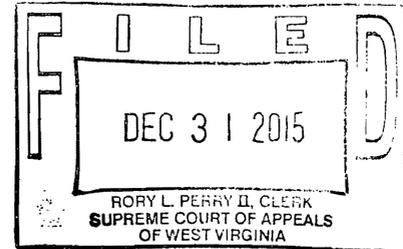


**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**Docket No. 15-0711**

**DAVID KING, AS ADMINISTRATOR OF THE  
ESTATE OF WILMA ANN KING, DECEASED,  
Respondent, Plaintiff below**



**v.**

**THE WEST VIRGINIA DEPARTMENT  
OF TRANSPORTATION, DIVISION  
OF MOTOR VEHICLES,  
Petitioner, Defendant below.**

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**PETITIONER'S REPLY BRIEF**

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## I. INTRODUCTION

Petitioner DMV agrees with Respondent King's statement in his Response to Petitioner's Appeal:

[T]his dispute turns on the issue of whether, after Ms. Peyton's license was suspended on March 14, 2007 and a reinstated driver's license issued on February 17, 2009, DMV was required by law to refer her medical file to the Medical Advisory Board for its review before her license could be reinstated.

(Response p.5:6-12).

In 2007, when the West Virginia Department of Motor Vehicles (hereinafter "DMV") received information questioning whether it was safe for Ms. Peyton to drive it required her to submit a medical form from her doctor evaluating her ability to drive safely. (App. 46, 48-132). When the form was not submitted, the DMV suspended Ms. Peyton's driving privileges in March 2007. In February 2009, her license was reinstated by the DMV upon receiving the requested medical information from her doctor indicating that it was safe for Ms. Peyton to drive. (App. 47). In 2013, she was involved in a car accident wherein the driver of the other vehicle, Ms. King, died. Respondent King alleged that the DMV was responsible for Ms. King's death because prior to reinstating Ms. Peyton's license in 2009, the DMV failed to refer her medical file to the Medical Advisory Board for review. (App. 180).

## II. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a) of the *West Virginia Rules of Appellate Procedure*, Petitioner DMV asserts that the parties have not waived oral argument; the appeal is not frivolous; and oral argument will aid the Court in making the correct decision. Pursuant to Rule 19, this case is suitable for oral argument because it involves an error in the application of settled law and involves a narrow issue of law.

### III. ARGUMENT

#### A. ***W.Va. Code § 17B-2-7a* Makes Referral To The Medical Advisory Board Discretionary.**

The DMV agrees with King's statement in his Response that "pass[ing] on the mental or physical fitness of *every applicant* for a driver's license in West Virginia . . . would be unnecessary, unworkable, and impossible to implement" and not supported by *W.Va. Code § 17B-2-1 et seq.* or the rules. (Response pp.11:25-27 and 12:1-2). Likewise, the passing on the mental or physical fitness of every applicant for a driver's license in West Virginia *with a medical or visual problem* in West Virginia would be unnecessary, unworkable, and impossible to implement.

King argued in his Response that "the statutory language in [*W.Va. Code § 17B-2-7*] actually leaves open the question of whether such a submission [to the Board] is discretionary or mandatory duty" but was answered in *W. Va. Code R. § 91-5-3.3.c.* (Response p.12:22-23). To the contrary, the answer is not found in subsection 3.3.a., but found in *W.Va. Code § 17B-2-7* and *W. Va. Code R. § 91-5-3.3.a.*

*W.Va. Code § 17B-2-7a* (2003) requires the Board to do to do the following four things:

- 1) Advise the DMV "as to vision standards and all other medical criteria" relevant to the licensing of persons to operate motor vehicles.

The Board is required to *advise* the DMV of all vision standards and other medical criteria relevant to the licensing of persons to operate motor vehicles. If the Board was required to review every file of a licensee or applicant who had medical or vision issues, there would be no need for the Board to advise the DMV of all vision and medical criteria relevant to the licensing would have no application or meaning.

- 2) Upon request, advise the DMV as to the mental or physical fitness of an applicant for, or holder of, a license to operate a motor vehicle.

The second requirement refers to what specific medical files the Board is required to review. “The Board shall, *upon request* [by the DMV], advise the commissioner of motor vehicles as to the mental or physical fitness of an applicant for . . . a license to operate a motor vehicle.” (Emphasis added). The Board’s mandate to review is triggered “upon request” of the DMV. In other words, the statute does not automatically require the Board to review every file with a vision or other medical issue.

In response to this second requirement King wrote that:

DMV invites the Court to read the pertinent sentence to entail that “[t]he board shall advise the commissioner of motor vehicles as to the mental or physical fitness of an applicant for, or the holder of, a license to operate a motor vehicle.” This reading is both strained and improbable, however.

(Response p 11:22-25).

This is a misrepresentation of what the DMV stated in its Petition for Appeal:

Absent the words “upon request” the statute *would* read that the board shall advise the commissioner of motor vehicles as to the mental or physical fitness of an applicant for, or the holder of a license to operate a motor vehicle. The phrase “upon request” is not meaningless.

(Emphasis added).

- 3) Furnish the DMV with all such medical standards, statistics, data, professional information and advice as the DMV may reasonable request.

The third requirement creates a mandatory duty on the Board to *furnish* to the DMV “all such medical standards, statistics, data, professional information and advice as [the DMV] may reasonably request.” Just as argued above, if the Board is required to review each and every

medical or vision file for each applicant or licensee as Respondent argues, there would be no need for the Board to furnish the DMV “all medical standards, statistics, data, professional information, and advice” upon request.

- 4) Receive compensation not to exceed what is paid to members of the legislature for their interim duties for each day or substantial portion thereof engaged in the performance of their duties.

Finally, the fourth requirement in *W.Va. Code* § 17B-2-7a requires the Board to be comprised of four licensed physicians or surgeons and one optometrist to receive the same compensation as legislators performing interim duties. If the members of the Board were required to review every medical file at this level of compensation, the amount of time needed would, in all likelihood, prohibit service.

In summary, to require the Board to review *all* applicants and licensees who have any kind of medical or visual issue that could affect their ability to drive safely does not comport with the duties articulated in *W.Va. Code* § 17B-2-7a (2003). It is only when the DMV requests additional assistance from the Board is a review by the Board required as further developed in *W. Va. Code R.* § 91-5-3.3.a. Subsection 3.3.a. reads that the DMV *may* require a licensee to make available to the Board his or her medical information. (Emphasis added).

**B. Reliance Upon *W. Va. Code R.* § 91-5-3.3.c. As Controlling Is Misplaced.**

Rather than relying on *W. Va. Code* § 17B-2-7a and subsection 3.3.a. permitting, but not requiring, the DMV to request review by the Board, King argued that *W. Va. Code R.* § 91-5-3.3.c. controlled the issue:

During the pertinent time subsection 3.3.c. (2006) read:

3.3.c. The Commissioner, after reviewing the Medical Report or Vision Examination Report and the recommendation of the Driver's License Advisory Board, may determine a person's competency drive.

Several years after the above regulation was promulgated, it was clarified by the legislature in *W. Va. Code R. § 91-5-3.3.c.(2009)* reinforcing its intent that referral to the Board was discretionary so to be consistent with *W. Va. Code § 17B-2-7a* and *W. Va. Code R. § 91-5-3.3.a*. Even King agreed that the change flowed from *W. Va. Code R. § 91-5-3.3.a*. (Response p.14:12-16). Upon clarification by the legislature in 2009 of *W. Va. Code R. § 91-5-3.3.c*. read:

3.3.c. The Commissioner, after reviewing the Medical Report or Vision Examination Report and the recommendation of the Driver's License Advisory Board, *if applicable*, may determine a person's competency drive.

(Emphasis added).

King argued that the "DMV is trying unsuccessfully to mix the apples of the regulation [*W. Va. Code R. § 91-5-3.3.c.*] with the oranges of the statute [*W. Va. Code § 17B-2-7a* ] to find a contradiction that does not in fact exist." (Response p.16:8-13). To the contrary, the statute and the rule both refer to the duties of the DMV *and* Board thereby comparing "apples to apples." *W. Va. Code § 17B-2-7a* refers to the performance of a *discretionary* duty by the DMV while subsection § 91-5-3.3.c. (2003) of the rule refers to the performance of a *nondiscretionary* duty by the DMV. When a statute is clear, no deference is given to a contradictory rule. Syl. Pts. 3, 4, and 5, *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

**C. *W.Va. Code R. § 91-5-3.3.a. Renders Referral To The Medical Board By The DMV A Discretionary Act.***

King argued that *W.Va. Code R. § 91-5-3.3.a.* is not applicable because it speaks *only* to the obligations and rights of licensees, not the DMV. (Response p.18:1-5). To the contrary, subsection 3.3.a. speaks to the obligations and rights of the licensee and the DMV reading:

3.3.a. The *Division may* upon written notice of five days *require* the licensee to present in the form prescribed by the Commissioner to the Driver's License Board a:

- 1) Medical Report Form completed by a physician of the licensee's choice who is licensed in the United States;
- 2) Medical Report Form completed by a board certified physician in the appropriate medical specialty for the condition under consideration; or
- 3) Vision Examination Report Form completed by an optometrist or ophthalmologist of the licensee's choice who is licensed in the United States.

(Emphasis added).

While subsection 3.3.a. requires the licensee to present medical information to the Board when requested, it also permits the DMV to use its discretion in deciding whether to request it in the first place.

**D. *DMV's Articulated Policy Argument Is Sound.***

King argued that the DMV's policy argument was not sound because the policy was "nowhere to be found." (Response pp.18:17; 19:1-4). The policy dated April 30, 2002 (re-typed December 3, 2008), was attached to *DMV's Motion for Summary Judgment*, Exhibit 12. The Policy reads:

The Division of Motor Vehicle relies on [W. Va. Code R. § 91-5-1 *et seq.*] in reviewing applications for driver licensing from individuals who are subject to mental, emotions or physical illness.

In regard to seizure disorders, there are no specific Regulations on which to rely. However, the Division of Motor Vehicles *and/or* the Driver's License Advisory Board will review each individual applicant's medical history to determine whether or not that person should be licensed. In cases where no seizure activity has been reported within the past year, applications will be approved if no other significant health problems exist.

If seizure activity has occurred, the Division of Motor Vehicles will review the individual's medical history to ascertain the frequency and severity of such seizures. In general, an applicant must remain seizure free for twelve months before being approved for driving. This is in accordance with recommendations for past and current Medical Review Board Members,

The Division of Motor Vehicles and Driver's License Board strive to ensure the balance between protecting public safety and recognizing the need for all people to have access to the privilege of driving a motor vehicle.

(App. 151).

King argued that even if the policy existed "somewhere" it is not known for what period of time it existed. As indicated above, the policy existed during the relevant period of time, April 30, 2002, and retyped on December 3, 2008. It was amended in 2010, and attached to the *Motion for Summary Judgment* as Exhibits 15. (App. 158). The language that "the Division of Motor Vehicles *and/or* the Driver's License Advisory Board will review each individual applicant's medical history to determine whether or not that person should be licensed" remained.

An agency's articulated policy interpreting a statute will stand unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424, 433, 440 (1995).

“[C]onstruction of [a] statute by the person charged with the duty of executing the same is accorded great weight.” *Id.* at 438.

**E. The DMV’s *Expressio Unius Est Exclusio Alterius* Argument Is Sound.**

Finally, King alleged that DMV’s argument in support of the maxim *expressio unius est exclusio alterius*, meaning that the express mention of one thing implies the intentional exclusion of another, was not sound because he was “unclear exactly what this argument [was] intended to establish.” (Response p.19:19-22). The maxim was intended to establish that when applied to the case *sub judice* it reinforced the DMV’s position that its duty to refer any particular medical file to the Board was discretionary.

*W. Va. Code R.* §91-5-3.2.a.-e. lists the “procedural requirements” that the DMV must follow after it receives medical information concerning a licensee or applicant. It omits any requirement that the DMV must refer each medical file to the Board. Upon “the express mention of one thing” [the listing of requirements that DMV must do after receiving medical information about a licensee or applicant] “implies the intentional exclusion of another” [a requirement for referral to the Board]. *W. Va. Code R.* §91-5-3.2.d. lists the “actions” that the DMV must follow after receiving medical information about a licensee or applicant. It omits any requirement that the DMV must refer each medical file to the Board. Upon “the express mention of one thing” [the listing of the actions that DMV must do after receiving medical information about a licensee or applicant] “implies the intentional exclusion of another” [a requirement for referral to the Board].

IV. CONCLUSION

WHEREFORE, Petitioner West Virginia Department Transportation, Division of Motor Vehicles requests that this Honorable Court reverse the circuit court decision and dismiss the case *sub judice* because the Petitioner enjoys qualified immunity.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF  
TRANSPORTATION, DIVISION  
OF MOTOR VEHICLES

*By counsel*

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**CERTIFICATE OF SERVICE**

I, Mary M. Downey, Esq., Counsel for Petitioner, Defendant below, hereby certify that a copy of the foregoing *Petitioner's Reply Brief* was sent via US Mail postage prepaid on this the 31<sup>st</sup> day of December, 2015 to:

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