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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

RONNIE MEADOWS,

Petitioner,

v.

CIVIL ACTION NO. 13-AA-89
Judge King

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

Respondent.

DISMISSAL ORDER

This matter is before the Court on Petitioner's *Petition for Judicial Review*, by which Petitioner seeks reversal of the *Final Order* of the Commissioner, effective July 23, 2013, which revoked his driving privilege for second-offense driving under the influence of alcohol (hereinafter, "DUI").

Having considered the record, the pleadings filed herein, and the applicable law, the Court finds and concludes as follows:

Findings of Fact

1. Petitioner was arrested for driving under the combined influence of alcohol and a controlled substance or drug on August 21, 2008 in Charleston, Kanawha County, West Virginia. Investigating Officer J. D. Matheny of the Charleston Police Department apprised the Respondent of Petitioner's arrest by submitting a DUI Information Sheet, an Implied Consent Statement, and an Intoximeter printout ticket. After reviewing these documents, the Respondent issued an initial order,

dated September 17, 2008, revoking Petitioner's privilege to drive in West Virginia for second-offense driving under the influence.

2. Petitioner timely requested an administrative hearing and requested the officer's attendance. On September 12, 2008, Patrolman Matheny advised the Respondent that he would be on active military duty from October 8, 2008 through March 8, 2009, and April 1-19, 2009. He also indicated that he would be out of the country beginning May 19, 2009 for 12-17 months. On September 22, 2008, the Division of Motor Vehicles' Director of Legal Services notified the Charleston Police Department and Carter Zerbe, counsel for the Petitioner, that the administrative hearing could not be scheduled at that time because Patrolman Matheny was on active military duty.

3. Patrolman Matheny was terminated from his job at the Charleston Police Department on October 15, 2010. The Charleston Police Department notified the Division of Motor Vehicles of this fact in a letter dated January 27, 2011.

4. A hearing was scheduled for May 4, 2011. The investigating officer was subpoenaed to attend. That hearing was continued at the request of the Office of Administrative Hearings. The Petitioner generally objected to the continuance.

5. A hearing was then set for November 14, 2011. That hearing was continued at the request of counsel for the Division of Motor Vehicles, without objection from the Petitioner.

6. The hearing was then rescheduled for February 27, 2012. That hearing was continued due to the illness of the Hearing Examiner.

7. Patrolman Matheny died on April 26, 2012.

8. The hearing was rescheduled for July 9, 2012. On that date, the Petitioner appeared, along with counsel, and the Respondent appeared by counsel.

9. At the hearing, the Examiner offered and accepted as admissible evidence the documents in the Respondent's file, including the DUI Information Sheet, Implied Consent Statement, and the Intoximeter ticket. The Petitioner testified.

10. The Division's evidence in the record shows that on August 21, 2008, at 9:05 p.m., the investigating officer observed Petitioner's car accelerating or decelerating rapidly on Glenwood Avenue in Kanawha County, West Virginia. Following a stop of the car, the investigating officer observed that Petitioner had the odor of alcoholic beverage on his breath, that he was unsteady while exiting the vehicle and walking to the roadside, and while standing. His speech was slurred, and his eyes were bloodshot. Petitioner admitted to the investigating officer that he had drunk two 22-ounce beers, and was on medication. Petitioner failed the horizontal gaze nystagmus, walk-and-turn, and one-leg stand tests. The investigating officer placed Petitioner under arrest and transported him to the Charleston Police Department, where he properly administered a secondary chemical test of the breath. The result of the test shows that Petitioner's blood alcohol content was .071.

11. Petitioner testified that he made a break to cross the road at the corner of Glenwood and Central because he could not see oncoming traffic.. At that point Investigating Officer Matheny turned on his lights. He testified that Investigating Officer Matheny told him he had run a red light, that he protested and said it was a stop sign. After five minutes, Investigating Officer Matheny asked Petitioner to get out of the car. Petitioner testified that he did not have difficulty getting out of the car. He further testified that he walked normally. When asked by his counsel whether his balance and coordination were impacted by the alcohol in his system, Petitioner initially responded, "I think so, yes," then upon requestioning by counsel, changed his answer to "I don't, I don't think that, I don't think the alcohol, I don't think I was affected." Transcript of Administrative Hearing At 15

(hereinafter, "Tr. At 15"). Petitioner denied that alcohol made him unsteady or impaired his balance and coordination and that he was unsteady getting out of the car or standing or walking. Petitioner denied slurring his speech. He attributed his bloodshot eyes to allergies. Petitioner admitted in testimony that he drank beer from 5:00 p.m. to 7:30 p.m.

12. The parties agreed the horizontal gaze nystagmus test should not be given weight. As to the walk-and-turn test, Petitioner testified that "there was no line" (Tr. At 19), therefore, he did not step off the line. Petitioner further denied missing heel-to-toe. As to the one-leg-stand test, Petitioner testified that he sways naturally. Petitioner testified on cross examination that he takes blood pressure medication.

13. A Final Order was issued effective July 23, 2013, upholding the revocation.

Conclusions of Law

1. The Hearing Examiner properly allowed the file documents, including the DUI Information Sheet, the Implied Consent Statement and the Intoximeter ticket, into evidence. The Commissioner properly relied upon the aforementioned evidence in the file, which was admitted subject to rebuttal pursuant to W. Va. Code § 29A-5-2 and 91 C.S.R. 1-3.9.4. *See, Crouch v. West Virginia Div. of Motor Vehicles,* 219 W.Va. 70, 631 S.E.2d 628 (2006); *Lowe v. Cicchirillo,* 223 W.Va. 175, 672 S.E.2d 311 (2008); *Cain v. West Virginia Div. of Motor Vehicles,* 225 W.Va. 467, 694 S.E.2d 309 (2010); and *Groves v. Cicchirillo,* 694 S.E.2d 639 (2010).

2. The Final Order also set forth the testimonial evidence offered by the Petitioner, and gave it consideration and weight. Final Order at 5.

3. The principal issue before the Division was whether the Petitioner operated his motor vehicle while under the influence. W. Va. Code § 17C-5A-2(e). The obvious and most critical

inquiry in a license revocation proceeding is whether the person charged with DUI is actually intoxicated. *Carte v. Cline*, 194 W. Va. 233, 460 S.E.2d 48 (1995). Regarding the issue of intoxication, there is no requirement that a chemical sobriety test be administered in order to prove that a motorist was driving under the influence of alcohol or drugs for the purpose of an administrative revocation of a driver's license. *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984); although, as the Commissioner pointed out in the Final Order, evidence that there was more than .05 and less than .08 blood alcohol content is relevant evidence pursuant to W. Va. Code §17C-5-8(a)(2). Where 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, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol. Syllabus point 2, *Albrecht, supra.*

4. The Commissioner properly found that there was sufficient evidence presented to uphold the revocation. The evidence showed that Petitioner had consumed alcohol; that he took blood pressure medication; that he drove with excessive speed; and that he exhibited indicia of intoxication once stopped. Petitioner testified that he could not perform the field sobriety tests well because of his balance and coordination issues, denied slurring his speech, and testified that he was not unsteady getting out of the car, walking or standing. The Hearing Examiner weighed the documentary evidence and the Petitioner's testimony, reconciled the evidence and concluded that the revocation should be upheld. Testimonial evidence is given no preference over documentary evidence "in the context of driver's license revocation proceedings." *Groves v. Cicchirillo*, 225 W.Va. 474, 481, 694 S.E.2d 639, 646 (2010).

5. A court can only interfere with administrative 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). "[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." *Brown v. Gobble,* 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996). "This Court has recognized that credibility determinations by the finder of fact in an administrative proceeding are 'binding unless patently without basis in the record.'" *Webb v. W. Va. Bd. of Med.,* 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (per curiam) (quoting *Martin v. Randolph County Bd. of Ed.,* 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)). In other words, an appellate court may only conclude a fact is clearly wrong when it strikes the court as "wrong with the 'force of a five-week-old, unrefrigerated dead fish.'" *Brown,* 196 W. Va. at 563, 474 S.E.2d at 493 (quoting *United States v. Markling,* 7 F.3d 1309, 1319 (7th Cir.1993)). The Commissioner's weighing of the Petitioner's self-serving testimony against the documentary evidence which was made contemporaneously with the arrest cannot be found to be clearly wrong.

6. There is no "law requiring the ALJ to use particular words or to write a minimum number of sentences or paragraphs." *Francis v. Astrue,* No. 3:09-cv-01826 (VLB), 2011 WL 344087, at 4 (D. Conn. Feb. 1, 2011). Indeed, an ALJ is not required to make "'explicit credibility findings' as to each bit of conflicting testimony, so long as his factual findings as a whole show that he 'implicitly resolve[d]' such conflicts." *N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.,* 174 F.3d 13, 26 (1st Cir. 1999) (quoting *N.L.R.B. v. Berger Transfer & Storage Co.,* 678 F.2d 679, 687 (7th Cir.1982)). *Accord N.L.R.B. v. Katz's Delicatessen of Houston St., Inc.,* 80 F.3d 755, 765 (2d Cir.1996) (An ALJ may resolve credibility disputes implicitly rather than explicitly where his "treatment of the evidence is supported by the record as a whole.") *See also Martin v. Randolph*

County Bd. of Ed., 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995) (emphasis added) ("The ALJ, who *apparently* disbelieved the plaintiff's recollection of the circumstances leading up to the continuance, did not exceed permissible bounds in accepting testimony of the defendant's witnesses about this exchange.")

> When, as is the case here, a trial court fails to render express findings on credibility but makes a ruling that depends upon an implicit determination that credits one witness's testimony as being truthful, or implicitly discredits another's, such determinations are entitled to the same presumption of correctness that they would have been accorded had they been made explicitly.

Lavernia v. Lynaugh, 845 F.2d 493, 500 (5th Cir. 1988). In short, "[a]n appellate court may not set aside the factfinder's resolution of a swearing match unless one of the witnesses testified to something physically impossible or inconsistent with contemporary documents." *Martin v. Randolph County Bd. of Ed.,* 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995). Here, the Hearing Examiner weighed the evidence and found that there was sufficient evidence to uphold the revocation, even in light of the Petitioner's testimony.

7. Petitioner has failed to show that he suffered actual prejudice by the delay in convening the hearing. Indeed, an evidentiary hearing was held at which all due process requirements were met.

> When we apply *North* [*v. W. Virginia Board of Regents*, W.Va., 160 W. Va. 248, 233 S.E.2d 411 (1977)] standards to the administrative suspension order, we find they are met. The preliminary order of suspension under W.Va.Code, 17C-5A-4, based on the statutory grounds, must be sent to the licensee and constitutes the notice of suspension. Thereafter, the licensee can request a hearing which must be held before the Commissioner or his authorized deputy or agent. The provisions of the Administrative Procedures Act, W.Va.Code, 29A-5-1, et seq., are expressly made applicable to the hearing. Once the hearing procedures are invoked the suspension order is stayed

> pending the final resolution of the issues. Consequently, there is no prehearing deprivation. W.Va.Code, 17C-5A-4.

Jordan v. Roberts, 161 W. Va. 750, 756, 246 S.E.2d 259, 263 (1978).

8. Petitioner must prove actual prejudice, which is defined as the impairment of his ability to prepare or defend his case as a result of the delay in the hearing (Fn. 8, *Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011) in an evidentiary hearing before this Court:

> On appeal to the circuit court from an order revoking a party's license to operate a motor vehicle in this State, when the party asserts that his constitutional right to due process has been violated by a delay in the issuance of the revocation order by the Commissioner of the Division of Motor Vehicles, he must demonstrate that he has suffered actual and substantial prejudice as a result of the delay. Once actual and substantial prejudice from the delay has been proven, the circuit court must then balance the resulting prejudice against the reasons for the delay.

Syl. Pt. 5, *Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011). Presumptive prejudice has no application in these proceedings. In *Moredock, supra*, the Supreme Court expressly ruled that "this Court's subsequent decision in *Facemire* [*State ex rel. Knotts v. Facemire*, 223 W. Va 594, 678 S.E. 2d 847 (2009)] **precludes** the use of presumptive prejudice to establish a due process violation based on delay, expressly overruling *Hey* and its progeny." (Emphasis in original) 229 W. Va. 71, 726 S.E.2d 39.

9. There has been no showing that the delay in the Respondent's holding a hearing in this matter constitutes a valid basis for reversal of the Final Order. The Petitioner's license revocation was stayed during the pendency of the hearing (and, indeed, during the pendency of this appeal), and he has failed to show actual prejudice by the delay.

10. Petitioner has failed to show any prejudice, including the ability to defend himself, in this matter, as the Supreme Court required in *State ex rel. Knotts v. Facemire,* 223 W.Va. 594, 678 S.E.2d 847 (2009):

> As the Fourth Circuit held in *Jones* [*v. Angelone,* 94 F.3d 900 (4th Cir.1996)], a defendant is required to introduce evidence of "actual substantial prejudice" to establish that his case has been prejudiced by preindictment delay.
>
> > This is a heavy burden because it requires not only that a defendant show actual prejudice, as opposed to mere speculative prejudice, ... but also that he show that any actual prejudice was *substantial*-that he was meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected.
> > 94 F.3d at 907 (emphasis in original).

223 W.Va. 603, 678 S.E.2d 856. "[T]he mere passage of time in rendering an administrative determination will not, standing alone, justify its annulment. Instead, a party must demonstrate actual and substantial prejudice as a result of the delay." *Board of Ed. v. Donaldson,* 839 N.Y.S.2d 558, 561 (N.Y.A.D. 3 Dept. 2007) (citations omitted).

11. Even if actual prejudice were found, it must be balanced against the government's justification for the delay. "Once actual and substantial prejudice from the delay has been proven, the circuit court must then balance the resulting prejudice against the reasons for the delay." 229 W. Va. 72, 726 S.E.2d 40.

12. Reversal of the revocation order in this matter on the basis of delay would also ignore the applicable standard for review in administrative license revocation matters. The Supreme Court

has affirmed the applicable standard for review of administrative license revocation cases in *Cain v. West Virginia Div. of Motor Vehicles,* 225 W.Va. 467, 694 S.E.2d 309 (2010):

> As set forth in West Virginia Code § 17C-5A-2(f), [footnote omitted] the underlying factual predicate required to support an administrative license revocation is whether the arresting officer had reasonable grounds to believe that the accused individual had been driving his or her vehicle while under the influence of alcohol, controlled substances, or drugs.

and in *Groves v. Cicchirillo*, 225 W.Va. 474, 694 S.E.2d 639 (2010):

> In instances of administrative license revocation, our decisions have clearly stated that there is no statutory requirement that proof of a motorist driving under the influence of alcohol be established by secondary chemical test results. *See* Syl. Pt. 1, *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984); Syl. Pt. 4, *Coll v. Cline*. What we have consistently held is that
>
> > [w]here 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, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol. Syllabus Point 2, *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984). Syllabus Point 2, *Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997).

Syl. Pt. 4, *Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311 (2008). The reversal of a revocation order on the basis of delay is insupportable on its face, as well as a departure from the question of whether the person was driving a vehicle while under the influence of alcohol. Thus, reversal on the merits is not warranted and, as set forth above, neither is reversal on the basis of delay.

WHEREFORE, the Court does hereby **ORDER** that the *Final Order* of the Commissioner effective July 23, 2013, is **AFFIRMED**. It is further **ORDERED** that the above-styled action is

DISMISSED and **STRICKEN** from the docket of this Court. The Circuit Clerk shall mail true copies of this Order to all counsel of record.

The objections and exceptions of the Petitioner to this ruling are hereby noted and preserved.

ENTERED this 6TH day of Feb. 2014.

CHARLES E. KING, JR., JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 10th DAY OF February 2014
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared by:

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Deputy Circuit Clerk

J. James
D. Pence
S. Dale-DMV

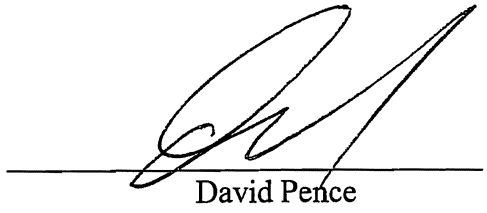
CERTIFICATE OF SERVICE

I, David Pence, counsel for Respondent, do hereby certify that I have served a true and exact copy of the foregoing NOTICE OF APPEAL by depositing a true copy thereof by certified mail in the United States Mail, postage prepaid, in an envelope addressed to:

Janet James, Asst. Attorney General
DMV - Office of the Attorney General
P. O. Box 17200
Charleston, WV 25317

Kanawha County Circuit Clerk
Kanawha County Judicial Annex
111 Court Street
Charleston, WV 25301

on this 13th day of February 2014.



David Pence