearing was actually conducted, or that a transcript was made of that proceeding.

The Revised Decision of Hearing Examiner and Final Order of Chief Hearing Examiner, entered June 28, 2013, merely stated that the Hearing Examiner determined that the original final order was "legally deficient and erroneous". The Revised Final Order makes no additional findings that were not already address by the order of May 16, 2103, except to find that "the investigating officers' testimony is more credible and sufficiently establishes that the Petitioner was operating the motor vehicle on the date of the alleged offense." The Revised Final Order reinstates the revocation that was originally issued on May 4, 2102.

This Court finds that the Amended Motion for Reconsideration, and subsequent Revised Final Order entered June 28, 2013, prejudices the substantial rights of the Petitioner.

The unilateral reversal of a Final Order of the Chief Hearing Examiner, without proper Notice to the Petitioner and a meaningful opportunity to be heard, violates the Petitioner's Due Process Rights, and is in violation of the Constitutional and Statutory provisions of the State Administrative Procedures Act with regard to hearings before the Office of Administrative Hearings;

The Motion for Reconsideration resulting in a Revised Final Order of Chief Hearing Examiner, without a meaningful opportunity for Petitioner to be heard, is in excess of the statutory authority of the Office of Administrative Hearings;

The Revised Final Order of Chief Hearing Examiner was entered upon unlawful procedures without proper Notice to the Petitioner giving him a meaningful opportunity to be heard;

The Revised Final Order of the Chief Hearing Examiner that arbitrarily reversed the Final Order of the Chief Hearing Examiner and reinstating the revocation of Petitioner's license, is arbitrary and capricious and an abuse of discretion, and a clearly unwarranted exercise of discretion by the Office of Administrative Hearings;

OPINION ORDER

It is therefore **ORDERED, ADJUDGED** and **DECREED** that the Final Order of the Chief Hearing Examiner entered on June 28, 2013, that affirmed the Commissioner's Revocation Petitioner's License, is hereby **REVERSED**, and the Final Order of the Chief Hearing Examiner entered on May 16, 2013, that reversed the Commissioner's Revocation of Petitioner's license shall be **REINSTATED** as of the date of this order.

This is a Final Order of the Circuit Court upon Judicial Review.

The Clerk shall send attested copies of this Order to the following:

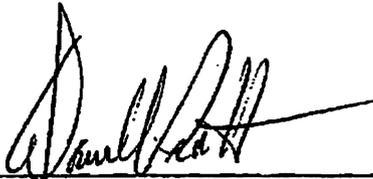
Division of Motor Vehicles
Office of Attorney General, Counsel for Respondent
ELAINE L. SKORISH, Esq.
PO BOX 17200
Charleston, WV 25317

JOE E. MILLER, COMMISSIONER
Division of Motor Vehicles
5707 MacCorkle Avenue, SE
Charleston, WV 25317

BELLOMY & TURNER, L.C.
SHAWN BARTRAM, Esq.
Counsel for Petitioner, Jason L. Thompson
741 Fifth Avenue
Huntington, WV 25701

Enter this 31 day of January, 2014

**ORDER
ENTER:**


HONORABLE DARRELL PRATT

A COPY TESTE
Milton J. Ferguson II Clerk
By _____ Deputy

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

STEVEN O. DALE, Acting Commissioner,
Division of Motor Vehicles,

Petitioner,

v.

JASON L. THOMPSON,

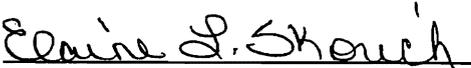
Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, 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 28th day of February, 2014, addressed as follows:

Shawn Bartram, Esquire
Bellomy and Turner
741 Fifth Avenue
Huntington, WV 25701

The Honorable Milton J. Ferguson, II
Clerk of the Circuit Court
Wayne County Courthouse
Post Office Box 38
Wayne, WV 25570-0038


ELAINE L. SKORICH