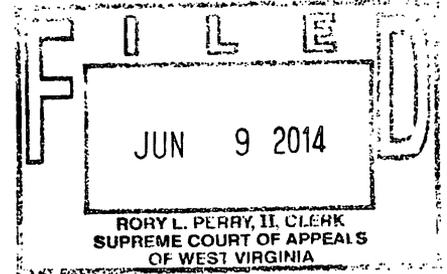


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 14-0138

RONNIE MEADOWS,

Petitioner,



v.

Civil Action No. Below: 13-AA-89

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

Respondent.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PETITION FOR APPEAL AND WRIT OF ERROR

Respectfully submitted:

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I. ASSIGNMENT OF ERROR

- A. The circuit court was clearly wrong in concluding that the extraordinary delay of approximately four years in conducting the administrative hearing did not cause Petitioner actual prejudice.**
- B. The circuit court was clearly wrong in upholding the order of revocation, which lacked any meaningful analysis, and denying Petitioner's request for an evidentiary hearing.**

II. STATEMENT OF THE CASE

Petitioner was stopped and later arrested by Officer J. D. Matheny of the Charleston Police Department (hereinafter "arresting officer") for driving under the influence of alcohol on August 21, 2008. Following the arrest, the arresting officer forwarded the D.U.I. Information Sheet, the Implied Consent Statement and Intoximeter Printout ticket to the Respondent.

(A.R.62-68) The Respondent issued an initial order of revocation, dated September 17, 2008, revoking Petitioner's driver's license. (A.R. 61)

Upon receipt of the initial order of revocation, Petitioner timely and appropriately requested an administrative hearing. In his request, Petitioner specifically checked the box at the bottom of the hearing request form titled "I request the investigating officer's attendance" as required by W. Va. Code §17-5-2(d) (2008) to alert the Commissioner of his statutory duty to secure the attendance of the arresting officer at the hearing. (A.R. 55)

On September 12, 2008, the arresting officer informed the Respondent via letter that he would be on active military duty from October 8, 2008 through March 8, 2009 and April 1-19, 2009. (A.R. 60) He also indicated that he would be out of the country beginning May 19, 2009 for 12-17 months.¹ (A.R. 60) In a follow up letter dated September 18, 2008, the arresting officer

¹ The military orders contained in the Respondent's file list only December 1, 2008 to February 10, 2009 as dates for active duty. (A.R. 54)

informed the Respondent that he would not be available for hearings from October 7, 2008 until April 20, 2009. (A.R. 59)

Thus, in a letter dated September 22, 2008, the Respondent informed Petitioner's counsel generally that the arresting officer was on military leave and that a hearing would be scheduled upon his return. (A.R. 50)

A letter dated January 27, 2011 to the Division of Motor Vehicles from the Charleston Police Department indicates that as of October 15, 2010 the arresting officer was no longer employed by the Charleston Police Department. (A.R. 46)

The first hearing in that matter was not scheduled until May 4, 2011, nearly three years after the arrest, and was continued by the Office of Administrative Hearings (OAH) over Petitioner's objection. (A.R. 39, 41) A second hearing scheduled for November 14, 2011 was continued at the request of counsel for the Division of Motor Vehicles to locate and speak with witnesses and review the file. (A.R. 28, 33) A third hearing was then rescheduled for February 27, 2012 and continued by the Respondent due to the illness of a hearing examiner over Petitioner's objection. (A.R. 23, 27) Petitioner complained of the delay in a letter dated February 27, 2012 and asked that the matter be stricken from the docket. (A.R. 27)

The arresting officer died on April 26, 2012.

A fourth hearing was scheduled for July 9, 2012. (A.R. 21) The Petitioner, the undersigned, the Respondent's attorney and the hearing examiner were present. No witness for the Respondent testified at the hearing. Petitioner was therefore precluded from cross examining the arresting officer regarding the reports he submitted which are the subject of this action. The only witness to testify at the hearing was the Petitioner.

At the hearing, Petitioner explained and refuted the allegations of the arresting officer. Petitioner explained that he entered an intersection where he was unable to see left and unable to see right due to vehicles parked along the road. (Tr. 12) Also, it was impossible for him to reverse due to the traffic to his rear. (Tr. 12) Thus, Petitioner waited for a break in traffic and accelerated across the road in the shortest route to prevent a collision. (Tr. 12) According to Petitioner, it was the only safe route to take. (Tr. 12)

The arresting officer immediately triggered his flashers. (Tr. 13) Petitioner appropriately pulled over at the first safe, available place. (Tr. 13) Petitioner testified that the arresting officer accused him of running a red light. (Tr. 13) However, Petitioner explained that the intersection was governed by a stop sign, not a traffic light, which angered the arresting officer. (Tr. 13)

The arresting officer had Petitioner exit his vehicle walk to the middle of the roadway. (Tr. 14) Petitioner testified that he had no difficulty exiting his vehicle or walking on the roadside, contrary to the arresting officer's report. (Tr. 14) Petitioner testified that his balance and coordination were not impacted by alcohol and that his speech was normal. (Tr. 16)

Petitioner explained that his eyes were likely bloodshot that evening because he suffers from bad allergies and typically has baggy, bloodshot eyes. (Tr. 16) Petitioner requires a Breathright strip on his nose in order to breath at night. (Tr. 16)

According to Petitioner, he informed the arresting officer that he had previously consumed two 22 ounce beers from about 5:00 p.m. until 7:30 p.m. at home. (Tr. 17)

During the walk and turn test, Petitioner explained that the test was administered in the roadway with traffic present and that there was no line for him to walk on. (Tr. 19) Petitioner disputed the arresting officer's report that he missed heel-to-toe and also explained that he took

the required “turn” in a series of small steps just as he was instructed. (Tr. 21)

With regard to the one leg stand test, Petitioner explained that at the time of the hearing he was 57 years old, had suffered a prior brain aneurysm and that due to his physical health, he cannot stand on one leg without swaying. (Tr. 21) At the hearing, Petitioner stood one leg for only five seconds prior to losing his balance, a fact acknowledged by the parties. (Tr. 23)

Petitioner testified that he did not feel like the amount of alcohol in his system impacted his ability to operate a motor vehicle in any way. (Tr. 24) On cross examination, Petitioner was asked what type of medication he was taking which had caused the arresting officer to charge him with DUI “combined” with alcohol and drugs.² Petitioner informed her that he had taken blood pressure medication which does not impact his overall functioning. (Tr. 24-25)

At the station, the arresting officer’s notes indicate that Petitioner provided a breath sample registering .071g/dL. (A.R. 68) Because the arresting officer did not appear at the hearing, Petitioner was precluded from challenging whether the arresting officer administered the field sobriety tests and breath test in compliance with his NHTSA training and the applicable West Virginia Department of Health Rules and Regulations. A decision was issued by the Commissioner effective July 23, 2013. (A.R. 163) It was not learned until after the filing of the circuit court appeal that the hearing examiner who heard evidence did not draft a recommended order to the Commissioner. (Exhibit A) Instead, upon information and belief, the hearing examiner (Kathy Holland) merely acquiesced to the Commissioner’s proposed order on May 1, 2013 several months after she had terminated her employment with the Division of Motor

² The arresting officer’s report indicates only that Petitioner was on “medication.” His report is devoid of any other information regarding the medication, such as its name, purpose, dosage etc.

Vehicles.

This proceeding is an appeal from a final order from Charles E. King, Jr. of the Circuit Court of Kanawha County entered February 6, 2014 affirming an order previously entered by the West Virginia Division of Motor Vehicles revoking Petitioner's drivers license based upon his arrest on August 21, 2008 for driving while under the influence. (A.R. 2) In its decision, the Commissioner did not address Petitioner's challenge to the prejudicial impact of the extraordinary delay and determined that the contents of the arresting officer's report outweighed the live testimony of Petitioner. (A.R. 163) Absent from the Commissioner's order is any meaningful analysis toward credibility, which is especially troubling given that the arresting officer never appeared at the hearing and the Petitioner's B.A.C. registered below the *per se* limit.

On appeal the circuit court concluded that despite the approximate four year delay in conducting a hearing, the Petitioner nonetheless did not suffer actual prejudice in having his request to cross examine the arresting officer negated by the arresting officer's untimely demise before the hearing. (A.R. 8) In reaching its decision, the lower court implicitly found that the procedural safeguard set forth in *Jordan v. Roberts*, 161 W. Va. 750, 755, 246 S.E.2d 259, 262 (1978) that the driver be permitted to confront his accusers was met. The lower court also refused to provide Petitioner an evidentiary hearing regarding his claim that the hearing examiner that took evidence failed to issue a recommendation or draft an order while employed by the Respondent.

After receiving a decision approximately one year after the final hearing, Petitioner filed a Petition for Judicial Review at the Kanawha County Circuit Court on or about July 17, 2014.

(Ar.71) The lower court issued a Final Order dated February 6, 2014 and Petitioner timely filed a *Notice of Appeal* with the West Virginia Supreme Court on or about November 13, 2014.

III. SUMMARY OF ARGUMENT

The lower court was clearly wrong in finding that the approximate four year delay in conducting an administrative hearing did not cause Petitioner actual prejudice. The Respondent's failure to act timely in scheduling and conducting hearings effectively eviscerated Petitioner's statutory and procedural due process right to confront his accusers at the administrative hearing.

As a result of the extraordinary delay, Petitioner suffered actual prejudice by being denied his timely request to cross examine the arresting officer. Petitioner's inability to cross examine the officer was especially prejudicial in this case because the contents of the D.U.I. Information Sheet, which included scores from the field sobriety tests, was the sole evidence relied upon by the hearing examiner to revoke Petitioner's drivers license. Petitioner was denied the opportunity to question the officer about alternative explanations for his roadside observations and the reliability of field sobriety tests administered to Petitioner, who at the time was a 57 years old man who had previously suffered a brain aneurysm.

During this entire process, Petitioner has followed the law, maintained his innocence and appeared at all scheduled hearings. He has never requested a continuance. The sole basis for the delay lies with the Respondent and the arresting officer.

The circuit court upheld the Commissioner's decision despite its exclusive reliance upon the deceased officer's unsubstantiated report over the live, credible testimony of Petitioner. The emptiness of the Commissioner's analysis is readily apparent in his finding that Petitioner was impaired by a combination of alcohol and a controlled substance. (A.R. 88) In his report, the

arresting officer alleged generally that Petitioner had taken “medication” and charged him with combination. (Ar. 63) However, at the hearing, the uncontroverted evidence showed that Petitioner had only taken blood pressure medication, which does not cause impairment. (Tr. 24-25) Nevertheless, without explanation, the Commissioner found that Petitioner drove while impaired by a combination of alcohol and controlled substance.

Lastly, the lower court erroneously denied Petitioner’s request for an evidentiary hearing on the merits of his challenge that the hearing examiner that heard the evidence did not issue a recommendation in the matter while employed with the Respondent. (A.R. 141) Instead, upon information and belief, the hearing examiner merely acquiesced to the Commissioner’s proposed order several months later after she had terminated her employment with the Division of Motor Vehicles.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20 of the Revised Rules of Appellate Procedure (2010), the Petitioner requests oral argument in this case as the matter is both factually and legally complex and because the parties would benefit answering questions from the Court.

V. STANDARD OF REVIEW

Pursuant to West Virginia Code §29A-5-4(g) (2007) of the State Administrative Procedures Act the Appellate 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, decision 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.

VI. ARGUMENT

A. The circuit court was clearly wrong in concluding that the extraordinary delay of approximately four years in conducting the administrative hearing did not cause Petitioner actual prejudice.

As a result the extraordinary delay of approximately four years in conducting a hearing, the Petitioner was stripped of his statutory and procedural due process right to confront his accusers and challenge the arresting officer regarding the contents of the D.U.I. Information Sheet, which was exclusively relied upon by the Commissioner to revoke Petitioner's driver's license. In fact, the Respondent's case literally consisted of handing the hearing examiner the deceased officer's report and resting its case. (Tr. 3) Deprived of his ability to challenge the author of the D.U.I. Information Sheet, Petitioner was forced into a swearing match against a faceless, voiceless, unsubstantiated document beyond reproach. Discounting the fatal blow to Petitioner's defense, the lower court determined that the Petitioner did not suffer actual prejudice and that sufficient evidence was presented to uphold the revocation.

A drivers license is a property interest entitled to the protections under the Due Process clause of the West Virginia Constitution. *Abshire v. Cline*, 193 W. Va. 180, 455 S.E.2d 549 (1995). Due process of law extends to actions of administrative offices and tribunals *Smith v. Siders*, 155 W. Va. 193 183 S. E. 21d 433 (1971); *McJunkin Corp. v. West Virginia Human Rights Commission*, 179 W. Va. 417, 369 S. E. 2d 720 (1988) and is synonymous with fundamental fairness. *State ex*

rel. Peck v. Goshorn, 162 W. Va. 420, 249 S. E. 2d 765 (1978). With respect to the quasi-judicial functions of administrative agencies, due process requires them to timely adjudicate matters properly submitted to them. See *Allen v. State Human Rights Comm.*, 324 S. E. 2d 99, 116 (1984). More pointedly, in Syllabus Point 3 of *Dolin v. Roberts*, 173 W. Va. 443, 317 S. E. 2d 802 (1984), the West Virginia Supreme Court of Appeals noted that, “[u]nreasonable delay can result in denial of procedural due process in license suspension cases.”

Because of the valuable property interest at stake, this Court adopted the following procedural due process safeguards in a license revocation proceeding:

“ . . . a formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, **to confront his accusers**, and to present evidence on his own behalf; an unbiased hearing tribunal; and an adequate record of the proceedings.”

Jordan v. Roberts, 161 W. Va. 750, 755, 246 S.E.2d 259, 262 (1978) quoting *North v. Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977) (emphasis supplied) In this case, Petitioner unequivocally was stripped of his procedural due process right to confront his accusers.

Also, according to W. Va. Code §17C-5A-2(d) (2008) (Emphasis supplied):

“Any investigating officer who submits a statement pursuant to section one of this article that results in a hearing pursuant to this section shall not attend the hearing on the subject of that affidavit unless requested to do so by the party whose license is at issue in that hearing or by the commissioner. The hearing request form shall clearly and concisely inform a person seeking a hearing of the fact that the investigating officer will only attend the hearing if requested to do so and provide for a box to be checked requesting the investigating officer's attendance. The language shall appear prominently on the hearing request form. The Division of Motor Vehicles is solely responsible for causing the attendance of the investigating officers.”

Petitioner timely and appropriately checked the box on the hearing request form titled “I

request the investigating officer's attendance." (A.R. 55) Thus, the responsibility for ensuring the attendance of the arresting officer and conducting a hearing rested exclusively with the Respondent. Petitioner never requested a continuance, appeared at all hearings with counsel and complied with the law at every step.

Nevertheless, as a result of the extraordinary delay, Petitioner was never afforded his right to challenge the arresting officer on the contents of his reports. Therefore, Petitioner's procedural due process right and statutory right to challenge the arresting officer was vitiated in this case as a result of the Commissioner's delay.

Had the State acted diligently in prosecuting this claim in a timely fashion, the Petitioner would not have been stripped of his constitutional and statutory right to cross examine his accusers and would have been able to successfully rebut the contents of the D.U.I. Information Sheet through cross examination. The right to cross examination is "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930 1935 (1970).

More recently, the Court in *Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011) precluded the use presumptive prejudice to establish a due process violation based upon a delay of seventeen months in issuing a final order of revocation by an administrative agency following a hearing on the merits. Instead, the Court found that the complaining party must demonstrate that he suffered actual and substantive prejudice as a result of the delay. *Id.* "Once actual and substantial prejudice from the delay has been proven, the circuit court must the balance the resulting prejudice against the reasons for the delay." *Id.*

Through inaction and delay, the Respondent effectively disarmed Petitioner, forced him to

trial against an unsubstantiated report, and thereafter passed judgment upon him. Petitioner was denied a meaningful opportunity to challenge the officer regarding how he administered the field sobriety tests, the conditions in which those were administered, the circumstances and alternative explanations for his unstructured observations, the legality of the stop etc. This becomes even more troublesome given that Petitioner provided a breath sample below the legal limit. (A.R. 68)

Instead of addressing Petitioner's actual allegations of prejudice, the circuit court instead perpetuates the fiction that Petitioner did not suffer prejudice because he was able to drive during the approximate five year period awaiting a hearing and decision. (A.R. 9) Whether Petitioner was able to drive during those five years is irrelevant to whether Petitioner's ability to defend himself was impaired.

There is no question that the Petitioner suffered actual prejudice, as the arresting officer in an administrative hearing is an "essential witness" and the Commissioner was obligated to secure his attendance. *Miller v. Hare*, 227 W. Va. 337, 342, 708 S.E.2d 531 (2011). While the Court in *Hare* permitted hearings to be continued on the DMV's finding of good cause, it did not address the remedy for situations where the arresting officer can no longer be subpoenaed due to unavailability.

Had the lower court properly acknowledged the significant prejudice suffered by Petitioner and balanced it against the reasons for the delay as required by *Moredock*, Petitioner would prevail. Giving the benefit of the doubt to Respondent, the arresting officer was out of the country for military leave at most approximately twenty two months of the approximate forty three month delay.³

³ The only order from the military contained in the Respondent's file shows the arresting officer being on active duty from December 1, 2008 to February 10, 2009. However, Respondent presumably relied upon the personal letter previously provided by the arresting officer that he would be on active duty from the dates described above. Those times include

So, how does the Respondent justify the additional twenty one month delay when the officer was not on military leave?

Again, giving the benefit of doubt to Respondent, the arresting officer was expected to return from military duty on or about October 19, 2010. Why was a hearing not scheduled before May 4, 2011, over six months later? A second hearing was not scheduled for another six months later on November 14, 2011. That hearing was not rescheduled until approximately three months later on February 27, 2012. The arresting officer did not become deceased until April 26, 2012. There exists no justifiable explanation for the Commissioner's dilatory delay in adjudicating the matter in a timely manner.

In *Holland v. Miller*, 230 W. Va. 35, 736 S.E.2d 35 (2012) the Court ruled that a circuit court must conduct a careful analysis of whether the facts support good cause for continuances in administrative license revocation proceedings and that the determination of whether the delay was reasonable or excessive must include as a factor any prejudice to the driver. The Court noted:

“To permit the DMV to grant itself an extension of the 180-day deadline for revocation hearings that is mandated by West Virginia Code 17C-5A-2(b) (2004) without providing for any limits on the length of such extensions encourages the establishment of a lopsided system - a system that proves inherently unjust for the defendant.”

Id. at 39, quoting *In re Petition of Donley*, 217 W. Va. 449, 453, 618 S.E.2d 458, 462 (2005).

By not carefully analyzing the facts surrounding the reasons for the continuances, the lower court

October 8, 2008 to March 8, 2009 (5 months), April 1-19 (19 days) and May 19, 2009 for 12-17 months (17 months) Compare this to the arresting officer's follow up letter dated September 18, 2008, which indicates a return date of October 7, 2008 until April 20, 2009. (A.R. 59)

failed to follow the law and acknowledge the unjust, lopsided system utilized by Respondent to deprive Petitioner of his driver's licence.

In a homologous situation, the West Virginia Supreme Court precluded the Commissioner from conducting a second hearing several years after the arrest when the driver suffered actual prejudice as a result of the extraordinary delay. In *Petry*, the Commissioner of DMV attempted to schedule a second administrative hearing approximately six years following the original administrative hearing. *Petry v. Stump*, 219 W. Va. 197, 198, 632 S.E.2d 353, 354 (2006). The reason for the second hearing was because the file was lost and unaccounted for and a decision had never been made from the first hearing. *Id.* In response, the driver filed a writ of prohibition in an effort to prevent the Commissioner of DMV from conducting a second hearing.

In finding that he suffered actual prejudice, the Court emphasized that the driver could not recreate the evidence as it existed at the time of the original hearing. *Id.* at 201, 357. Pictures of an area that had since been vastly renovated were lost with the original record. *Id.* Also, the driver had commissioned an expert to testify at the original hearing, and because the designated breath testing device had since changed, the Court highlighted the expense and difficulty in finding an expert available to testify regarding the subject matter at a second hearing. *Id.*

The Court found that *Petry* had suffered actual prejudice and dismissed the revocation as being violative of *Petry's* due process rights. *Id.*

As in *Petry*, the sole fault of the delay herein was attributed to the Commissioner. The prejudice in this case is perhaps worse than *Petry* in that the driver in *Petry* was at least afforded his basic right to cross examine the officer, impeach the State's witnesses and rebut the officer's

allegations at the hearing. In this case, Petitioner was forced to defend himself against a document void of eyes, ears, reason or response.

Likewise, in a similar case involving pre-hearing delay caused by an administrative agency, this Court in *State ex rel. Fillinger R. N. v. Rhodes*, 230 W. Va. 560, 741 S. E.2d 118 (2013) concluded that an agency's failure to take decisive action within a reasonable time will be assumed to be a refusal of the action sought. In *Fillinger*, the Board of Examiners for registered nurses charged Fillinger, a registered nurse, with twice stealing drugs meant for patients for her own use or for selling to others.

Under a regulatory scheme similar to the one herein involving 180 day time limit and other time limits, Fillinger requested a hearing. The incidents occurred in March of 2008 and September 2009 but the regulations allowed for a lengthy investigation period. A hearing was finally scheduled for July 26, 2011 and continued and rescheduled 3 times, i.e., September 8, 2011, October 25, 2011, November 1, 2011, (4 months), for no or inadequate reasons, i.e., board had received additional evidence requiring modification of charges, unavailability of Board's counsel, medical emergency. Before the November 1, 2011 hearing, Fillinger sought a writ of prohibition in the West Virginia Supreme Court of Appeals. The issue as framed by the court was whether an extraordinary writ was proper and whether the board exceeded its jurisdiction by unreasonably delaying the hearing. *Id.*

The court pointed out certain aspects of case that mirror the situation herein, as follows: Practice of register nursing is a privilege, not a right; the regulations and administrative systems were designed to protect the public; the charged party was entitled to a hearing by a hearing examiner appointed by the Board; continuances could be granted upon a showing of good cause and must be

in writing. *Id.*

The Board sought dismissal claiming the Plaintiff failed to exhaust administrative remedies. The court rejected that argument noting that the failure of a state board or agency to take decisive action within a reasonable time in a matter before it, will be assumed to be a refusal of the action sought. Because reasons for the continuances were not given or inadequately explained, and the court held that the Board acted in excess of its jurisdiction and dismissed the complaints with prejudice.

So too should this court reverse the Commissioner's decision due to the extraordinary delay in adjudicating this matter. "Justice shall be administered without . . . delay." W. Va. Constitution, Art. III, Sec. 17. "Long delay in processing claims . . . is not consistent with the declared policy of the Legislature." Syllabus Point 1, *Workman v. State Workmen's Compensation Comm'r*, 160 W. Va. 656, 236 S.E.2d 236 (1977). *See also* West Virginia Trial Court Rule 16.01 (listing constitutional provisions and court rules intended to curtail delay and requiring circuit court compliance, unless "the circuit court finds, on the record, that extraordinary circumstances exist for exemption from these standards.")

B. The circuit court was clearly wrong in upholding the order of revocation, which lacked any meaningful analysis, and denying Petitioner's request for an evidentiary hearing.

In a boilerplate decision, the Commissioner rubber stamped the allegations contained the arresting officer's D.U.I. Information Sheet absent any meaningful analysis, discounted Petitioner's testimony wholesale without explanation and turned a blind eye to the fact that Petitioner was precluded from challenging the arresting officer. With regard to analysis, the hearing examiner concluded that:

“The Respondent’s testimony was given consideration and weight. It must be noted that there is sufficient evidence to prove that the consumption of alcohol, medication, structured and non-structured tests resulted in the secondary chemical being relevant evidence that the Respondent was under the combined influence of alcohol and a controlled substance or drug. Pursuant to West Virginia Code 17C-5-8(2), ‘Evidence that there was, at that time, more than five hundredths of one percent and less than eight hundredths of one percent, by weight, of alcohol in the person’s blood is relevant evidence . . .’ Therefore, the Order of Revocation issued to the Respondent on September 17, 2008 must be upheld.”

(A.R. 167)

What “sufficient evidence” is the Commissioner referring? The fact that a 57 year old brain aneurism survivor displayed evidence of instability while standing on one leg or walking heel to toe on an imaginary line? The fact that Petitioner’s blood alcohol level was .07 g/dL, an amount below the presumptive level of impairment? The fact that he consumed non-impairing blood pressure medication? Or evidence that Petitioner had bloodshot eyes, which he explained was due to his bad allergies which typically cause baggy, bloodshot eyes. (Tr. 16) In fact, Petitioner requires a Breathright strip on his nose in order to breath at night. (Tr. 16)

The Commissioner never explained why he rejected Petitioner’s testimony in favor of the arresting officer’s deficient report, which included: his failure to interview Petitioner and learn what “medication” he was allegedly under the influence of (A.R. 63), his administration of the HGN test in light of the presence of resting nystagmus, which even the Respondent’s counsel agreed would invalidate the test, (Ar. 63, Tr. 18) his failure to video record his interaction with Petitioner (A.R. 62), the lack of detail regarding the method and circumstances in which the field sobriety tests were administered and scored (A.R. 63, 64) and his failure to consider the impact of Petitioner’s health, apparently unknown to the officer at the time of the stop, upon the his allegations of diminished

balance and coordination. (Tr. 21-23)

Petitioner's inability to cross examine the arresting officer was especially fatal regarding his administration of the walk and turn and one leg stand test. Although the results of the horizontal gaze nystagmus test were suppressed as a result of the medical assessment, the results of the walk and turn and one leg stand test were admitted and relied upon by the Commissioner. In *White v. Miller*, 228 W. Va. 797, 806, 724 S.E.2d 768, 777 (2012) this Court noted that

“We hold that upon a challenge by the driver of a motor vehicle to the admission in evidence of the results of the horizontal gaze nystagmus test, the police officer who administered the test, if asked, should be prepared to give testimony concerning whether he or she was properly trained in conducting the test, and assessing the results, in accordance with the protocol sanctioned by the National Highway Safety Administration and whether, and in what manner, he or she complied with that training in administering the test to the driver.”

Petitioner specifically noted in his original hearing request form that he intended to cross examine the arresting officer with regard to his administration of the field sobriety tests. (A.R. 57)

Like the horizontal gaze nystagmus test, The National Highway Traffic Safety Administration (NHTSA) lists specific instructions for the walk and turn and one leg stand test. These instructions outline the conditions for administration, the required specific instructions and the instructions for scoring. Because Petitioner was denied the opportunity to cross examine the officer, he was precluded from exploring how the officer was trained to administer the test, whether the test was administered pursuant to the arresting officer's training and whether alternative factors could have caused Petitioner to perform unsatisfactorily.

The same is true for the results of the secondary chemical test result which was admitted into evidence without establishing compliance with relevant foundation for admission, such as:

“was in proper working order, that the test was administered in accordance with the methods and standards approved by the State Department of Health and was administered at the direction of the arresting officer, that the person giving and interpreting the test was properly qualified and that there was compliance with any statutory requirements.”

State v. Hood, 155 W. Va. 337, 184 S.E.2d 334 (1971).

Moreover, pursuant to W. Va. Code §17C-5-4(h) (2008) dealing with breath testing following a DUI arrest, “only the person actually administering or conducting a test conducted pursuant to this article is competent to testify as to the results and the veracity of the test.” In this case, the Commissioner turned a blind eye to the deficient foundation for all evidence contained in the D.U.I. Information Sheet.

Instead of analyzing the evidence in the context of this unique set of circumstances, the circuit court instead relied upon this Court’s holding in *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006) and *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010) to reach the inequitable conclusion that the Commissioner was correct to admit the documents and rely upon them over the live testimony of Petitioner.⁴ However, in both *Groves* and *Crouch*, the arresting officer appeared and presented live testimony, thus subjecting himself to cross examination.

⁴ This case demonstrates the inequitable result which can occur when a party’s adversarial, testimonial reports are admitted into evidence in lieu of live testimony and given the same weight as live testimony, as this Court allowed in *Crouch* and recently reaffirmed in *Dale v. Odum*, No. 1403 (February 14, 2014) and *Dale v. Doyle*, No. 12-1509 (February 11, 2014) Presumably, if this Court were to sanction the conduct in this case, the Respondent could strategically not subpoena the arresting officer in cases going forward before the OAH and rely exclusively upon the officer’s reports, which appear to be unassailable. The driver would then be in the awkward position of being forced to subpoena an adverse witness, issue subpoena enforcement action against him for failure to appear in circuit court if necessary, and be denied the opportunity to cross examine him if for whatever reason he become deceased or unavailable.

Even if this Court concludes that the reasons for the delay outweighs the substantial prejudice suffered by Petitioner, this Court should still reverse the circuit court order and rescind the order of revocation based upon the violation of Petitioner's procedural due process rights and statutory right to have the arresting officer present. This Court has never addressed a situation where an arresting officer becomes deceased following a driver's request to both contest the allegations in the D.U.I. Information Sheet and cross examine the arresting officer under W. Va. Code §17C-5A-2 (2008). For the reasons alleged above, the equitable result would be to rescind the order of revocation based upon a violation of the drivers right under *Jordan v. Roberts*, 161 W. Va. 750, 755, 246 S.E.2d 259, 262 to confront his accusers. After all, it is the Petitioner who stands to lose a valuable property right. Petitioner should not have to defend himself against a deaf/mute document devoid of any credibility challenge. If any party should suffer consequences as a result of the arresting officer not being available, it should not be the Petitioner.

The matter becomes even more troubling considering that the lower court refused Petitioner's request for an evidentiary hearing to present evidence that the hearing examiner never issued a decision or recommendation while employed by the Respondent. (Exhibit A) Instead, it was learned through subpoena that the hearing examiner, upon information and belief, was no longer employed by the Respondent, presumably lacked access to Petitioner's file and notes and merely acquiesced to a decision drafted by the Commissioner. (A.R. 141)

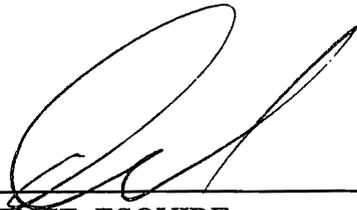
VII. CONCLUSION

WHEREFORE, for the foregoing reasons, the Petitioner prays that this Honorable Court reverse the decision of the Circuit Court of Kanawha County and the Final Order issued by the West

Virginia Division of Motor Vehicles which revoked Petitioner's driver's license. Petitioner also prays that this court order the Commissioner to immediately restore to Petitioner a valid, permanent driver's license or for whatever alternative relief this court deems appropriate.

RONNIE MEADOWS

By Counsel



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**IN THE SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA**

RONNIE MEADOWS,

Petitioner,

v.

No. 14-0138

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

Respondent.

CERTIFICATE OF SERVICE

I, David Pence, counsel for Petitioner, do hereby certify that I have served a true and exact copy of the foregoing **PETITION FOR APPEAL AND WRIT OF ERROR** by depositing a true copy thereof 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

on this 9th day of June 2014.



David Pence

Pierson, Jennifer L

From: Pierson, Jennifer L
Sent: Thursday, April 18, 2013 11:58 AM
To: 'pastorKDholland@hotmail.com'
Subject: FW: 288053B - final order for approval and review
Attachments: 288053B Meadows - corrected.docx

Importance: High

From: Pierson, Jennifer L
Sent: Wednesday, April 17, 2013 4:02 PM
To: Holland, Kathie D
Subject: 288053B - final order for approval and review
Importance: High

I have attached a copy of the draft final order for your review. If you agree, please send an email confirming your approval as soon as possible.

Thank you,

Jennifer Pierson
WDMV
Legal Services

"Notice of Confidentiality" The information contained in this email message is intended for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of the communication is strictly prohibited. If you have received this message in error, please notify the sender immediately and destroy all copies of the original message.

Pierson, Jennifer L

From: Pastor Kathie Holland [pastorkdholland@hotmail.com]
Sent: Wednesday, May 01, 2013 4:31 PM
To: Pierson, Jennifer L
Subject: RE: REMINDER --- FW: 288053B - final order for approval and review

Reviewed and approved.

Until HE comes, I am,

Pastor Kathie D. Holland
New Vision Baptist Church
73 East Main Street
White Sulphur Springs, W 24986
(304) 536-3483 (church)
(304) 768-1323 (home)
(304) 552-9750 (cell)

"The purpose in life is to have a life of purpose"

Subject: REMINDER --- FW: 288053B - final order for approval and review

Date: Wed, 24 Apr 2013 09:15:33 -0400

From: Jennifer.L.Pierson@wv.gov

To: pastorKDholland@hotmail.com

From: Pierson, Jennifer L
Sent: Thursday, April 18, 2013 11:58 AM
To: 'pastorKDholland@hotmail.com'
Subject: FW: 288053B - final order for approval and review
Importance: High

From: Pierson, Jennifer L
Sent: Wednesday, April 17, 2013 4:02 PM
To: Holland, Kathie D
Subject: 288053B - final order for approval and review
Importance: High

I have attached a copy of the draft final order for your review. If you agree, please send an email confirming your approval as soon as possible.

Thank you,

Jennifer Pierson
WVDMV

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BEFORE THE COMMISSIONER OF WEST VIRGINIA DIVISION OF MOTOR VEHICLES

AT CHARLESTON, KANAWHA COUNTY, WEST VIRGINIA

IN THE MATTER OF: RONNIE W. MEADOWS

FILE NUMBER: 288053B

FINAL ORDER

DATE PRIVILEGE TO DRIVE A MOTOR VEHICLE SUSPENDED OR REVOKED
PURSUANT TO WEST VIRGINIA CODE § 17C-5A-2:

DATE OF ORIGINAL SUSPENSION OR REVOCATION: OCTOBER 22, 2008

DATE HEARING REQUEST RECEIVED BY COMMISSIONER: SEPTEMBER 10, 2008

DATE OF FINAL HEARING: JULY 9, 2012

PRIOR OFFENSE DATE(S): JUNE 29, 2000

APPEARANCES

Kathie D. Holland, Hearing Examiner

Ronnie W. Meadows, Respondent

Rebecca D. McDonald, Attorney for Respondent

David Pence, Attorney General

After mature consideration of the evidence submitted in this case, this Hearing Examiner hereby proposes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On August 21, 2008 at approximately 2105 hours, Officer J. D. Matheny of the Charleston Police Department, the Investigating Officer in this matter, observed a vehicle accelerate rapidly in the vicinity of 6th Street and Glenwood Avenue in Charleston, Kanawha County, West Virginia.
2. The Investigating Officer initiated a traffic stop of the vehicle and identified the driver as Ronnie W. Meadows, the Respondent in this matter.
3. The odor of an alcoholic beverage emanated from the Respondent's breath.
4. The Respondent advised the Investigating Officer that he had consumed two twenty-two ounce beers and was on medication.
5. The Respondent was unsteady as he exited the vehicle, walked to the roadside and while standing.
6. The Respondent's speech was slurred and his eyes were bloodshot.
7. The Investigating Officer explained, demonstrated and administered a series of field sobriety tests to the Respondent, including the horizontal gaze nystagmus, walk-and-turn, and one-leg stand.
8. During administration of the horizontal gaze nystagmus test, the Respondent's eyes exhibited a resting nystagmus; therefore the results of this test will not be given any weight.

9. During the walk-and-turn test, the Respondent did not touch heel to toe, stepped off the line, and did not turn properly.
10. While performing the one-leg stand test, the Respondent swayed while balancing, used his arms to balance and put his foot down.
11. The Investigating Officer had reasonable grounds to believe the Respondent had been driving while under the influence of alcohol and asked the Respondent to submit to a preliminary breath test.
12. The Investigating Officer was trained to administer the preliminary breath test and is a certified instrument operator.
13. The Respondent did not drink alcohol or smoke for at least fifteen minutes prior to the administration of the preliminary breath test.
14. The Investigating Officer used an individual disposable mouthpiece while administering the preliminary breath test.
15. The Respondent failed the preliminary breath test.
16. The Investigating Officer concluded that the Respondent had been driving while under the influence of alcohol and transported the Respondent to the Charleston Police Department for the purpose of administering a secondary chemical test of the breath to the Respondent.
17. The Investigating Officer was trained at the West Virginia State Police Academy to administer secondary chemical tests of the breath and has been certified as a test administrator by the West Virginia Department of Health since December 26, 2006.
18. The testing instrument used to administer the secondary chemical test—an Intoximeter EC/IR-II, Serial No.008106 —has been approved by the West Virginia Department of Health for use as a secondary breath testing instrument.

19. The Investigating Officer observed the Respondent for a period of twenty minutes prior to administration of the secondary chemical test, during which time the Respondent had no oral intake.
20. The Investigating Officer utilized an individual disposable mouthpiece and followed an operational checklist during administration of the secondary chemical test.
21. Standard checks conducted upon the testing instrument, immediately prior to and after administration of the secondary chemical test, showed that it was in proper working order.
22. The Respondent filed a timely written notice of intent to challenge the results of the secondary chemical test administered to him by the Investigating Officer.
23. The secondary chemical test was administered in accordance with Title 64, Code of State Rules, Series 10.
24. The results of the secondary chemical test administered to the Respondent showed that his blood alcohol concentration level was seventy-one hundredths of 1 percent (.071), by weight.
25. Previously, the Respondent's driving privilege was revoked pursuant to § 17C-5A- 2 for an offense(s) that occurred on June 29, 2000.
26. The Respondent was present at the administrative hearing and presented evidence.

DISCUSSION

The record will reflect that the Investigating Officer was not present at the administrative hearing and it was presented on the record by the Assistant Attorney General, Rebecca D. McDonald, that the Investigating Officer is now deceased. The Assistant Attorney General submitted the West Virginia Division D.U.I. Information Sheet and stood on the record.

The Respondent testified that he had consumed two twenty-two ounce beers at home between the hours of 5 and 7:30. He further testified that he had stopped at a stop sign on Glenwood and Central and was unable to see oncoming traffic because of cars parked at a bar. Therefore, he proceeded to make a “break” to go across the road, and was stopped by the Investigating Officer.

The Respondent alleged that he was not affected by the alcohol he had consumed, the blood pressure medication or from his allergy condition. He testified that he is 57 years of age and has had a brain aneurism; and therefore could not balance on field sobriety tests.

The Respondent’s testimony was given consideration and weight. It must be noted that there is sufficient evidence to prove that the consumption of alcohol, medication, structured and non-structured tests resulted in the secondary chemical being relevant evidence that the Respondent was under the combined influence of alcohol and a controlled substance or drug. Pursuant to West Virginia Code §17C-5-8 (2), “Evidence that there was, at that time, more than five hundredths of one percent and less than eight hundredths of one percent, by weight, of alcohol in the person’s blood is relevant evidence,…” Therefore, the Order of Revocation issued to the Respondent on September 17, 2008, must be upheld.

CONCLUSIONS OF LAW

1. The Investigating Officer had reasonable grounds to believe the Respondent drove a motor vehicle in this State while under the influence of alcohol.
2. Sufficient evidence was presented to show that the Respondent drove a motor vehicle in this State while under the influence of alcohol on August 21, 2008.

3. The secondary chemical test was administered in accordance with Title 64, Code of State Rules, Series 10.
4. Pursuant to West Virginia Code § 17C-5A-2(j), a person's license must be revoked if a finding is made that the person drove a motor vehicle while under the influence of alcohol, controlled substances, or drugs.
5. Pursuant to West Virginia Code § 17C-5A-3a (d), a person shall participate in the Alcohol Test and Lock Program, if the person is convicted of violating West Virginia Code § 17C-5-2 or the person's driving privilege is revoked pursuant to West Virginia Code § 17C-5A-2 and the person was previously convicted or revoked under those sections within the past ten years.
6. Pursuant to Title 91 Code of State Rules, Series 5 and West Virginia Code § 17C-5A-3, the license to operate a motor vehicle shall not be reissued until the offender successfully completes the Safety and Treatment Program; pays all costs of the Program and its administration; pays all costs of the revocation hearing; and pays a reinstatement fee.
7. Pursuant to West Virginia Code § 17C-5A-3a the minimum revocation period for a person required to participate in the Alcohol Test and Lock Program is one year. The minimum period for use of the ignition interlock device is two years. The minimum period of use is extended by one year for each additional previous revocation or conviction.

WHEREFORE, based on the findings set forth above, this Hearing Examiner hereby proposes that the Commissioner conclude as a matter of law that the Respondent committed an offense described in West Virginia Code § 17C-5-2, in that the Respondent drove a motor vehicle in this state while under the combined influence of alcohol, and a controlled substance or drug.

FINAL ORDER

The Commissioner adopts the Findings of Fact and Conclusions of Law proposed by the above-listed Hearing Examiner. It is hereby ordered that the Respondent participate in the Alcohol Test and Lock Program. Such participation requires a minimum one year revocation of the Respondent's driving privilege and a minimum of two years installation and use of the ignition interlock device on all vehicles owned and operated by the Respondent. Additionally, the Respondent's privilege to drive will remain revoked until the Respondent fulfills all other obligations for reinstatement.

Steven O. Dale
Acting Commissioner