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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 19-0350
(Circuit Court Civil Action No. 18-AA-223)**

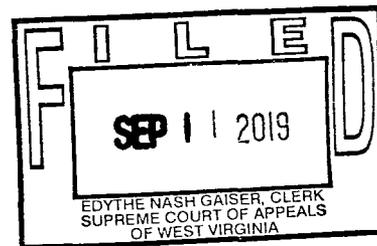
**ADAM HOLLEY, ACTING COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Petitioner,

v.

JOHN H. FOUCH, III,

Respondent.



REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

**ADAM HOLLEY, Acting Commissioner,
Division of Motor Vehicles,**

By Counsel,

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Now comes Adam Holley, Acting Commissioner of the West Virginia Division of Motor Vehicles (“DMV”), by and through his undersigned counsel, and pursuant to Rev. R. App. Pro. 10(g) submits the *Reply Brief of the Division of Motor Vehicles*.

I. ARGUMENT

A. The holding in *Dale v. Odum*, 233 W. Va. 601, 760 S.E.2d 415 (2014) (per curiam) has been reviewed by this Court and properly upheld.

In his response brief, Mr. Fouch argues that this Court’s holding in *Dale v. Odum*, 233 W. Va. 601, 760 S.E.2d 415 (2014) (per curiam) is distinguishable from the instant matter because the officers in *Odum* appeared at the administrative hearing in that matter. (Resp. Br. at P. 7.)

Although the officers in *Odum*, appeared at the administrative hearing in those consolidated cases, this Court has upheld the holding in *Odum* in cases before the Office of Administrative Hearings (“OAH”) where the officers have failed to appear. In *Dale v. Reynolds*, No. 13-0266, 2014 WL 1407375 (W. Va. Apr. 10, 2014) (memorandum decision), the officer failed to appear at the hearing before the OAH, and this Court applied its holding in *Odum*, opining “there is no requirement that the evidence of record be testimonial as opposed to documentary.” FN 5, No. 13-0266, 2014 WL 1407375. *Dale v. Reynolds* is also instructive because like Mr. Fouch’s counsel below, “Mr. Reynolds’s counsel waived the appearance of the arresting officer during the hearing below.” *Id.* “It follows that testimony is not necessary for the DMV to meet its burden of proof. Documentary evidence can form the basis for a revocation decision if it is supported by substantial evidence.” *Id.*

In *Reed v. Craig*, No. 14-0346, 2015 WL 3387982 (W. Va. May 15, 2015) (memorandum decision), the administrative hearing convened despite the investigating officer’s absence and the DMV moved to continue and reschedule the hearing. Mr. Craig moved for a dismissal of the

administrative action based upon the officer's failure to appear. Neither party requested that the hearing proceed without the officer, and no testimony or other evidence was offered. At the conclusion of the hearing and in consideration of the DMV's motion to continue, the OAH hearing examiner directed the DMV's counsel to submit "something in writing," within five days to advise of the reason for the officer's absence. The hearing examiner then further advised the parties that "... this is an old case and the next time it is scheduled it will go forward unless something happens where it can't be avoided. Someone is in the hospital or, you know, something serious like that, but the next hearing that is scheduled, we're going to go forward if the officer is here or not or the petitioner is here or not, we're going to go forward." No. 14-0346, 2015 WL 3387982, at *2.

The hearing examiner then advised the parties that "this hearing will be in recess." *Id.* Thereafter, the OAH entered its decision reversing the revocation of Mr. Craig's license to drive, and finding that the DMV did not prove, by a preponderance of evidence, that Mr. Craig drove a motor vehicle in West Virginia while under the influence of alcohol or refused to submit to the designated secondary chemical test. *Id.* In that order, the hearing examiner ruled that the DMV's counsel had been given five days to file a motion for an emergency continuance following the hearing but did not do so, and further that the DMV's counsel did not ask to proceed with the presentation of evidence despite the officer's absence. *Id.* The hearing examiner noted that while the "DUI Information Sheet" was "submitted to the file" prior to the hearing, there was no proper foundation for its admission and, accordingly, it was not considered by the hearing examiner. *Id.*

On appeal, the DMV argued that the OAH failed to acknowledge or apparently consider any of the documents contained within its file at the time of the hearing. This Court agreed, opining that

in *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006) and *Dale v. Odum*, 233 W. Va. 601, 609, 760 S.E.2d 415, 423 (2014), this Court ruled that documents (such as statements of arresting officers) that are not typically admissible during normal court proceedings are admissible in administrative hearings, and that there is no foundational requirement for the admission of these documents.

No. 14-0346, 2015 WL 3387982, at *4. This Court reversed and remanded the matter to the OAH to conduct an administrative hearing pursuant to W. Va. Code § 17C-5A-2. No. 14-0346, 2015 WL 3387982, at *4. The Court further noted

as we recognized in *Crouch*, that even though a document is deemed admissible at an administrative hearing, under West Virginia Code § 29A-5-2(b), its contents may still be challenged during the hearing. 219 W. Va. at 76 n. 12, 631 S.E.2d at 634 n. 12. In conducting the administrative hearing, as required pursuant to West Virginia Code § 17C-5A-2, and providing respondent with an opportunity to present rebuttal evidence, the OAH will fulfill its important role as fact finder and determine the credibility of all of the evidence relevant to the revocation of respondent's license to drive, both documentary and testimonial.

FN 6, *Reed v. Craig*, No. 14-0346, 2015 WL 3387982 (W. Va. May 15, 2015).

In *Reed v. Zipf*, 239 W. Va. 752, 806 S.E.2d 183 (2017), two officers testified at the administrative hearing before the OAH about the sobriety checkpoint, and another officer testified about the administration of the standard field sobriety test; however, the officer who stopped Mr. Zipf's vehicle did not testify. The OAH rescinded Mr. Zipf's driver's license revocation because it found insufficient evidence that his DUI arrest was lawful. *Id.* The OAH based its decision on two grounds: (1) the sobriety checkpoint guidelines were not submitted into evidence; and (2) the officer who stopped Mr. Zipf did not testify at the OAH hearing on why he suspected Mr. Zipf drove under the influence of alcohol. 239 W. Va. 752, 754-755, 806 S.E.2d 183, 185-186.

The DMV filed a petition with the circuit court, and the circuit court denied the DMV's petition, upheld the OAH's order, and adopted the OAH's reasoning on whether there was sufficient

evidence that Mr. Zipf's arrest was lawful. 239 W. Va. 752, 755, 806 S.E.2d 183, 186. The circuit court also found insufficient evidence that Mr. Zipf's arrest was lawful because there was "an absence of any information as to what criteria [the stopping officer] utilized in determining that [Mr. Zipf] should be detained for further investigation." 239 W. Va. 752, 756, 806 S.E.2d 183, 187.

This Court opined that despite the circuit court's assertion, Mr. Zipf's DUI Information Sheet was part of the record before the OAH, and it revealed that the stopping officer observed "slurred speech" and an "odor of alcoholic beverages" coming from Mr. Zipf. *Id.* This Court further found that it has previously held that in "an administrative hearing conducted by the Division of Motor Vehicles, a statement of an arresting officer as described in W. Va. Code § 17C-5A-1(b) (2004) (Repl. Vol. 2004), that is in the possession of the Division and is offered into evidence on behalf of the Division, is admissible pursuant to W. Va. Code § 29A-5-2(b) (1964) (Repl. Vol. 2002)." 239 W. Va. 752, 756, 806 S.E.2d 183, 187.

Next this Court discussed *Dale v. Odum, supra*, wherein it found that

[a]lthough there was no testimonial evidence [by the stopping officer] ... our review of the record shows that documentary evidence was submitted during the hearing that established that the stop of Mr. Doyle's vehicle by Officer Anderson was valid. In that regard, the statement of the arresting officer/DUI Information Sheet, which was made part of the record, indicated that Mr. Doyle's vehicle was stopped because of "Failure to Obey Traffic Control Device."....Consequently, there was un rebutted evidence admitting during the administrative hearing that established a valid stop of Mr. Doyle's vehicle, and the hearing examiner's finding to the contrary was clearly wrong.

239 W. Va. 752, 756-57, 806 S.E.2d 183, 187-88. Finally, this Court held that it was error to rescind the revocation of Mr. Zipf's driver's license because the officer who stopped him did not testify at the OAH hearing. 239 W. Va. 752, 757, 806 S.E.2d 183, 188.

It is clear this Court has considered cases heard by the OAH wherein the officer has failed

to appear and upheld its holding in *Dale v. Odum* that the DMV's record must be admitted at the administrative hearing pursuant to W. Va. Code § 29A-5-2(b) (1964), *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006) and *Dale v. Odum*, 233 W. Va. 601, 760 S.E.2d 415 (2014).

B. Mr. Fouch was provided with all due process protections.

In his response brief, Mr. Fouch alleges that the admission of the Commissioner's file without the Investigating Officer presence at the hearing deprived him "of his fundamental Due Process right to confront his accusers." (Resp. Br. at PP. 7, 8.)

On June 7, 2013, three years before the administrative hearing was actually held, the OAH issued a notice of hearing and included *Additional Instructions to the Parties*. (App. at PP. 106-107.) In pertinent part, the OAH instructed, "**TO ALL PARTIES: IF A PARTY INTENDS TO PRESENT TESTIMONY FROM ANY PERSON (INCLUDING ANY LAW-ENFORCEMENT OFFICER) IT IS THE RESPONSIBILITY OF THAT PARTY TO OBTAIN THE PRESENCE OF THE PERSON AT THE HEARING. THIS RESPONSIBILITY WILL BE CONSIDERED FULFILLED BY A PARTY IF THE PERSON WHOSE TESTIMONY IS DESIRED HAS BEEN SUBPOENAED BY THE PARTY WHO DESIRES HIS OR HER PRESENCE.**" [Emphasis in original.] (App. at P. 107.) On June 13, 2013, Mr. Fouch's counsel below asked the OAH to issue a subpoena for the Investigating Officer (App. at P. 113), and the OAH did so. (App. at PP. 116-117.)

On June 17, 2013, the DMV sent to the OAH a memorandum which included

a copy of the Division's file which should be considered at the administrative hearing in accordance with W. Va. Code § 29A-5-2 (b) and § 17C-5C-4 (b) with or without representation, and is otherwise admissible under the Rules of Evidence. Specifically,

these documents are recorded with and maintained by the Division of Motor Vehicles pursuant to W. Va. Code § 17C-5A-1 and are therefore admissible without a witness pursuant to West Virginia Rules of [E]vidence 901 (b) 7 and 902 (4). The documents are clearly relevant under Rule 401 and are exceptions to the hearsay rule under both Rule 803 (6) and (8). A copy of these documents will be forwarded to the driver and/or the driver's attorney at the e-mail address provided to the Office of Administrative Hearings on the hearing request form. The Division respectfully moves the documents into evidence.

(App. at P. 119.)

On August 21, 2013, the OAH rescheduled the matter for hearing and included the *Additional Instructions to the Parties* outlined previously. (App. at PP. 135-137.) On July 9, 2014, the OAH again rescheduled the matter for hearing and included a copy of the additional instructions. (App. at PP. 146-147.) The OAH also included a *Standing Memorandum Order Governing Motions to Admit Documentary Exhibits*. (App. at PP. 150-151.) In pertinent part, this memorandum instructed parties that

By publication of this Memorandum Order that a ruling may be made pre hearing, or at the time of the hearing, that evidence may be admitted without the requirements that the declarant is present to testify or that the proposed evidence is otherwise admissible under the West Virginia Rules of Evidence, the Parties are provided fair warning prior to the hearing that a significant procedural change has recently been adopted by the OAH in view of the substantial implication of *Dale v. Doyle*, ___ W. Va. ___, No. 12-1509 (Slip Op. February 11, 2014). Consequently, this Memorandum Order is, in part, intended to prevent procedural ambush, by providing pretrial warning that the procedural landscape has significantly changed - in order to afford the Parties fair opportunity to take whatever steps or preparation they deem necessary and prudent to address evidentiary submissions that are the subject of this Memorandum Order. Without pretrial warning, a party may be unduly ambushed by the procedural change, or - at the time of the hearing, - the matter would have to be continued due to a party's lack of knowledge and preparation to meet the procedural change; either case being undesirable.

(App. at P. 151.) The OAH sent its directive after to this Court's decision in *Dale v. Odum*, *supra*, which was decided on February 11, 2014.

On July 15, 2014, at Mr. Fouch's request, the OAH issued a subpoena for the Investigating Officer (App. at P. 162), and on October 3, 2014, the OAH received an *Affidavit of Service* indicating that the Investigating Officer was served with the subpoena. (App. at P. 161.) On November 12, 2014, the OAH rescheduled the matter for hearing and included the *Additional Instructions to the Parties* outlined previously. (App. at PP. 168-169.) Mr. Fouch again requested a subpoena for the officer. (App. at PP. 172-173.) On December 3, 2014, on July 30, 2015, and on February 22, 2016, the OAH rescheduled the matter for hearing and included the *Additional Instructions to the Parties* outlined previously. (App. at PP. 176-177, 186-189, 199-201.) On February 22, 2016, the OAH issued a subpoena for the Investigating Officer at Mr. Fouch's request. (App. at P. 205.)

On July 9, 2014, Mr. Fouch was put on notice that the DMV's file would be admitted into evidence at the hearing, and he did not object at that time but waited until the administrative hearing on June 15, 2016. (App. at P. 271.) In addition, the OAH explained in great detail that the admission of the DMV's record may require the Petitioner to "take whatever steps or preparation they deem necessary and prudent to address evidentiary submissions that are the subject of this Memorandum Order." When the hearings were rescheduled below, Mr. Fouch requested the OAH to issue a subpoena for the Investigating Officer's attendance at the hearing. Although he had previously filed an affidavit of service after serving the officer before a hearing which was later continued, the administrative record contains no affidavit of service for the subpoena issued on February 22, 2016.

More importantly, when the Investigating Officer failed to appear at the administrative hearing (App. at P. 270), the OAH hearing examiner offered, "If you do want the officer here, we can continue it and, you know, try to get him -." (App. at P. 272.) However, Mr. Fouch, through his counsel below, waived the opportunity for subpoena enforcement stating, "No, I certainly don't want

my client to have to incur further expenses.” *Id.* Mr. Fouch voluntarily proceeded with the hearing and testified on his own behalf. (App. at PP. 272-285.)

Regardless of Mr. Fouch’s attempts to get the officer to appear at hearing and his ultimate waiver to enforce the subpoena, there is no constitutional *right* to confront one’s accusers at a civil administrative license revocation hearing. Instead, the *opportunity* to confront one’s accusers is the procedural due process protection afforded a drunk driver in the administrative process. *See, North v. W. Virginia Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977).

By memorandum, statute and Legislative Rule, Mr. Fouch was provided with notice that he was required to subpoena the Investigating Officer if he wanted the officer’s testimony. Mr. Fouch was also provided an opportunity to subpoena the Investigating Officer when the OAH issued the requested subpoenas. At the administrative hearing he was provided with further opportunity to continue the matter for subpoena enforcement, but he waived the opportunity get the officer to hearing. It is clear that Mr. Fouch’s due process rights were protected in that he was given an opportunity to confront the Investigating Officer yet waived that opportunity.

As support for his argument that he was denied an opportunity to question the Investigating Officer, Mr. Fouch relies on this Court’s decision in *Meadows v. Reed*, 2015 WL 1558462 (2015) (memorandum decision). In *Meadows*, this Court determined that the driver was prejudiced by pre-hearing delay because the investigating officer in that matter died before the matter could be heard. *Meadows* is distinguishable from the instant matter because it was decided when the DMV was the tribunal and the procedural statute and rules required the DMV to secure the officer’s attendance at hearing if the driver so requested. Since the OAH became the tribunal in 2010, by statute and rule, the burden has been on the party requesting a witness to secure that person’s attendance at the

hearing. Therefore, *Meadows* has no relevance here.

In his brief, Mr. Fouch asks this Court, “[h]ow can a driver challenge whether those [the standard field sobriety] tests were administered properly absent the testimony of the officer who administered those tests to establish the instructions that were provided? Also, how can a driver challenge the reliability of those field sobriety tests if he is denied the opportunity to question the officer about his training?” (Resp. Br. at P. 9.) The answer is simple: a driver can subpoena the investigating officer pursuant to W. Va. Code § 17C-5A-2(c)(3) (2015), W. Va. Code R. § 105-11.1 (2016), and the OAH’s *Additional Instructions to the Parties* and not waive the opportunity to continue a hearing for subpoena enforcement if the subpoenaed witness fails to appear.

C. Post 2010, the DMV is still the agency which created the record which must be admitted at the administrative hearing, and the documents are not required to be authenticated.

In his responsive brief, Mr. Fouch alleges that the under the Administrative Procedures Act (“APA”), the DMV is no longer the “agency,” and therefore, its records should not be automatically accepted into evidence at the administrative hearing. When the APA was enacted in 1964, the state agencies were both prosecutor and adjudicator in administrative appeals. Therefore, it was imperative that all documents which were relied upon in taking the appealable action were included in the record. Since then, some agencies have appeals of their decisions heard by an independent tribunal like the Public Employees Grievance Board or the OAH. It would be nonsensical for the only admissible records in a DUI license revocation to be the driver’s hearing request form filed with the OAH, the OAH notices of hearing, and the continuance motions and orders filed at the OAH.

Mr. Fouch’s argument about admissibility is not novel: it is the identical contention made by the driver and rejected by this Court in *Crouch v. W. Virginia Div. of Motor Vehicles*, 219 W. Va.

70, 631 S.E.2d 628 (2006). There, this Court opined that,

Although W. Va. Code § 29A-5-2(a) has made the rules of evidence applicable to DMV proceedings generally, **W. Va. Code § 29A-5-2(b) has carved out an exception to that general rule in order to permit the admission of certain types of evidence in administrative hearings that may or may not be admissible under the Rules of Evidence.** Moreover, inasmuch as we view W. Va. Code § 29A-5-2(a) as a statute pertaining to the application of the Rules of Evidence to administrative proceedings generally, while W. Va. Code § 29A-5-2(b) specifically addresses the admission of particular types of evidence, W. Va. Code § 29A-5-2(b) would be the governing provision. “The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” *Syl. pt. 1, UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984). *See also Tillis v. Wright*, 217 W. Va. 722, 728, 619 S.E.2d 235, 241 (2005) (“specific statutory language generally takes precedence over more general statutory provisions.”); *Syl. pt. 6, Carvey v. West Virginia State Bd. of Educ.*, 206 W. Va. 720, 527 S.E.2d 831 (1999) (quoting *UMWA by Trumka v. Kingdon*); *Bowers v. Wurzburg*, 205 W. Va. 450, 462, 519 S.E.2d 148, 160 (1999) (“Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails.”); *Daily Gazette Co., Inc. v. Caryl*, 181 W. Va. 42, 45, 380 S.E.2d 209, 212 (1989) (“The rules of statutory construction require that a specific statute will control over a general statute[.]”).

[Emphasis added.] *Crouch v. W. Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 75, 631 S.E.2d 628, 633 (2006).

In the instant matter, the documents upon which the DMV relied in issuing its order of revocation were required to be admitted into evidence at the OAH hearing, subject to rebuttal. The DMV is the agency in possession of the file being contested, **and** it is the opposing party. Even after the OAH became the tribunal for administrative license revocation appeals, this Court has consistently upheld the holding in *Crouch, supra*. *See, Comm'r of W. Virginia Div. of Motor Vehicles v. Brewer*, No. 13-0501, 2014 WL 1272540 (W. Va. Mar. 28, 2014) (memorandum decision); *Dale v. Reynolds*, No. 13-0266, 2014 WL 1407375 (W. Va. Apr. 10, 2014) (memorandum decision); *Dale v. Reed*, No. 13-0429, 2014 WL 1407353 (W. Va. Apr. 10, 2014) (memorandum decision); *Dale v.*

Judy, No. 14-0216, 2014 WL 6607609 (W. Va. Nov. 21, 2014); *Dale v. Haynes*, No. 13-1327, 2014 WL 6676546 (W. Va. Nov. 21, 2014) (memorandum decision); *Reed v. Craig*, No. 14-0346, 2015 WL 3387982 (W. Va. May 15, 2015) (memorandum decision); *Reed v. Zipf*, 239 W. Va. 752, 806 S.E.2d 183 (2017); *Reed v. Lemley*, No. 17-0797, 2018 WL 4944553 (W. Va. Oct. 12, 2018) (memorandum decision).

Moreover, the documents contained in the DMV's file are admissible without a witness pursuant to W. Va. R. Evid. 901(b)(7):

Evidence about public records. – Evidence that:

- (A) a document was recorded or filed in a public office as authorized by law; or
- (B) a purported public record or statement is from the office where items of this kind are kept.

Here, the Investigating Officer sent the DMV a copy of the DUI Information Sheet on which the DMV based its *Order of Revocation*. See, W. Va. Code §§ 17C-5A-1(b) and (c) (2008). The DMV's file is also admissible without a witness pursuant to W. Va. R. Evid. 902(4) because it was a certified copy of a public record. (App. at P. 120.)

Finally, the DMV's file documents are clearly relevant under W. Va. R. Evid. 401 because they have a tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. Further, the documents in the DMV's file are exceptions to the hearsay rule under both W. Va. R. Evid. 803(6) (records of a regularly conducted activity) and W. Va. R. Evid. 803(8) (public records).

II. CONCLUSION

The OAH properly admitted the DMV's file pursuant to statute and case law. Admission of the record alone may meet the DMV's burden of proof. There is no presumption of guilt. The clear

duty of the OAH as tribunal is to weigh the evidence presented by both parties. When viewed in light of this State's administrative procedures law, and not in light of the criminal law, all due process requirements were met, and there are no violations of constitutional rights in this matter.

Moreover, Mr. Fouch's blood alcohol concentration was .12%, and he has provided no legitimate defense that he did not commit a *per se* violation of statute. Instead, Mr. Fouch is asking this Court to change the law to allow driving with a blood alcohol concentration greater than .08 when the officer is not present at a subsequent administrative hearing.

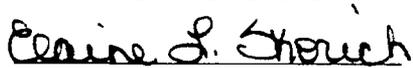
For the reasons outlined above as well as in the *Brief of the Division of Motor Vehicles*, the DMV respectfully requests that this Court reverse the circuit court order.

Respectfully submitted,

ADAM HOLLEY, ACTING COMMISSIONER,
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