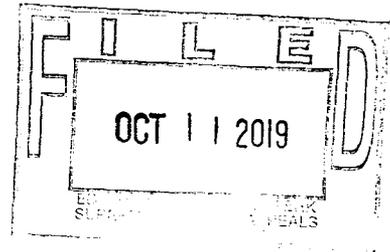


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**BEFORE THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA**

State of West Virginia, ex rel.  
Adam Holley, Acting Commissioner,  
West Virginia Division of Motor Vehicles,

Petitioner,

vs)

No. 19-0754

The Honorable William S. Thompson,  
Judge of the Circuit Court of Boone County,  
and Dylan Price,

Respondents.

**RESPONSE OF RESPONDENT DYLAN PRICE  
TO PETITION FOR WRIT OF PROHIBITION**

---

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<b>I. STATEMENT OF THE CASE</b>	<b>3,4</b>
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**Attachment: Price Exhibit 1**

**TABLE OF AUTHORITIES**

**STATUTES:**

**W. Va. Code §17C-5A-2(s) (2015)**

**W. Va. Code § 17C-5C-1(a)**

**W. Va. Code § 17C-5-C3(3)**

**W. Va. Code § 29A-1-2(b)**

Wendle Cook, counsel for Dylan Price, a driver charged with driving under the influence of alcohol resulting in a death, states the following response to this petition for writ of prohibition.

### **I. STATEMENT OF THE CASE**

Dylan Price is a driver charged with driving under the influence of alcohol resulting in the death of his best friend. He has not been convicted of that charge. A criminal trial in that matter is set to begin in Lincoln County, West Virginia, in November, 2019. Venue for the criminal trial was changed to Lincoln County, West Virginia. The respondent in this matter, Judge William S. Thompson, recused himself from presiding over the underlying criminal case on the grounds that he had a close personal relationship with the decedent, and that he also knew and had formerly represented members of Mr. Price's family in his private practice. Judge Thompson advised the parties that the decedent had played ball on a basketball team that he once coached, and that his daughter was the same age as the decedent and they were friends.

Counsel has not received an official order of recusal in this case, but it would not be possible for Judge Thompson to recuse himself from one case, and preside over the other, where the underlying facts are the same. A successor judge has not been appointed for this civil appeal. This writ seeks to set aside an order granting a stay a revocation of Mr. Price's driver license. That matter is moot in that the Respondent, Dylan Price, has turned in his driver license and has not been driving.

The underlying facts of this license revocation are important because the State of West Virginia is complaining that Judge Thompson signed an order requiring the DMV to produce a transcript within 30 days, where the latest statute provides for 60 days, and provides for payment of a fee for the transcript. When this appeal was filed, counsel for Mr. Price submitted an order to Judge Thompson that was based

upon the old statute that provided 30 days to prepare a transcript, instead of 60 days. There is an apparent conflict of laws regarding the manner in which the transcript is ordered and paid for. Counsel for the State argues that the Office of Administrative Hearings should have been named as a party, but West Virginia Code 17-C-5-4 specifically states that the OAH may not be named as a party.

### **ARGUMENT**

As stated in Price Exhibit 1, the argument of Respondent Price on appeal is based upon the failure of the OAH to grant him a hearing. Your Respondent argues that legally sufficient service of the revocation letter was not made on him and that he filed the request for hearing within 30 days of his receipt of the revocation order.

The Order Filing Petition For Review ordered that a hearing on the merits of the claim be set by counsel for the petitioner following receipt of the hearing (transcript). That seems to make sense. You get the transcript and then you have a hearing.

If you cannot make the OAH a party, then the only other State agency with access to the transcript would be the DMV. Respondent understands that he may have to pay for a transcript, but there is nothing in the statute that requires prepayment. In fact, it would be impossible to know the cost until the transcript was completed. In this case, the Respondent was denied a hearing, so the only contents of a transcript would be the information contained in the file of the DMV, along with the notices mailed to the Respondent and his responses.

The Order Filing Petition and Petition For Review of Administrative Order are attached hereto as Price Exhibit 1.

Petitioner's argument is based upon an interpretation of West Virginia Code 17C-5-4, which reads as follows: A person whose license is at issue and the commissioner shall be entitled to judicial review as set forth in chapter twenty-nine-a of this code. Neither the commissioner nor the Office of

Administrative Hearings may stay enforcement of the order. The court may grant a stay or supersede as of the order only upon motion and hearing and a finding by the court upon the evidence presented, that there is a substantial probability that the appellant shall prevail upon the merits and the appellant will suffer irreparable harm if the order is not stayed: *Provided*, That in no event shall the stay or supersede as of the order exceed one hundred fifty days. The Office of Administrative Hearings may not be made a party to an appeal. The party filing the appeal shall pay the Office of Administrative Hearings for the production and transmission of the certified file copy and the hearing transcript to the court. Notwithstanding the provisions of section four, article five of said chapter, the Office of Administrative Hearings may not be compelled to transmit a certified copy of the file or the transcript of the hearing to the circuit court in less than sixty days. Circuit Clerk shall provide a copy of the circuit court's final order on the appeal to the Office of Administrative Hearings by regular mail, by facsimile, or by electronic mail if available.

The law is clear that the State agency gets 60 days to produce the transcript. However, the statute does not state that the cost of the transcript must be paid in advance. The statute does require that a hearing be held. The order signed by Judge Thompson provides that a hearing be held and that the transcript be produced. It appears that the argument of the DMV is that there are insufficient findings made in the order to justify a stay of the revocation order.

Before Judge Thompson recused himself, he did hear testimony regarding the evidence against Mr. Price and for Mr. Price. One important item of evidence that was produced at a hearing in the criminal case before Judge Thompson before his recusal was the blood test evidence that showed Mr. Price had no detectable alcohol in his system following his arrest and being taken to the hospital by the arresting officer.

Counsel for the State argues that the Circuit Court does not have jurisdiction over this case due to the fact that her interpretation of W.V. Code 29A-5-4 is that this is not a contested case.

Counsel for the Respondent respectfully disagrees with that interpretation and submits that the definition of a contested case has two possible interpretations. W. V. Code 29A-1-2 provides as follows:

§ 29A-1-2. Definitions of terms used in this chapter

For the purposes of this chapter:

(a) "Agency" means any state board, commission, department, office or officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches.

(b) "Contested case" means a proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing, but does not include cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination and does not include rulemaking.

I submit that the present case comes within the definition of a contested case in that it is an appeal of a proceeding that requires that the Respondents legal rights, duties, and privileges are such that they require a hearing, and the issue before the court is whether he is entitled to a hearing, given the timeliness of his appeal, based upon all of the facts in the record.

W. Va. Code, § 29A-5-4 provides that no appeal bond is required for an administrative appeal; that the court may grant a stay upon such term as it deems proper; and that the agency shall transmit to such circuit court the original or a certified copy of the entire record of proceedings. Here, the agency is the DMV. The OAH cannot be named as a party.

§ 29A-5-4. Judicial review of contested cases.

(a) Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter, but nothing

in this chapter shall be deemed to prevent other means of review, redress or relief provided by law.

(b) Proceedings for review shall be instituted by filing a petition, at the election of the petitioner, in either the circuit court of Kanawha county, West Virginia or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business, or with the judge thereof in vacation, within thirty days after the date upon which such party received notice of the final order or decision of the agency. A copy of the petition shall be served upon the agency and all other parties of record by registered or certified mail. The petition shall state whether the appeal is taken on questions of law or questions of fact, or both. No appeal bond shall be required to effect any such appeal.

(c) The filing of the petition shall not stay enforcement of the agency order or decision or act as a supersedeas thereto, but the agency may stay such enforcement, and the appellant, at any time after the filing of his petition, may apply to such circuit court for a stay of or supersedeas to such final order or decision. **Pending the appeal, the court may grant a stay or supersedeas upon such terms as it deems proper.**

(d) Within fifteen days after receipt of a copy of the petition by the agency, or within such further time as the court may allow, the agency shall transmit to such circuit court the original or a certified copy of the entire record of the proceeding under review, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the agency, all agency staff memoranda submitted in connection with the case, and a statement of matters officially noted; but, by stipulation of all parties to the review proceeding, the record may be shortened. The expense of preparing such record shall be taxed as a part of the costs of the appeal. The appellant shall provide security for costs satisfactory to the court. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs involved. Upon demand by any party to the appeal, the agency shall furnish, at the cost of the party requesting same, a copy of such record. In the event the complete record is not filed with the court within the time provided for in this section, the appellant may apply to the court to have the case docketed, and the court shall order such record filed.

(e) Appeals taken on questions of law, fact or both, shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or argued. The court or judge shall fix a date and time for the hearing on the petition, but such hearing, unless by agreement of the parties, shall not be held sooner than ten days after the filing of the petition, and notice of such date and time shall be forthwith given to the agency.

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

(g) 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 discretion.
- (h) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals of this state in accordance with the provisions of section one, article six of this chapter.

The order that was presented to Judge Thompson by counsel for the Respondent did contain an error regarding the 60 day period that the State agency is granted to produce a transcript. Counsel takes responsibility for those errors. However, those errors can be easily cured by a remand to the Circuit Court with instructions to require a hearing and allowing the OAH 60 days to produce a transcript. In this case, there is no transcript in the normal sense of the word, in that Mr. Price was denied a hearing on the grounds that his request for a hearing was not timely filed. Mr. Price has not driven since he was charged.

Hearings have been held on the facts of this case, albeit in the criminal case in the form of motions in limine. The evidence in the criminal case is that Dylan Price was taken by the arresting officer to Logan Regional Medical Center following his arrest where a blood test was performed. That testing revealed no detectable alcohol in Mr. Price's blood. A copy of those test results was provided to the State prosecuting attorney and was considered by the Court at a hearing.

The argument for the underlying appeal is that Mr. Price is entitled to a hearing because the request was timely filed, and because sufficient legal service of the revocation order was not made upon

Mr. Price. The notice that was mailed to Mr. Price was not mailed by restricted delivery or restricted delivery was not followed. The notice was picked up by another person. The signature on the receipt was not that of Mr. Price. The handwriting was not recognized by him. Counsel argues that even if service had been legally sufficient, and it was not, when service by mail is made, three days are added to the time by application of Rule 5 of the WVRCP. Therefore, the denial of a hearing was unlawful and prejudicial.

#### VII. CONCLUSION

For the reasons listed above, the Petitioner prays that this Court deny Petitioner's *Petition for Writ of Prohibition*. *There exists no irreparable harm, as the Respondent Dylan Price turned in his driver license at the request of the DMV and has not been driving. This matter can be easily resolved by a remand to the successor judge who will be named to replace Judge Thompson after his recusal.*

Respectfully submitted,  
DYLAN PRICE  
By Counsel,



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***Counsel for Dylan Price***

**BEFORE THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA**

**State of West Virginia, ex rel.  
Adam Holley, Acting Commissioner,  
West Virginia Division of Motor Vehicles,**

**Petitioner,**

**vs)**

**No. 19-0754**

**The Honorable William S. Thompson,  
Judge of the Circuit Court of Boone County, and Dylan Price,**

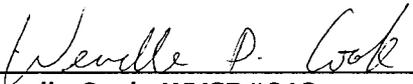
**Respondents.**

**CERTIFICATE OF SERVICE**

I, Wendle D. Cook, counsel for Dylan Price, do hereby certify that on this 11<sup>th</sup> day of October, 2019, the foregoing **Response of Dylan Price** was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 11th day of October 2019, addressed as follows:

The Honorable William S. Thompson, Judge  
Boone County Circuit Court  
200 State Street  
Madison, WV 25130

Elaine L. Skorich  
Assistant Attorney General  
DMV Legal Division  
PO Box 17220  
Charleston, WV 25317

  
**Wendle Cook, WVSB#812**  
**Cook and Cook**  
**P.O. Box 190**  
**Madison, WV 25130**  
**(304)369-0110**  
**wcook@cookandcook.com**  
***Counsel for Dylan Price***

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IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

DYLAN LEVI PRICE

Petitioner,

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Vs.

CIVIL ACTION: 18-AA-4  
OAH File No: 398087B

COMMISSIONER, STATE OF  
WV DIVISION OF MOTOR VEHICLES,  
Respondent.

**PETITION FOR REVIEW OF ADMINISTRATIVE ORDER**

Your Petitioner, Dylan Levi Price, by counsel, Wendle D. Cook, states and avers as follows:

1. This Court has jurisdiction over the matters contained herein pursuant to Chapter 29-A-5-4 of the West Virginia Code.
2. Petitioner's driver's license was revoked as a result of a statement of the arresting officer filed by Deputy C.T. Daniels, Boone County Sheriff's Department, alleging that the Petitioner did drive a motor vehicle on May 27, 2018, while under the influence alcohol, controlled substances, drugs or a combination of those and proximately caused the death of another person while acting in reckless disregard of the safety of other people. The Order of Revocation was dated May 31, 2018, and stated that the Petitioner's driving privileges were revoked on July 5, 2018.
3. Petitioner filed a Written Objection to the revocation which was mailed to the Office of Administrative Hearings on July 2, 2018 and received on July 5, 2018.

4. On July 17, 2018, Counsel for the Petitioner received a letter dated July 13, 2018, stating that the Written Objection was not received in a timely manner, that the Written Objection was received by the OAH on July 5, 2018 and the Order of Revocation was signed for on June 2, 2018.

5. The Order of Revocation was not received by Petitioner on June 2, 2018.

6. The Written Objection was filed by the Petitioner and received by the Respondent within 30 days after the Order of Revocation was received by the Petitioner.

7. By correspondence dated July 13, 2018, which was received by counsel for Petitioner on August 17, 2018, the Office of Administrative Hearings denied Petitioner's request for administrative hearing, stating as the reason therefore that the request was not received within 30 days after receipt of the Order of Revocation by the Petitioner.

#### **ASSIGNMENT OF ERRORS**

1. The Office of Administrative Hearings committed error by refusing to set an administrative hearing as requested by Petitioner. The error committed was both an error of fact and an error of law. A factual error occurred when the OAH found that Mr. Price had received the Order of Revocation on June 2, 2018. He did not. That letter was sent to an address used by multiple persons. The letter was not mailed by restrictive mail. The letter, in fact, was not signed for by Petitioner on June 2, 2018. Petitioner did not receive that letter on June 2, 2018.

The OAH also committed an error of law by failing to accurately compute the thirty calendar days as stated in West Virginia Code 17C-5-7(c). West Virginia Rule of Civil Procedure 5 (e) states the following: *Additional Time After Service By Mail.*

*Whenever a party has the right or is required to act or take some proceedings within a prescribed period after the service of a notice or other paper unto the party and notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.*

Therefore, even if the Petitioner had received the Order of Revocation on June 2, 2018, as contended by the OAH, and he did not, 3 days would have been added to the deadline to file a request for hearing. The OAH admitted that it received the Request for Hearing on July 5, 2018.

The refusal of the OAH to set an administrative hearing in response to Petitioner's request for hearing constitutes an error that is:

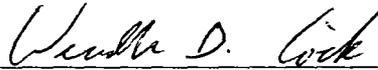
- 1) In violation of the constitutional or statutory provisions; and/or
- 2) Made upon unlawful procedures; and/or
- 3) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; and/or
- 4) Arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion; and/or
- 5) The factual error committed by the OAH has caused prejudice to the Petitioner.

### **PRAYER**

Wherefore, your Petitioner does pray that his petition for appeal be filed, that the Office of Administrative Hearings be required to produce a true and accurate copy of the transcript of the hearing and all exhibits contained within the file, that an order be entered staying the revocation order entered by letter dated May 31, 2018, with an effective date

of July 5, 2018, and that the revocation order be stayed until such time as a hearing on the merits of the petition can be held, that the revocation order entered by the Commissioner be reversed and set aside in accordance with West Virginia Code 29A-5-4 (c), and for such other and further relief that this Court would deem appropriate.

Dylan Levi Price,  
By Counsel,



---

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