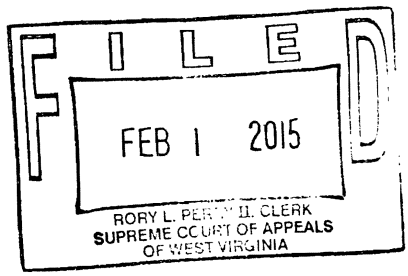
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-1063



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

Petitioner,

v.

ROBERT B. CONNIFF,

Respondent.

BRIEF OF RESPONDENT

Respectfully submitted,

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I. STATEMENT OF THE CASE

On May 30, 2010, Officer W. M. Ward, of the Wheeling Police Department, initiated a traffic stop of the respondent's vehicle. The traffic stop was premised upon allegations made by a person unknown to Officer Ward about an automobile accident involving the respondent's vehicle. (AR Diskette June 4, 2013, Hearing).

After the stop, Officer Ward (hereinafter "Investigating Officer"), arrested the respondent, Robert B. Conniff, for driving under the influence of alcohol (DUI) in violation of W.Va. Code §17C-5-2. (AR p.35).

On June 29, 2010, the Division of Motor Vehicles ("DMV") sent Mr. Conniff an Order of Revocation of his driver's license as a result of Officer Ward's submission to the DMV of a Statement of Arresting Officer regarding the May 30, 2010, incident. (AR p.41).

On July 2, 2010, Mr. Conniff properly completed and delivered a hearing request form to the DMV. The form was created by and sent to the respondent by the DMV, and the respondent properly filled out the form and timely returned the same. On the form, Mr. Conniff checked the box, "I request the investigating officer's attendance. By law, DMV will subpoena the officer". (AR p.42).

On July 27, 2010, the DMV scheduled an administrative hearing for October 28, 2010, at 11:00 a.m. in Moundsville, West Virginia. (AR p.46).

On October 28, 2010, at 11:00 a.m. in Moundsville, West Virginia, the respondent, Mr. Conniff, appeared, in person and by counsel, for the scheduled hearing for the revocation of his driver's license. The DMV's hearing examiner waited 15-20 minutes for the officer to arrive. The Investigating Officer did not arrive or otherwise appear for the hearing and the hearing was then held. The hearing examiner placed on the record that the matter was being continued for "subpoena

enforcement" since the Investigating Officer failed to appear after being subpoenaed by the DMV. (AR Diskette October 28, 2010 Hearing - App. time 1:52).

At the hearing on October 28, 2010, the respondent, by and through counsel, objected to any continuance of the October 28, 2010, hearing as there was no motion for continuance or emergency situation for a continuance. Further, the respondent, by and through counsel, demanded that the revocation of the respondent's license be rescinded and that his driving privileges be reinstated immediately for lack of evidence in the case. (AR Diskette October 28, 2010 Hearing - App. time 2:45, 13:50).

There was no motion or request for continuance ever filed by the officer, either before or after the October 28, 2010, hearing; however, the hearing examiner, over respondent's objection, continued the case for "subpoena enforcement" (AR Diskette October 28, 2010 Hearing - App. time 15:00), although the evidence is unrefuted that the Investigating Officer was never served with a subpoena for said hearing by the DMV as more fully set forth below.

The history of the numerous hearings scheduled in this matter by the DMV are best set forth in the chronology below:

HISTORY OF SCHEDULED HEARINGS

1. **Hearing No. 1** - The initial hearing before the Division of Motor Vehicles was scheduled for October 28, 2010, pursuant to a notice dated July 27, 2010. (AR p. 46).

On October 28, 2010, the respondent appeared in person and by counsel. The investigating officer failed to appear and the respondent moved to have the revocation rescinded. (AR Diskette October 28, 2010 Hearing - App. time 13:50).

The DMV continued the case over the respondent's objection on the basis of "subpoena enforcement". (AR Diskette October 28, 2010 Hearing - App. time 15:00).

2. **Hearing No. 2** - The DMV scheduled a second hearing for February 25, 2011. (AR p.3). The respondent objected to the second hearing by letter dated February 16, 2011. (AR p. 21). The respondent appeared in person and by counsel for the scheduled hearing as there was no letter or order from the DMV continuing the case. The DMV failed to appear at the hearing on February 25, 2011; thus, the hearing did not take place as scheduled. (AR p.3).

The DMV has now admitted, "The file had been inadvertently sent to the new hearing tribunal, the Office of Administrative Hearings ("OAH"), and had not been returned to the DMV in time to conduct the 2/25/11, hearing". (Petitioner's Notice of Appeal Extra Sheet, p. 1).

3. **Hearing No. 3** - The DMV scheduled the matter for another hearing for May 18, 2012. The respondent requested the DMV to pay his attorney fees and costs to adequately prepare for a fair hearing if the DMV was going to conduct the hearing over respondent's objection. (AR p. 24). The DMV did not provide respondent any fees or costs; however, the May 18, 2012, hearing was cancelled due to the hearing examiner being on sick leave. (AR p. 74).

4. **Hearing No. 4** - The DMV scheduled the matter for another hearing for January 22, 2013. (AR p. 75). The respondent appeared in person and by counsel. The investigating officer appeared as well as the Assistant Attorney General and the DMV's hearing examiner. Prior to the hearing, the respondent again objected to this hearing taking place. (AR p. 25).

The hearing examiner commenced the hearing but then aborted and continued the hearing because the hearing examiner's 30 day recording subscription demo on his computer (Quickscribe) expired and was not timely or properly renewed by the DMV. (AR pp. 27, 80).

The DMV's hearing examiner continued the hearing, over respondent's objection, on the grounds or basis that there was "mechanical failure" of the recording equipment. Again, the respondent objected to the continuance and to any further rescheduling of this matter. (AR p. 25).

By letter dated February 27, 2013, the DMV, through counsel, claimed that the January 22, 2013 hearing was continued due to "equipment failure". The DMV's counsel stated,

> I am writing to respond to your letter dated January 25, 2013. 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 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. The Arresting Officer submitted a DUI information sheet. By law the Division must revoke upon receipt of the document. You have requested a hearing on the DUI event in question. Please make any motions or objections about the events of the DUI at the next scheduled hearing. I regret any inconvenience this may have caused you or your client.

(AR p. 27).

5. **Hearing No. 5** - Over the respondent's objections, the matter was again set for another hearing on June 4, 2013. The respondent appeared in person and by counsel and objected to the hearing taking place prior to the testimony. (AR Diskette June 4, 2013, Hearing). The hearing was held on June 4, 2013, over respondent's objection. During cross-examination at the hearing on June 4, 2013, the Investigating Officer testified under oath that he was not served with a subpoena by the DMV as required by law for the first administrative hearing (Hearing No. 1) scheduled for October 28, 2010.

At the June 4, 2013, hearing, Officer Ward testified, amongst other things, as follows:

Q. Were you subpoenaed to appear at a hearing on October 28, 2010?

A. No I was not.

Q. If in fact you were subpoenaed you know that you have to appear or else it would be a misdeameanor, correct?

A. That is correct.

Q. And you would appear if you were subpoenaed correct?

A. Correct.

Q. Is there anywhere within the file that shows that you were personally served with a subpoena for the October 28, 2010 hearing?

A. Give me one second (pause) no.

Q. You would agree with me within that entire file there is no return of service of a subpoena being served upon you by personal service correct?

A. That is correct.

Q. You would agree with me Corporal Ward that there is nowhere in that record a signed return receipt card required by 17A-2-8?

A. That is correct.

Q. And you never recall being served with a subpoena correct?

A. That is correct.

Q. You would agree here under oath that you were not served with a subpoena for the October 28, 2010 hearing that is correct?

A. That is correct.

Q. For the DMV to state and imply within the record that they were continuing the case for subpoena enforcement indicating that you did not appear after being served with a subpoena is that a misrepresentation?

A. Yes.

Q. Is that an untrue statement?

A. Yes sir.

Q. Let me show you a letter Corporal dated May 22, 2012, from Jill Dunn, General Counsel for the DMV, I will show that to you... Here in this letter, it states, " in your hearing request you specifically checked the box requesting the appearance of the officer at the hearing"...did I read that correctly?

A. Yes sir.

Q. She states, "the officer was subpoenaed to the first scheduled hearing but the officer did not appear". Is that a true statement?

A. No I wasn't subpoenaed.

Q. So is that a true and accurate statement?

A. No it is not true.

Q. That is not true is it?

A. No.

Q. You were not subpoenaed?

A. I was not.

Q. You did not ignore a subpoena?

A. No I did not.

(AR Diskette June 4, 2013, Hearing - App. time 22:35 - 30:00).

The record is clear and the testimony is unrefuted that Officer Ward was never served by the DMV with a subpoena compelling his attendance and appearance for the October 28, 2010, hearing, despite the DMV's assertions and representations that Officer Ward was subpoenaed by the DMV and "failed to appear" for the October 28, 2010, hearing, and that the hearing was continued for "subpoena enforcement" as a result of Officer Ward failing to honor the subpoena.

On or about July 22, 2014, the DMV issued its Final Order upholding the revocation of Mr. Conniff's driving privileges. (AR p. 94). Interestingly, the DMV did not address one procedural argument or defense advanced by the respondent.

Even though the DMV was well aware of the procedural issues regarding the DMV's failure to subpoena Officer Ward to Hearing No. 1, as required by law, the DMV, in its Final Order, never addressed this dispositive issue. In fact, the only mention of the word "subpoena" in the DMV's Final Order was when the DMV stated, "Counsel for the respondent cross-examined the investigating officer regarding whether he was subpoenaed to appear at the first administrative hearing scheduled on October 28, 2010..." (AR p. 98).

On or about July 25, 2014, Mr. Conniff filed his Petition for Review in the Circuit Court of Ohio County, West Virginia. (AR p. 104). On or about July 28, 2014, Mr. Conniff filed an Application to Stay Final Order and a Notice of Hearing scheduling the matter for a hearing on August 8, 2014. (AR pp. 132-135).

On August 8, 2014, the respondent, Robert Conniff, appeared in person and by counsel for the scheduled hearing before the Honorable Martin J. Gaughan. The DMV appeared by counsel. (AR p. 2).

As a condition precedent to obtaining a stay of the DMV's Final Order, the respondent was required to show irreparable harm and a substantial probability that he would prevail in his appeal. W.Va. Code §17C-5A-2(s). Thus, Mr. Conniff testified as to the irreparable harm he would incur, and also submitted ten (10) exhibits, numerous legal authorities and made legal arguments to establish and prove that Mr. Conniff had a substantial probability of prevailing in his appeal. The fact that Officer Ward was not subpoenaed to the first administrative hearing was argued before the Court at that time. (AR lower court Tr. p. 8).

Initially, the lower court found that the respondent would suffer irreparable harm and that he had a substantial probability of prevailing in his appeal; thus, the lower court found that respondent's application for stay was proper. (AR p. 5). The lower court granted the respondent's relief regarding the stay, and then stated that it was going to remand the matter to the DMV, as allowed by law, to have the DMV address the procedural and legal issues raised by the respondent and which the DMV elected to ignore in its Final Order. (AR p. 5).

The DMV vehemently objected to any such remand and questioned the lower court's authority and ruling on the stay. (AR p. 5). The lower court recognized at the August 8, 2014, hearing "I think there is an issue that the department be required to issue a subpoena to bring someone forward and it is just very capricious of them not to subpoena someone when a defendant has clearly asked for the defendant (sic) -- witness to be present... (AR lower court Tr. p. 14)..., and the lower court further stated, "[B]ut the hearing didn't take place as scheduled due to the department's part, and that's the issue that I just framed...". (AR lower court Tr. p. 15). The lower court then, *sua sponte*, turned the hearing into one on the merits, and considered the issues of law including the failure to subpoena the officer to the first hearing. The court then considered the issues of law and stated from the bench that he was granting Mr. Conniff's relief as requested in his appeal. (AR lower court Tr. p. 17). As a result of the court's ruling, the stay was rendered moot. As for the Final Order, the lower court did not enter its Final Order until September 11, 2014, (AR pp. 2-12), a week after the record was submitted by the DMV to the court and a month after the August 8, 2014, hearing.

At no time after the August 8, 2014, hearing before Judge Gaughan and prior to the entry of the lower court's Final Order on September 11, 2014, did the DMV request any type of relief

whatsoever. The DMV did not file a motion to reconsider. The DMV did not request another hearing. The DMV did not submit any legal brief or additional argument to the lower court during this time.

The lower court's Final Order is in all respects proper as the lower court had jurisdiction over the matter and had the authority to make legal determinations regarding issues of law and procedure. The lower court was lawfully permitted to decide errors of law at the August 8, 2014, hearing, without any further hearings being necessary.

II. SUMMARY OF ARGUMENT

The lower court was correct in granting the relief sought by Mr. Conniff in his Petition for Review and the lower court's ruling should be affirmed.

Mr. Conniff was adversely affected by the Final Order of the DMV in his contested case and was therefore entitled to judicial review pursuant to W. Va. Code §29A-5-4.

W. Va. Code §29A-5-4(g) provides that the Court shall reverse, vacate or modify the order of the agency if the substantial rights of the petitioner (Mr. Conniff) have been prejudiced because the administrative findings, conclusions, decision or order are (1) in violation of constitutional or statutory provisions, (2) in excess of the statutory authority or jurisdiction of the agency, (3) made upon unlawful procedures, (4) affected by other error of law, (5) clearly wrong, or (6) arbitrary or capricious or abuse of discretion or clearly unwarranted exercise of discretion.

The lower court followed the mandate of W. Va. Code §29A-5-4 and reversed the Final Order of the DMV based upon the DMV's violations of Mr. Conniff's constitutional, statutory, procedural and administrative rights, including but not limited to, the DMV's failure to abide by the statutory and administrative provisions governing DMV hearings, and by engaging in unlawful

procedures, including but not limited to, the DMV unlawfully granting a continuance of the first administrative hearing, over respondent's objection, on the basis of "subpoena enforcement" when the officer was never served with a subpoena by the DMV, as required by law, to the first hearing, and by unlawfully scheduling, continuing and conducting other hearings thereafter.

The lower court correctly reversed the Final Order of the DMV as the respondent's substantial rights were prejudiced by the DMV's wrongful acts and omissions as contemplated by W. Va. Code §29A-5-4(g) and as more fully set forth herein. The DMV had no right, authority or jurisdiction to grant a continuance of the October 28, 2010, hearing, and the DMV had no authority or right to schedule or conduct or continue any of the other hearings, and the respondent's substantial rights were prejudiced as a result thereof.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Your respondent respectfully maintains and states that oral argument is unnecessary under the Revised Rules of Appellate Procedure (2010), Rule 18(a)(3), as "the dispositive issue or issues have been authoritatively decided", or 18(a)(4), as "the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument".

If the Court were to grant argument, it should be under Appellate Rule 19, and a memorandum decision would be appropriate for this case.

IV. ARGUMENT

A. Standard of Review

1. 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).

2. 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:

(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 direction.

West Virginia Code §29A-5-4(g).

3. The applicable standard of review for these types of cases is as follows:

> "On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code §29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

B. <u>Points and Legal Authorities</u>

1. 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."

2. Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter. W.Va. Code §29A-5-4(a).

3. 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. W.Va. Code §29A-5-4(e).

4. 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, 219 W.Va. 493, 637 S.E.2d 591 (W.Va. 2006).

5. The standard and procedures for granting continuances of DMV administrative hearings, authorized by W.Va. Code §17C-5A-2, are set forth at W.Va. C.S.R. Title 91, Legislative Rules, Division of Motor Vehicles, Series 1, Administrative Due Process. Rules 3.8.1, 3.8.2 and 3.8.3, state as follows:

> 3.8.1 The Commissioner may grant the person requesting a hearing a continuance of the scheduled hearing. The person shall make the request for continuance in writing, and it must be received by the Commissioner at least five (5) days prior to the scheduled hearing date. The Commissioner shall grant the request if good cause is shown. Good cause shall include such reasons as serious illness, medical appointments, court appearances, or religious holidays. In no case may the Commissioner grant more than one continuance per party except as provided in Subdivisions 3.8.3 and 3.8.4.

3.8.2 In DUI hearings, the Commissioner may also grant a continuance to the arresting officer as prescribed in Subdivision 3.8.1.

3.8.3 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.

6. The standard and procedures for issuing and serving subpoenas for DMV administrative hearings are set forth at W.Va. C.S.R. Title 91, Legislative Rules, Division of Motor Vehicles, Series 1, Administrative Due Process. Rules 3.2, 3.2.1 and 3.2.2 state as follows:

3.2 Subpoenas - The Commissioner may issue subpoenas or subpoenas duces tecum in accordance with W. Va. Code §29A-5-1(b).

3.2.1 Every subpoena and subpoena duces tecum shall be served at least five days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail. A return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail.

3.2.2 All subpoenas and subpoena duces tecum shall be issued in the name of the Division of Motor Vehicles. Any party requesting the issuance of a subpoena or subpoena duces tecum must see that they are properly served.

7. The standard and procedures regarding a person's failure to appear for DMV administrative hearings are set forth at W.Va. C.S.R. Title 91, Legislative Rules, Division of Motor Vehicles, Series 1, Administrative Due Process. Rules 3.7.1 and 3.7.2, state as follows:

3.7.1 The Division shall automatically reinstate the revocation or suspension and the assessment of costs outlined in Subsection 3.11 of this rule if the person fails to appear either in person or by counsel, at the hearing without obtaining a continuance pursuant to Subsection 3.8 of this rule.

3.7.2 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.

8. An investigative officer's failure to appear at a revocation hearing to which he was properly served with a subpoena constitutes good cause to continue the hearing. *Holland v. Miller*, 230 W.Va. 35, 736 S.E.2d 35 (W.Va. 2012) citing *Miller v. Hare*, 227 W.Va. 66, 708 S.E.2d 531 (W.Va. 2011).

9. The statutory duty imposed on the DMV to secure the officer's attendance translated into an affirmative obligation upon the DMV to compel the officer to be present at the revocation hearing by properly serving the officer with a subpoena, when requested to do so. See, *Miller v. Hare,* 227 W.Va. 66, 708 S.E.2d 531 (W.Va. 2011). Accordingly, the DMV's violation of this statutory duty and affirmative obligation to subpoena the officer, when requested to do so, does not constitute "good cause" to continue the hearing when the officer does not appear at such hearing because he was not served with a subpoena by the DMV to appear at such hearing.

10. The equal enforcement and application of procedure in administrative hearings is fundamental to our system of justice. *David v. Commissioner of Motor Vehicles*, 219 W.Va. 493, 637 S.E.2d 591 (W.Va. 2006), (Benjamin, J. concurring).

C. <u>The lower court correctly granted the respondent the relief sought in his petition for review and the lower court's Order is in all respects proper and should be affirmed.</u>

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."

Moreover, the exact legislative rules that the DMV enacted and which were approved by the legislature, and the exact rules which the DMV applies to citizens such as Mr. Conniff, provide for Administrative Due Process. C.S.R. 91-1-1 et seq.

West Virginia law is clear that the respondent, Robert Conniff, was and is entitled to the protections of due process in this license revocation matter. As set forth herein, Mr. Conniff was deprived of his constitutional, statutory, procedural and administrative due process rights by the DMV throughout this case.

The evidence is clear that Officer Ward was not subpoenaed to the first administrative hearing on October 28, 2010. (AR Diskette June 4, 2013, Hearing). Even though Officer Ward's testimony is unrefuted on this issue, the DMV, from the very beginning and continuing throughout this matter, has wrongfully asserted and represented that Officer Ward was subpoenaed to the first hearing, including the following assertions by the DMV:

1. At the October 28, 2010, hearing (Hearing No. 1), the DMV continued the case for "subpoena enforcement" through the circuit court, when, in fact, the subpoena was never served;

2. By letter dated March 22, 2012, counsel for the DMV stated, "The officer was subpoenaed to the first scheduled hearing, but the officer did not appear. Therefore, pursuant to the *Hare* decision, the hearing in this case will be rescheduled..." (AR p. 22); and

3. In the DMV's brief to this Honorable Court, the DMV states on page 3, "On July 23, 2010, the DMV issued a subpoena to the I/O. At the administrative hearing on October 28, 2010, the officer failed to appear".

It is time for the DMV's blame upon the officer to end and time for the DMV to bear the consequences of its unlawful acts and omissions. Officer Ward was never served with a subpoena

by the DMV compelling his attendance at the first hearing. The DMV, by law, had the affirmative duty to properly serve Officer Ward with a subpoena and failed in its duty. Thus, for the DMV to continue the first hearing on the basis of "subpoena enforcement" was improper and unlawful.

The standard and procedures for granting continuances of DMV administrative hearings, authorized by W.Va. Code §17C-5A-2, are set forth at W.Va. C.S.R. Title 91, Legislative Rules, Division of Motor Vehicles, Series 1, Administrative Due Process. Rules 3.2.1 and 3.2.2 state as follows:

> 3.2.1 Every subpoena and subpoena duces tecum shall be served at least five days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail. **A return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail.** (Emphasis added).
>
> 3.2.2 All subpoenas and subpoena duces tecum shall be issued in the name of the Division of Motor Vehicles. **Any party requesting the issuance of a subpoena or subpoena duces tecum must see that they are properly served.** (Emphasis added).

Here, the respondent requested the attendance of the officer by checking the appropriate box on the hearing request form (AR p. 42); thus, the DMV had the affirmative duty to issue and properly serve the subpoena on Officer Ward to compel his appearance at the first hearing. The DMV failed in this duty and now wants this Court to ignore the DMV's dereliction. As the record shows, there was no return receipt card or acknowledgment signed by Officer Ward as required by W.Va. Code §17A-2-18 and C.S.R. 3.2.1. Also, there was no return of service or proof of service in the file indicating personal service of the subpoena upon Officer Ward. The certified mail to Officer Ward came back "unclaimed" (AR p. 83), and Officer Ward testified that he was never subpoenaed to the first hearing, and further testified that for someone to say he (Officer Ward) was subpoenaed to said

hearing would be false. (AR Diskette June 4, 2013, Hearing). It is appalling that the DMV accuses Officer Ward of "failing to appear" after being served with a subpoena, thereby implying that the officer committed a misdemeanor, as contemplated by W.Va. Code §17A-2-18, to cover up the DMV's own wrongdoings and to deprive the respondent of his rights.

The lower court properly applied the holding and rationale in *Miller v. Hare*, 227 W. Va. 66, 708 S.E.2d 531 (W.Va. 2011) to this case. The case sub judice is clearly distinguishable from *Miller v. Hare*, 227 W. Va. 66, 708 S.E.2d 531 (W.Va. 2011). In *Hare*, this 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**. (Emphasis added).

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 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". Here, the DMV stipulated that it was the DMV's obligation to properly subpoena Officer Ward to the first hearing. (AR Diskette June 4, 2013, Hearing App. time 23:30).

In *Hare*, this Court found that "good cause" existed for the Commissioner to grant a continuance when the officer was served with a subpoena and failed to appear. Thus, consistent with this reasoning, the DMV's violation of the statutory duty and affirmative obligation to subpoena the officer, when requested to do so, does **not** constitute "good cause" to continue the hearing when the officer does not appear at such hearing because he was not served with a subpoena by the DMV to appear at such hearing.

The case sub judice is also distinguishable from *Holland v. Miller, II* , Memorandum Decision No. 13-0924 (W.Va. June 13, 2014). In *Holland II*, this Court, noted,

> Petitioner was arrested for second offense driving under the influence ("DUI") on January 10, 2009. He timely requested an administrative hearing by completing and returning to the Division of Motor Vehicles ("DMV") the prescribed hearing request form. **It is undisputed that petitioner failed to mark the space on the form requesting the attendance of the investigative officer at the hearing. Likewise, the DMV did not subpoena the officer because the notice of hearing was sent to him by regular, rather than registered or certified mail...Given that the investigative officer did not appear at the hearing because he was not subpoenaed the hearing examiner adjourned the hearing...**

The Court, in deciding *Holland, II*, made it clear that (1) the petitioner failed to mark the space on the form requesting the attendance of the investigative officer at the hearing which would have placed the affirmative duty upon the DMV to subpoena the officer, and (2) petitioner did not object to the continuance.

Here, Mr. Conniff did mark the space on the form requesting the attendance of the investigative officer which required the DMV to subpoena the officer by law, and Mr. Conniff objected to the continuance.

Respondent's case involves the one set of facts that differentiate his case from *Hare* and *Holland, II*, those facts being (1) the respondent requested the investigative officer's attendance on the form which required the DMV to subpoena the officer, and (2) the DMV failed to subpoena the officer, and (3) the DMV continued the case for subpoena enforcement and (4) the respondent objected to the continuance. The DMV clearly violated Mr. Conniff's due process rights under these facts.

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". The rules do not authorize the DMV to continue a hearing for subpoena enforcement when the DMV fails to serve the exact subpoena it is trying to "enforce".

The DMV had the exclusive responsibility of securing the attendance of Officer Ward once requested to do so by Mr. Conniff, and the DMV was obligated by law to issue and properly serve the subpoena on the officer to compel his appearance at said hearing. The DMV failed to properly serve the subpoena on Officer Ward thereby violating its statutory duty to do so. The Commissioner's violation of his statutory duty certainly cannot constitute "good cause" for a continuance.

The respondent, at the October 28, 2010, hearing, and thereafter, objected to the continuance and demanded that the revocation order be rescinded and that the Mr. Conniff's license be reinstated immediately. (AR Diskette October 28, 2010, Hearing).

91 C.S.R. 3.7.2 states,

> 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.

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 at that time, due to the DMV's own wrongdoings, and the DMV should have reinstated the Mr. Conniff's driving privileges after the hearing on October 28, 2010.

The DMV had no authority or right to grant a continuance of the October 28, 2010, hearing under the facts of this case and to do so over Mr. Conniff's objection was improper and unlawful.

The policies and procedures pertaining to the DMV shall be enforced and applied to all persons equally. This case is somewhat analogous to *David v. Commissioner of Motor Vehicles*, 219 W.Va. 493, 637 S.E.2d 591 (W.Va. 2006), in that the DMV improperly granted a continuance. The 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 contrast 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 the continuance over Mr. Conniff's objections in this case. However, since the DMV advised Mr. Conniff that it was scheduling another hearing over his objections, the respondent requested the DMV to pay for fees and costs so that the respondent could properly prepare for any additional hearings that may take place over the respondent's objections. The DMV refused to make any such payment to the respondent so that the respondent could properly prepare for any hearing scheduled over his objections despite repeated demands; thus, violating the respondent's rights to due process and a fair hearing as contemplated by *David v. Commissioner of Motor Vehicles*, 219 W.Va. 493, 637 S.E.2d 591 (W.Va. 2006).

Since the DMV had the opportunity to make payment to the respondent for fees and costs so that respondent could properly prepare for any hearings to take place over his objections, and since the DMV elected not to pay the respondent his attorneys' fees and expenses to adequately prepare and defend, the DMV acted in excess of its jurisdiction in conducting additional hearings that violated the respondent's due process rights to a fair hearing. *See*, *David v. Commissioner of Motor Vehicles.*

The DMV's reliance on *Miller v. Hare*, 227 W. Va. 66, 708 S.E.2d 531 (W.Va. 2011) is misplaced as Officer Ward was not served with a subpoena 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 respondent's objection. The DMV violated the respondent's due process rights by conducting other hearings on the matter when it had no right or authority to do so.

The standard and procedures for granting continuances of DMV administrative hearings, authorized by W.Va. Code §17C-5A-2, are set forth at W.Va. C.S.R. Title 91, Legislative Rules, Division of Motor Vehicles, Series 1, Administrative Due Process. Rules 3.8.1, 3.8.2 and 3.8.3, state as follows:

> 3.8.1 The Commissioner may grant the person requesting a hearing a continuance of the scheduled hearing. The person shall make the request for continuance in writing, and it must be received by the Commissioner at least five (5) days prior to the scheduled hearing date. The Commissioner shall grant the request if good cause is shown. Good cause shall include such reasons as serious illness, medical appointments, court appearances, or religious holidays. In no case may the Commissioner grant more than one continuance per party except as provided in Subdivisions 3.8.3 and 3.8.4.
>
> 3.8.2 In DUI hearings, the Commissioner may also grant a continuance to the arresting officer as prescribed in Subdivision 3.8.1.

> 3.8.3 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.

Any rescheduled hearing, including the hearing scheduled on February 25, 2011, (Hearing No. 2) was improper and unlawful. The respondent objected to the February 25, 2011, hearing and further requested attorneys' fees and costs pursuant to *David v. Commissioner of Motor Vehicles.* (AR p. 21). The respondent and counsel appeared for the scheduled hearing however, the DMV did not appear, and the hearing did not take place. The DMV never notified the respondent or his counsel of any continuance or postponement and there was not any motion seeking or order granting a continuance of the February 25, 2011, hearing. The record reveals that the DMV did not appear at the scheduled hearing on February 25, 2011, because,

> 1. The file had been inadvertently sent to the new hearing tribunal, the Office of Administrative Hearings ("OAH"), and had not been returned to the DMV in time to conduct the 2/25/11, hearing. (Notice of Appeal - Extra Sheet p. 1).
>
> 2. I am writing to address your letter dated February 16, 2011 concerning the rescheduling of the administrative hearing in this file. I apologize for the delay in responding. This file is under the jurisdiction of the Division based upon the date of the offense. However, since the legislative division of the Division and the creation of the Office of Administrative Hearings, it appears that this file was transferred to the Office of Administrative Hearings with the hearing personnel and was not returned to the Division until this month. Once I reviewed the file, it was clear that your letter deserved an immediate response. (AR p. 22).

Under the facts of this case, Hearing No. 3 should have never been scheduled to begin with; however, that hearing did not take place because the hearing examiner was on sick leave and the hearing was continued.

The fourth scheduled hearing, the hearing on January 22, 2013, was also improper and unlawful and should not have taken place over respondent's objections. In addressing the January 22, 2013, hearing, the Commissioner had no right or authority to schedule, hold or conduct the hearing, and further had no right or 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 software to expire and did not timely renew the recording subscription. (AR pp. 27, 80).

In a letter dated February 27, 2013, DMV's counsel explained this situation as follows,

> 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 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.

(AR p. 27).

Moreover, the DMV's own hearing examiner, in an e-mail to DMV's counsel, described the situation as follows:

> When I was assigned a laptop, the tech person that set it up for me only gave me a 30-day demo copy of Quickscribe. He told me that they would look for a license number and send it to me, and that I could use the demo in the meantime.
>
> The 30-day demo expired at some point last week, so I called Joni to report it Friday morning when I discovered I could no longer record anything for longer than 30 seconds. She referred me to Cindy Beane, who said that a license number would be sent to me no later than today at 11 am. She said it would either be found in Purchasing or in your files at Legal.

> I didn't receive any information today regarding the license number. I only had one hearing scheduled for this afternoon, so, in consultation with Steve Dragisich and Joni, we continued it due to my inability to record the hearing...
>
> However, I have two additional hearings tomorrow starting at 10:30 a.m. in Weirton, so I will need to obtain the license number ASAP. It should only take a moment to start Quickscribe, follow the prompts, and enter the number. Cindy said she thinks she found a license number I could use, but she needs to consult with Wilbur about it before the end of the day today. She suggested I contact you to see if you had any license numbers for the Quickscribe program in your files.
>
> Sorry about this, I should have remembered about the demo and pursued the issue more promptly.

(AR p. 80).

Using a 30 day demo copy of Quickscribe and then allowing the recording software to expire and then failing to obtain a new license for the software is not "equipment failure", and the DMV cannot claim that "good cause' existed under these facts to continue the matter on the grounds of "mechanical failure of essential equipment, recording equipment" pursuant to 91 C.S.R. 3.8.3.

In comparison, knowing that your gas gauge is on empty and then allowing your car to run out of gas does not equate to or constitute "mechanical failure" when the car does not run.

In addition, the delay in scheduling the additional hearings violated W.Va. Code §17C-5A-2. W.Va. Code §17C-5A-2(c)(1) states,

> Any hearing shall be held within 180 days after the date upon which the DMV received the timely written objection unless there is a postponement or continuance.

Since the continuance of the first hearing was improper, the DMV certainly cannot benefit from its own wrongdoing and use the improper continuance to hold the hearing beyond the 180 day limit. Moreover, after the first hearing was improperly continued, the DMV waited approximately 7 months to hold the second hearing, which the DMV failed to attend, then waited another 14

months to hold the third hearing, which got continued by the DMV, then waited another 8 months to hold the fourth hearing, which got continued by the DMV, and then another 5 months to hold the fifth hearing. Such delays are inexcusable and unlawful.

The DMV asserts that the respondent did not suffer any prejudice because of the delay. Initially, the respondent should not have to prove prejudice when the delays were due to the unlawful acts and omissions of the DMV that deprived the respondent of his rights. However, the respondent did suffer prejudice. The respondent was deprived of his rights to a fair hearing when the DMV failed to provide fees and costs to properly and adequately prepare for the other hearings as contemplated by *David v. Commissioner.* Also, the main witness, the unknown individual who claimed the respondent was involved in the accident which formed the basis of the traffic stop, could not be located years later for cross examination regarding the alleged accident forming the basis for the initial stop. At the June 4, 2013, hearing, Officer Ward testified that he did not witness the accident personally, and that he did not know the witness or if she was trustworthy or if she was even telling him the truth about the alleged accident involving the respondent. (AR Diskette Recording June 4, 2013, Hearing - App. time 21:28). Officer Ward further testified that he did not know whether the witness even still lived in the area and that he was not able to locate the witness after being asked by respondent's counsel to do so on a few different occasions. (AR Diskette Recording June 4, 2013, Hearing - App. time 21:45). The respondent suffered extreme prejudice due to the DMV's wrongdoings and improper continuances and delays.

D. <u>The DMV was not entitled to another hearing before the lower court and the lower court had sufficient evidence before it to issue its Final Order.</u>

The respondent filed an Application for Stay of Final Order and Notice of Hearing scheduling a hearing before Judge Gaughan on August 8, 2014. (AR pp. 133-135). In fact, the DMV filed an Amended Notice of Hearing changing the time of said hearing (AR p. 142).

As required by law, Mr. Conniff was required to present evidence of irreparable harm and was required to establish that he had a substantial probability that he would prevail in his appeal. The DMV knew that it had to refute these issues if it opposed Mr. Conniff's application for stay. The DMV did in fact oppose the respondent's application for stay and had the opportunity, at the August 8, 2014, hearing, to cross-examine Mr. Conniff and argue against his application for stay and his assertion that he had a substantial probability to prevail in his appeal. The DMV was aware of the procedural issues as they were set forth in the respondent's petition for review.

At the August 8, 2014, hearing, Mr. Conniff testified as to the irreparable harm he would incur if the revocation order was not stayed pending appeal, and further presented ten (10) exhibits and legal authorities to establish his probability of success in his appeal, including the fact that Officer Ward was not subpoenaed to the first administrative hearing.

The lower court noted, at the hearing on August 8, 2014,

> I think there is an issue that the department be required to issue a subpoena to bring someone forward and it is just very capricious of them not to subpoena someone when a defendant has clearly asked for the defendant (sic) - - witness to be present.
>
> But the hearing didn't take place as scheduled due to the department's part, and that is the issue that I just framed.

(AR lower court TR. pp 14-15).

Thus, the lower court had a clear legal issue before it, that being whether the DMV could properly continue the first administrative hearing for subpoena enforcement when the DMV failed to subpoena the officer to the first administrative hearing.

The lower court correctly found that the respondent established the requisite elements for a stay, including irreparable harm as the respondent owned and operated a restaurant ten miles away

from his house and went to work at 4:30 a.m. and the respondent did not have other viable or reliable options to get to work. Accordingly, the lower court correctly found that respondent would suffer irreparable harm and that he had a substantial probability of success in his appeal and granted the stay. However, the granting of the stay was rendered moot when the DMV questioned the lower court's ruling and authority regarding a remand to the DMV at the August 8, 2014, hearing, and the lower court, *sua sponte*, turned the hearing into one on the merits, and considered the issues of law including the failure to subpoena the officer to the first hearing. The lower court then considered the issues of law and stated from the bench that he was granting Mr. Conniff's relief as requested in his appeal. (AR lower court Tr. p. 17).

The DMV was not prejudiced in any way by not having another hearing before the lower court. What was the DMV really going to be able to accomplish at another hearing? Another hearing was not going to change the unrefuted fact that Officer Ward was not subpoenaed to the first administrative hearing. Another hearing was not going to change the admitted fact that the DMV did not show up for Hearing No. 2 because it had sent the file to the OAH and did not get it back in time for the hearing. Another hearing was not going to change the admitted fact that the DMV knowingly used a 30 day demo and then allowed the Quickscribe software demo to expire, thereby preventing Hearing No. 4 from taking place as scheduled. The facts and evidence were clear and unrefuted and the lower court was absolutely authorized to reverse the DMV's Final Order based upon the law and the facts before the court at that time pursuant to W. Va. Code 29A-5-4(g).

The DMV further criticizes the lower court and claims the lower court erred by asserting, "The circuit court denied the petitioner's 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.".

Initially, how ironic that the DMV asserts its due process rights were denied when the DMV denied the respondent's due process rights throughout this case. The DMV's rights were not denied. The administrative record was filed with the court on September 4, 2014. The lower court's Final Order was not entered until September 11, 2014; thus, the record was filed with the court at the time the Final Order was entered.

Moreover, the lower court can decide the matter without briefs, especially when it involves a clear question of law. "**Appeals taken on questions of law, fact or both, shall be heard upon assignments of error filed in the cause <u>or</u> 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). The lower court has the authority to consider and decide errors filed in the cause without the necessity of briefs and can decide errors not even assigned or argued pursuant to West Virginia Code §29A-5-4(e).

Here, Mr. Conniff, in his Petition for Review, asserted the following assignments of error, amongst other things:

> (1) The DMV wrongfully, unlawfully and improperly granted a continuance of the originally scheduled hearing in violation of the law over the Petitioner's objections even though the officer was not subpoenaed;
>
> (2) The DMV wrongfully, unlawfully and improperly rescheduled a second hearing, then a third hearing, and a fourth hearing in violation of the law and over the Petitioner's objections;
>
> (3) At the hearing on January 23, 2013, the Hearing Examiner could not conduct the hearing because the computer software expired due to the DMV's failure to pay for the same and not because of any "equipment failure" and the DMV wrongfully continued that hearing in violation of the law and over the Petitioner's objections; and

> (4) The DMV, in his Final Order, totally and completely failed to consider or address any of the Petitioner's arguments set forth at the final hearing on June 4, 2013, including but not limited to, the failure of the officer to be subpoenaed at the original hearing, thus the continuance was invalid and improper; that the expiration of the software by failure to pay was not "equipment failure" and the continuance was thus improper and in violation of the law...; that the DMV violated statutory mandates regarding timely hearings and proceedings...

The lower court had before it the above assignments of error as contained in Mr. Conniff's Petition for Review. The DMV could not refute pertinent and essential facts and the court applied the applicable law to the unrefuted and admitted facts. There is no requirement in West Virginia Code §29A-5-4 that the DMV file a brief or that the lower court must wait on a brief from the DMV before deciding on a clear issue of law. A brief from the DMV was not necessary as it could not change the admitted and unrefuted facts as set forth herein. If the DMV thought a brief was necessary, it would have filed one with the court between August 8, 2014, and September 11, 2014.

Even though the lower court had the administrative record prior to entering its Final Order, the administrative record was actually unnecessary to the legal determinations made therein because the issues involved questions of law, including whether the DMV could lawfully continue the first administrative hearing for "subpoena enforcement" when the DMV never subpoenaed the officer, and whether the other hearings and continuances thereafter were lawful and proper.

This Court has found and determined that the entire record was unnecessary for legal determination when issues in the case involve a question of law. See *Wood County Board of Education v. Smith*, 202 W.Va. 117, 502 S.E.2d 214 (W.Va. 1998). Also, this Court has found that any error in not having a full record was harmless when the circuit court had a sufficient record for the dispositive legal determination in the case. *Public Citizen, Inc. v. First National Bank of Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (W.Va. 1996).

Here, it is unrefuted that Officer Ward was not served with a subpoena for the first administrative hearing. It is unrefuted that the DMV used a 30 day recording demo and then allowed the recording software demo to expire, thereby preventing Hearing No. 4 from taking place. These were assignments of error within respondent's Petition for Review which the lower court could rule upon without the necessity of the entire record as they involved legal determinations. The lower court had a sufficient record for the dispositive legal determination yet waited for the administrative record to be filed before entering its Final Order on September 11, 2014.

A court speaks only through its orders, and the lower court did not enter its Final Order in this case until September 11, 2014, after the DMV record was filed with the court on September 4, 2014, and over a month after the hearing before the lower court..

After the hearing on August 8, 2014, but before the entry of the lower court's Final Order on September 11, 2014, the DMV did not move the Court to reconsider its ruling. The DMV did not request another hearing. The DMV did not file any brief during this time and had over a month to do so prior to the entry of the lower court's Final Order. The DMV cannot now be heard to complain.

The lower court was not going to allow Mr. Conniff to be deprived of his rights any longer and properly granted him relief. The respondent is entitled to defend the judgment on any grounds supported by the record and the record includes many grounds that support the judgment as set forth herein. There is no need for this matter to be prolonged any further as the respondent's constitutional, statutory, procedural and administrative due process rights have been violated repeatedly throughout this case by the DMV and Mr. Conniff is entitled to his granted relief.

E. <u>The lower court did not err in reversing the DMV's Final Order and did not disregard any evidence</u>.

Unfortunately, the DMV attempts to inflame this Court by emphasizing Mr. Conniff's past conduct from ten years ago, and his BAC in this case, all in an attempt to divert the attention away from the DMV's egregious and unlawful acts and omissions.

The DMV, in an assignment of error, asserts that the law mandates a license revocation based on the respondent's BAC level alone. The DMV is wrong. The law does not mandate an automatic license revocation based upon one's BAC level alone.

The law does provide, in limited circumstances, an automatic license revocation, that being when an individual pleads guilty or is found guilty to the criminal DUI charge and does not appeal the conviction. W.Va. Code §17C-5A-1a(a).

The finding of guilt is used to automatically revoke one's license. However, there is no such law to automatically revoke one's license because of one's BAC level. Whether a person has a BAC level of .08 or .18 or .28, that person is entitled to their constitutional, statutory, procedural and administrative rights.

Moreover, the DMV wants this Court to disregard all of the DMV's wrongdoings and focus solely upon whether the respondent was driving under the influence. Before the DMV can even get to the question of whether the respondent drove under the influence at a properly scheduled and convened hearing, the DMV must follow and apply the applicable laws, rules and procedures and must afford the respondent due process.

The equal enforcement and application of procedure in administrative hearings is fundamental to our system of justice. Simply stated, a government 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. See, *David v. Commissioner of Motor Vehicles*, (Benjamin, J. concurring opinion).

The DMV had no authority or jurisdiction to address the "principal question" at the June 4, 2013, hearing due to the DMV's blatant and flagrant violations of the procedures and of Mr. Conniff's rights. The DMV acted arbitrarily and capriciously throughout this case. The lower court stated in its Final Order,

> 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.

W.Va. Code §29A-5-1 states that, "All hearings shall be conducted in an impartial manner". For the DMV to totally ignore its unlawful procedures and violations of law shows that the DMV was not acting in an impartial manner. The DMV was only concerned with protecting its interests and had no concerns for the rights of the respondent.

The DMV could not justify or explain its own violations and wrongdoings in this case so it simply ignored them in its Final Order. By failing to address the procedural issues in its Final Order, the DMV explicitly adopted, ratified and approved a false claim that Officer Ward was subpoenaed to the first hearing, when he was not, and improperly allowed a continuance based upon subpoena enforcement when the subpoena sought to be enforced was never served on the officer by the DMV. In addition to the DMV's failure to address the legal arguments of the respondent within its Final Order, the lower court had many reasons and legal bases to reverse the DMV's order as set forth, in detail, in the lower court's Final Order.

The lower court did not ignore any facts about Mr. Conniff's BAC or whether he drove under the influence of alcohol. The lower court was duty bound to protect Mr. Conniff's constitutional, statutory, procedural and administrative rights and his rights to due process of law. The DMV is the only entity that ignored the facts and law in an effort to avoid the consequences of its own wrongdoings.

The DMV had every opportunity to follow the laws, rules and procedures and to provide Mr. Conniff due process and to properly seek a revocation of his driver's license in a fair and lawful manner. The DMV failed to do so. It is the DMV's failure and blatant disregard of the rules, laws and procedures that need scrutinized in this case. In addition to violating Mr. Conniff's rights, the DMV also asserts that Officer Ward was subpoenaed to the first administrative hearing, when he was not, thus accusing Officer Ward of committing a misdemeanor, which is extremely disturbing and appalling.

The DMV wants to blame and criticize the lower court, the DMV wants to blame and criticize the officer for not appearing at the initial hearing, and the DMV wants to blame the respondent. However, the DMV has nobody to blame but itself. The DMV must be held accountable and must bear the consequences of its flagrant and blatant disregard of the laws, rules and procedures and the violation of Mr. Conniff's rights.

The respondent cannot sum this matter up any better than Justice Benjamin set forth in his concurring opinion in *David v. Commissioner of Motor Vehicles*, wherein 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 contrast 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.

This Honorable Court is the highest Court in the State and the Court of last resort which prides itself on its efforts to uphold a citizen's constitutional, statutory and procedural rights, and ensures that citizens receive their due process of law regardless of the sensitivity of the facts. Accordingly, the respondent prays that his rights be protected and that the lower court's Final Order be affirmed.

V. CONCLUSION

The lower court did not err in this case and its Final Order was in all respects proper in granting the respondent the relief sought in his Petition for Review for all of the reasons set forth herein and/or set forth in the lower court's Final Order and/or otherwise supported by the record or law.

WHEREFORE, your respondent respectfully prays that the lower court's Final Order be AFFIRMED and for such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted, Respondent
Robert B. Conniff

By: **John & Werner Law Offices, PLLC**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-1063

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

Petitioner,

v.

ROBERT B. CONNIFF,

Respondent.

CERTIFICATE OF SERVICE

Service of the foregoing **Brief of Respondent** was made upon the following by mailing a true copy thereof, by United States Mail, postage prepaid, on this 13 day of February, 2015:

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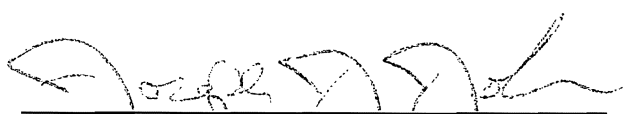

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