

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-0040
(Circuit Court Civil Action No. 13-AA-82)

STEVEN O. DALE, ACTING COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

CONTAINS
CONFIDENTIAL
MATERIALS

Petitioner below/Petitioner,

v.

DAVID S. LITTLETON,

Respondent below/Respondent.

BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

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I. ASSIGNMENTS OF ERROR

- A. Even though the issue was not raised before the circuit court, the OAH lacked jurisdiction to hear the administrative matter because Mr. Littleton pled guilty in the companion criminal case.**
- B. The circuit court erred in determining that the stop of Mr. Littleton's vehicle was invalid.**
- C. The circuit court misinterpreted W. Va. Code § 17C-5A-2(f) (2010) while ignoring W. Va. Code § 17C-5A-2(e) (2010).**

II. STATEMENT OF THE CASE

A. Substantive Facts

On August 6, 2010, at approximately 11:55 p.m., Trooper First Class M. J. Glende of the Charles Town Detachment of the West Virginia State Police, the Investigating Officer (“I/O”) in this matter, was conducting routine patrol on West Virginia State Route 115 in Ranson, Jefferson County, West Virginia. (App.¹ at PP. 405, 454 and 455.) The I/O observed a silver colored 2007 Chrysler 300 bearing West Virginia registration OLN-342 traveling southbound on Route 115, weaving in its lane of travel, driving with its tires on the line marker, swerving, and presenting a defective registration light. (App. at P. 456.) The I/O initiated a traffic stop of the motor vehicle and identified the driver as David Scott Littleton, the Respondent herein. (App. at P. 405.)

Patricia Ann Painter was the registered owner of the vehicle and was also a passenger in the vehicle at the time of the traffic stop. *Id.* Mr. Littleton had an odor of alcoholic beverage on his breath, and his speech was normal but his eyes were bloodshot. (App. at PP. 406 and 457.) Mr. Littleton admitted to the I/O that he had a couple of drinks at the Moose Lodge prior to leaving. (App. at PP. 406 and 471.) Mr. Littleton was normal exiting the vehicle, walking to the roadside and while standing. (App. at P. 406.)

¹ App. refers to the Appendix filed contemporaneously with this brief.

The I/O conducted a medical assessment of Mr. Littleton noting that he had equal pupils, no resting nystagmus and equal tracking with his eyes. (App. at PP. 406 and 458-459.) Next, the I/O explained and administered the horizontal gaze nystagmus (“HGN”) field sobriety test which Mr. Littleton failed because of lack of smooth pursuit in both eyes and a distinct and sustained nystagmus at maximum deviation in both eyes. (App. at PP. 406 and 462.) The I/O also explained and demonstrated the walk-and-turn field sobriety test which Mr. Littleton failed because he could not keep his balance during the instruction stage, stopped while walking, missed walking heel-to-toe, stepped off the line, and raised his arms to balance. (App. at PP. 406 and 464-465.) The I/O also explained and demonstrated the one-leg stand test which Mr. Littleton also failed because he swayed while balancing, used his arms to balance, and put his foot down. (App. at PP. 407 and 466.) The I/O administered a preliminary breath test (“PBT”) to Mr. Littleton which he failed with a result .102%. (App. at PP. 407 and 468.)

The I/O had reasonable grounds to believe that Mr. Littleton had been operating a motor vehicle in this state while under the influence of alcohol and arrested him for DUI on August 7, 2010. The I/O transported Mr. Littleton to the Charles Town Detachment of the West Virginia State Police where he read and provided Mr. Littleton with a written document containing the penalties for refusing to submit to a designated SCT, required by W. Va. Code § 17C-5-4 (2010), and the fifteen minute time limit for refusal, specified in W. Va. Code § 17C-5-7 (2010). (App. at PP. 408 and 468.) The testing instrument used to administer the SCT - in Intoximeter EC/IR, Serial No. 008361 - has been approved by the West Virginia Bureau for Public Health for use as a secondary breath testing instrument. (App. at P. 408.) Mr. Littleton failed the SCT with a result of .096%. (App. at PP. 404, 408 and 488.)

B. *Procedural Facts*²

- On September 16, 2010, the DMV sent Mr. Littleton an *Order of Revocation* (File # 350671B) revoking his driver's license for DUI (App. at P. 521) and an *Order of Disqualification* (File # 350671A) disqualifying him from operating a commercial motor vehicle because of the DUI. (App. at P. 520.)
- On September 21, 2010, Mr. Littleton filed an administrative appeal of only the *Order of Disqualification* issued by the DMV. (App. at P. 217.) The grounds for the administrative appeal stated, "My client is not guilty." *Id.* Mr. Littleton also challenged the secondary chemical test. *Id.*
- On October 20, 2010, Mr. Littleton's counsel sent a letter to Charles B. Howard, Assistant Prosecuting Attorney for Jefferson County. (App. at P. 111.) The letter stated that Mr. Littleton wanted to proceed "under the deferral program of the new DUI statute which went into effect on June 11, 2010, in dealing with the DUI charge against him..." and that he "will waive his right to a DMV hearing and requests conditional probation and deferral of the charges against him, with the possibility for dismissal and expungement." *Id.*
- On the same day that Mr. Littleton's counsel sent the letter to the prosecutor's office, Mr. Littleton plead guilty to DUI in the Magistrate Court of Jefferson County and signed a *Plea Order Granting Conditional Probation for DUI Deferral* on which Mr. Littleton attested before Magistrate William E. Senseney that the "defendant has informed the court that he/she does not hold a commercial driver's license and does not operate commercial vehicles."

² Because the procedural facts in this case are labyrinthine, instead of adhering to the traditional paragraph format here, Petitioner shall use bullet points to make the chronology of events less laborious to follow.

(App. at PP. 148-149.)

- On October 26, 2010, Mr. Littleton enrolled in the Safety and Treatment Program. (App. at P. 117.)
- On December 8, 2010, the OAH canceled the administrative hearing scheduled for January 12, 2011, because Mr. Littleton had “enrolled in the DUI deferral Program.” (App. at P. 275.)
- On January 5, 2011, Mr. Littleton completed the DUI classes and treatment (App. at P. 277); the Magistrate Court of Jefferson County entered a *Plea Order Granting Conditional Probation for DUI Deferral* (Case Number 10-M-2705) wherein Mr. Littleton again attested that “defendant has informed the court that he/she does not hold a commercial driver’s license and does not operate commercial vehicles³” (App. at PP. 221-222); and Mr. Littleton and his counsel signed a “*Conditional*” *Guilty or No Contest Plea* in the Magistrate Court of Jefferson County. (App. at PP. 114-115.) The Jefferson County Magistrate Court *Criminal Case History* dated January 5, 2011, indicates that the criminal matter was “dismissed per plea.” (App. at P. 116.) The magistrate also provided Mr. Littleton with a payment schedule with a July 5, 2011 due date. (App. at P. 276.)
- On January 19, 2011, the DMV completed an eligibility assessment for DUI Deferral, Case Number 10-M-2705, and found that Mr. Littleton is not eligible to participate in the Alcohol Test and Lock Program under the terms of W. Va. Code § 17C-5-2b (2010) because Mr. Littleton held a CDL license - something Mr. Littleton attested he did not have when he

³This time, however, when the *Plea Order Granting Conditional Probation for DUI Deferral* was entered, it was signed by Magistrate Mary P. Rissler and not William E. Senseney.

signed the *Plea Order Granting Conditional Probation for DUI Deferral*. (App. at P. 118-122.)

- On May 16, 2011, Mr. Littleton paid the Jefferson County Magistrate Court in full the \$215.80 in costs and fees in his criminal case (Case No. 10-M-2705.) (App. at P. 276.)
- On July 8, 2011, under File #350671C, the DMV sent Mr. Littleton an *Order of Disqualification* (App. at P. 224) as a result of his conviction in the Magistrate Court of Jefferson County and under File # 350671D, an *Order of Revocation* (App. at P. 226) as a result of his conviction in the Magistrate Court of Jefferson County.
- On July 13, 2011, Mr. Littleton filed a *Motion to Withdraw a Conditional Plea of Guilty* with the Magistrate Court of Jefferson County, and on the same date the magistrate entered an *Order* granting said *Motion*. (App. at PP. 278-279.)
- On July 14, 2011, Mr. Littleton requested an administrative hearing on File No. 350671C (disqualification upon his conviction) because there “was a lack of probable cause to stop my client’s vehicle and my client was not under the influence of alcohol.” (App. at P. 280.) Mr. Littleton also challenged the results of the secondary chemical test. *Id.*
- On August 17, 2011, the Office of Administrative Hearings (“OAH”) entered an *Order Striking Contested Revocation From Docket and Canceling the Administrative Hearing*. (App. at PP. 140-141.) On the same date, the OAH issued an *Amended Order Striking Contested Revocation From Docket and Canceling the Administrative Hearing*. (App. at PP. 142-144.)
- On September 9, 2011, the OAH issued a letter advising Mr. Littleton that he was only entitled to an identity hearing on File No. 350671C (disqualification on conviction.) (App.

at P. 252.)

- On September 14, 2011, in the criminal matter, Mr. Littleton filed a *Motion* to continue a hearing in magistrate court set for that date because “Defense and the State are working on a plea to resolve this matter.” (App. at P. 128.)
- On September 16, 2011, in response to the OAH’s *Order Striking Contested Revocation From Docket and Canceling the Administrative Hearing*, Mr. Littleton filed a *Petition for Review* in the Circuit Court of Jefferson County, West Virginia. (App. at PP. 254-282.)
- On September 20, 2011, in Civil Action No. 11-AA-6, the Circuit Court of Jefferson County entered an *Order Setting Hearing* for October 17, 2011. (App. at P. 158.)
- On October 17, 2011, Mr. Littleton appeared for hearing, yet the DMV did not; therefore, the circuit court entered the order prepared by Mr. Littleton’s counsel. (App. at P. 159.)
- On October 17, 2011, the same day as the scheduled hearing in Civil Action 11-AA-6, the DMV, through its counsel, sent to the Clerk of the Circuit Court of Jefferson County its *Notice of Special Limited Appearance and Motion to Dismiss* as well as a proposed *Order Granting Hearing* in Civil Action No. 11-AA-6. (App. at PP. 160-168.)
- On October 20, 2011, the Circuit Court of Jefferson County entered Mr. Littleton’s proposed *Order* which granted his *Petition for Review* and ordered the DMV to vacate Mr. Littleton’s conviction and to reinstate Mr. Littleton’s privilege to drive. (App. at PP. 169-172.) Said *Order* was copied to the Commissioner of the DMV at P. O. Box 17130, which was not the DMV’s address of P. O. Box 17200. (App. at P. 173.)
- On October 26, 2011, the OAH entered an *Order Rescinding the Office of Administrative Hearings’ Final Order and Reinstating Written Objection to Commissioner’s Order of*

Revocation. (App. at PP. 293-295.)

- On October 28, 2011, in response to the *Order* of the Magistrate Court purportedly granting Mr. Littleton's withdrawal of his guilty plea, the OAH issued a letter explaining the procedural issues and alerting the parties that an order reinstating Mr. Littleton's written objection to the *Order of Revocation* will be forthcoming. (App. at PP. 539-540.)
- On November 14, 2011, the DMV filed a *Motion to Alter or Amend a Judgment* in Civil Action No. 11-AA-6 in the Circuit Court of Jefferson County. (App. at PP. 174-177.)
- On November 18, 2011, the DMV filed a *Notice of Hearing* on its motion. (App. at PP. 178-179.)
- Also on November 18, 2011, the DMV filed a *Notice of Appeal* with this Court in response to the *Order* entered by the Circuit Court of Jefferson County on October 20, 2011. (App. at PP. 181-196.)
- On December 21, 2011, Marcia L. Chandler, Official Court Reporter for the Circuit Court of Jefferson County, sent the DMV a letter confirming that no hearing was even held on October 17, 2011, before the Honorable David H. Sanders. (App. at P. 197.)
- On January 3, 2012, the Circuit Court of Jefferson County entered an *Order Granting Relief from Judgment* because the DMV had not been served with notice of the hearing held on October 17, 2011, and because the circuit court had not considered the bases for relief in the DMV's *Motion to Dismiss* before it entered its final order. (App. at PP. 198-199.)
- On January 12, 2012, the DMV filed a *Motion to Permit Withdrawal of Notice of Appeal* with this Court in Case No. 11-1609. (App. at PP. 202-205.)
- On January 19, 2012, the OAH conducted an administrative hearing in OAH Case No.

350671AB (the original revocation and disqualification for DUI.) (App. at P. 419.) Mr. Littleton appeared at the hearing, but he refused to testify at the hearing which he requested. (App. at P. 421.)

- On January 25, 2012, the Circuit Court of Jefferson County entered a *Stipulation of Dismissal* in Civil Action No. 11-AA-6. (App. at PP. 200-201.)
- On January 13, 2012, this Court granted the DMV's motion to withdraw in Case No. 11-1609. (App. at P. 206.)
- On February 29, 2012, the Jefferson County Magistrate Court amended the *Criminal Case History* form to indicate that Case No. 10-M-2705 was dismissed. (App. at P. 130.) The form also indicates that Mr. Littleton was part of the "deferral program" and that the verdict was a "gp" or guilty plea. *Id.* The *State of West Virginia Court Disposition Reporting* form (WVSP Form 29) completed by the Jefferson County Magistrate Office indicates that Mr. Littleton was found guilty of the DUI 1st offense (a violation of W. Va. Code § 17C-5-2(d) (2010)) and that the charge of defective equipment (a violation of W. Va. Code § 17C-15-1 (1951)) was dismissed. (App. at P. 129.) Said form does not indicate a reversal of the guilty plea. *Id.*
- On March 1, 2012, Mr. Littleton's counsel sent a letter to the OAH, *but not the DMV*, which included an *Order* entered by the Jefferson County Magistrate on February 29, 2012, dismissing the DUI charge because "the Defendant completed the required DUI classes and treatment... [and] paid all costs associated with the DUI classes and all fines and costs regarding the above-captioned [criminal] cases...and Defendant's operator's license and CDL license are valid as shown by the DMV record dated February 17, 2012." (App. at PP. 321-

322.)

- On May 28, 2013, instead of dismissing the matter in response to the Magistrate's *Order of February 29, 2012*, indicating that Mr. Littleton had completed DUI Deferral, the OAH entered a *Decision of Hearing Examiner and Final Order of Chief Hearing Examiner*, which reversed the DMV's *Order of Revocation and Order of Disqualification*. (App. at PP. 344-354.)
- On June 27, 2013, the DMV filed a *Petition for Judicial Review* with the circuit court of Kanawha County. (App. at PP. 9-44.)
- On September 30, 2013, Petitioner filed the *Brief of the DMV* with the circuit court. (App. at PP. 45-70.)
- On October 25, 2013, Respondent filed the *Brief of David S. Littleton* with the circuit court. (App. at PP. 71-90.)
- On November 13, 2013, Petitioner filed the *Reply Brief of the DMV* with the circuit court. (App. at PP. 91-110.)
- On December 16, 2013, the circuit court entered a *Final Order* in this matter and upheld the OAH's *Decision of Hearing Examiner and Final Order of Chief Hearing Examiner*. (App. at PP. 2-8.)
- On December 27, 2013, based upon Mr. Littleton's conviction in the Magistrate Court of Jefferson County, the DMV issued an *Order of Disqualification* in File Number 350671C (App. at P. 520) and an *Order of Revocation* in File Number 350671D. (App. at P. 521.)
- On January 2, 2014, Mr. Littleton filed a hearing request in only File Number 350671C, which is the disqualification of Mr. Littleton's commercial driver's license ("CDL.") (App.

at P. 523.) On this particular hearing request form, Mr. Littleton's grounds for appeal were: the results of the secondary chemical test; no reasonable suspicion existed to initiate the traffic stop and/or detain me; no reasonable grounds existed to prove that I was under the influence of alcohol, controlled substances, or drugs; I did not refuse to submit to the secondary chemical; and "no probable cause to stop vehicle involved." *Id.*

- On January 14, 2014, the DMV sent Mr. Littleton's counsel a letter advising him that the DMV will not stay the *Order of Disqualification* because of the guilty plea. (App. at P. 558.)
- On or about February 6, 2014, Mr. Littleton filed a *Petition for Review and Extraordinary Relief* in the Circuit Court of Jefferson County. (App. at P. 526-559.)
- On or about February 20, 2014, the DMV filed a *Notice of Special Limited Appearance and Motion to Dismiss for Lack of Jurisdiction and Venue and Request for Fees and Costs* in the Circuit Court of Jefferson County in Civil Action No. 14-P-7. (App. at PP. 560-595.) In its *Motion*, the DMV pointed out that "Magistrates are not authorized to entertain or grant a motion to withdraw a plea of guilty or no contest. Rules of Criminal Procedure for Magistrate Courts, Rule 9(e)." (App. at P. 564.)
- On March 5, 2014, at the hearing in that matter, Mr. Littleton withdrew his administrative petition via a *Voluntary Dismissal* filed by the DMV. (App. at P. 596.)
- On March 7, 2014, the Circuit Court of Jefferson County entered an *Order* which "ratified and affirmed" the unauthorized order withdrawing a "Condition [*sic*] Plea of Guilty" by the Magistrate Court of Jefferson County on July 13, 2011 (two and a half years previous.) (App. at P. 597.)
- On March 12, 2014, Mr. Littleton's counsel sent the OAH a letter in File No. 350671C (the

disqualification) asking that agency to “lift the suspension of my client’s driving privileges” and asking the OAH to “rule forthwith that the suspension and Order of Revocation be REVERSED as a matter of law.” (App. at PP. 598-623.)

- On March 14, 2014, the OAH entered an *Order Striking Contested Revocation from the Docket*. (App. at PP. 627-630.)

III. SUMMARY OF ARGUMENT

Mr. Littleton was arrested for DUI then he plead guilty to the same and waived his right to an administrative hearing because he wanted to participate in the DUI deferral process. In a filing with the Jefferson County magistrate court, Mr. Littleton attested that he was not the holder of a CDL even though he held such a license. Once the DMV informed the magistrate court that Mr. Littleton was ineligible for deferral, Mr. Littleton attempted to withdraw the guilty plea. The magistrate improperly entered an order by which the guilty plea was purportedly withdrawn. Mr. Littleton presented this improper order to the OAH, which granted him a hearing.

The law is clear that the DMV must revoke upon conviction, and there is no “take back” remedy anywhere in the W. Va. Code which permits the DMV to ignore Mr. Littleton’s conviction as the OAH and the Magistrate and Circuit Court of Jefferson County have done. Further, once the OAH was befooled into conducting an administrative hearing, it reversed Mr. Littleton’s revocation because the OAH found the officer lacked credibility about where he first spotted Mr. Littleton on the night of his DUI arrest. The hearing examiner ignored the evidence of Mr. Littleton’s bad driving in favor of testimony from Mr. Littleton’s domestic partner who never rebutted the I/O’s reason for the stop of Mr. Littleton’s vehicle. This was clear error. The stop of Mr. Littleton’s vehicle was valid, and the circuit erred in not so finding. Finally, both the OAH and the circuit court

improperly created a remedy not contained in W. Va. Code § 17C-5A-2(f) (2010) by excluding the uncontradicted evidence of Mr. Littleton's driving with a blood alcohol content in excess of .08.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20 of the Revised Rules of Appellate Procedure (2010), the DMV requests oral argument because this matter involves issues of first impression and issues of fundamental public importance. Additionally, the parties would benefit from the opportunity to answer questions from the Court.

V. ARGUMENT

A. Standard of Review

Review of the Commissioner's decision is made under the judicial review provisions of the Administrative Procedures Act at W. Va. Code § 29A-5-4 (1998). *Groves v. Cicchirillo*, 225 W. Va. 474, 479, 694 S.E.2d 639, 643 (2010) (per curiam).

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: "(1) In violation of constitutional or statutory provisions; or (2) In excess of the 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 by abuse of discretion or clearly unwarranted exercise of discretion."

Syl. Pt. 2, *Shepherdstown VFD. v. State ex rel. State of W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983).

"The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial

evidence or by a rational basis.” Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). This Court has “made plain that an appellate court is not the appropriate forum for a resolution of the persuasive quality of evidence.” *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996).

A court can only interfere with a hearing examiner’s findings of fact when such findings are clearly wrong. *Modi v. W. Va. Bd. of Med.*, 195 W. Va. 230, 239, 465 S.E.2d 230, 239 (1995). “This rule is of appreciable importance to the parties because clear-error review ordinarily heralds a rocky road for an appellant. Under this standard, appellate courts cannot presume to decide factual issues anew. Our precedent ordains that deference be paid to the trier’s assessment of the evidence.” *FOP v. Fairmont*, 196 W. Va. 97, 101 n.4, 468 S.E.2d 712, 716 n.4 (1996). “[T]his standard precludes a reviewing court from reversing a finding of the trier of fact simply because the reviewing court would have decided the case differently.” 196 W. Va. 559, 565, 474 S.E.2d 489, 495.

B. Even though the issue was not raised before the circuit court, the OAH lacked jurisdiction to hear the administrative matter because Mr. Littleton pled guilty in the companion criminal case.

1. Mr. Littleton manipulated the deferral process in order to befool the OAH into granting him an administrative hearing.

On October 20, 2010, Mr. Littleton’s counsel sent a very detailed letter to Charles B. Howard, Assistant Prosecuting Attorney for Jefferson County. (App. at P. 111.) The letter unequivocally stated that Mr. Littleton wanted to proceed “under the deferral program of the new DUI statute which went into effect on June 11, 2010, in dealing with the DUI charge against him...” and that he “will waive his right to a DMV hearing and requests conditional probation and deferral of the charges against him, with the possibility for dismissal and expungement.” *Id.* The contents

of the letter succinctly outlined the requirements for deferral and manifested Mr. Littleton's intent to proceed with the requirements of the deferral process.

West Virginia Code §17C-5-2b (2010) is entitled "Deferral of further proceedings for certain first offenses upon condition of participation in motor vehicle alcohol test and lock program; procedure on charge of violation of conditions." Specifically, this section of the Code states in pertinent part:

(a) Except as provided in subsection (g) of this section, whenever any person who has not previously been convicted of any offense under this article or under any statute of the United States or of any state relating to driving under the influence of alcohol, any controlled substance or any other drug:

(1) Notifies the court within thirty days of his or her arrest of his or her intention to participate in a deferral pursuant to this section; and

(2) Pleads guilty to or is found guilty of driving under the influence of alcohol under subsection (d), section two of this article, the court, without entering a judgment of guilt and with the consent of the accused, shall defer further proceedings and, notwithstanding any provisions of this code to the contrary, place him or her on probation, which conditions shall include, that he or she successfully completes the Motor Vehicle Alcohol Test and Lock Program as provided in section three-a, article five-a of this chapter. Participation therein shall be for a period of at least one hundred and sixty-five days after he or she has served the fifteen days of license suspension imposed pursuant to section two, article five-a of this chapter.

(b) A defendant's election to participate in deferral under this section shall constitute a waiver of his or her right to an administrative hearing as provided in section two, article five-a of this chapter.

Mr. Littleton's case is the perfect example of a drunk driver having his cake and eating it too.

At no point did Mr. Littleton comply with the letter or spirit of the law in his attempt to manipulate both the criminal and administrative DUI processes. First, Mr. Littleton was arrested on August 10, 2010, yet waited until October 20, 2010 to notify the magistrate court of his desire to take advantage of the deferral process. Pursuant to W. Va. Code 17C-5-2b(a)(1) (2010), Mr. Littleton only had thirty days to inform the court of his desire to proceed with the deferral process, yet the magistrate

court ignored the statute and permitted Mr. Littleton to proceed.

Next, Mr. Littleton elected to participate in deferral as evidenced by his signature on the form *Plea Order Granting Conditional Probation for DUI Deferral*. The statute is quite clear that Mr. Littleton's *election* to participate (not his actual participation in, eligibility for, or his completion of) deferral waived his right to have an administrative hearing on the merits of his DUI. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). Since the language of W. Va. Code § 17C-5-2b(b) (2010) is clear, there is no need for this Court to interpret it here.

Next, Mr. Littleton completed and signed a *Plea Order Granting Conditional Probation for DUI Deferral* by which he entered a guilty plea for the DUI charge as required by W. Va. Code 17C-5-2b(a)(2) (2010) and waived his right to an administrative hearing as required by W. Va. Code 17C-5-2b(b) (2010). (App. at PP. 148-149.) West Virginia Code § 17C-5-2b(g)(2) (2010) makes ineligible for deferral any person who "holds a commercial driver's license or operates commercial motor vehicle(s)." Mr. Littleton clearly knew, and his counsel knew or should have known, that Mr. Littleton possessed a commercial driver's license. However, Mr. Littleton attested on the *Plea Order Granting Conditional Probation for DUI Deferral* that the "defendant has informed the court that he/she does not hold a commercial driver's license and does not operate commercial vehicles." *Id.*

Unfortunately for Mr. Littleton, his commercial driver's license made him ineligible for deferral, and on January 19, 2011, the DMV completed a form entitled, "Eligibility Assessment for DUI Deferral" regarding Mr. Littleton's request to participate in the deferral process stating Mr. Littleton was ineligible to participate "in the Alcohol Test and Lock Program under the terms of WV

Code § 17C-5-2b because of the following: CDL License[.]” (App. at P. 122.)

The facts are not in dispute here. Mr. Littleton **elected** to participate in deferral. The statute plainly states that a defendant's **election** to participate in deferral under this section shall constitute a waiver of his or her right to an administrative hearing. Whether or not Mr. Littleton was eligible for deferral, he waived his right to an administrative hearing when he signed the *Plea Order Granting Conditional Probation for DUI Deferral* form before the magistrate on October 20, 2010.

Recently this Court heard a similar case about participation in deferral. In footnote two of *State ex rel. Dale v. Divita*, No. 11-1726, 2013 WL 2131056 (W. Va. May 16, 2013)(memorandum decision), this Court explained the criminal deferral process stating that

W. Va. Code § 17C-5-2b (2010) (Supp.2012) (“deferral statute”), newly enacted in 2010, sets forth a deferral program for people who commit a first offense DUI in violation of W. Va. Code § 17C-5-2(d) (2010) (Supp.2012). Without entering a judgment of guilt, the court defers the criminal proceedings while the defendant receives a fifteen-day driver's license revocation followed by a minimum of 165 days participation in the Motor Vehicle Alcohol Test and Lock Program. *See n. 5, infra*. Upon successful completion of the deferral program, the DUI charge can be dismissed, and the criminal record expunged. In return for the lenience offered in the deferral statute, a defendant participating in the program is required to waive the right to challenge the administrative proceedings before the DMV.

In that case, Ms. Divita was arrested on December 5, 2009, for aggravated DUI pursuant to W. Va. Code § 17C-5-2 (2010) because she was driving with a blood alcohol concentration of “fifteen hundredths of one percent or more [.]” Following her arrest, both administrative and criminal proceedings were initiated. On December 30, 2009, the DMV revoked Ms. Divita's driver's license for forty-five days and required 270 days of participation in the Motor Vehicle Alcohol Test and Lock Program. Ms. Divita timely requested an administrative hearing, which was held October 27, 2010. Subsequently, on June 21, 2011, the DMV entered its final order resulting from the

administrative hearing wherein it upheld the revocation of Ms. Divita's license for aggravated DUI and the accompanying penalties.

In *Divita*, this Court found that

In the present case, the magistrate court's request for the DMV to apply the deferral statute has no attendant requirement for a hearing. In fact, **application** of the deferral statute specifically requires that the right to an administrative hearing is waived. See n. 2, *supra*. Therefore, the issue of the DMV's assessment of Ms. Divita for participation in the deferral program does not constitute a contested case.

[Emphasis added.] *Divita, supra*.

Before trying to “unwaive” his right to an administrative hearing, Mr. Littleton had already filed an administrative appeal of the *Order of Revocation* and the *Order of Disqualification* issued by the DMV. (App. at P. 217.) The grounds for the administrative appeal stated, “My client is not guilty.” On October 26, 2010, Mr. Littleton enrolled in the Safety and Treatment Program, a requirement for reinstatement of the licenses. (App. at P. 117.) It defies logic how Mr. Littleton could plead guilty in the criminal forum and claim that he was not guilty in the administrative forum - especially after he had already manifested his acknowledgment that he was not entitled to an administrative hearing once he pled guilty to the criminal matter. Contrary to any editing by Mr. Littleton on later versions of the form, on October 20, 2011, he signed a *Plea Order Granting Conditional Probation for DUI Deferral*. The plea was not conditional: the probation was conditional.

On July 8, 2011, under File #350671C, the DMV sent Mr. Littleton an *Order of Disqualification* as a result of his conviction in the Magistrate Court of Jefferson County. (App. at P. 224.) On July 8, 2011, under File # 350671D, the DMV sent Mr. Littleton an *Order of Revocation* a result of his conviction in the Magistrate Court of Jefferson County. (App. at P. 226.) On July 13,

2011, Mr. Littleton filed a *Motion to Withdraw a Conditional Plea of Guilty* with the Magistrate Court of Jefferson County, and on the same date the magistrate entered an *Order* granting said *Motion*— both documents not being formulaic but rather drafted by Mr. Littleton’s counsel, evidence of which is the mischaracterization of the guilty pleas as “conditional.” On July 14, 2011, Mr. Littleton requested an administrative hearing on File No. 350671C (disqualification upon his conviction.) (App. at PP. 278-279.)

On August 17, 2011 (10 months after entering his plea of guilty), the OAH entered an *Order Striking Contested Revocation From Docket and Canceling the Administrative Hearing*. (App. at PP. 140-141.) On September 9, 2011, the OAH issued a letter advising Mr. Littleton that he was only entitled to an identity hearing on File No. 350671C (disqualification on conviction.) (App. at P. 252.) On September 14, 2011, even though he had “withdrawn” his guilty plea, Mr. Littleton filed a *Motion* to continue a hearing in magistrate court set for that date because “Defense and the State are working on a plea to resolve this matter.” (App. at P. 128.) There is no statutory provision for Mr. Littleton to “unwaive” his right to an administrative hearing once he elected to participate in deferral; therefore, the OAH had no authority to conduct an administrative hearing after Mr. Littleton’s election.

Even though Mr. Littleton attempted to evade both the criminal and the administrative penalties for driving drunk, the DMV had a statutory duty, pursuant to W. Va. Code § 17C-5A-1a(a) (2010) to revoke his driver’s license if “a person has a term of conditional probation imposed pursuant to section two-b, article five of this chapter...” Once Mr. Littleton plead guilty to the criminal charge, he sealed his fate in the administrative arena because the DMV must revoke a driver’s license upon conviction. There is nothing in the DMV statutes or the OAH statutes to

permit a rescission of the revocation if the driver wants a “take back” of his guilty plea. Quite simply, the DMV must revoke the driver upon conviction, and this Court has previously upheld the DMV’s statutory duty to revoke upon conviction. Moreover, the “withdrawal” of the guilty plea was unlawful.

In *Reger v. W. Va. Dep’t of Transp., Div. of Motor Vehicles*, No. 11-1704, 2013 WL 2477269 (W. Va. June 7, 2013) (memorandum decision), Mr. Reger, a West Virginia licensed driver, was cited for operation of a motor vehicle while under the influence of alcohol in Ohio on August 6, 2010. At his arraignment and without counsel, Mr. Reger pled guilty to the charge, and the State of Ohio sent a notice of conviction to the DMV in West Virginia after which the DMV revoked Mr. Reger’s driving privileges pursuant to W. Va. Code § 17B-1A-1 (1972). Thereafter, Mr. Reger filed a motion to set aside the Ohio court judgment and to withdraw his guilty plea. The Ohio court vacated the initial conviction after which Mr. Reger pled guilty to physical control of a vehicle while under the influence, a non-moving violation in Ohio.

Mr. Reger then notified the DMV that his conviction for DUI in Ohio had been vacated and that he had been subsequently convicted of a non-moving violation. Notwithstanding this notification, the DMV refused to reinstate Mr. Reger’s driving privileges in West Virginia. Mr. Reger filed a petition for a writ of mandamus in circuit court, and the circuit court refused the petition. Mr. Reger appealed to the denial of the petition to this Court. This Court opined that Mr. Reger “withdrew his plea in Ohio, however, this withdrawal does not negate the fact that he was driving while under the influence at the time of his arrest in Ohio.

[A] person pleading guilty...of driving under the influence of alcohol, controlled substances, or drugs, shall be considered ‘convicted,’ and the Commissioner has a mandatory duty to revoke the person’s license to operate a motor vehicle in the State

of West Virginia as provided by W. Va. Code § 17C-5A-1a(a). Syl. Pt. 2, in part, *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005).

Reger, supra. Accordingly, the DMV was required to revoke upon Mr. Littleton's guilty plea regardless of whether or not that plea was later withdrawn.

Further, Rule 9(e) of the Rules of Criminal Procedure for Magistrate unequivocally states that "A magistrate may neither entertain nor grant a motion to withdraw a plea of guilty or no contest." Even though the Magistrate of Jefferson County was unauthorized to withdraw Mr. Littleton's guilty plea, on July 13, 2011, Mr. Littleton was able to persuade the magistrate to grant his *Motion to Withdraw a Conditional Plea of Guilty*. Mr. Littleton's manipulative intent is manifested in his renaming the *Plea Order Granting Conditional Probation for DUI Deferral* to a *Conditional Plea of Guilty*. The deferral process requires a guilty plea with conditional probation, and in his letter to the prosecutor on October 20, 2010, Mr. Littleton acknowledged the correct process. However, once he realized that he was ineligible for deferral because of his CDL status, Mr. Littleton needed to manufacture a way to undo his guilty plea and to get the administrative hearing that he had waived. By submitting to the magistrate that the newly created deferral process only considered the guilty plea - and not the probation - conditional, Mr. Littleton was able to persuade the magistrate to violate the law. As further evidence of his manipulation of the process, on the very next day, July 14, 2011, Mr. Littleton requested an administrative hearing on File No. 350671C, so that he could take his chances in another forum. (App. at P. 280.)

On October 26, 2011, the OAH fell victim to Mr. Littleton's deception and entered an *Order Rescinding the Office of Administrative Hearings' Final Order and Reinstating Written Objection to Commissioner's Order of Revocation*. (App. at PP. 293-295.) On October 28, 2011, in response

to the *Order* of the Jefferson County Magistrate Court purportedly granting Mr. Littleton's withdrawal of his guilty plea, the OAH issued a letter which explained the procedural issues and alerted the parties that an order reinstating Mr. Littleton's written objection to the *Order of Revocation* [for DUI] would be forthcoming. (App. at PP. 293-295.) The OAH was without jurisdiction to reinstate the administrative matter based upon an illegal order from the magistrate; an illegal order which was subsequently ratified by the circuit court.

This Court has also advised that "subject-matter jurisdiction may not be waived or conferred by consent and must exist as a matter of law for the court to act." *State ex rel. Smith v. Thornsbury*, 214 W. Va. 228, 233, 588 S.E.2d 217, 222 (2003). Accordingly, " '[l]ack of jurisdiction of the subject matter may be raised in any appropriate manner ... and at any time during the pendency of the suit or action.' " *McKinley v. Queen*, 125 W. Va. 619, 625, 25 S.E.2d 763, 766 (1943) (citation omitted); *see also* Syllabus Point 3, *Charleston Apartments Corp. v. Appalachian Elec. Power Co.*, 118 W. Va. 694, 192 S.E. 294 (1937) ("Lack of jurisdiction may be raised for the first time in this court, when it appears on the face of the bill and proceedings, and it may be taken notice of by this court on its own motion.").

Whittaker v. Whittaker, 228 W. Va. 84, 87, 717 S.E.2d 868, 871 (2011). Therefore, even though the DMV did not raise the issue of the OAH's lack of subject matter jurisdiction before the circuit court, this Court has held that this issue may be raised at any time. Clearly, the OAH did not have authority to hold an administrative hearing on the revocation for DUI after Mr. Littleton pled guilty to the same in the magistrate court.

2. The DMV is prohibited from masking Mr. Littleton's conviction.

The Magistrate Court of Jefferson County, West Virginia, was in violation of state and federal law when it set aside Mr. Littleton's guilty plea in Case No. 10-M-2705 on the 13th day of July, 2011. West Virginia Code § 17E-1-13(g) (2011) states:

In accordance with the provisions of 49 U.S.C. § 313.119(a)(19)(2004), and 49 C.F.R. § 384.226 (2004), notwithstanding the provisions of section twenty-five [§ 61-

11-25], article eleven, chapter sixty-one of this code, no record of conviction, revocation, suspension or disqualification related to any type of motor vehicle traffic control offense, other than a parking violation, of a commercial driver's license holder or a person operating a commercial motor vehicle may be masked, expunged, deferred or be subject to any diversion program.

Further, Title 91, Section 5-7.14 of the W. Va. Code of State Rules (2013) states,

Prohibition Against Masking B – In accordance with the provisions of W. Va. Code § 17E-1-13(g), implementing the requirements of 49 C.F.R. §384.226, all citations accumulated by a licensee who holds a commercial driver's license shall be recorded and retained as part of the licensee's driver record. The provisions of W. Va. Code § 17C-6-1(i) and (j) which exempt convictions for [a] speeding violation ten miles per hour or less over the speed limit committed on an interstate or other controlled access highway from being reported to the Division do not apply to a licensee who hold [*sic*] a commercial driver's license.

Title 49, Section 384.226 of the Code of Federal Rules (2011) states,

The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is license or another State.

Mr. Littleton indeed held a commercial driver's license at the time that he asked the magistrate (and later the circuit court) to mask his DUI from his criminal record. Because Mr. Littleton held a commercial license, both State and Federal law prohibit his attempt to mask his DUI from his driver's record.

The *Order* entered by the magistrate in Jefferson County violates the law and is void as is the ratification of that unlawful order by the circuit court of Jefferson County. The State of West Virginia (via the DMV) is prohibited from masking violations on Mr. Littleton's driving record; therefore, when his guilty plea to DUI was entered by the magistrate court on January 5, 2011, the DMV had no authority to ignore the same.

C. The circuit court erred in determining that the stop of Mr. Littleton's vehicle was invalid.

The OAH rescinded the revocation because it found that the DMV failed to demonstrate that sufficient articulable suspicion existed to initiate a lawful traffic stop, and the circuit court upheld that decision. The OAH's reasoning was based, in large part, on the testimony of Ms. Painter, who testified that she and Mr. Littleton had exited the Moose Lodge and proceeded eastbound for only a short distance when she observed the I/O parked beside the roadway facing the opposite direction of their travel. (App. at PP. 494-495.) The OAH also noted that Ms. Painter testified that Mr. Littleton immediately responded to the emergency lights and stopped the vehicle within one block of the cruiser's initial location. (App. at P. 495.) The hearing examiner failed to mention in his final order that Ms. Painter also testified that, "We saw when the lights come on. We were already pulled over. We were pulling over as the lights turned on." *Id.*

When asked about Mr. Littleton's alcohol consumption on the evening of his arrest, Ms. Painter testified, "I see [*sic*] him drink a drink." (App. at P. 502.) Then Ms. Painter testified, "I saw him take, like, one little drink from a beer can." *Id.* Next when she was asked how many drinks, Ms. Painter answered, "Just a couple." *Id.* Finally, when asked if she was sure of her testimony regarding Mr. Littleton's consumption, Ms. Painter responded, "I wasn't really focused on him. I was on the dance floor." *Id.* Later, Ms. Painter clarified, "He barely drank. I saw one can probably for the couple hours we were there." (App. at P. 503.)

Ms. Painter's testimony then focused on what occurred when Mr. Littleton was on the side of the road with the I/O. Ms. Painter testified that she heard the I/O ask Mr. Littleton whether he had been drinking (*Id.*), but incredulously, Ms. Painter could not hear Mr. Littleton's response to the

I/O even though she was seated next to Mr. Littleton in the car, and the I/O was farther away from her. (App. at P. 505.)

Ms. Painter had also left the Moose Lodge on the night of Mr. Littleton's arrest and had reason to testify for Mr. Littleton's benefit, not the least of which is that she was the owner of the car which Mr. Littleton was driving. The I/O, who was not intoxicated and who had no reason to lie, was deemed a liar by the OAH. The OAH should have mentioned Ms. Painter's inconsistent statements about how much Mr. Littleton had drunk earlier in the evening as well as her incredible testimony about hearing the I/O ask Mr. Littleton if he had been drinking but not being able to hear her long time friend's answer when he was seated next to her in the car.

Relying on syllabus point 6, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996), the OAH erred in its order in making a credibility determination that Ms. Painter's testimony at the hearing was more credible than the officer's documentary and testimonial evidence combined,

here there is a direct conflict in the critical evidence upon which an agency proposes to act, the agency may not elect one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court.

The circuit court erred in upholding the OAH's determination.

The OAH and the circuit court further erred in their preference for testimonial evidence over documentary evidence. At the administrative hearing, the hearing examiner opined, "I'm going to admit the document on your motion. Now to me that document doesn't show me probable cause for the stop. The officer's testimony is the best evidence here." (App. at P. 484.) The hearing examiner further opined,

Further, the Respondent failed to elicit testimony or present other evidence to rebut

the assertions of the Petitioner's witness and which directly conflicted with the Investigating Officer's version of the events. Consequently, the record lacks credible evidence to support that the Investigating Officer had an articulable reasonable suspicion to initiate a traffic stop of the motor vehicle driven by the Petitioner on the date of the alleged offense.

(App. at PP. 349-350.) Clearly, the OAH ignored the evidence contained in the DUI Information Sheet, and the circuit court sanctioned the OAH's actions. Here, the OAH clearly demonstrated a preference for testimonial evidence over documentary evidence. However, "[o]ur law recognizes no such distinction in the context of drivers' license revocation proceedings." *Groves v. Cicchirillo*, 225 W. Va. 474, 481, 694 S.E.2d 639, 646 (2010).

The I/O testified that he "looked up and saw that he had registration lights out, and he was weaving in the roadway, and so I initiated a traffic stop." (App. at P. 476.) The I/O's testimony is not inconsistent with the DUIIS, completed on the night of Mr. Littleton's arrest, which clearly shows that the I/O's reason for stopping Mr. Littleton were weaving, tires on line marker, swerving, and defective equipment. (App. at P. 405.) The I/O testified that his normal patrol in that area is to drive down 115, turn around and come back up 115. (App. at PP. 476-477.) He does that "circle because that's a trouble area." (App. at P. 477.) The I/O remembered that "when I first observed his vehicle is when I was behind him going south on 115[;]" however, the I/O could not remember if he had made a U-turn and came back because he "did it for six hours straight." *Id.*

The documentary evidence contains the I/O's reason for stopping Mr. Littleton (App. at P. 405), which is recorded on the DUI Information Sheet, a sworn report of the investigating officer. This is affirmed by the officer in his testimony: "Q. This document that you see in front of you now, which is identical to the one that we submitted to the file, is it a true and accurate copy of your observations? A. Yes, it is." (App. at P. 482.)

Additionally, the West Virginia Rules of Evidence suggest a strong preference for evidence developed closer in time to an event (*i.e.* present sense impression, excited utterance, recorded recollection). Evidence taken closer in time to an event is generally more accurate for the reasons that the event is fresh in the memory of the witness and because there is less time to fabricate a lie. Under the foregoing rationale, the information recorded by the I/O on the night of the arrest is more reliable than Ms. Painter's subsequent, self-serving testimony.

Testimonial evidence cannot be given greater weight than documentary evidence simply because it is testimony. *Groves, supra*. The evidence in this case consists of the DUI Information Sheet which was completed contemporaneously with the arrest and which is also the sworn statement of the I/O, coupled with the testimony of the I/O versus the later-in-time, self-serving testimony of Ms. Painter.

The OAH alleged that the I/O's testimony was inconsistent with Ms. Painter's and wrote an elaborate analysis attacking the officer's credibility while at the same time the OAH ignored the inconsistencies in Ms. Painter's testimony and failed to provide any sort of analysis regarding her testimony. The OAH's actions (and inactions) are clearly arbitrary and capricious, and the circuit court erred in ignoring those inconsistencies.

The OAH's order lacks plausibility as to the facts and as to the rationale for choosing to believe Ms. Painter's hearing testimony over all of the other evidence. It is verbose and overreaching, and reaches a conclusion which is clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The Order states,

During cross-examination, the Investigating Officer testified that he was following behind the motor vehicle driven by the Petitioner when he observed the driving infractions upon which he based his articulable reasonable suspicion to initiate the

traffic stop. However, further cross-examination of the Investigating Officer regarding the traffic stop, elicited testimony that was wholly inconclusive, inconsistent, rambling, and vague.

(App. at P. 389.) To the contrary, the I/O testified that he “looked up and saw that he had registration lights out, and he was weaving in the roadway, and so I initiated a traffic stop.” (App. at P. 476.) He also testified that his normal patrol in that area is to drive down 115, turn around and come back up 115. (App. at PP. 476-477.) He does that “circle because that’s a trouble area.” (App. at P. 59.) The I/O remembered that “when I first observed his vehicle is when I was behind him going south on 115[;]” however, the I/O could not remember if he had made a U-turn and came back because he “did it for six hours straight.” (*Id.*) None of the I/O’s testimony is inconsistent with any of his other testimony nor with the DUI Information Sheet.

The lengths to which the hearing examiner went to credit Ms. Painter (without mentioning all of her inconsistent testimony) and to discredit the officer is clear error which the circuit court ratified. Further, the hearing examiner used dramatic and colorful language and exceeded the boundaries of the evidence in his attempt to justify finding in favor of the driver in this case: the I/O’s testimony was “wholly inconclusive, inconsistent, rambling, and vague.” (App. at P. 347) while “the witness for the Petitioner provided a detailed account of the events which occurred which the Hearing Examiner finds plausible. Conversely the Investigating Officer’s indecisive and inconsistent testimony regarding the events preceding the initiation of the traffic stop is particularly suspect.” (App. at P. 349.)

This unsupported and prejudiced reasoning is this hearing examiner’s answer to the requirements of *Muscatell, supra*, which set forth the requirements of an agency following an evidentiary hearing:

We have said, with respect to decisions of administrative agencies following from findings of fact and conclusions of law proposed by opposing parties, that the agency must rule on the issues raised by the opposing parties with sufficient clarity to assure a reviewing court that all those findings have been considered and dealt with, not overlooked or concealed. *See, St. Mary's Hospital v. State Health Planning and Development Agency*, 178 W. Va. 792, 364 S.E.2d 805 (1987). We have also said that in requiring an order by an agency in a contested case to be accompanied by findings of fact and conclusions of law, “the law contemplates a reasoned, articulate decision which sets forth the underlying evidentiary facts which lead the agency to its conclusion....” Syl. pt. 2, in part, *Citizens Bank v. W. Va. Board of Banking and Financial Institutions*, 160 W. Va. 220, 233 S.E.2d 719 (1977). The purpose of these rules is not to burden an administrative agency with proving or recording the obvious. The purpose is to allow a reviewing court (and the public) to ascertain that the critical issues before the agency have indeed been considered and weighed and not overlooked or concealed. Indeed, a reviewing court cannot accord to agency findings the deference to which they are entitled unless such attention is given to at least the critical facts upon which the agency has acted.

196 W. Va. 598, 474 S.E.2d 528.

Finally, when the OAH chose Ms. Painter’s testimony regarding Mr. Littleton’s operation of the vehicle and whether the registration light was operable over the testimony of the I/O, the OAH made a credibility determination. If the OAH was going to choose testimonial evidence of one witness over the documentary evidence and the testimonial evidence of another witness, at the very least, the OAH should have considered all of that favored witnesses’ testimony. To do any less is arbitrary and capricious and a violation of W. Va. Code § 29A-5-4(g) (1998). Here, the OAH found Ms. Painter’s account of the events credible but ignored the fact that her testimony never rebutted the reason for the stop of Mr. Littleton’s vehicle. It was clear error for the OAH to ignore these facts while favoring the rest of her testimony, and the circuit court erred in supporting the OAH’s error.

D. The circuit court misinterpreted W. Va. Code § 17C-5A-2(f) (2010) while ignoring W. Va. Code § 17C-5A-2(e) (2010).

In its final order, the circuit court correctly stated that “W. Va. Code § 17C-5A-2(f) provides

that specific findings must be made by the [hearing] Examiner when reaching a decision regarding whether the administrative revocation of a person's driving privileges for driving under the influence of alcohol." The circuit court's order, however, ignores what the Legislature deemed as the principle issue at the administrative hearing as found in W. Va. Code § 17C-5A-2(e) (2010) while at the same time creating a non-existent remedy in W. Va. Code § 17C-5A-2(f) (2010). This is clear error.

Pursuant to W. Va. Code § 17C-5A-2(e) (2010), "the principal question at the [administrative] hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol..." The OAH failed to meet its statutory obligation to answer that question here, and the circuit court erred in not recognizing the OAH's failure.

The required findings of the OAH as outlined in W. Va. Code § 17C-5A-2(f) (2010) need not be answered, *in toto*, in the affirmative. West Virginia Code § 17C-5A-2(f) (2010) requires the OAH to make the following findings:

- (1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs, or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or to have been driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight;
- (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test: *Provided*, That this element shall be waived in cases where no arrest occurred due to driver incapacitation;
- (3) whether the person committed an offense involving driving under the influence of alcohol, controlled substances or drugs; and
- (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

The OAH and the circuit court misinterpret W. Va. Code § 17C-5A-2(f) (2010) and attempt

to create a remedy if *any* of those required findings are in the negative. This is nonsensical, inasmuch as it is possible that one or more of the findings may be inapplicable to the case. The Legislature did not include such a remedy, and the OAH and the circuit court's overreaching interpretation is contrary to that which is in the Code.

The first finding that the OAH must make is whether the investigating officer had reasonable grounds to believe that the driver was DUI. The officer's reasonable grounds are based upon his or her investigation, i.e., whether the driver exhibited the indicia of intoxication and failed the field sobriety tests. This finding directly relates to W. Va. Code § 17C-5-4(b) (2010) which gives the officer direction regarding the administration of the preliminary breath test:

A preliminary breath analysis may be administered in accordance with the provisions of section five of this article whenever a law-enforcement officer has *reasonable cause to believe a person* has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

[Emphasis added.]

If the OAH finds that the officer did not gather evidence of the indicia of intoxication or conduct any field sobriety test but instead simply administered the preliminary breath test, then the OAH should make the required finding in the negative and not consider the results of the preliminary breath test. A negative finding on one factor does not negate any of the other evidence of DUI.

The second required finding for the OAH, and the most critical one in this case, is whether the person was lawfully placed under arrest for DUI for the purpose of administering a secondary test. W. Va. Code § 17C-5A-2(f) (2010). This finding also contains a caveat that "this element shall be waived in cases where no arrest occurred due to driver incapacitation." Therefore, it is possible that the OAH would not need to address the issue of the driver's arrest if, for instance, the driver was

in an accident and taken to the hospital and, therefore, could not be placed under arrest by the officer. This is the very fact scenario which occurred in *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008).

This second finding regarding the arrest contains no required finding about the nature of the stop of the vehicle (if there even was a stop by the officer) and relates directly to the lawful arrest language in W. Va. Code § 17C-5-4(c) (2010) regarding the admissibility of the secondary chemical test. Secondary breath test results cannot be considered if the test was administered when the driver was not lawfully arrested, meaning that the officer had not gathered enough evidence to have a reasonable suspicion to believe that the driver had been driving while under the influence of alcohol, drugs or controlled substances. Any definition of lawful arrest contained in W. Va. Code § 17C-5A-2 (2010) that disregards its limited use in W. Va. Code § 17C-5-4(c) (2010) is overreaching.

The phrase “[a] secondary test of blood, breath or urine shall be incidental to a lawful arrest” means that the results of a chemical test are not admissible unless it was done in connection with, or “incidental” to, a lawful arrest. This is the construction we placed on this statutory language in *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976), where we found a blood test to be inadmissible because it was not taken incident to a lawful arrest.

Albrecht v. State, 173 W. Va. 268, 272, 412 S.E.2d 859, 863 (1984). Therefore, a negative finding as to the second factor simply means that the results of the SCT cannot be considered.

The third required finding for the OAH to make pursuant to W. Va. Code § 17C-5A-2(f) (2010) is whether the driver committed an offense involving DUI of alcohol, controlled substances or drugs. The OAH can find in the affirmative if “there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages...” Syl. pt. 2, *Albrecht, supra*. See also, syl. pt. 2, *Carte v. Cline*,

200 W. Va. 162, 488 S.E.2d 437 (1997); syl. pt. 4, *Lowe, supra*. Therefore, it is possible to have a negative finding as to the first and second factors but still have a positive third finding if the requirements of the *Albrecht* test are met.

Here, the evidence shows that Mr. Littleton was weaving in his lane of travel, driving with his tires on the line marker and swerving. (App. at P. 405.) He had an odor of alcoholic beverage on his breath and that his speech was normal but that his eyes were bloodshot. (App. at PP. 406 and 457.) Mr. Littleton admitted to the I/O that he had a couple of drinks at the Moose Lodge prior to leaving. (App. at PP. 406 and 471.) Mr. Littleton failed the HGN because of lack of smooth pursuit in both eyes and a distinct and sustained nystagmus at maximum deviation in both eyes (App. at PP. 406 and 462.) He failed the walk-and-turn test because he could not keep his balance during the instruction stage, stopped while walking, missed walking heel-to-toe, stepped off the line, and raised his arms to balance. (App. at PP. 406 and 464-465.) In addition, Mr. Littleton also failed the one-leg stand test because he swayed while balancing, used his arms to balance, and put his foot down. (App. at PP. 407 and 466.) Finally, Mr. Littleton failed the PBT with a result .102%. (App. at PP. 407 and 468.)

Therefore, even without considering any evidence of a secondary chemical test, the DMV presented more than sufficient evidence to show by a preponderance of the evidence that Mr. Littleton drove a motor vehicle in this state while under the influence of alcohol. The third factor was met, and this alone is sufficient to support the revocation.

The fourth and last finding which the OAH must make pursuant to W. Va. Code § 17C-5A-2(f) (2010) is whether the “tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.” If there is no SCT, this factor is inapplicable. The OAH need

not make positive findings for all four subsections of W. Va. Code § 17C-5A-2(f) (2010) in order to uphold the DMV's order of revocation. This Court's previous holding in *Albrecht* supports that conclusion.

If the circuit court's supposition that all of the required findings of W. Va. Code § 17C-5A-2(f) (2010) need to be made in the positive is to be adopted, then what would be the statutory result? If the OAH found that the officer did not have reasonable grounds to believe that the driver was DUI before administering the preliminary breath test, then only the results of the preliminary breath test should be ignored. If the OAH found that the driver was not lawfully placed under arrest, then only the results of the secondary chemical test should be ignored. There is absolutely no remedy anywhere in Chapters 17C-5 or 17C-5A of the Code which requires that the other evidence of DUI (e.g., odor of alcoholic beverage, slurred speech, glassy eyes, failure of the field sobriety test, etc.) be excluded. For the OAH and the circuit court to determine otherwise is contrary to law and tantamount to legislating from the bench. Here, there was evidence that the driver committed the offense of DUI.

Moreover, W. Va. Code § 17C-5A-2(f) (2010) should be read *in pari materia* with the remainder of Chapter 17C of the Code. This Court has previously held that "[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. pt. 3, *Smith v. State Workmen's Compensation Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). See also, *Clower v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 535, 539, 678 S.E.2d 41, 45 (2009).

A review of Chapter 17C of the W. Va. Code reveals that the entire Chapter pertains to "Traffic Regulations and Laws of the Road." In its review of administrative license revocation

proceedings, this Court regularly analyzes both Article 5, “Serious Traffic Offenses,” and Article 5A, “Administrative Procedures for Suspension and Revocation of Licenses for Driving Under the Influence of Alcohol, Controlled Substances or Drugs.” For instance, W. Va. Code § 17C-5-8 (2004) addresses “Interpretation and Use of Chemical Test,” and this Court has found that “W. Va. Code § 17C-5-8(a) (2004) (Repl.Vol.2009) allows the admission of evidence of a chemical analysis performed on a specimen that was collected within two hours of either the acts alleged or the time of the arrest.” Syl. Pt. 5, *Sims v. Miller*, 227 W. Va. 395, 709 S.E.2d 750 (2011). *See also*, Syl. Pt. 4, *Dale v. Veltri*, 230 W. Va. 598, 741 S.E.2d 823 (2013).

Further, in Syl. Pt. 1 of *Moczek v. Bechtold*, 178 W. Va. 553, 363 S.E.2d 238 (1987), this Court found that W. Va. Code § 17C-5-9 (1983) does not require blood tests of drivers arrested for DUI of alcohol and law enforcement officers are under no duty to inform DUI suspects of their right to blood tests in addition to the designated chemical test for intoxication; however, W. Va. Code § 17C-5-9 (1983) accords a driver arrested for DUI of alcohol a right to demand and receive a blood test within two hours of his arrest. *Sims*, *Veltri* and *Moczek* were all appeals of administrative license revocations (Article 5A) wherein this Court interpreted Article 5 as part of its review.

This review makes clear, therefore, that the various Articles of Chapter 17C of the West Virginia Code “relate to the same persons or things” and “have a common purpose” capable of being “regarded *in pari materia* to assure recognition and implementation of the legislative intent.” Syl. pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975). *See also*, *Clower*, *supra* at 540, 678 S.E.2d 46. As a result, Article 17C-5 must be read *in pari materia* with Article 17C-5A.

In addition, this Court must read W. Va. Code § 17C-5A-2(f) (2010) *in pari materia* with

Chapter 17E of the Code. The DMV also enforces Chapter 17E, the Uniform Commercial Driver's License Act, and is required to consider Chapter 17C in its enforcement of Chapter 17E. Specifically, W. Va. Code § 17E-1-15 (2005) contains the implied consent requirements for commercial motor vehicle drivers and outlines the procedures for disqualification for driving with a blood alcohol concentration of four hundredths of one percent or more, by weight.

While this Court in dicta in *Clower, supra*, and *Dale v. Odum*, No. 12-1403 (2014 WL 641990, W. Va., Feb. 11, 2014) (per curiam) has opined that a lawful arrest is based on the nature of the stop of the vehicle, that proposition is only found in the statutes governing commercial drivers. The Legislature addressed the stop of a vehicle in W. Va. Code § 17E-1-15(b) (2005):

A test or tests may be administered at the direction of a law-enforcement officer, who after lawfully stopping or detaining the commercial motor vehicle driver, has reasonable cause to believe that driver was driving a commercial motor vehicle while having alcohol in his or her system.

If the Legislature had wanted to provide similar protection to non-commercial drivers, it would have included language about a lawful stop in W. Va. Code § 17C-5A-2(f) (2010) when it amended that statute in 2010. It did not.

The Legislature did, however, tie in the implied consent requirements to the commercial driver statutes, referencing W. Va. Code § 17C-5-4 (2010) in W. Va. Code § 17E-1-15(a) (2005):

A person who drives a commercial motor vehicle within this State is deemed to have given consent, subject to provisions of section four [§ 17C-5-4], article five, chapter seventeen-c of this code, to take a test or tests of that person's blood, breath or urine for the purpose of determining that person's alcohol concentration, or the presence of other drugs.

The commercial driver is under heightened scrutiny because he or she may be subject to license disqualification with a blood alcohol content of only .04% – which is below the .05% limit

required to show *prima facie* evidence of intoxication pursuant to W. Va. Code § 17C-5-8(a)(2) (2004) for an operator's license. Therefore, the Legislature has provided commercial drivers with an extra level of protection by including the lawful stop or detention language in W. Va. Code § 17E-1-15(b) (2005). Again, this language could have been included in Article 5A, but it was not.

Clearly, the Legislature is capable of determining when a lawful stop or a lawful arrest is required. The Legislature placed the "stop" language in Chapter 17E: it did not do so in Chapter 17C. If lawful stop and detention [W. Va. Code § 17E-1-15(b) (2005)] meant the same as lawful arrest [W. Va. Code § 17C-5A-2(f) (2010)], then the Legislature would not have needed to put the lawful stop and detention language in W. Va. Code § 17E-1-15(b) (2005).

"The Legislature must be presumed to know the language employed in former acts, and, if in a subsequent statute on the same subject it uses different language in the same connection, the court must presume that a change in the law was intended." Syl. pt. 2, *Hall v. Baylous*, 109 W. Va. 1, 153 S.E. 293 (1930).

Butler v. Rutledge, 174 W. Va. 752, 753, 329 S.E.2d 118, 120 (1985). In *Clower and Odum, supra*, this Court did not analyze the language in W. Va. Code § 17E-1-15(b) (2005), and this Court must read all of Chapter 17 *in pari materia*.

Requiring an affirmative finding of a valid stop as a predicate to lawful arrest, and lawful arrest as determinative of the license revocation, overreaches the intent of the statute.

The principal question at the hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or did refuse to submit to the designated secondary chemical test, or did drive a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight.

W. Va. Code § 17C-5A-2(e)(2010).

The record is replete with an abundance of evidence regarding the only issue that was before the OAH: whether Mr. Littleton drove a motor vehicle in the State of West Virginia while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having a blood alcohol concentration of eight hundredths of one percent (0.08%) or more, by weight. The circuit court erred in ignoring this evidence.

Mr. Littleton may argue that the circuit court was not applying the criminal exclusionary rule in contravention of this Court's holdings in *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d. 137 (2012) and *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) but was, instead, requiring that all findings in W. Va. Code § 17C-5A-2(f) (2010) were made. As argued above, not all four findings must be made in the affirmative, and save for excluding the results of the SCT, there is no statutory remedy if the circuit court deems the arrest unlawful; therefore, the circuit court took it upon itself to create the remedy of excluding the other evidence of DUI. That, by definition, is the application of the criminal exclusionary rule.⁴

Since the criminal exclusionary rule cannot be, and was not, properly applied to the instant matter, then the following evidence of Mr. Littleton's intoxication, which was admitted into evidence but ignored by the OAH and the circuit court below, must be considered: weaving in his lane of

⁴ The DMV further submits that the proper application of the judicially created criminal exclusionary rule requires more than a summary dismissal of any evidence obtained after the stop of the vehicle. If a court is to apply the exclusionary rule, there must be a motion to suppress the evidence; a hearing on the motion; and a separate order from the court explaining why each piece of evidence is being excluded. Even if some of the evidence of intoxication would be suppressed at the motion hearing, the prosecuting party would still have the opportunity to present other evidence of intoxication (e.g., testimony from witnesses such as a bartender or other occupants of the driver's vehicle, a bar tab, video tape from a bar or convenience store, etc.) None of these required procedures were followed here, nor should the administrative process include such criminal trial procedures.

travel, driving with his tires on the line marker and swerving; the odor of alcoholic beverage on his breath and that his bloodshot eyes; his admission to the I/O that he had a couple of drinks at the Moose Lodge prior to leaving; his failure on the HGN, walk-and-turn, and one-leg stand tests; and his failure on the PBT with a result .102%. All of that evidence answers the principal question in W. Va. Code § 17C-5A-2(e) (2010), which is whether the person drove a motor vehicle while under the influence.

“Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.” Syl. pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973). *See also*, syl. pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003). Accordingly, there is no legislatively or judicially created rule to exclude evidence or to dismiss a matter completely based on the stop of the vehicle. Courts cannot read more into the statute than what the Legislature wrote.

Here, the W. Va. Code, when read *in pari materia*, outlines the remedy for a violation of W. Va. Code § 17C-5A-2(f) (2010). If the OAH finds that the officer did not have reasonable grounds to believe that the driver was driving while under the influence of alcohol, then the results of the PBT cannot be considered. If the OAH finds that the arrest was not lawful, then the results of the SCT cannot be considered. If the OAH finds that the officer did not properly administer the SCT, then results of that test cannot be considered. West Virginia Code § 17C-5A-2(f) (2010) requires the OAH to make specific findings, but nowhere in the Code is there a requirement that all of those

findings have to be made in the affirmative. Rather, the factors are considered on the way to answering the principal question: whether the person drove a motor vehicle while under the influence. Neither forum below answered the principal question.

This Court recently held that

Our decision in this matter is controlled by the statute that requires a specific finding by the hearing examiner of “whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol . . . or was lawfully taken into custody for the purpose of administering a secondary chemical test.” W. Va. Code § 17C-5A-2(f) (2010).

Dale v. Arthur, No. 13-0374, 2014 WL 1272550 (W. Va. March 28, 2014)(memorandum decision).

However, in *Arthur*, this Court made its determination based upon a negative finding of one of four factors in W. Va. Code § 17C-5A-2(f) (2010) while completely ignoring the principal question in W. Va. Code § 17C-5A-2(e) (2010), the statutory *issues* in W. Va. Code § 17C-5A-2(g-p) (2010), and the rescission/modification provisions in W. Va. Code § 17C-5A-2(s) (2010).

The relevant issue in Mr. Littleton’s case is found in W. Va. Code § 17C-5A-2(j) (2010), which states in pertinent part:

If the Office of Administrative Hearings finds by a preponderance of the evidence that the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, but less than fifteen hundredths of one percent or more, by weight, or finds that the person knowingly permitted the persons vehicle to be driven by another person who was under the influence of alcohol, controlled substances or drugs, or knowingly permitted the person's vehicle to be driven by another person who had an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight the commissioner **shall revoke** the person's license . . . [Emphasis added.]

West Virginia Code § 17C-5A-2(s) (2010) states in pertinent part, “If the Office of Administrative Hearings finds to the contrary with respect to the above *issues*[,] the commissioner shall

rescind his or her earlier order of revocation or shall reduce the order of revocation to the appropriate period of revocation under this section or section seven, article five of this chapter.” [Emphasis added.] In a *in pari materia* reading, the language in W. Va. Code § 17C-5A-2(s) (2010) requires the OAH to rescind or modify the revocation if any of the issues in W. Va. Code § 17C-5A-2(g-p) (2010) are found in the negative; however, the direction given the OAH in subsection (s) is not tied to the direction given the OAH in subsection (f) as the issues and findings are separate and distinct.

For instance, if the OAH finds that the driver indeed was not under the influence of alcohol or drugs, then the revocation should be rescinded. However, if the OAH finds that the SCT was not administered properly and, therefore, cannot be considered, the result would not be to rescind the revocation for DUI but to modify the revocation to reflect a revocation for simple and not aggravated DUI. Similarly, if the OAH were to find that a driver charged with DUI causing bodily injury was not the cause of the injury, the result would be to modify the revocation to a simple DUI - not to rescind the DUI completely. As argued above, this Court has already spoken on this issue in *Albrecht, supra*, by holding that a SCT is not required to uphold a charge of DUI. In sum, one negative finding in W. Va. Code § 17C-5A-2(f) (2010) by the OAH does not vitiate the OAH’s duty to answer the principal question in W. Va. Code § 17C-5A-2(f) (2010); to address the issues in W. Va. Code § 17C-5A-2(g-p) (2010); and to consider possible modification instead of rescission as outlined in W. Va. Code § 17C-5A-2(s) (2010).

VI. CONCLUSION

For the reasons outlined above, the DMV respectfully requests that this Court reverse the circuit court order.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STEVEN O. DALE, ACTING COMMISSIONER
OF THE WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,**

Petitioner,

v.

NO. 14-0040

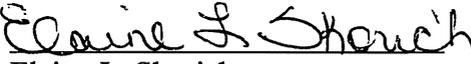
DAVID S. LITTLETON,

Respondent.

VII. CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 17th day of April, 2014, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

J. Michael Cassell, Esquire
Cassell & Prinz, PLLC
P. O. Box 782
120 N. George Street, Suite 200
Charles Town, WV 25414


Elaine L. Skorich

Respectfully submitted,

STEVEN O. DALE, ACTING
COMMISSIONER, WEST VIRGINIA
DIVISION OF MOTOR VEHICLES,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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