

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

GARLAND HARLESS,

Petitioner,

v.

Petition No.: 19-AA-47

The Honorable Jennifer Bailey, Judge

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

Respondent.



FINAL ORDER

Pursuant to W.Va. Code §29A-5-1, et seq., the Petitioner appeals the Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner (hereafter "Final Order") entered on April 26, 2019, of the Office of Administrative Hearings (hereafter "OAH") that affirmed the *Order of Revocation* issued by the West Virginia Division of Motor Vehicles revoking Petitioner's driver's license for driving under the influence of alcohol. An administrative license revocation hearing was conducted at the OAH on April 27, 2017. The Petitioner timely filed his *Petition for Judicial Review* to appeal the revocation of his driving privileges.

STANDARD OF REVIEW

Pursuant to West Virginia Code § 29A-5-4(a), a decision of an administrative agency may be reversed if the court finds that the agency's findings, inferences, conclusions, decisions and/or orders are:

- (1) In violation of constitutional or statutory/regulatory provisions; and/or
- (2) In excess of the statutory authority or jurisdiction of the agency; and/or
- (3) Made upon unlawful procedures; and/or
- (4) Affected by other error of law; and/or

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- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and/or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

### **FINDINGS OF FACT**

1. On July 8, 2012, at 2:00 a.m. Petitioner was stopped for speeding by Patrolman M.A. Simms (hereinafter "Investigating Officer") of the South Charleston Police Department and arrested for driving under the influence of alcohol.
2. The D.U.I. information sheet indicates that Petitioner was unsteady exiting the vehicle (though vehicle was a motorcycle), was unsteady walking to the roadside and standing, had bloodshot eyes, emanated the odor of alcohol, and had slurred mumbled speech.
3. Petitioner testified that he was in fact speeding and that he had consumed two (2) beers approximately four (4) hours prior to the stop.
4. It appears from the D.U.I. information sheet that the Investigating Officer asked the Petitioner to perform field sobriety tests and the Petitioner submitted to the same.
5. Petitioner allegedly failed all three (3) field sobriety test administered to him.
6. There were numerous inaccuracies in the D.U.I. Information Sheet. For instance, on the D.U.I. Information Sheet, the Investigating Officer indicates that during the medical assessment portion of the horizontal gaze nystagmus test, the Officer observed resting nystagmus, which would mean that Petitioner failed the medical assessment and the horizontal gaze nystagmus test should not have been administered. Yet, the Investigating Officer still administered the test. With the Officer not present at the hearing below to explain such notation, it is impossible to

determine whether such is a typographical error or a mistake in administering the field sobriety tests by the Investigation Officer.

7. Further, Patrolman Simms failed to note Petitioner's score on the one-leg stand field sobriety test.
8. Even simple details, such as the make of the Petitioner's vehicle, were incorrect.<sup>1</sup>
9. In regards to the walk and turn field sobriety test, the D.U.I. Information Sheet indicated that the Petitioner failed such. However, Petitioner testified that he had had back surgery on his fourth and fifth vertebrae six (6) months prior to his arrest. The Hearing Examiner viewed scarring on Petitioner's back just above the pectoral region during the hearing below.
10. The D.U.I. Information Sheet indicated that the Petitioner submitted to a preliminary test of his breath. The results of the preliminary test was 0.131% BAC. Petitioner testified that he had smokeless tobacco in his mouth during the administration of the preliminary test of his breath. The D.U.I. Information Sheet does not indicate that the officer checked Petitioner's mouth for foreign matter prior to administration. There was no testimony by the Investigating Officer that established that proper procedures were followed in administering the tests.
11. The Petitioner was placed under arrest and transported to the South Charleston Police Department for processing. The Investigating Officer read and provided a copy of the West Virginia Implied Consent form to Petitioner. Petitioner submitted to the secondary chemical test of his breath. The results were a blood alcohol concentration

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<sup>1</sup> The D.U.I. information sheet incorrectly identified Petitioner's motorcycle as a Honda instead of a Harley-Davidson.

level of 0.128%. Petitioner testified that he had smokeless tobacco in his mouth during the administration of the secondary chemical test.<sup>2</sup>

12. Thereafter, Patrolman Simms transmitted the D.U.I. Information Sheet to the West Virginia Division of Motor Vehicles (hereinafter "DMV").
13. The Commissioner of the DMV issued an *Order of Revocation* and *Order of Disqualification* on July 27, 2012.
14. On August 14, 2012, Petitioner timely requested an administrative license revocation hearing to challenge the evidence against him and retained counsel.
15. The Petitioner timely filed a written notice of intent to challenge the results of the secondary chemical test administered by the Investigating Officer pursuant to West Virginia Code §17C-5A-2.
16. The hearing was initially scheduled for November 30, 2012 and was continued numerous times.
17. On July 29, 2014, the DMV filed a *Motion for Evidentiary Submission* requesting the pre-admission of the DMV Commissioner's file. A hearing was eventually held on April 27, 2017.
18. The only individual to testify at the April 27, 2017 hearing was Petitioner. Neither the Investigating Officer nor any witness for the Respondent appeared at the hearing to testify, and the Respondent rested its case entirely on the Commissioner's file.
19. The OAH's Final Order was issued April 26, 2019, upholding the DMV's *Order of Revocation* and *Order of Disqualification*. In the OAH's Final Order the hearing

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<sup>2</sup> In fact, Petitioner testified that he regularly has smokeless tobacco in his mouth. Petitioner even had smokeless tobacco in his mouth during his testimony before the hearing examiner, which was produced for the hearing examiner upon request.

examiner discredited Petitioner's testimony and found the arresting officer's reports more credible than the live testimony of Petitioner even though there was "no officer narrative of any type or in any format" included in the Commissioner's file.

#### **APPLICABLE LAW**

##### ***Crouch, Doyle, and W.Va. Code § 29A-5-2(b)***

The DMV argues that the DUI Information Sheet (which shows the results of the reference checks) and the Intoximeter Intox EC/IR-II printer ticket are part of the DMV Commissioner's file and, as such, are required to be automatically admitted into and considered as evidence at the OAH administrative hearing as a matter of statute, in accordance with W. Va. Code §29A-5-2(b), which provides:

All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

Following this interpretation, in practical terms, at OAH Hearings, the DMV does not have to produce a witness to verify or authenticate documents as required by the West Virginia Rules of Evidence. This interpretation also means that the DMV can simply appear by counsel who then moves for all of the records in its possession to automatically be admitted and considered by the OAH Hearing Officer. With no requirement for the arresting officer to appear as a witness, the contesting driver cannot cross examine his accuser and the OAH Hearing Officer hears no testimony regarding the legality of the traffic stop, the propriety of the sobriety tests and procedures, the propriety of any implied consent, the propriety of any SCT procedures, etc. As a result, the OAH Hearing Officer is forced to make findings of fact based solely upon the arguments

of counsel and the automatically admitted records of the party DMV.<sup>3</sup> Accordingly, there is the absurd result of effectively stripping the DMV of its burden to prove by the preponderance of the evidence its case against the driver.

This interpretation of W. Va. Code §29A-5-2(b) has been adopted by the OAH as contained in the Standing Memorandum Order Governing Motions to Admit Documentary Exhibits entered April 23, 2014 by Chief Hearing Examiner John G. Hackney, Jr. This memo was issued in response to a consolidated opinion of the Supreme Court of Appeals of West Virginia that adopted the DMV's interpretation of W. Va. Code §29A-5-2(b).<sup>4</sup>

Specifically, the Supreme Court of Appeals of West Virginia set forth the following syllabus point in the consolidated cases of *Dale v. Odum v. Doyle*, 233 W. Va. 601, 760 S.E.2d 415, 417 (2014),

“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).” Syl. Pt. 3, *Crouch v. West Virginia Div. Of Motor Vehicles*, 219 W.Va. 70, 631 S.E.2d 628 (2006).

This decision substantially implies that Syllabus Point 3 of *Crouch v. West Virginia Division of Motor Vehicles*, 219 W.Va. 70, 631 S.E.2d 628 (2006), applies to current hearings conducted before the OAH, even though *Crouch* pertains to the previous scheme wherein the West Virginia Division of Motor Vehicles conducted both the revocations and the appellate hearings. In

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<sup>3</sup> W. Va. Code §§ 17C-5A-1 *et seq.* and 29A-5-2(a) require the OAH hearing examiner to make evidentiary rulings based upon the application of the West Virginia Rules of Evidence. Further, pursuant to W. Va. Code § 17C-5A-2(f), the OAH Hearing Examiner is required by statute to make specific findings of facts.

<sup>4</sup> Until February 11, 2014, the OAH maintained an interpretation of the statutory provisions that prescribe hearing procedures, particularly W. Va. Code § 17C-5C-4(a) & (c), as requiring adherence to the West Virginia Rules of Evidence- as the perceived plain meaning of those statutory provisions. Therefore, the previous policy of the OAH was to interpret the statutory provisions specific to OAH relating to hearing procedures as requiring adherence to the West Virginia Rules of Evidence in a like manner as practiced by the court(s) of this state.



*Crouch*, which was decided in 2006, the “agency” was the West Virginia Division of Motor Vehicles. However, since the creation of the Office of Administrative Hearings in 2010, the “agency” whose decisions are subject to circuit court review pursuant to W.Va. Code 29A-5-4 is the Office of Administrative Hearings, and not the DMV, which became merely a party.<sup>5</sup>

The West Virginia Code of State Rules § 105-1-3 establishes definitions for the OAH which include:

3.7. ‘Office of Administrative Hearings’ and ‘OAH’ means the separate operating agency within the Department of Transportation with jurisdiction to hear and determine all appeals pursuant to W. Va. Code § 17C-5C-3, including the Chief Hearing Examiner and all OAH employees designated to act on his or her behalf.

...

3.9. ‘Party’ and ‘parties’ means the petitioner and the respondent.

3.10. ‘Petitioner’ means the person contesting an order or decision of the Commissioner.

3.11. ‘Respondent’ means the Commissioner.”

### **The OAH v. The DMV as The “agency”**

In 2010, the West Virginia Legislature made significant changes to the procedures for conducting license revocation hearings. One of the most significant changes was the enactment of W. Va. Code § 17C-5A-1 *et seq.* and the creation of a new agency in the OAH. This change in the law made the Department of Motor Vehicles a party to the hearings conducted by the OAH under

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<sup>5</sup>§ 17C-5C-5. Transition from Division of Motor Vehicles to the Office of Administrative Hearings provides, “(a) In order to implement an orderly and efficient transition of the administrative hearing process from the Division of Motor Vehicles to the Office of Administrative Hearings, the Secretary of the Department of Transportation may establish interim policies and procedures for the transfer of administrative hearings for appeals from decisions or orders of the Commissioner of the Division of Motor Vehicles denying, suspending, revoking, refusing to renew any license or imposing any civil money penalty for violating the provisions of any licensing law contained in chapters, seventeen-A, seventeen-B, seventeen-C, seventeen-D and seventeen-E of this code, currently administered by the Commissioner of the Division of Motor Vehicles, no later than October 1, 2010.

(b) On the effective date of this article, all equipment and records necessary to effectuate the purposes of this article shall be transferred from the Division of Motor Vehicles to the Office of Administrative Hearings: *Provided*, That in order to provide for a smooth transition, the Secretary of Transportation may establish interim policies and procedures, determine how equipment and records are to be transferred and provide that the transfers provided for in this subsection take effect no later than October 1, 2010.

W. Va. Code § 29A-5-2 and not an agency as is the interpretation of the DMV's role in the *Doyle* decision and its progeny. When the Supreme Court of Appeals of West Virginia in *Doyle* applied syllabus point 3 of *Crouch*, it did not recognize that the administrative appellate procedure was no longer under the control of DMV and had instead been assigned to the OAH by the legislature in 2010.

Recognizing that the OAH, and not the DMV, is responsible for conducting DUI hearings is essential to a plain language reading of W. Va. Code 29A-5-2, as it establishes who is a proper party and which entity is the subject "agency". W. Va. Code § 29A-5-2 (a) reads, in full,

"In contested cases irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the circuit courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record. Any party to any such hearing may vouch the record as to any excluded testimony or other evidence."

Nevertheless, W. Va. Code § 29A-5-2(b) reads, again, in full with emphasis,

"All evidence, including papers, records, *agency* staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference."

Subsections (a) and (b) of the W. Va. Code Ann. § 29A-5-2 are in direct conflict with one another if one applies the *Doyle* holdings. Subsection (a) describes what evidence is admissible and what evidence is excluded in contested administrative hearings. To guide the agency (the OAH) in determining what evidence is admissible and what evidence is excluded, subsection (a) refers the agency to the West Virginia Rules of Evidence. However, subsection (b) states that *all evidence* is admissible so long as it is in the possession of the agency. This inconsistency is made harmonious only by the recognition that subsection (a) establishes rules of evidence and subsection



(b) establishes rules of procedure for administrative appeals performed by the OAH, not the DMV. Subsection (a) applies to the parties to the contested hearing and subsection (b) applies to the agency hearing the appeals. In the case before this court, the DMV is a party and must present and prove its case by a preponderance of the evidence; the OAH is the agency as it is the trier-of-fact, the neutral arbiter, and the entity tasked with issuing findings of facts and conclusions of law for appellate review.<sup>6</sup>

W. Va. Code § 29A-5-2(b) describes what documents the agency OAH is to include as part of the record for judicial review of its final decision if appealed by either *party*. For further guidance, this Court turns to the Supreme Court of Appeals of West Virginia's Rules of Procedure for Administrative Appeals. Rule 1 states:

"These rules govern the procedures in all circuit courts for judicial review of final orders or decisions from an agency in contested cases that are governed by the Administrative Procedures Act, W. Va. Code § 29A-5 *et seq.* These rules do not apply to extraordinary remedies such as certiorari which are governed by Rule 71B(a) of the West Virginia Rules of Civil Procedure."

Further, Rule 4(c) states,

"The record shall include a copy of the final opinion, order or decision being appealed. Unless otherwise provided by designation or stipulation of the parties, the record shall also include a transcript of all testimony and all papers, motions, documents, exhibits, evidence and records as were before the agency, all agency staff memoranda submitted in connection with the case, all orders or regulations promulgated in the proceeding by the agency and a statement of matters officially noted. The papers shall be arranged, as nearly as possible, in the order of the filing and entry thereof, with a table of contents or index."

Rule 4(c) lays out the proper procedure for the submission of the record to the circuit court for a "determination of the case" as consistent with W. Va. Code § 29A-5-2(b). Rule 4 of the Rules of Procedure for Administrative Appeals as promulgated by the Supreme Court of Appeals of West

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<sup>6</sup> The Court is cognizant of the fact that under state law, both the DMV and OAH are separate agencies under the umbrella of the West Virginia Division of Transportation.

Virginia is the better worded restatement of W. Va. Code § 29A-5-2(b), and as such, should be applicable here.

Without context or legislative history, and assuming that the DMV is the subject “agency”, the DMV’s interpretation of W. Va. Code § 29A-5-2(b) leads to an absurd result of virtually nullifying other applicable statutes and the code of state rules,<sup>7</sup> while also violating a contesting driver’s constitutional rights of due process.

For instance, as the party with the burden of proof, the DMV is the first party to present evidence. If the DMV is able to lawfully and automatically admit evidence into the record without check, then the driver is unable to present any evidence whatsoever under the plain reading of the statute as established in *Doyle*. W. Va. Code § 29A-5-2(b) again states with emphasis, “All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and *no other factual information or evidence shall be considered in the determination of the case.*” With the DMV’s interpretation, the challenging driver could not offer any other factual information or evidence (either through testimony or otherwise) to be considered by the OAH.

Reading the entirety of W. Va. Code § 29A-5-2 as a whole makes it abundantly clear that the OAH is the subject “agency” according to the statute as it is the agency charged with hearing and deciding disputes between parties. The DMV and licensee are parties to the dispute. To further illustrate, W. Va. Code § 29A-5-2(d) reads, in full with emphasis,

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<sup>7</sup> Indeed, the code of state rules clearly provides that: 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.*

W. Va. Code R. 91-1-3 3.7.2 (emphasis added).

*“Agencies may take notice of judicially cognizable facts. All parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.”*

Only triers-of-fact can take judicial notice of facts and it would lead to an absurd result to allow the DMV to take judicial notice of facts. Moreover, subsection (c) states “*Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.*”

Finally, W. Va. Code § 29A-5-4(a) states, in full, “*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.*”

#### ***Doyle is inapplicable as in relies on Crouch***

The *Doyle* opinion, although still precedent, is directly at odds with the requirements set forth above in other applicable statutes and the code of state rules. Its application violates the West Virginia Rules of Evidence, the right of the licensee to cross examine witnesses, the DMV’s burden to prove its case, and the OAH Hearing Examiner’s charge of making specific findings based upon all of the evidence. The application of *Doyle*, leads to the absurd result to allow a party below, the DMV, to automatically admit all of its evidence prior to or during a hearing without any verification, authentication, or challenge. Since 2014, the DMV has not been required to produce a single witnesses to prove its case, and the OAH Hearing Examiner has been mandated to admit and consider all of the DMV’s evidence, with no judicial discretion, in direct violation of the driver’s constitutional right of due process. *Doyle* and its progeny have misconstrued the provisions of W.Va. 29A-5-2(b) by eliminating the DMV’s burden of proof, and creating a presumption of guilt.

In sum, this Court, being charged with the proper interpretation and application of the law, finds that Syllabus Point 3 of *Crouch* is inapplicable to all post OAH DMV administrative appeals. Accordingly, applying the proper interpretation of W. Va. Code § 29A-5-2(b) compels a ruling contrary to the position of the DMV in this matter.

### **CONCLUSIONS OF LAW**

1. Prior to 2010, the administrative hearing process was under the control of DMV. See W. Va. Code § 17C-5C-5(a) (Repl. Vol. 2013) (2010) (recognizing the “transition of the administrative hearing process from the Division of Motor Vehicles to the Office of Administrative Hearings”). In 2010, “[t]he Office of Administrative Hearings [was] created as a separate operating agency within the Department of Transportation.” W. Va. Code § 17C-5C-1(a) (2010) (Repl. Vol. 2013). *Reed v. Staffileno*, 239 W. Va. 538, 542, 803 S.E.2d 508, 512 (2017). The OAH and the DMV are separate entities.

2. Syllabus Point 3 of *Crouch v. W. Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 71, 631 S.E.2d 628, 629 (2006) provides, “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).” This syllabus point is not controlling in this proceeding because this Court is ruling upon a modern administrative review hearing held before the OAH, and not the DMV.

3. ““Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is

important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment \* \* \*. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, \* \* \* but also in all types of cases where administrative \* \* \* actions were under scrutiny.’’ *Goldberg v. Kelly*, 397 U.S. 254, 270, 90 S. Ct. 1011, 1021, 25 L. Ed. 2d 287 (1970) citing *Greene v. McElroy*, 360 U.S. 474, 496—497, 79 S. Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).

4. The Supreme Court of Appeals of West Virginia has recognized that “[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.” Syl. Pt. 1, *Abshire v. Cline*, 193 W.Va. 180, 455 S.E.2d 549 (1995). *Straub v. Reed*, 239 W. Va. 844, 848, 806 S.E.2d 768, 772 (2017).

5. “Except as otherwise provided by this code or legislative rules, the Commissioner of Motor Vehicles has the burden of proof.” W. Va. Code § 17C-5C-4. The DMV bears the burden of proof by a preponderance of evidence.

6. “Where there is a direct conflict in the critical evidence upon which an agency proposes to act, the agency may not elect one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court.” *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

7. This Court finds that the OAH misapplied *Crouch* and its progeny to the case at hand. This Court further finds W. Va. Code § 29A-5-2(b) is not controlling in this case and the



West Virginia Rules of Evidence are applicable. As such, the DMV's counsel was required to move for the admission of the documents after authentication.

8. In an attempt to reconcile the absurd result from the misapplication of W.Va. Code § 29A-5-2(b), the West Virginia Supreme Court of Appeals in *Doyle* also specifically stated, "Of course, we recognized in *Crouch* that although a document is deemed admissible under West Virginia Code § 29A-5-2(b), its contents may still be challenged during the administrative hearing." Of course, in *Crouch*, the DMV both admitted evidence and heard appeals, which made sense at the time for this exception.

9. The violations of the West Virginia Rules of Evidence was not lost on Petitioner's counsel in this proceeding who objected to the admission of the DUI Information Sheet and the Intoximeter Intox EC/IR-II printer ticket at the hearing, and argued that the documents were lacking foundation.

10. Accordingly, since there was no testimony of any kind to authenticate the documents in the Commissioner's file, the same was improperly admitted over the objection of Petitioner. The Investigating Officer did not testify as to the standard reference checks provided on the DUI Information Sheet as required by the Code of State Rules § 64-10-7.1(c) of the State Bureau for Public Health Rules, and did not explain the failure to record a score on the one leg stand field sobriety test, did not explain why the horizontal nystagmus test was performed despite recording resting nystagmus. Further, the Investigating Officer did not explain whether Petitioner informed him of his recent back surgery which may have affected his ability to perform the physical portions of the field sobriety tests, or whether he checked Petitioner's mouth before administering the preliminary breath test or the secondary chemical test, among other things.

Without such testimony, the documents in the Commissioner's file entered into evidence are unreliable and should have been excluded.

11. Even if this Court were to apply the legal framework utilized by the Hearing Examiner below, this Court would still find that the Hearing Examiner's conclusion was in error. The *Final Order* cites Supreme Court precedent stating that information listed in the West Virginia D.U.I. Information Sheet is presumed to be accurate unless it is rebutted by Petitioner. However, when Petitioner testified at the hearing and attempted to rebut the Information Sheet, the Hearing Examiner concluded that Petitioner's testimony is "both self-serving and convenient. . ."

12. A Petitioner is not compelled to appear and offer testimony that confirms the D.U.I. Information Sheet or is otherwise contrary to his self-interest simply because the investigating officer fails to appear. Due process entitles a Petitioner to appear and present a defense to the claims brought against him or her.

13. In accordance with the Supreme Court precedent cited by the Hearing Examiner, Petitioner offered testimony that challenged and rebutted the information contained in the Commissioner's file, including testimony that cast doubt on the reliability of both breath tests and all three (3) field sobriety tests. Despite the numerous mistakes or inconsistencies in the D.U.I. Information Sheet and the complete lack of an officer narrative of the events, the Hearing Examiner viewed Petitioner's testimony as inherently incredible because Petitioner – unsurprisingly – offered testimony that supported his own version of events.

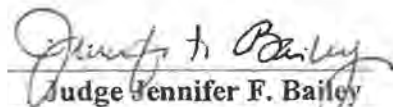
14. The entire purpose of an OAH hearing evaporates if Hearing Examiners view as incredible any testimony that contradicts the D.U.I. Information Sheet, particularly when the author of that Information Sheet fails to appear at the hearing. This Court concludes that the

Petitioner successfully rebutted the evidence against him and the DMV, therefore, did not meet its burden of proof.

### DECISION

Accordingly, the Court **ORDERS** the *Petition for Judicial Review* **GRANTED** and the *Final Order* of the OAH **VACATED** and **REVERSED**. The Court **ORDERS** that any *Order of Revocation* issued in this matter be **VACATED**. The Court further **ORDERS** that Petitioner's motor vehicle license and commercial drivers license be **REINSTATED**. There being nothing further, this Court does **ORDER** that the above-styled appeal be **DISMISSED** and **STRICKEN** from the docket of this Court. The Clerk is **DIRECTED** to send a certified copy of this *Final Order* to all parties and counsel of record, as well as the Office of Administrative Hearings at 1124 Smith Street, B100, Charleston, WV 25301.

ENTERED this 17<sup>th</sup> day of January, 2020.

  
Judge Jennifer F. Bailey  
Kanawha County Circuit Court

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, W.V.  
I, CATHY S. GATTON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT. 22  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS  
DAY OF January, 2020  
Cathy S. Gatton CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA