

14-1063

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA
OF OHIO COUNTY

ROBERT B. CONNIFF,
Petitioner,

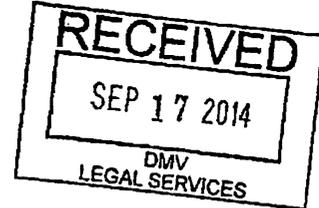
2014 SEP 12 ~~PM 10:42~~
PM 1:35
BRENDA L. MILLER

v.

Case No. 14-P-120(G)

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

Respondent.



ORDER

On August 8, 2014, a hearing was held in the above-referenced matter. The Petitioner, Robert Conniff, appeared in person and by counsel, Joseph J. John. The Respondent, Steven O. Dale, appeared by counsel, Elaine L. Skorich, Assistant Attorney General. After considering the pleadings and pertinent legal authorities, the Court declared its decision as set forth below.

Factual and Procedural History

1. By letter dated June 29, 2010, the DMV officially notified Mr. Conniff of a revocation of his driver's license as a result of a DUI charge against him in May, 2010.
2. On July 2, 2010, Mr. Conniff properly completed and delivered a Hearing Request Form to the DMV. Importantly, on the form, Mr. Conniff checked the box, "I request the investigating officer's attendance. By law, DMV will subpoena the officer".
3. The DMV received the hearing request form and signed the certified mail receipt card on July 6, 2010.
4. By letter dated July 27, 2010, the DMV scheduled a hearing for October 28, 2010, at 11:00 a.m. in Moundsville, West Virginia.

5. On October 28, 2010, at 11:00 a.m. in Moundsville, West Virginia, appeared Mr. Conniff, in person and by counsel, for the scheduled hearing for the revocation of his driver's license. The hearing examiner waited 15-20 minutes for the Officer to arrive. The Officer did not arrive or otherwise appear for the hearing, and the hearing was then held. The DMV did not subpoena the officer for this hearing despite its legal duty to do so.

6. At the hearing on October 28, 2010, Mr. Conniff, by and through counsel, objected to any continuance of the October 28, 2010, hearing as there was no proper motion for continuance. Further, Mr. Conniff, by and through counsel, demanded that the revocation of his license be rescinded and that his driving privileges be reinstated immediately for lack of evidence in the case.

7. There was no motion or request for continuance ever filed by the officer, either before or after the hearing.

8. The DMV scheduled a second hearing to take place on February 25, 2011.

9. The Petitioner objected to the second hearing by letter dated January 28, 2011.

10. The February 25, 2011, hearing did not take place.

11. Over one year later, by letter dated March 22, 2012, the DMV advised the Petitioner that the *Hare* decision applied as: "The officer was subpoenaed to the first scheduled hearing, but the officer did not appear." Contrary to the DMV's contention, the evidence shows that the officer was not subpoenaed to the October 28, 2010, scheduled hearing.

12. The DMV scheduled a third hearing for May 18, 2012.

13. The May 18, 2012, hearing was cancelled due to an illness with the hearing examiner.

14. The DMV scheduled another hearing for January 22, 2013.

15. The Petitioner and his counsel appeared at the January 22, 2013, hearing, placing an objection on the record prior to the hearing. The hearing commenced over Petitioner's objections, but was again continued because the hearing examiner's recording demo expired and was not renewed by the DMV.

16. The DMV continued the January 22, 2013, hearing claiming "mechanical failure" as the basis for the continuance under the rules.

17. The Petitioner objected to this continuance as well. The Petitioner asserted that it was not "mechanical failure" but the DMV's own failure to pay and renew the recording subscription, thus there was not "good cause" shown for this continuance.

18. By letter dated February 27, 2013, the DMV admitted, "In response, the hearing scheduled for January 22, 2013, was continued due to equipment failure. The hearing examiner's recording software license on his laptop had expired during the January 22, 2013, hearing. The hearing examiner had previously spoken with the West Virginia Department of Transportation/IT Personnel and he was supposed to have continued software access on the day of the hearing. The West Virginia Department of Transportation/IT Personnel told the hearing examiner he could continue to use the demo in the meantime. Unfortunately, the demo expired while conducting the hearing for your client. I have no alternative but to reschedule the hearing."

19. The DMV claimed that it had no alternative but to reschedule the hearing again, and advised the Petitioner to make any motions or objections about the events of the DUI at the "next scheduled hearing."

20. The DMV scheduled another hearing for June 4, 2013.

21. The Petitioner objected to the hearing scheduled for June 4, 2013, and the hearing was conducted over the Petitioner's objections.

22. By Order entered July 22, 2014, the Respondent revoked the driving privileges of the Petitioner for driving under the influence of alcohol, effective August 2, 2014.

23. On July 25, 2014, the Petitioner filed a timely Petition for Review.

~~24. A hearing was held on August 8, 2014, initially addressing the Petitioner's~~
Application for Stay.

25. Initially, the Petitioner's Application for Stay was granted after hearing testimony from the Petitioner and receiving and considering his ten exhibits. The Court found that the Petitioner would suffer irreparable harm and that the Petitioner had a substantial probability and likelihood that he would prevail in his appeal as proven and established by the testimony, evidence and exhibits.

26. Thereafter, the Court considered the testimony, arguments of counsel, exhibits, positions taken by the parties and determined that the case should be remanded with instruction that the Final Order be written to address the Petitioner's arguments set forth at the administrative hearing on January 4, 2013 regarding the failure of the officer to be subpoenaed at the original hearing and other related arguments thereto. By doing so, the Final Order would then be capable of review on appeal by the Circuit Court. After the Court announced this ruling, counsel for the Respondent vehemently objected asserting that the Circuit Court did not have the authority to remand this case and stay the revocation of the Petitioner's license simultaneously. Consequently, the Court thenceforth reevaluated its ruling based upon counsel's adamancy and determined that the Petitioner was nevertheless entitled to relief sought in his petition. As a result, the Court ruled that the Final Order of the DMV should be reversed and that the Petitioner's driving privileges be reinstated, effective immediately.

Standard of Review and Pertinent Legal Authorities

1. Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law. *West Virginia Code* §29A-5-4(a).

2. Appeals taken on questions of law, fact or both, shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or argued. *West Virginia Code* §29A-5-4(e).

3. The Court may affirm the order or decision of the agency or remand the case for further proceedings. It 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:

- (a) In violation of constitutional or statutory provisions; or
- (b) In excess of the statutory authority or jurisdiction of the agency; or
- (c) Made upon lawful procedures; or
- (d) Affected by other error of law; or
- (e) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of direction.

West Virginia Code §29-A-5-4(g).

4. The failure of an arresting officer to appear at a DUI hearing does not relieve the licensee from the obligation to appear at the hearing or from the provisions of Subsection 3.7.1 of

this rule. Provided, that, where the arresting officer fails to appear at the hearing, but the licensee appears, the revocation or suspension of license may not be based solely on the arresting officer's affidavit or other documentary evidence submitted by the arresting officer. 91 CSR 3.7.2.

5. *W. Va. Code* §17C-5A-2(b) [2004] addresses the issue of continuances of DMV

hearings, and states in pertinent part:

The commissioner may postpone or continue any hearing on the commissioner's own motion or upon application for each person for good cause shown. The commissioner shall adopt and implement by a procedural rule written policies governing the postponement or continuance of any such hearing on the commissioner's own motion or for the benefit of any law-enforcement officer or any person requesting the hearing, and such policies shall be enforced and applied to all parties equally. For the purpose of conducting the hearing, the commissioner shall have the power and authority to issue subpoenas and subpoenas duces tecum in accordance with the provisions of section one, article five, chapter twenty-nine-a of this code: *Provided*, that the notice of hearing to the appropriate law-enforcement officers by registered or certified mail, return receipt requested, shall constitute a subpoena to appear at the hearing without the necessity of payment of fees by the division of motor vehicles.

David v. Commissioner of Motor Vehicles, 837 S.E.2d 591, 219 W.Va. 493 (W.Va. 2006).

6. The West Virginia Supreme Court of Appeals, in *Miller v. Hare*, 708 S.E.2d 531 (W.Va. 2011), held that the Commissioner had authority to postpone or continue the hearing when the officer failed to appear after being served with a validly issued subpoena.

The Court stated, "At the center of the matter before us is the issue of whether the Commissioner had the right to continue the April 15, 2009, hearing when Deputy Martin failed to appear after being served with a validly issued subpoena."

7. An investigative officer's failure to appear at a revocation hearing to which he was subpoenaed constitutes good cause to continue the hearing. *Holland v. Miller*, 736 S.E.2d 35 (W.Va. 2012) citing *Miller v. Hare*, 708 S.E.2d 531 (W.Va. 2011).

8. According to the DMV Commissioner, the statutory duty imposed on the DMV

to secure the officer's attendance translated into an affirmative obligation to compel the officer to be present at the revocation hearing. *See, Miller v. Hare*, 708 S.E.2d 531 (W.Va. 2011).

Accordingly, the Commissioner's violation of his statutory duty to subpoena the Officer when requested to do so does not constitute "good cause" to continue the hearing when the Officer does not appear because he was not subpoenaed to appear.

9. In Syllabus Point 1 of *Abshire v. Cline*, 193 W.Va. 180, 455 S.E.2d 549 (1995), Justice Cleckley stated, "A driver's license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution."

Discussion

The case *sub judice* is clearly distinguishable from *Miller v. Hare*, 708 S.E.2d 531 (W.Va. 2011). In *Hare*, the West Virginia Supreme Court of Appeals stated,

At the center of the matter before us is the issue of whether the Commissioner had the right to continue the April 15, 2009, hearing when Deputy Martin failed to appear after being served with a validly issued subpoena.

According to the law at the time, 2008-2010, the DMV was charged with the exclusive responsibility of securing the attendance of the investigating officer at the administrative hearing. *See*, W.Va. Code 17C-5A-2(d) (2008) and *Hare*. In *Hare*, the DMV Commissioner admitted that, "...the statutory duty imposed on the DMV to secure the officer's attendance translated into an affirmative obligation to compel the officer to be present at the revocation hearing." In addition, the court in *Hare* found that "good cause" existed for the Commissioner to grant a continuance when the officer was served with a subpoena and failed to appear after being served with the subpoena. Here, Officer Ward was not subpoenaed by the DMV to appear at the October 28, 2010, hearing, thus, there could be no continuance for "subpoena enforcement" when a subpoena was never served on the officer by the DMV as required by law.

The DMV had the exclusive responsibility of securing the attendance of Officer Ward, and was requested to do so by the Petitioner, and the DMV was obligated by law to subpoena the officer to said hearing. The DMV failed to subpoena Officer Ward thereby violating the statutory duty to do so. The Commissioner's violation of his statutory duty certainly cannot constitute "good cause" for a continuance. The Petitioner, at the October 28, 2010 hearing, and thereafter, objected to the continuance and demanded that the revocation order be rescinded and that the Petitioner's license be reinstated immediately.

Since 91 CSR 3.7.2 does not authorize a revocation solely on the arresting officer's affidavit or other documentary evidence submitted by the officer when the officer fails to appear, the DMV should have dismissed the revocation order because there was insufficient evidence and the DMV should have reinstated the Petitioner's driving privileges on October 28, 2010. As such, the DMV had no authority to grant a continuance of the October 28, 2010, hearing under the facts of this case and to do so over Petitioner's objections was improper.

In Syllabus Pt. 1 of *Abshire v. Cline*, 455 S.E.2d 549 (W.Va. 1995), Justice Cleckley stated, "A driver's license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution." Also, the policies and procedures pertaining to the DMV shall be enforced and implied to all persons equally. This case is somewhat analogous to *David v. DMV*, 637 S.E.2d 591 (W.Va. 2006), in that the DMV improperly granted a continuance. The obvious distinction being in *David* the officer was subpoenaed to appear at the hearing and in this case Officer Ward was not subpoenaed to appear at the October 28, 2010, hearing. In *David*, Justice Benjamin, in his concurring opinion, summed up the issues which are applicable to this case. Justice Benjamin stated:

Here, the DMV seeks to avoid the operation against it of its own rules; rules which it had enacted, rules which the legislature approved, and rules which

the DMV applies to citizens such as the appellant herein. Appellant did everything he was obligated to do under the DMV's procedural rules to ensure that he could proceed with his hearing. The DMV did not, however. Notwithstanding its failure to comply with its own procedural rules, the agency now seeks to void the application against it of its own rules. Our system of justice does not sanction such a stark contract in the procedure which a citizen must follow to enforce his or her rights and the procedure which the state must follow to deprive the citizen of such rights. Simply stated, a governmental entity is not above the law and is not above the procedures necessary to obtain justice. No free society could long endure if anything else were the case.

The DMV had no right or authority to grant any continuances over Petitioner's objections in this case. Furthermore, since the DMV advised the Petitioner that it was scheduling another hearing over his objections, the Petitioner requested the DMV to pay for fees and costs so that the Petitioner could properly prepare for any additional hearings that may take place over the Petitioner's objections. (*See*, Petitioner's Exhibit 5 and 7). The DMV refused to make any such payment to the Petitioner so that the Petitioner could properly prepare for any hearing scheduled over his objection despite repeated demands.

Since the DMV had the opportunity to make payment to the Petitioner for fees and costs so he could properly prepare for any hearing to take place over his objection, and the DMV elected not to pay the Petitioner his attorneys' fees and expenses to adequately prepare and defend, the DMV acted in excess of its jurisdiction in conducting a hearing that violated the Petitioner's due process rights to a full and fair hearing on the merits. *See, David v. DMV*, 637 S.E.2d 591 (W.Va. 2006).

The DMV's reliance on *Hare*, in this case, is misplaced as Officer Ward was not subpoenaed to appear at the first administrative hearing that took place on October 28, 2010, and the DMV had no right or authority to continue the October 28, 2010, hearing over the Petitioner's objection. The DMV violated the Petitioner's due process rights by conducting

another hearing on the matter when it had no authority to do so.

Based upon the above, the hearing on January 22, 2013, was improper and unlawful and should not have taken place over Petitioner's objections. In addressing that hearing, the Commissioner had no authority to even have the hearing, and further had no authority to grant a continuance of the January 22, 2013, hearing for "good cause" due to equipment failure. The recording device did not fail. The DMV knowingly allowed the demo app to expire and did not pay for or renew the recording subscription. (See, Petitioner's Exhibit 9). Allowing the recording software to expire is not "equipment failure" and the DMV cannot claim that good cause existed in order to avoid its own errors and misconduct.

What is very disturbing to this Court is the DMV's final order which totally fails to address any of the Petitioner's legal and procedural arguments. The DMV is to be neutral and fair and for the DMV to not even address any of the many legal and procedural arguments advanced by the Petitioner is capricious, arbitrary and disturbing. For example, the DMV simply noted that counsel cross-examined the officer regarding whether he was subpoenaed to appear at the first administrative hearing scheduled on October 28, 2010, but the DMV never addressed the DMV's failure to subpoena Officer Ward and the Petitioner's objection to the continuance of the October 28, 2010, hearing in its final order. The DMV, in its final order, totally ignored legal arguments and procedural matters which is indicative of the strength of Petitioner's arguments.

Accordingly, for the reasons set forth above and for reasons set forth within the record, this Court finds that the conclusion, decision and order of the DMV were:

- (a) Made in violation of constitutional and statutory provisions;
- (b) In excess of the statutory authority and jurisdiction of the agency;
- (c) Made upon unlawful procedures;

- (d) Effected by other error of law;
 - (e) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and/or
 - (f) Arbitrary and capricious and characterized by abusive discretion, the same which is clearly and unwarranted exercise of discretion.
-

Conclusion

Accordingly, the Court does hereby **ORDER** that the Final Order of the DMV pertaining to Robert Conniff is hereby **REVERSED** and the Petitioner's driving privileges are reinstated, effective August 8, 2014. The Respondent's objections to this ruling are noted and saved.

The Court hereby directs the entry of the final judgment as set forth above and expressly determines that there is no just reason for delay and expressly directs the entry of the judgment and this order is determined to be a final order pursuant to Rule 54(b) of the *West Virginia Rules of Civil Procedure*.

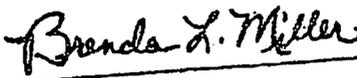
The Clerk shall transmit a copy of this Order to counsel of record and to the DMV.

ENTERED this 11th day of September, 2014.



JUDGE MARTIN J. GAUGHAN

A copy, Teste:



Circuit Clerk

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

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

Petitioner,

v.

ROBERT B. CONNIFF,

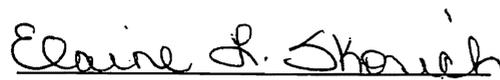
Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, do hereby certify that the foregoing *Notice of Appeal* was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 9th day of October, 2014, addressed as follows:

Joseph J. John, Esquire
John & Werner Law Offices
Board of Trade Bldg., Ste. 200
80-12th Street
Wheeling, WV 26003

The Honorable Brenda Miller
Clerk of the Circuit Court
Ohio County Courthouse
1500 Chapline Street
Wheeling, WV 26003


ELAINE L. SKORICH