

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-1063
(Circuit Court Civil Action No. 14-P-120)

**PATRICIA S. REED, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Petitioner,

v.

ROBERT B. CONNIFF,

Respondent.

BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

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West Virginia Division of Motor Vehicles,**

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I. ASSIGNMENTS OF ERROR

- A. The circuit court erred in granting a stay of Mr. Conniff's license revocation because he presented no evidence of irreparable harm or proved likelihood of success on the merits.**
- B. The circuit court erred in issuing a final decision on the merits when the matter was only noticed for a stay hearing.**
- C. The circuit court denied the Petitioner due process by issuing a final decision on the merits when there was no administrative record in the file and the parties had not had the opportunity to brief the matter.**
- D. The circuit court erred in granting the petition for judicial review when there was no requirement for the Division of Motor Vehicles to address Mr. Conniff's objections below in its Final Order.**
- E. The circuit court misapplied this Court's decision in *Miller v. Hare*, 227 W. Va. 337, 708 S.E.2d 531 (2011).**
- F. The circuit court erred in rescinding the Final Order of the Commissioner when all of the evidence indicated that Mr. Conniff was driving while under the influence of alcohol.**
- G. The circuit court erred in rescinding the Final Order of the Commissioner when Mr. Conniff's blood alcohol content was .269, which mandates a license revocation.**

II. STATEMENT OF THE CASE

On May 30, 2010, Patrolman W. M. Ward of the Wheeling Police Department, the Investigating Officer ("I/O") herein, was notified of a hit and run accident on the Fort Henry Bridge in Wheeling, Ohio County, West Virginia. (App¹. at P. 34.) The victim of the hit and run accident pointed out Mr. Conniff's vehicle, and officer initiated a traffic stop. (App. at P. 123.) The I/O approached the driver of the car that fled the scene and identified him as Robert Conniff, the Respondent in this matter. (App. at PP. 35 and 123.) Mr. Conniff admitted to the I/O that he had

¹App. refers to the Appendix filed contemporaneously with the *Brief of the Division of Motor Vehicles*.

been in an accident, and the I/O smelled the odor of an alcoholic beverage on Mr. Conniff's breath. (App. at P. 36.) Mr. Conniff's eyes were bloodshot and glassy, and he was unsteady while exiting his vehicle, while walking to the roadside and while standing. *Id.* The I/O located beer caps in Mr. Conniff's car. *Id.*

The I/O administered the horizontal gaze nystagmus test which Mr. Conniff failed because his eyes lacked smooth pursuit, displayed distinct and sustained nystagmus at maximum deviation and exhibited the onset of nystagmus prior to an angle of forty-five degrees. *Id.* Mr. Conniff failed the walk-and-turn test because he missed heel-to-toe, walked an incorrect number of steps and executed an improper turn. *Id.* Further, Mr. Conniff failed the one-leg stand test because he swayed while balancing, used his arms to balance, and put his foot down. (App. at P. 37.)

The I/O had reasonable grounds to believe that Mr. Conniff had been driving while under the influence ("DUI") of alcohol then administered a preliminary breath test to Mr. Conniff who did not provide a sufficient breath sample for analysis. *Id.* The I/O concluded that Mr. Conniff had been DUI and transported him to the Ohio County Sheriff's Department for the purpose of administering a secondary chemical test ("SCT") of Mr. Conniff's breath. (P. 34.) The results of the SCT indicate that Mr. Conniff's blood alcohol content ("BAC") was .269% which is more than three times the legal limit. (App. at PP. 34, 38 and 123.)

During a post arrest interview, Mr. Conniff admitted to operating a motor vehicle, being involved in a crash, and consuming a couple of beers. (App. at P. 39.) Mr. Conniff, however, denied being under the influence of alcohol, being injured or ill, and having any physical defects. *Id.*

On June 29, 2010, the Division of Motor Vehicles ("DMV") sent Mr. Conniff an *Order of Revocation* for aggravated DUI. (App. at P. 41.) Mr. Conniff had a prior DUI offense which

occurred on September 1, 2001. (App. at PP. 91-92 and 110.) His BAC at that time was also .26%. *Id.* Even though Mr. Conniff pled guilty in criminal court to the first DUI (App. at PP. 91-92), administratively the matter was dismissed because the arresting officer failed to appear at hearing. (App. at P. 102.)

On July 6, 2010, Mr. Conniff requested an administrative hearing for his second DUI, the instant matter. (App. at P. 42.) On July 27, 2010, the DMV scheduled an administrative hearing for October 28, 2010. (App. at P. 46.) The I/O and the Wheeling Chief of Police were copied on that hearing notice. *Id.* The Chief's main was delivered on July 30, 2010 (App. at P. 84); however, the I/O's copy was returned as unclaimed on August 14, 2010. (App. at P. 83.) On July 23, 2010, the DMV issued a subpoena to the I/O. (App. at P. 48.) At the administrative hearing on October 28, 2010, the officer failed to appear ("OFTA.") (App. at P. 82.) The hearing was reset for February 25, 2011. (App. at P. 82.)

On January 28, 2011, Mr. Conniff's attorney sent a letter to the DMV which objected to the hearing continuance and demanded that the license revocation be rescinded. (App. at PP. 59-62.) The DMV did not respond to the letter from Mr. Conniff's attorney, so on February 16, 2011, his attorney send a second letter which renewed his objection to a hearing continuance and which demanded \$2,500.00 for attorney fees, travel costs and witness fees to be paid in advance of the next hearing. (App. at P. 67.) The February 25, 2011, hearing was continued. (App. at P. 82.)

On March 22, 2012, DMV General Counsel Jill C. Dunn sent Mr. Conniff's attorney a letter explaining that Mr. Conniff's file had been transferred to the newly created Office of Administrative Hearings ("OAH") along with the hearing personnel and that file had not been returned to the DMV until March of 2012, and therefore, Ms. Dunn could not have responded to the letters of January 28,

2011 and February 16, 2011. (App. at PP. 69-70.) The letter also explained the DMV's position that the *Hare* decision authorizes the DMV to reschedule the matter for the OFTA at the first hearing.

Id.

The administrative hearing was continued and rescheduled for May 18, 2012. (App. at P. 56.) Again, the I/O was copied on the notice of hearing. *Id.* On May 10, 2012, the DMV also issued a subpoena to the I/O. (App. at P. 58.) On May 18, 2012, Marey Casey, Hearing Examiner Manager for the OAH, contacted the DMV stating that the hearing examiner (an OAH employee who was still hearing old DMV cases as well) was sick and unable to conduct Mr. Conniff's hearing that day. (App. at P. 71.) The hearing was rescheduled for January 22, 2013; however, that hearing was continued after convening because the licensing software used by the hearing examiners had expired during the hearing. (App. at P. 75.)

On January 25, 2013, Mr. Conniff's attorney sent the DMV a letter indicating that on January 22, 2013, the hearing examiner, DMV counsel, the I/O, Mr. Conniff and Mr. Conniff's counsel had appeared for hearing but that during the hearing, the recording software expired. (App. at PP. 77-78.) Mr. Conniff's attorney renewed his objection to any further continuances. *Id.* On February 27, 2013, Ms. Dunn responded to the letter of January 25, 2012, stating that the hearing examiner had contacted information technology personnel prior to the hearing regarding the software license and was assured that the program would work throughout that day. (App. at P. 76.) Ms. Dunn also stated that the DMV has no alternative but to reschedule the hearing. *Id.* On March 4, 2013, Mr. Conniff's counsel sent Ms. Dunn a letter which expressed his disbelief in the contents of Ms. Dunn's letter and stated that if "another hearing is scheduled, my client will pursue all legal recourse, whether at any such hearing or in a separate proceeding." (App. at P. 90.) The matter was

rescheduled for June 4, 2013. (App. at P. 82.) At the administrative hearing, the I/O appeared and testified, yet Mr. Conniff did not testify at the hearing which he requested. (App. at PP. 94-100.)

The DMV issued its *Final Order* upholding the revocation, and Mr. Conniff's privilege to drive a motor vehicle was to be revoked on August 2, 2014. (App. at P. 94.) On or about July 25, 2014, Mr. Conniff filed a *Petition for Review* in the Circuit Court of Ohio County. (App. at PP. 10-109.) On or about July 28, 2014, Mr. Conniff also filed *Petitioner's Application for Stay of Final Order* and a *Notice of Hearing* setting the request for stay to be heard on August 8, 2014. (App. at PP. 132-135.) On or about July 31, 2014, Mr. Conniff filed his designation of the record. (App. at PP. 168-172.)

The parties appeared at the stay hearing on August 8, 2014, and Mr. Conniff testified at said hearing. (C. Ct. Tr². at PP. 3-8.) The court below granted the stay of revocation (C. Ct. Tr. at P. 13) and remanded the matter to the DMV "to make additional findings on all the legal issues that were raised." (C. Ct. Tr. at P. 14.) Counsel for the DMV then questioned the granting of a stay since the matter was remanded to the DMV, and the court responded, "Okay. What I'll do then, to satisfied [*sic*] that problem is that I'll just grant the motion to dismiss the case on the part of the state for failure to make findings of fact that are consistent with that, and you can do whatever you want to do to appeal the ruling." (C. Ct. Tr. at P. 16.)

On September 4, 2014, the DMV transmitted the administrative record to the circuit court. (App. at PP. 29-193.) Because the circuit court granted the petition for judicial review prior to the DMV being able to finish the administrative record completely, the DMV submitted an audio

² C. Ct. Tr. refers to the circuit court transcript attached at the end of the Appendix filed herewith.

compact diskette of the administrative hearing in lieu of a completed transcript. (App. at PP. 189-190.) A week later, on September 11, 2014, the circuit court entered its *Order* reversing the *Final Order* of the DMV. (App. at PP. 2-12.) The DMV filed its *Notice of Appeal* in the instant matter on October 9, 2014.

III. SUMMARY OF ARGUMENT

The Circuit Court of Ohio County erred in granting a stay of the license revocation while remanding the matter back to the DMV for further review. Once the DMV questioned the procedural issue based upon the language of W. Va. Code § 17C-5A-2(s) (2008), the circuit court then committed additional error by impetuously granting Mr. Conniff's petition for judicial review without reviewing the administrative record or considering any of the evidence of DUI.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Revised Rules of Appellate Procedure (2010), the DMV requests oral argument because this matter involves this case involves an assignment of error in the application of settled law and because this matter involves an unsustainable exercise of discretion where the law governing that discretion is settled. Additionally, the parties would benefit from the opportunity to answer questions from the Court.

V. ARGUMENT

A. Standard of Review

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

Upon judicial review of a contested case under the West Virginia Administrative

Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: “(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

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

“The ‘clearly wrong’ and the ‘arbitrary and capricious’ standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). This Court has “made plain that an appellate court is not the appropriate forum for a resolution of the persuasive quality of evidence.” *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996). Findings of fact are accorded deference unless the reviewing court believes the findings to be clearly wrong, and conclusions of law are reviewed *de novo*. *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010) (per curiam).

B. The circuit court erred in granting a stay of Mr. Conniff’s license revocation because he presented no evidence of irreparable harm or proved likelihood of success on the merits..

West Virginia Code § 17C-5A-2(s) (2008) states that a circuit court may grant a stay or supersedeas of the revocation order only upon motion and hearing, and a finding by the court “upon evidence presented, that there is a substantial probability that the appellant shall prevail upon the merits and the appellant will suffer irreparable harm if the order is not stayed.” In the *Order* entered

by the circuit court on September 11, 2014, the court stated in paragraph 25 of the *Factual and Procedural History* that

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.

(App. at P. 5.) The circuit court erred in making such a finding.

Irreparable harm is more than mere inconvenience and speculation. Irreparable harm is "injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages." *Rodriguez v. DeBuono*, 162 F.3d 56, 61 (2d Cir.1998) (per curiam) (internal quotation marks omitted). See, *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 153 (2d Cir. 1999).

Irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Bell & Howell: Mamiya Co. v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir.1983) (quoting 11 C. *Wright & A. Miller, Federal Practice & Procedure*, § 2948 at 431 (1st ed.1973)). Accordingly, "the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir.1990). "The movant must demonstrate an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages." *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir.1995) (quotation marks and citation omitted); see also *Sweeney v. Bane*, 996 F.2d 1384, 1387 (2d Cir.1993) (upholding denial of preliminary injunction seeking to prevent erroneous Medicaid co-payments because harm was purely financial). In the absence of a showing of irreparable harm, a motion for a preliminary injunction should be denied. See *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 80 (2d Cir.1990); *Sierra Club v. Hennessy*, 695 F.2d 643, 647 (2d Cir.1982).

Rodriguez by *Rodriguez v. DeBuono*, 162 F.3d 56, 61 (2d Cir. 1998) opinion amended and superseded sub nom. *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227 (2d Cir. 1999).

There are no West Virginia DUI license revocation cases directly on point regarding

speculation to prove irreparable harm, but this Court recently addressed the issue of speculation not being sufficient to defeat a summary judgment motion in *Dellinger v. Pediatric Medical Group*, 232 W. Va. 115, 750 S.D.E.2d 668 (2013). In *Dellinger*, this Court said that while the nonmoving party is entitled to the most favorable inferences that may reasonably be drawn from the evidence, such evidence cannot create a genuine issue of material fact through mere speculation.

Mr. Conniff's complete direct testimony regarding any irreparable harm that would befall him if a stay of his license revocation were not granted is as follows:

- A. I own a restaurant.
Q. And where is the restaurant?
A. It's at 753 Main Street in Wheeling.
Q. How far do you live from the restaurant?
A. Approximately about ten mile.
Q. And what do you do for the restaurant?
A. I'm a hundred percent owner. I cook, I do payroll, I do banking, I order, I pick up supplies, et cetera, et cetera.
Q. How would you be – or tell the Judge what harm you'd suffer if you could not operate your vehicle to get to work and do your chores at work if the stay wouldn't be granted here.
A. At this time I have no one to take my place, or trust with, you know, the payroll and valuable things.
Q. And your restaurant and your business would suffer, if not be rendered – maybe even shut down if you weren't able to continue to drive and operate your business?
A. That's correct.

(A. Tr. at PP. 4-5.)

On cross examination, however, Mr. Conniff testified that he has 30 employees and that he has some stepchildren that work in his restaurant. (A. Tr. at P. 6.) He also testified that there is taxi service available where he lives. *Id.* Mr. Conniff further testified that prior to the stay hearing on August 8, 2014, his license had gone revoked and that his wife has been driving him to work and that she does not work anywhere herself. (A. Tr. at PP. 7-8.) Without further explanation or evidence,

he added that his wife does not “have good health.” (A. Tr. at P. 8.)

Mr. Conniff had the burden of proving that he would be irreparably harmed if he was not granted a stay of his license revocation, yet he did not do that here. Mr. Conniff presented speculation to the court but no evidence of any actual harm that would befall him. He even testified that his wife had been driving him to work but never testified that she could not continue to do so. Further, he testified that he has 30 employees, including some family. He never testified that he could not rely on any of them to drive him for errands or even to and from work if his wife could not. He also never testified that his employees refused to drive him or did not have valid driver’s licenses. Instead, Mr. Conniff merely speculated that he could not trust his employees to do his work for him. Never once did Mr. Conniff testify that he would, in fact, lose his restaurant if he could not drive during the pendency of his appeal. Mr. Conniff’s speculation is not evidence and is the very issue of material fact which the circuit court was charged with deciding in order to grant a stay of the license revocation. Mr. Conniff’s assertions without showing his business finances or having his employees testify as to their qualifications are mere speculation and hearsay. It is not *evidence* of irreparable harm.

Even if Mr. Conniff had proven that he would, in fact and not in theory, lose his restaurant/employment, that is not *irreparable* harm. Pursuant to Dictionary.com, irreparable means “not reparable; incapable of being rectified, remedied, or made good.” Unlike a situation where Mr. Conniff could lose life or limb, *if* Mr. Conniff were to lose his restaurant, that situation could be rectified by finding alternate employment or opening another restaurant. Clearly, irreparable equates to not being able to repaired. Considering the amount of temporary and seasonal employees in the State of West Virginia, it is incredulous to think that being temporarily out of work is tantamount

to irreparable harm. Temporary unemployment may be inconvenient, but it is undoubtedly something that can be rectified, and is, therefore, not irreparable harm.

Moreover, pursuant to W. Va. Code § 17C-5A-2(s) (2008), in order to obtain a stay of his license revocation, Mr. Conniff was required to show a likelihood of success on the merits. During the stay hearing, Mr. Conniff argued various procedural matters; however, never once did he mention anything to do with the evidence of DUI. Accordingly, the merits of the underlying *Final Order* were not argued, and a finding that Mr. Conniff was likely to succeed on the merits was clearly erroneous.

In Footnote 6 of *State ex rel. Miller v. Karl*, 231 W. Va. 65, 70, 743 S.E.2d 876, 881 (2013), this Court recognized the differences between the specific stay provisions in the DMV statutes and the general stay provision in the Administrative Procedures Act.

In so holding, we also wish to address the discrepancy between West Virginia Code § 17C-5A-2(s) and West Virginia Code § 29A-5-4(c) (1998) regarding the requirements that must be satisfied for a circuit court to properly grant a stay. West Virginia Code § 29A-5-4(c) generally provides, in pertinent part, that “[p]ending the appeal, the court may grant a stay or supersedeas upon such terms as it deems proper.” (emphasis added). However, West Virginia Code § 17C-5A-2(s) more specifically provides that “[t]he court may grant a stay or supersedeas of the order only upon motion and hearing, and a finding by the court upon the evidence presented, that there is a substantial probability that the appellant shall prevail upon the merits, and the appellant will suffer irreparable harm if the order is not stayed.” To the extent that the terms of West Virginia Code § 17C-5A-2(s) more specifically delineate the requirements that must be satisfied before a stay can be granted by the circuit court, we find the language of West Virginia Code § 17C-5A-2(s) to be the controlling and superceding authority on this issue.

Accordingly, it is not an easy task to get a stay - nor should it be. If stays were required to be automatic, then the Legislature would not have written W. Va. Code § 17C-5A-2(s) like it did. Instead, the circuit courts would be required to use the general stay provisions in the Administrative

Procedures Act which does not require a specific finding of irreparable harm.

C. The circuit court erred in issuing a final decision on the merits when the matter was only noticed for a stay hearing.

On or about July 28, 2014, Mr. Conniff also filed Petitioner's Application for Stay of Final Order and a Notice of Hearing setting the request for stay to be heard on August 8, 2014. (App. at PP. 132-135.) There was no notice that the August 8th hearing would be a final hearing on the merits. West Virginia Rule of Civil Procedure 6(d)(1)(A) (2008) requires service of a notice of hearing at least nine (9) days before the time set for hearing if served by mail. Mr. Conniff never filed a notice of hearing on the merits of his petition pursuant to Rule 6; therefore, the circuit court erred in ruling on the merits of the petition for appeal.

This Court has found that the purpose of the notice requirement of "Rule 6(d) is to prevent a party from being prejudicially surprised by a motion." *Daniel v. Stevens*, 183 W. Va. 95, 104, 394 S.E.2d 79, 88 (1990). In *Daniel*, this Court found that because the party opposing the motion was not prejudicially surprised by the issue presented in the motion, the lack of notice was harmless. In *Cremeans v. Goad*, 158 W. Va. 192, 210 S.E.2d 169 (1974), however, only three hours of notice was given for a hearing. This Court found that three hours is insufficient time to prepare for a hearing and noted that Rule 6(d) is not a hard and fast rule, but sufficient time must be provided so that the parties have time to prepare. The Syllabus of *Cremeans* states:

While the language of Rule 6(d) of the Rules of Civil Procedure clearly permits a reduction of the time requirements for notice of hearing, where a trial court, in so acting, reduces time requirements to the extent that the party entitled to notice is deprived of all opportunity to prepare for hearing, such action constitutes a denial of due process of law and is in excess of jurisdiction.

In *Cremeans*, this Court further addressed the importance of adherence to the time

requirements set forth in W. Va. R. Civ. P. 6:

Rule 6(d) permits parties and the courts flexibility in setting time for hearings—but this is beyond permissible limits. At the minimum, a party proceeding under Rule 6(d) must show that the opposing party had actual notice and some time to prepare to meet the questions raised by the motion. *Herron v. Herron, Supra*. Although the wording of Rule 6(d) indicates that it is not primarily for the benefit of the moving party, under the above practice, the moving party needs notice just as does his adversary. The original movants in this case were given almost no notice of a hearing, and had no time to prepare for it. This is a denial of procedural due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article III, Section 10 of the Constitution of West Virginia. *Swallow v. United States*, 380 F.2d 710 (10th Cir.); *State ex rel. Battle v. Demkovich*, 148 W. Va. 618, 136 S.E.2d 895.

Cremeans v. Goad, 158 W. Va. 192, 195-96, 210 S.E.2d 169, 171 (1974).

This Court has further addressed non-compliance with W. Va. R. Civ. P. 6: “Given the language of Rule 6(d) permitting the reduction of notice requirements, we apply an abuse of discretion standard to the orders reducing Rule 6(d)'s notice requirements.” *State ex rel. Ward v. Hill*, 200 W. Va. 270, 276, 489 S.E.2d 24, 30 (1997). In the matter before this Court, Mr. Conniff provided no notice whatsoever of his intent to proceed with the merits before the circuit court, thus the DMV did not have time to prepare for it. Accordingly, the circuit court abused its discretion in determining a matter not noticed for hearing.

D. The circuit court denied the Petitioner due process by issuing a final decision on the merits when there was no administrative record in the file and the parties had not had the opportunity to brief the matter.

Mr. Conniff filed his designation of the record on July 31, 2014 (App. at PP. 168-172); therefore, the DMV did not have the administrative record prepared prior to the stay hearing on August 8th. In fact, the DMV was not able to transmit the administrative record to the circuit court until September 4, 2014. (App. at PP. 29-193.) Further, because the circuit court granted the

petition for judicial review prior to the DMV being able to finish the administrative record completely, the DMV submitted an audio compact diskette of the administrative hearing in lieu of a completed transcript. (App. at PP. 189-190.)

West Virginia Code § 29A-5-4 (1998) states in pertinent part:

(d) Within fifteen days after receipt of a copy of the petition by the agency, or within such further time as the court may allow, the agency shall transmit to such circuit court the original or a certified copy of the entire record of the proceeding under review, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the agency, all agency staff memoranda submitted in connection with the case, and a statement of matters officially noted; but, by stipulation of all parties to the review proceeding, the record may be shortened. . .

(e) 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. The court or judge shall fix a date and time for the hearing on the petition, but such hearing, unless by agreement of the parties, shall not be held sooner than ten days after the filing of the petition, and notice of such date and time shall be forthwith given to the agency.

(f) The review shall be conducted by the court without a jury and shall be upon the record made before the agency, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court. The court may hear oral arguments and require written briefs.

Here, a decision on the merits was not noticed for hearing, and it was impossible for the circuit court to make a determination without reviewing the record pursuant to W. Va. Code § 29A-5-4 (1998).

This Court has historically held that the administrative record is required for judicial review of an administrative proceeding. In *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995) that the court bases review of determination by administrative law judge for Educational Employees Grievance Board on the full administrative record that was before the administrative law judge at time he or she made decision. In *Frymier-Halloran v. Paige*, 193 W.

Va. 687, 458 S.E.2d 780 (1995) this Court determined that the standard of review set forth in the West Virginia State Administrative Procedures Act applies to circuit court's review of Tax Commissioner's decisions; thus, the focal point for judicial review should be on the administrative record already in existence, rather than some new record made initially in the reviewing court.

This Court also addressed the requirement of an administrative record in *Wood Cnty. Bd. of Educ. v. Smith*, 202 W. Va. 117, 502 S.E.2d 214 (1998). There, this Court determined that the entire record was unnecessary for legal determination because the issue in that case was a question of law. Since “[q]uestions of law are subject to a de novo review,” Syl. pt. 1, *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (1996), the circuit court had a sufficient record for the dispositive legal determination in the case. Any error in not having a full record was harmless. *See Parham v. Horace Mann Ins. Co.*, 200 W. Va. 609, 617, 490 S.E.2d 696, 704 (1997) (“[W]e conclude the procedural error committed by the trial court did not result in substantial injustice or prejudice the substantive rights of Appellants. Therefore, we consider such error harmless, and decline to reverse the final decision of the trial court”).

In the instant matter, before the DMV was able to prepare any part of the administrative record and transmit it to the circuit court; before the circuit court was able to review the record; and before the parties were able to review the record and prepare briefs on the issues raised in the Petition for Judicial Review, the circuit court below reversed the Commissioner’s Order of Revocation and reinstated Mr. Conniff’s driving privileges in violation of W. Va. Code § 29A-5-4 (1998) and case law.

E. The circuit court erred in granting the petition for judicial review when there was no requirement for the Division of Motor Vehicles to address Mr. Conniff's objections below in its Final Order.

In its *Order* the circuit court found,

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.

(App. at P. 11.) The circuit court, however, failed to provide any authority which requires the DMV to address each and every issue raised by Mr. Conniff below. That is clear error.

West Virginia Code § 17C-5A-2 (2008) governs the hearing procedure for Mr. Conniff's DUI arrest on May 30, 2010. Subsection (e) of that Code section directs the Commissioner to focus on the principal question at the administrative hearing which is whether the person did drive a motor vehicle while under the influence of alcohol or while having an BAC of more than .08%. Subsection (f) of § 17C-5A-2 contains the findings which the Commissioner is required to make at hearing: 1) whether the officer had reasonable grounds to believe that the person was DUI or had a BAC over .08%; 2) whether the person committed an offense involving DUI of alcohol, controlled substances or drugs; and 3) whether the tests, if any, were administered in accordance with the provisions of article 5 and article 5A of Chapter 17C of the Code.

Subsections (g-p) are statutory issues which the Commissioner must consider after making a determination that the driver was DUI. Subsections (q-r) contain the specific finding which the Commissioner must make if a driver refuses to take the SCT. Subsection (s) instructs the Commissioner to rescind the prior order of revocation if he/she found the above issues to the contrary. Subsection (s) also contains the procedure for obtaining a stay of a license revocation

during the appellate process. There is nothing in W. Va. Code § 17C-5A-2 (2008) which requires the Commissioner to address every issue raised at the administrative hearing.

Title 91 Section 1-3.12 Code of State Rules (2005) discusses the issuance of final orders by the Commissioner after an administrative hearing is held. The rule states specifically:

3.12.1. The Commissioner shall make findings of fact and conclusions of law pursuant to W. Va. Code §29A-5-1 et seq. and the applicable statutory provisions.

3.12.2. The Commissioner shall make and enter every final order pursuant to W. Va. Code §29A-5-1 et seq. and the applicable statutory provisions .

3.12.3. The person is entitled to judicial review as set forth in W. Va. Code §29A-5-1 et seq. and in accordance with the applicable statutory provisions.

There is nothing in the administrative rule requiring the Commissioner to address every issue raised at the administrative hearing.

West Virginia Code § 29A-5-3 (1964) governs the orders or decisions from administrative hearing and states specifically:

Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. Prior to the rendering of any final order or decision, any party may propose findings of fact and conclusions of law. If proposed, all other parties shall be given an opportunity to except to such proposed findings and conclusions, and the final order or decision shall include a ruling on each proposed finding. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. A copy of the order or decision and accompanying findings and conclusions shall be served upon each party and his attorney of record, if any, in person or by registered or certified mail.

The administrative record (App. at PP. 29-193) contains no proposed findings and conclusions submitted by either party; therefore, the Commissioner was not obligated in his *Final Order* to rule on any proposed findings or conclusions. The Commissioner did, however, address all arguments regarding the principal question at hearing, i.e., whether Mr. Conniff drove a motor

vehicle in this state while under the influence of alcohol or with a BAC greater than .08%. Accordingly, the DMV committed no error in its *Final Order*, and the circuit court was clearly wrong to determine otherwise.

F. The circuit court misapplied this Court's decision in *Miller v. Hare*, 227 W. Va. 337, 708 S.E.2d 531 (2011).

The circuit court found below that 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.” (App. at P. 8.) In *Miller v. Hare*, 227 W. Va. 337, 708 S.E.2d 531 (2011), this Court held that pursuant to W. Va. Code § 17C-5A-2(c) (2008), the Commissioner of the DMV has authority to continue an administrative license revocation hearing on his or her own motion when an investigative officer, despite a validly issued subpoena, fails to appear at the hearing and fails to seek an emergency continuance. Good cause for the continuance exists by virtue of the statutory duty imposed on the Commissioner to secure the officer’s attendance at the hearing once the licensee has specifically requested the officer’s attendance at the revocation proceeding.

Mr. Conniff’s DUI occurred on May 30, 2010; therefore, the 2008 version of the statute applies to this case. Even though the I/O’s subpoena was returned as undeliverable for the first administrative hearing scheduled on October 28, 2010 (App. at P. 83), as part of the statutory changes in 2008, the DMV was charged with the exclusive responsibility of securing the attendance of the investigating officer at the administrative hearing. Mr. Conniff specifically checked the box on the hearing request form indicating that he requested the appearance of the officer. When the I/O did not appear at the October 28, 2010, the DMV was authorized by statute to continue the hearing

to secure the officer's attendance since Mr. Conniff did not waive the officer's appearance after asking for it.

The May 18, 2012 hearing was continued due to the illness of the hearing examiner. That continuance was within the purview of the Commissioner's authority to continue the matter because the hearing examiner was essential personnel as defined 91 C.S.R. § 1-3.8.3 (2005). In *Hare*, this Court spoke to the Commissioner's authority in the Code of State Rules.

As part of the statutory scheme that permits a person arrested for DUI to challenge his license revocation, the Commissioner is granted the authority to "postpone or continue any hearing" on his or her "own motion." W. Va. Code § 17C-5A-2(c) (2008). The statute also provides the Commissioner to grant such continuances "upon application for each person for good cause shown." *Id.* Confirming the Commissioner's *sua sponte* authority to grant continuances, the regulations that address the postponement or continuance of a revocation hearing provide:

The Commissioner may postpone or continue a hearing on his or her own motion. The motion shall be for good cause including, but not limited to, docket management, availability of hearing examiners *or other essential personnel*, Division error in scheduling or notice, or mechanical failure of essential equipment, i.e. recording equipment, file storage equipment, etc.

91 C.S.R. § 1-3.8.3 (emphasis supplied).

As part of the 2008 changes to the license revocation statutes, 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). According to the 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. In light of this statutory amendment, the Commissioner instituted a policy of continuing hearings when an officer who had been subpoenaed pursuant to the licensee's request failed to show up at the revocation hearing.

When the investigating officer failed to appear at the administrative revocation hearing in this case, the Commissioner took the position that it had the necessary authority under both the applicable statutes and regulations to grant a continuance of his own accord notwithstanding the fact that a continuance had not

been requested by either the licensee or the officer. We agree. Given the statutory duty imposed on the DMV to secure the investigating officer's presence at the hearing once Mr. Hare had requested his attendance, Deputy Martin qualified as an individual essential to the resolution of the revocation proceeding. See W. Va. Code § 17C-5A-2(d) (2008); 91 C.S.R. § 1-3.8.3. Barring the licensee's decision to forego his request to have Deputy Martin attend the hearing, the Commissioner was obligated to secure the officer's attendance at the revocation proceeding. Consequently, the necessary good cause for continuing Mr. Hare's revocation proceeding was present.

In ruling that the Commissioner exceeded its jurisdiction by scheduling a second hearing in this matter, the trial court committed error. Pursuant to West Virginia Code § 17C-5A-2(c) (2008), the Commissioner has authority to continue an administrative license revocation hearing on his or her own motion when an investigative officer, despite a validly issued subpoena, fails to appear at the administrative hearing and fails to seek an emergency continuance. Good cause for the continuance exists by virtue of the statutory duty imposed on the Commissioner to secure the officer's attendance at the hearing under West Virginia Code § 17C-5A-2(d) (2008) once the licensee has specifically requested the officer's attendance at the revocation proceeding.

Miller v. Hare, 227 W. Va. 337, 340-41, 708 S.E.2d 531, 534-35 (2011).

The January 22, 2013, hearing was not recorded because of equipment failure even though the hearing examiner had contacted information technology personnel prior to the hearing regarding the software license and was assured that the program would work throughout that day. (App. at P. 76.) Again, 91 CSR § 1-3.8.3 (2005) provides the Commissioner *sua sponte* authority to continue a hearing for mechanical failure of essential equipment, e.g., recording equipment. On June 4, 2013, the DMV held the administrative hearing in this matter.

The circuit court Order found that the “DMV had no right or authority to grant any continuance over Petitioner’s objections in this case.” (App. at P. 10.) The circuit court also found that the “DMV violated the Petitioner’s due process rights by conducting another hearing on the matter when it had no authority to do so.” In his *Petition for Review* (App. at PP. 151-156), Mr.

Conniff alleged that the DMV overstepped its authority by granting continuances; however, nowhere in his petition did he allege that he was substantially prejudiced by any delay caused by the continuances, and no where in the circuit court's Order was there a finding that Mr. Conniff was substantially prejudiced by any delay caused by the continuances granted by the DMV.

In *Holland v. Miller*, 230 W. Va. 35, 736 S.E.2d 35 (2012), this Court determined that ascertaining whether facts support a good cause basis for granting any continuance in driver's license revocation proceeding requires a careful examination of whether the delay was unreasonable or excessive under the circumstances and any prejudice to the licensee shall be a factor considered in making the determination of whether the delay was unreasonable or excessive.

Again, the first hearing in the instant was continued so that the Commissioner could compel the officer's appearance since Mr. Conniff requested it on his hearing request form. The next hearing was continued because the hearing examiner was sick. The next hearing was continued because of equipment failure. The next hearing was held as scheduled. None of the reasons for the continuances below rise to the level of unreasonableness or excess.

In *Holland*, however, the matter was never resolved on the merits because Ms. Holland sought a writ. This Court did not require that the matter be dismissed outright. Instead, the Court remanded the matter for a hearing to determine if there was unreasonable or excessive delay under the circumstances. This Court also found that any prejudice to the driver shall be a factor considered in making the determination of whether the delay was unreasonable or excessive.

Further, Mr. Conniff must show actual and substantial prejudice as defined by *Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011), namely that he was unable to defend his case because of the delay in getting to hearing. *Moredock* involved a delay between the time of the final

hearing and the time that the final order was issued – not the time between when the hearing was requested and when it was held – however, that case is instructive here regarding delay.

In *Moredock*, this Court held that the delay would not be presumed to be prejudicial but rather the driver would be required to show actual and substantial prejudice meaning that he was unable to defend himself. Here, Mr. Conniff cannot and did not make a showing of actual and substantial prejudice. He was timely notified of his license revocation. He timely appealed the same. He hired legal counsel. He cross examined the investigating officer. He even appeared at the hearing he requested yet refused to testify.

Assuming *arguendo* that Mr. Conniff were able to show actual and substantial prejudice from the delay, then this Court must balance the resulting prejudice against the reasons for the delay. Again, the first hearing was continued so that the Commissioner could compel the officer's appearance since Mr. Conniff requested it on his hearing request form. The next hearing was continued because the hearing examiner was sick. The next hearing was continued because of equipment failure. The next hearing was held as scheduled. The Commissioner's reasons for continuing the matter below were not arbitrary but were based on 1) ensuring Mr. Conniff's right to have the officer present as requested; 2) unavailability of essential personnel; and 3) equipment failure.

However, even if this Court does not find that the DMV had good cause for continuing the first administrative hearing, dismissal of the DUI is not the remedy favored by this Court. In *David v. The Comm'r of the DMV*, 29 W. Va. 493, 637 S.E.2d 591 (2006), this Court held that the law favors the resolution of cases on their merits. Granting Mr. Conniff's appeal of the license

suspension proceedings, under the facts of the instant case, runs counter to this principle, and the circuit court erred in so doing.

G. The circuit court erred in rescinding the Final Order of the Commissioner when all of the evidence indicated that Mr. Conniff was driving while under the influence of alcohol.

In its Order entered September 11, 2014, the circuit court began its Factual and Procedural History with June 29, 2010, the date the DMV sent its Order of Revocation to Mr. Conniff for aggravated DUI. (App. at P. 2.) No where in the circuit court's Order is any mention whatsoever of the evidence of DUI gathered on the night that Mr. Conniff hit another vehicle then fled the scene. The circuit court completely ignored all evidence of Mr. Conniff's drunk driving thus ignoring the principal question at an administrative hearing: whether Mr. Conniff drove a motor vehicle in this state while under the influence of alcohol. W. Va. Code § 17C-5A-2(e) (2008).

It is well established law 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.” Syl. Pt. 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984). *See also*, Syl. Pt. 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).

Here, the evidence shows that Mr. Conniff had the odor of an alcoholic beverage on his breath; his eyes were bloodshot and glassy; he was unsteady while exiting his vehicle, while walking to the roadside and while standing. (App. at P. 36.) There were beer caps in Mr. Conniff's car. *Id.*

Mr. Conniff failed the horizontal gaze nystagmus test because his eyes lacked smooth pursuit, displayed distinct and sustained nystagmus at maximum deviation and exhibited the onset of nystagmus prior to an angle of forty-five degrees. *Id.* He failed the walk-and-turn test because he missed heel-to-toe, walked an incorrect number of steps and executed an improper turn. *Id.* Further, Mr. Conniff failed the one-leg stand test because he swayed while balancing, used his arms to balance, and put his foot down. (App. at P. 37.) During a post arrest interview, Mr. Conniff admitted to operating a motor vehicle, being involved in a crash, and consuming a couple of beers. (App. at P. 39.) Mr. Conniff, however, denied being under the influence of alcohol, being injured or ill, and having any physical defects. *Id.*

A revocation decision must be affirmed if supported by substantial evidence. “We find that there was substantial evidence for the revocation of the appellee’s driver’s license and conclude that the DMV’s findings were not clearly wrong in light of all of the probative and reliable evidence in the record.” *Lilly v. Stump*, 217 W. Va. 313, 319, 617 S.E.2d 860, 866 (2005).

“Substantial evidence” requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. If the Commission’s factual finding is supported by substantial evidence, it is conclusive. Neither this Court nor the circuit court may supplant a factual finding of the Commission merely by identifying an alternative conclusion that could be supported by substantial evidence.

In re Queen, 196 W. Va. 442, 446, 473 S.E.2d 483, 487 (1996).

Here there was sufficient evidence reflecting that Mr. Conniff was operating a motor vehicle on a public street, exhibited symptoms of intoxication and had consumed alcoholic beverages. Accordingly, the circuit court erred in not considering the overwhelming evidence of DUI.

H. The circuit court erred in rescinding the Final Order of the Commissioner when Mr. Conniff’s blood alcohol content was .269, which mandates a license revocation.

Finally, Mr. Conniff failed the SCT with a result of .269% (App. at PP. 34, 38 and 123), yet the circuit court ignored that fact completely. “Evidence that there was, at that time, eight

hundredths of one percent or more, by weight, of alcohol in his or her blood, shall be admitted as prima facie evidence that the person was under the influence of alcohol.” W. Va. Code § 17C-5-8(a)(3) (2004). *See also, Dale v. Veltri*, 230 W. Va. 598, 741 S.E.2d 823 (2013). Further, “[o]perating a motor vehicle with a concentration of eight hundredths of one percent (.08%) or more of alcohol in the blood constitutes DUI.” *Id.* at FN.3. It is clear error for the circuit court to completely ignore the fact that Mr. Conniff’s blood alcohol content was .269%, which is clearly more than three times the legal limit of .08%.

VI. CONCLUSION

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

Respectfully submitted,

PAT REED, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,

By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-1063
(Circuit Court Civil Action No. 14-P-120)

**PATRICIA S. REED, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Petitioner,

v.

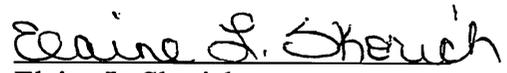
ROBERT B. CONNIFF,

Respondent.

VII. CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 13th day of January, 2015, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, to wit:

Joseph J. John, Esquire
John Law Offices
200 Board of Trade Building
80 Twelfth Street
Wheeling, WV 26003-3273


Elaine L. Skorich