

FILED

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, concurring:

Present in this case is an issue fundamental to our justice system: Should procedural rules for administrative hearings be enforced and applied equally to all persons, including the administrative agency, itself? Most certainly, they should. Neither an administrative agency, nor any other governmental entity, is entitled by virtue of being the government to avoid the effect of procedural rules simply by ignoring the requirements of such rules – rules which private citizens must follow. I cannot conceive any understanding of basic constitutional principles or the specific statutory law applicable herein which permits a different conclusion.

By statute, the Legislature established a procedural mechanism for the granting of continuances in administrative license revocation cases such as this. *See* W.Va. Code 17C-5A-2(b).¹ By this statutory section, the Department of Motor Vehicles (“D.M.V.”) was

¹ The Legislature has determined to afford hearings for the appeal of the mandatory suspension of a driver’s license in a number of circumstances. For example, a conviction for driving under the influence of alcohol, controlled substances or drugs results in the automatic suspension of a person’s driver’s license. *See*, W. Va. Code §17C-5A-1a (2004), *Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005). Likewise, offenses such as habitual reckless or negligent driving, multiple convictions for driving offenses and failure to pay child support also may result in the mandatory suspension of a person’s driver’s license (continued...)

required to develop further procedural rules setting forth the requirements for continuances.

The Legislature spoke with clarity:

... and such policies shall be enforced and applied to all persons
equally.

Id. [Emphasis added.] There is no equivocation or ambiguity in this statutory command. Nor could there be in view of the Fourteenth Amendment to the United States Constitution.

Here, the D.M.V. 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 D.M.V. applies to citizens such as the Appellant herein. Appellant did everything he was obligated to do under the D.M.V.'s procedural rules to ensure that he could proceed with his hearing. The D.M.V. did not, however. Notwithstanding its failure to comply with its own procedural rules, the agency now seeks to avoid 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

¹(...continued)

without a preliminary hearing. W. Va. Code §§17B-3-6 (a)(1997). A post-suspension hearing is required upon timely request of the person whose license has been suspended. W. Va. Code § 17B-3-6(d). A license may also be suspended for failure to pay certain court fees and costs, the return of the check paying vehicle registration and license fees, violation of student attendance requirements, and being involved in a motor vehicle accident without having valid liability insurance. *See*, W. Va. Code §17B-3-3a (2002); W. Va. Code §17B-3-3c (2005); W. Va. Code §17D-2A-7 (2006); 91 C.S.R. 5 (2006). Hearings arising from a challenge to many of these suspensions are limited in scope to the proper identity of the driver whose license has been suspended. *See*, 91 C.S.R. 5 (2006).

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.

There can be little doubt that an accusation of driving under the influence of an intoxicant is the type of charge which does not engender public sympathy. Charges of criminal or other wrongdoing do not garner public support, and never will. In view of this, it certainly would be both expedient and, in some cases, popular for the State if it were able to act against a citizen simply based upon accusations of misconduct alone. Indeed, that is exactly what is often the practice elsewhere in the world. But, not here. The true measure of the adequacy of the mechanisms which protect a right is not whether such mechanisms are enforced and applied in popular cases, but whether such mechanisms are enforced and applied in unpopular cases. The equal enforcement and application of procedure in administrative hearings is fundamental to our system of justice. I concur with the majority in applying and enforcing such procedures equally in this case.²

² While I share Justice Maynard's concern that some may seek to misuse the majority opinion in this case to attempt to recover fees when the D.M.V. seeks continuances or when delays are otherwise needed, I believe such a reading of the majority decision would be incorrect and greatly misguided. The majority opinion, in my opinion, does nothing more than hold that the rules which apply to continuances of administrative hearings should be enforced equally as written to all parties. These rules expressly anticipate the need for continuances and, more importantly, the necessity for "emergency continuances." See Rules 3.8.1 and 3.8.4. They also anticipate the obligation of the parties to be considerate to each other and to the administrative system.

