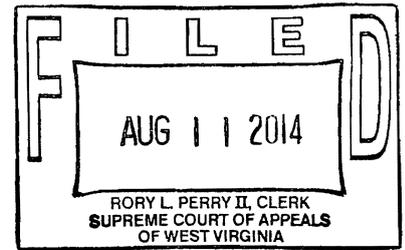


COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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



v.

Appeal No. 14-0040
Kanawha County Circuit Court No. 13-AA-82

DAVID S. LITTLETON,
Respondent.

RESPONSE BRIEF OF DAVID S. LITTLETON
(CORRECTED FORMAT)

Respectfully Submitted
John Michael Cassell, WWSB 670
Counsel for Respondent
Cassell & Prinz, PLLC
120 N. George Street
Suite 200
Charles Town, West Virginia 25414
304 728 2012/telephone
304-728-2881/facsimile

Table of Contents

I.	RESPONSE TO ASSIGNMENTS OF ERROR.....	1
II.	STATEMENT OF THE CASE.....	1
III.	SUMMARY OF ARGUMENT.....	4
IV.	STATEMENT REGARDING ORAL ARGUMENT.....	5
V.	ARGUMENT.....	5
A.	Standard of Review.....	5
B.	Decision of the Hearing Examiner is supported by substantial evidence and the factual findings are conclusive and dispositive in the case at bar.....	6
C.	The Petitioner failed to raise the issue of Waiver or to challenge the Findings of Fact in the Decision of the Hearing Examiner dated May 28, 2013.....	9
D.	The Standard of Review in the DMV Appeal is virtually the same as a Standard of Review for education grievances.....	11
VI.	CONCLUSION.....	12
VII.	CERTIFICATE OF SERVICE.....	13

TABLES OF AUTHORITIES

CASES:

<i>Queen</i> 473 SE 2d 483, 1986, 196 WV 442, Syllabus Pts. 3 & 4.....	5, 6, 8
<i>Martin v. Randolph County Board of Ed</i> 465 SEd 399, 406, 195 WV 297, 304 (1995)	6, 10, 11
<i>Choma v. West Virginia Division of Motor Vehicles</i> 557 SEd 310, 312, 210 WV 256, 258 (2001) Syllabus Pt. 2.....	6
<i>Lilly v. WV DMV</i> 617 SEd 260 (2005)	9
<i>Randolph County Board of Ed v. Scalia</i> 182 WV 289, 292, 387, SEd 524, 527 (1989)	10
<i>The Board of Education of the County of Mercer v. Wirt</i> 192 WV 568, 453 SE2d 402 (1994).....	11

I. Response to Assignments of Error.

A. Petitioner has mischaracterized the issue in this case. The Petitioner claims that the issue is a jurisdictional issue. This is inaccurate. The question before the Court is whether or not the Respondent waived his right to an Administrative Hearing. The failure of the Petitioner to raise this issue before the Circuit Court means that this issue is waived before this Court.

B. The Decision by the Hearing Examiner in the Administrative Hearing correctly identified the issue: The Hearing Examiner found that the evidence presented on behalf of Mr. Littleton was “more credible than that provided by the Respondent (DMV)”. The Decision of the Hearing Examiner is dispositive regarding factual issues.

C. Once the Hearing Examiner found that the witness for the DMV was not credible, the Hearing Examiner properly found that the DMV failed to meet its burden of proof and the DMV Order of Revocation was reversed.

II. Statement of the case.

The facts in this case have been determined and resolved by the Hearing Examiner in the Decision dated May 28, 2013. (Appendix, page 344-354) At no time has the Petitioner challenged the Findings of Fact contained in the Hearing Examiner’s Decision as being unsupported by the evidence. The failure of the Petitioner to challenge the Findings of Fact in the Hearing Examiner’s Decision constitutes a waiver of that issue before this Court.

Mr. Littleton was stopped by a West Virginia State Trooper on August 7, 2010. The Trooper testified at the hearing that he stopped Mr. Littleton because the lights illuminating the license plate of the vehicle were not working. This testimony was directly contradicted by the passenger in Mr. Littleton's car who was also the owner of the car, Patricia Ann Painter.

After hearing all of the evidence, the Hearing Examiner found that the investigating officer failed to recollect important facts. The Hearing Examiner also found on page 2 of the Decision that "to the extent that the testimony of any witnesses not in accordance with these Findings and Conclusions, such testimony is not credited".

At the time Mr. Littleton was charged with DUI, the Deferral Program was a new system. The particular details and procedures under the Deferral Program were not widely known or followed by the Magistrate Courts. The Courts were still "feeling their way along" in an attempt to implement this new program.

Mr. Littleton applied for the Deferral Program and completed the prerequisites. Mr. Littleton completed the required classroom work, paid fees and costs, and paid all fines and costs in Magistrate Court. It was only after Mr. Littleton had completed all of the preliminary requirements that the DMV informed him that he was not eligible for the Deferral Program.

Thereafter, Mr. Littleton withdrew his tendered guilty plea which was offered as part of the Deferral Program. Mr. Littleton has never been convicted of DUI. The

Magistrate Court did not convict Mr. Littleton based on his guilty plea at the time he entered the Deferral Program or anytime thereafter. (App. Pages 278 -9 and 592)

The documents presented by the Petitioner which purport to demonstrate that there was a conviction are inaccurate. The Magistrate Court Disposition Forms demonstrate that the case was later dismissed. The Magistrate Court of Jefferson County never convicted Mr. Littleton of DUI. (App. Pages 278-9 and 592)

This is important because the DMV has again suspended Mr. Littleton's license based on other grounds which they claim to be available as a bases for revocation. (App. Pages 557-8). The current status of the case before this Court is that the Circuit Court of Kanawha County ruled in favor of Mr. Littleton. The DMV never requested a stay of that Decision. There is no basis for the DMV to continue to suspend and revoke Mr. Littleton's privilege to drive. This suspension or revocation which has been in effect since January 2014 is in violation of the Decision of the Circuit Court of Kanawha County.

The Opinion Letter from the Chief Hearing Examiner dated October 29, 2011 (App. Pages 302-303) recognizes that Mr. Littleton successfully withdrew his conditional guilty plea. The Opinion Letter also concludes that Mr. Littleton was entitled to a hearing. The Opinion Letter correctly recites the history of the case to that point. (Please note there was a typographical error in paragraph 3 of the letter where the words "Tyler County" was substituted for "Jefferson County") Respondent was entitled to rely upon the Opinion Letter issued by the Chief Hearing Examiner which recognized that Mr. Littleton had a right to a hearing.

The issue before this Court is whether or not Mr. Littleton waived his right to a hearing. Since this issue was never raised by the Petitioner at either the Administrative Hearing stage or before the Circuit Court of Kanawha County, this issue is waived by Petitioner.

The Petitioner's case is based upon the mistaken assumption that there is a jurisdictional issue which can be raised at any time. This is not accurate. The Petitioner's case is also based on the mistaken assumption that the DMV is free to suspend the license of Mr. Littleton without sufficient legal bases in violation of the Decision of the Circuit Court of Kanawha County dated December 16, 2013. A copy of this Decision is included in the Petitioner's Appendix. (App. Pages 2-8) The Petitioner has failed to recognize the Orders of the Magistrate Court and the Circuit Court of Jefferson County which pertain to the withdrawal of the guilty plea offered by Mr. Littleton.

III. Summary of Argument.

This Appeal is based upon the mistaken assumption that there is a jurisdictional issue before this Court. The issue raised by the Petitioner is actually a question of whether or not Mr. Littleton waived his right to the Administrative Hearing. The Petitioner failed to raise this issue in either the Administrative Hearing or the Circuit Court of Kanawha County. This issue is waived and cannot be raised for the first time before this Court.

Secondly, the Hearing Examiner heard the testimony of the witnesses. The Decision of the Hearing Examiner regarding factual issues is conclusive and must be given deferential treatment by this Court.

The Hearing Examiner found that the testimony of Patricia Painter, a witness for Mr. Littleton, was credible. The Hearing Examiner also found that the investigating officer's testimony contained mistakes of fact and failures of memory. The Hearing Examiner then concluded that Ms. Painter's testimony should be given greater credibility than the testimony of the officer.

IV. Statement regarding oral argument.

This case rises and falls upon the factual determinations made by the Administrative Hearing Officer. These determinations are specific to this case. This case is confined to its own facts and provides little or no value as precedent. The Respondent waives oral argument unless the Court wishes to order the same.

V. Argument.

A. Standard of Review

In the case at bar, the Standard of Review is as follows as set forth in In re: Queen 473 SE 2d 483, 1986, 196 WV 442, Syllabus Pts. 3 and 4 quoted below:

3. 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 rational basis.

4. “Substantial evidence” requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. If an administrative agency’s factual finding is supported by substantial evidence, it is conclusive.”

The Standard of Review is also set forth in Martin v. Randolph County Board of Ed., 465 SE2d 399, 406, 195 WV 297, 304 (1995).

“We must uphold any of the Administrative Agency’s factual findings that are supported by substantial evidence and we owe substantial deference to inferences drawn from those facts.”

In addition, the Martin case states that “the clearly wrong and 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.” Martin v. Randolph County Board of Education (Supra)

This Court in the Martin case directly cites Syllabus Pt. No. 3 In re: Queen (Supra) for the same proposition.

The Standard of Review in the case at bar is the standard set forth in In re: Queen (Supra) and other cases including Martin v. Randolph County Board of Ed. (Supra) and Choma v. West Virginia Division of Motor Vehicles, 557 SE2d 310, 312, 210 WV 256, 258 (2001), Syllabus Pt No. 2. The Standard of Review is as follows:

“A reviewing Court must afford substantial deference to the Decision of the Office of Administrative Hearings unless the reviewing Court believes the findings to be clearly wrong. In addition, an administrative agencies factual finding is conclusive if it is supported by “substantial evidence”. (Emphasis Added)

B. The Decision of the Hearing Examiner (App. Pages 344-354) is supported by substantial evidence and the factual findings are conclusive and dispositive in the case at bar.

The Respondent presented testimony at the hearing which directly contradicted the officer’s description of the facts in this case. Ms. Painter, who was the owner of the vehicle in

question, was a passenger in the car when the officer stopped the vehicle. Ms. Painter testified that the officer told the Respondent that he stopped him because the light over his license plate was out. Ms. Painter further testified that she exited the vehicle, observed the rear of her car and found that the registration light was operating properly. The officer at that time commented to her that “well it’s a little dim”.

The Hearing Examiner evaluated this evidence and concluded that Ms. Painter’s testimony was credible and also found that the officer testimony was not reliable on these facts and others. Ms. Painter testified that the Respondent did not appear to be intoxicated. She testified that he operated the motor vehicle in safe and prudent manner. Ms. Painter disputed the I.O.’s testimony regarding the position of the vehicles prior to the traffic stop. The I.O. testified that he was following the Petitioner as the Petitioner entered the roadway from the Moose Club. Ms. Painter testified that the Officer was parked on the other side of the road facing the opposite direction as her vehicle passed the Officer heading back into Ranson.

Again, the Hearing Examiner evaluated this testimony and determined that Ms. Painter’s testimony was credible and that the officer’s testimony was not reliable on the facts.

The Hearing Examiner heard the I.O.’s testimony and found that the Officer could “recall very specific details regarding his observations during the administrative field sobriety test which he failed to record or which he recorded incorrectly on the DUI Information Sheet, but could not consistently recall the location of his cruiser when he initially observed the motor vehicle driven by the Respondent/Petitioner on the date of the stated offense.” (See page 6, OHA Decision Exhibit 1)(Emphasis Added)

In this passage the Decision the Hearing Examiner states that the Officer testified to specific details regarding the field sobriety test but that the Officer failed to record these details or recorded them incorrectly on the DUI Information Sheet submitted as evidence. This is an important test of the officer’s ability to recall important facts necessary for a determination in

this case. The Hearing Examiner found that the Officer's testimony is inconsistent with the DUI Information Sheet and based on that the Hearing Examiner discounted his testimony as unreliable. It is important to note that the Hearing Examiner never concluded that the Officer was testifying falsely. On page 4 of the Hearing Examiner's Decision he states as follows:

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

Counsel for the Respondent challenged the Officer's version of the facts regarding the traffic stop through the testimony of Ms. Painter, a passenger in the car. On cross-examination, the Officer's Testimony regarding the field sobriety test became suspect upon the revelation that the Officer failed to record some of the results of these tests on his papers and that he testified inconsistent with the other information he did record.

The Hearing Examiner provided a full account of his reasons for judging the credibility of the witnesses in the case at bar while acting as a trier of fact. Professor Cleckley in his "Handbook on Evidence for West Virginia Lawyers" (Fourth Edition) in Section 6-7 (Volume 1, page 6-73) states as follows:

"As suggested above, credibility may determine the outcome of the Trial. Matters effecting credibility of the witness are always open to cross-examination. The credibility of any witness, including the accused, is always a proper subject of inquiry on cross-examination. Conflicts of credibility between witnesses are matters for the jury. It is axiomatic that it is the role of the fact finder, not the appellate court, to resolve conflicts in testimony, weigh the evidence and judge the credibility of witnesses."(Emphasis Added)

There is a long line of cases in West Virginia which stand for the proposition that where an Administrative Agency's Findings of Facts are supported by substantial evidence, it is conclusive. In re: Queen (Supra) the OHA Decision is dispositive regarding all factual issues in the case at bar. In Lilly v. WV DMV, 617 SE2d 860 (2005) this Supreme Court provides a succinct statement of the Standard of Review in a DMV Appeal:

“As set forth above, the DMV is appealing an Order of the Circuit Court of Raleigh County reversing its revocation of the Appellee’s driver’s license. This Court applies the same Standard of Review that the Circuit Court applied to the DMV’s Administrative Decision i.e. giving deference to the DMV’s purely factual determinations and a de novo review of legal determinations.” Lilly v. WV DMV at page 863.

The Lilly case cites the other cases pertinent to the issue of the deference accorded to the Hearing Examiner’s Decision and the substantial Evidence Rule. Lilly v. WV DMV (Supra) page 863 – 864.

C. The Petitioner failed to raise the issue of Waiver or to challenge the Findings of Fact in the Decision of the Hearing Examiner dated May 28, 2013.

The two important issues in this case were unchallenged by the Petitioner in the Appeal filed in the Circuit Court of Kanawha County. The Petitioner failed to raise the issue that Mr. Littleton waived his rights to an Administrative Hearing. The Petitioner also failed to challenge the Findings of Fact contained in the Decision of the Hearing Examiner dated May 28, 2013. The Petitioner cannot now raise issues before this Court which the Petitioner failed to raise in the Court below.

Section V.B.1, of the Brief of the DMV should not be considered by this Court. The issue described in this Section of the Petitioner’s Brief was not raised before the Circuit Court.

The Petitioner’s Brief states as follows on page 13 of their Brief:

“Even though the issue was not raised before the Circuit Court, the OHA lacked jurisdiction to hearing the Administrative matter because Mr. Littleton pled guilty in the companion criminal case.”

Since the Petitioner failed to raise the issue of Waiver before the Circuit Court, this Court cannot now consider this issue on Appeal.

The same is true regarding the Findings of Fact made by the Hearing Examiner. These Findings of Fact are controlling on the issue of whether or not the officer properly stopped Mr. Littleton's vehicle on the night in question. The Hearing Examiner rejected the officer's testimony. The basis for the officer's stop of Mr. Littleton is also completely undermined. The Hearing Examiner resolved the conflicts in the testimony at the hearing. The Hearing Examiner heard the evidence and judged the credibility of the witnesses.

The Petitioner failed to challenge the Findings of Fact made by the Hearing Examiner therefore the Decision is conclusive on factual issues. As above-stated in the Martin case (Supra) and the Choma case (Supra), Syllabus Pt. No. 2:

"A reviewing Court must afford substantial deference to the Decision of the Office of Administrative Hearings unless the reviewing Court believes the Findings to be clearly wrong. In addition an Administrative Agencies fact finding is conclusive if it is supported by substantial evidence."

D. The Standard of Review in DMV Appeals is virtually the same as a Standard of Review for education grievances.

In anticipation of the objection of the DMV to the application of various Board of Education cases to a DMV Appeal, the undersigned cites Randolph County Board of Ed. v. Scalia 182 WV 289, 292, 387 SE 2d 524, 527 (1989). Justice Cleckley provides the following guidance by citing Justice Miller in the Scalia case:

"Justice Miller compared the Standard of Review applicable to a review of ALJ's Decision under Section 18-29-7, WV Code, to that of an Administrative Decision under the Administrative Procedures Act, Section 29A-5-4(g) (1964): both Statutes contain virtually the same criteria for reversal of the Factual Findings made at the Administrative level, i.e., that they are "clearly wrong in view of the reliable, probative and substantial evidence on the record as a whole".

Justice Cleckley again cites Justice Miller's Decision in a later case, Martin v. Randolph County Board of Ed. 1995 WV 297, 465 SE 2d 399 at page 406, (1995). It is clear that the Standard of Review in both the context of an Education Grievance Appeal and in the context of a DMV Appeal is virtually the same. This principal is clearly stated in the Martin case, Syllabus Pt. No. 1, citing the Scalia case.

Justice Cleckley cites The Board of Education of the County of Mercer v. Wirt, 192 WV 568, 453 SE 2d 402 (1994) for the following proposition directly applicable in the case at bar:

"The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the Hearing Examiner." (Emphasis Added)

The fundamental purpose of the OAH Hearing Examiner is to hear and determine the credibility of witnesses. In the case at bar, the Hearing Examiner discussed the evidence and articulated a rationale upon which he relied to come to his conclusions. The Decisions made by the Hearing Examiner on the credibility of the witnesses is dispositive in the case at bar. The Decision of the Hearing Examiner is fully supported by the testimony and should not be disturbed pursuant to the above-cited case law.

VI. Conclusion

The Respondent respectfully requests that this Court deny the Appeal filed by the Division of Motor Vehicles. The Respondent further requests that this Court order the Division of Motor Vehicles to restore Mr. Littleton's privilege to operate a motor vehicle and dissolve the current revocation which has been in effect since January, 2014.

DAVID S. LITTLETON
By Counsel



John Michael Cassell, Esq. WVSB 670
Cassell & Prinz, PLLC
120 N. George Street, Suite 200
Charles Town, West Virginia 25414
3047-728-2012/telephone
304-728-2881/facsimile

VII. CERTIFICATE OF SERVICE

IN THE SUPREME COURT OF APPEALS IN WEST VIRGINIA

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

v.

**Appeal No. 14-0040
Kanawha County Circuit Court No. 13-AA-82**

**DAVID S. LITTLETON,
Respondent.**

CERTIFICATE OF SERVICE

Type of Service:

United States Mail

Date of Service:

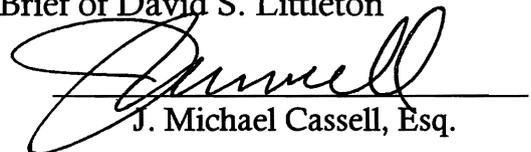
August 8, 2014

Persons served and
address:

Elaine L. Skorich
Assistant Attorney General
DMV – Attorney General’s Office
P. O. Box 17200
Charlestown, WV 25317-0010

Item Served:

Response Brief of David S. Littleton


J. Michael Cassell, Esq.