

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

JOSHUA DERECHIN,

Petitioner,

v.

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

Respondent.



2020 FEB -4 PM 4:40
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Civil Action No: 19-AA-80
Judge Joanna I. Tabit

**FINAL ORDER GRANTING APPEAL AND REVERSING FINAL ORDER
OF THE OFFICE OF ADMINISTRATIVE HEARINGS**

PROCEDURAL HISTORY AND BACKGROUND

The administrative action below was initiated pursuant to a DUI arrest of the Petitioner, Joshua Derechin (Mr. Derechin), on February 1, 2013. The stop and arrest was made by former Charleston Police Officer B. A. Lightner (Lightner), who was subsequently forced to resign his position for reasons of misconduct, including dishonesty. Lightner reported Mr. Derechin's BAC as .071%. Mr. Derechin prevailed in the criminal case, and the administrative matter ultimately came on for hearing before the Office of Administrative Hearings (OAH) on August 28, 2015. Lightner did not appear, nor did any other witness in support of the revocation. The only evidence presented against Mr. Derechin was the Division of Motor Vehicles ("DMV") file. As discussed below, Mr. Derechin presented apparently credible, unopposed testimony on his own behalf and a number of exhibits, many of which were refused or inexplicably accorded "no weight." The foregoing notwithstanding, the OAH ruled in favor of the DMV by

Final Order that was not entered until July 22, 2019. The hearing examiner did not issue any prior ruling or give any indication of the outcome of the action prior to that time.

The present appeal followed, accompanied by a motion to stay the revocation Order pending the appeal. As provided by *West Virginia Code* §17C-5A-2(s), a hearing on the motion to stay was convened before this Court on August 7, 2019, the focus of which was the requisite determination of irreparable harm to Mr. Derechin. It was clearly demonstrated through Mr. Derechin's uncontested testimony that since the August 28, 2015, OAH hearing and the July 22, 2019, revocation Order, Mr. Derechin's circumstances had significantly changed so as to place his profession career as a bridge design engineer in imminent jeopardy with the loss of his right to drive. At the time the OAH case was heard, he was married and his wife, who was not working, could have driven him during a period of suspension. But, prior to the decision, he had divorced, and the former wife returned to work and moved out of the area. He has no children, and his closest relative is in the Chicago area. Mr. Derechin lives in the Elkview area about a mile's distance up a mountain. The only public transportation is by bus. Even if he were to make the mile hike off of the mountain, the bus line has no realistic connections to his workplace. He made several attempts to obtain Uber service, and it registered a fare of \$20-22 one-way-- but each time followed by "no cars are available." A girlfriend who does not live with him, temporarily stayed with him while he was fearful that the revocation would become effective prior to a stay. Because she also has a job involving travel, that would not be a "long-term solution."

Petitioner is regularly sent considerable distances on assignments by his company both in-state and out-of-state. He has traveled repeatedly to Mississippi on assignment, and a bridge company offered him a management position there which he had to pass on since his driver's license was still in jeopardy. A *Stay and Supersedeas* was granted by this Court after hearing.

Respondent DMV followed the present action with its Cross-Petition, asserting, in substance, that it is blameless in the forty-seven (47) month delay in the OAH decision, that the Petitioner could have accepted an offer to enter the Interlock Program without a period of revocation or pursued a Writ of Mandamus to compel an earlier decision, and its interest in revoking impaired drivers. An evidentiary hearing was held on November 19, 2019, whereupon Petitioner submitted the record of his prior testimony of August 7, 2019. Respondent called representatives from the OAH and DMV. Respondent's candidly stated objective was, rather than to distinguish the present case from present authority, to seek to have *Reed v. Staffileno*, 239 W.Va. 538, 803 S.E.2d 508 (W. Va. 2017) overturned, citing subsequent efforts to remediate delays in decisions. At that hearing, the Court further considered and granted a motion for extension of Petitioner's *Stay and Supersedeas* as contained in the resulting order.

FINDINGS OF FACT

The Delay Issue

1. The parties do not disagree that the hearing before the OAH was conducted to completion on August 28, 2015, and the resulting Final Order issued on July 22, 2019.

Neither party filed an action in extraordinary relief to compel or hasten the production of the order. The record below indicates that on September 11, 2018, a form motion was filed by hearing counsel for DMV requesting the OAH to “diligently fulfill its obligation to issue a Final Order in this case.”

2. Mr. Derechin is a bridge design engineer for Michael Baker International in Charleston. He lives in Elkview. (Aug. 7, 2019 Hrg. Tr. 6). Thirty (30) percent of his time is spent on assignments outside of West Virginia. He also works in distant parts within the State. (Tr. 8).

3. Mr. Derechin has been unable to accept or apply for promotions while his license is in question. (Tr. 8). He was offered a management position with another company in his industry in Mississippi, but has declined due to his license being in jeopardy. (Tr. 10-11).

4. Between the inception of the case below and 2016, Mr. Derechin was married and his wife was not employed, and until that time would have been available to drive him to his office and to work assignments. (Tr. 6, 11).

5. Mr. Derechin has no children, and no relatives closer than the Chicago area. (Tr. 7). A girlfriend, who does not live with him, had recently been staying with him temporarily to drive him locally if needed, which would not be a long-term solution. She is employed and travels in her work for the West Virginia Primary Care Association far outside the Charleston area. (Tr. 18, 20).

6. There is “nothing realistic” available by way of public transportation for Mr. Derechin even to reach his office. He would first have to walk about a mile off a mountain to reach a bus line. The busses run infrequently, and he often works irregular hours. Uber rates are \$20-22 one-way to Charleston, and each of several attempts to use that service resulted in “no cars available.” (Tr. 8-9).

CONCLUSIONS OF LAW

7. The legal standards applicable to this case are embraced in *Reed v. Staffileno*, 803 S.E.2d 508, 512 (W. Va., 2017):

As a preliminary matter, we will note that the law governing revocation proceedings before OAH does not impose time constraints on the issuance of decisions by that agency following an administrative hearing. See W.Va. Code § 17C-5C-1 et seq. and 105 CSR § 1-1 et seq. However, this Court has long recognized the constitutional mandate that “‘justice shall be administered without ... delay.’ W. Va. Const. Art. III, § 17.” *Frantz v. Palmer*, 211 W.Va. 188, 192, 564 S.E.2d 398, 402 (2001). We further have recognized that “administrative agencies performing quasi-judicial functions have an affirmative duty to dispose promptly of matters properly submitted.” Syl. pt. 7, in part, *Allen v. State Human Rights Comm’n*, 174 W.Va. 139, 324 S.E.2d 99 (1984).

8. “In the context of a delay in issuing an order after a hearing has been held, the issue of prejudice necessarily involves prejudice to a party that occurred after the hearing was held. As a general matter, under *Miller* the standard for post-hearing prejudice will ordinarily involve some type of change in a party's circumstances that may have been substantially prejudiced because of the delay in issuing a final order by OAH.” *Staffileno* at 513, citing *Miller v. Moredock*, 229 W.Va. 66, 726 S.E.2d 34 (2011). Mr. Derechin unquestionably underwent a stark change of circumstances during the unreasonably long

delay in the issuance of a decision by the OAH. Had a decision been reached even within a year from the hearing, the consequences would amount to only an inconvenience to him and his then-wife, who would have been able to have driven him wherever and whenever needed.

9. Concerning the question of whether Mr. Derechin "suffered substantial and actual prejudice as a result of the delay in this matter and his due process rights have been violated" (*Staffileno* at 513), he has for an unreasonable period of time foregone career advancement in his present company and a management position in another State. Moreover, as previously discussed, being unable to drive would disqualify him from continuing in his present job, as analogous to the facts in *Staffileno*, "Petitioner is required to maintain his valid CDL as a condition of his employment and thus, if he is unable to drive, he can no longer be employed as a school bus driver." *Reed v. Staffileno*, 803 S.E.2d 508, 513 (W. Va. 2017).

The DUI Case

10. Mr. Derechin moved to the area from Massachusetts. At the time of the DUI charge, his office was in Cross Lanes, and he was not familiar with the area of Charleston in which the events in the underlying case occurred, having no regular occasion to be there. (OAH Hrg. Tr. 36.) According to his testimony and records produced, the temperature was under 10 degrees with snow and ice (Tr. 38-39). The DUI forms submitted by the arresting officer, B.A. Lightner, indicates that the Petitioner's performance was: "Walking to Roadside" - "Normal", and "Standing"- "Normal."

11. Contrary to the officer's report, Mr. Derechin stated in testimony that he initially signaled to turn right from Quarrier St. on to Laidley Street, but upon noting that no entry was permitted, went straight ahead without leaving his lane. (Tr. 48). At that time the markings were improperly positioned past the intersections. (Hrg. Exh. 6). His driving was not impaired by alcohol (Tr. 48). He continued on Quarrier Street and turned right on to Court Street to reach I-79. Though the officer reports that Mr. Derechin improperly went straight on Court Street in the right lane, no lane markings were visible as illustrated by photographs provided at the hearing as exhibits. (Exh. 7-9). Though the hearing exhibits were properly identified and authenticated (Hrg. Tr. 44-45, 50), the Hearing Examiner erroneously found to the contrary, finding because those were not time or date stamped, they would be accorded no weight. (Final Order P. 5).

12. The hearing examiner below erroneously found as true all assertions of the arresting officer as factual, in spite of evidence of his demonstrable unreliability. Mr. Derechin first notified Charleston Police Chief Brent Webster in writing on February 20, 2013, of his obligation to preserve all video records of the case for use in the criminal action and administrative proceedings (Pet. Hrg. Ex. 1). Chief Webster was served with a subpoena *duces tecum* issued by the OAH to appear and produce intoxilyzer records and disciplinary records of Officer Lightner. He failed to appear. However, Mr. Derechin presented newspaper print and online articles, concerning Lightner's misconduct. (See, *WVRE* 902). The OAH further erred in declining to find that the doctrine of spoliation

applied as to the absent video evidence and to accordingly apply an appropriate inference in favor of the Petitioner. (Final Oder, P. 5).

13. While the DMV may prove a case of DUI at a level of less than .08 BAC, it must alternatively prove that the driver was under the influence of alcohol to a preponderance of the evidence standard. Considering the foregoing, it was error for the OAH to determine that it had done so.

Respondent DMV's Position and Cross-Petition

14. The DMV posits, in essence, that it, too, is adversely affected by the lack of attention to this and other cases in its interest in ridding the roadways of intoxicated drivers; that it has essentially done all it can to abate the problem; and that Mr. Derechin is mutually blameworthy because he did not pursue a mandamus action for a more timely decision.

15. "Despite the availability of extraordinary relief as a means of seeking the issuance of delayed decisions, a party whose driver's license has been revoked should not have to resort to such relief to obtain a final decision by the Commissioner within a reasonable period of time following the administrative hearing." *Reed v. Staffileno*, 803 S.E.2d 508, 514 (W. Va. 2017). "The reviewing court is free to consider the aggrieved party's failure to pursue a ruling as a factor in determining whether he has suffered actual and substantial prejudice as a result of the delay." *Id.* The asserted failure of Mr. Derechin to pursue a mandamus action in this case cannot be said to have altered the actual and substantial prejudice that he suffered. He was charged with driving while

under the influence, but with a level of less than .08. Though such charge with adequate evidence could be sustainable, the evidence against Mr. Derechin was credibly and sharply disputed and emanated from a single witness with a history of dishonest conduct that led to the loss of his position as a police officer, and who chose not to appear to testify.

16. This Court heard testimony concerning the steps taken by the Office of Administrative Hearings toward reducing the backlog of pending cases before it. Procedurally, the OAH schedules hearings followed by a draft decision submitted by the assigned hearing examiner. The time to produce the recommended decision can be influenced by the number of cases assigned to a particular hearing examiner, which is in turn subject to vacancies in those positions. Once a recommended or draft decision is submitted, it is reviewed by one of a staff of paralegals. This step may be omitted when the examiner is an attorney. However, the OAH continues to appoint non-attorney examiners. After that review, the case advances to further review by the chief hearing examiner for any changes prior to issuance or the release of a final order. The priority has been realigned to generate final orders giving priority to cases last heard over time of the charge. Hearing examiner staff has also been increased to its authorized strength. However, nothing was advanced to show that Mr. Derechin's case presented particular challenges in terms of complexity or other exceptional reason for delay. To the contrary, the only measure taken to accelerate the final order was to release it without final review. A notation to the Final Order in the case below notes, in part:

In order to address the critical backlog of cases which are pending resolution, resulting in part from various events and circumstances in existence prior to the current Chief Hearing Examiner's appointment to the Office of Administrative Hearings, and to expedite the issuance of Final Orders, the Chief Hearing Examiner has temporarily suspended the review of proposed Final Orders submitted by the Hearing Examiners for stylistic, typographical, clerical, and grammatical errors. Pursuant to West Virginia Code §17C-5C-2, the Chief Hearing Examiner has limited her review of the Hearing Examiner's recommended decision to ensure legal accuracy and clarity.

However, the Chief Hearing Examiner, during testimony on behalf of Respondent DMV, disclosed that her review of the record would not have altered the decision below.

17. Accordingly, the present case must be reversed and dismissed. Mr. Derechin was subjected to a post-hearing delay in decision by the OAH for forty-seven (47) months. He did not cause or contribute to that delay. As contemplated by *Staffileno* at 513, he clearly suffered post-hearing substantial prejudice involving a change in his circumstances because of the delay in issuing a final order by OAH. Accepting that the OAH has initiated and continues in its efforts to resolve the backlog of cases before it, and DMV's efforts to promote the same, those bear no relevance to the procedures and particular harm visited upon the Mr. Derechin in this action.

18. Likewise, the costs to vindicate Mr. Derechin from the delay and resulting consequences should not be borne by him in the present action. "[W]e further find that the cumulative effect of the multiple continuances and overall delay in this matter, while not prejudicial to Conniff's defense, warrants an award of attorney fees and costs and therefore remand to the circuit court for a determination as to the reasonable amount of

such fees and costs.” Syllabus, *Reed v. Conniff*, 779 S.E.2d 568 (W.Va. 2015). In the instant case, according to the record below, the OAH was initially scheduled for a June 2013 hearing, and continued based on a timely motion by Mr. Derechin based on a conflict with his counsel’s long-standing prepaid travel plans. On the revised date of the hearing, September 12, 2013, at 9:30 a.m., the Respondent DMV filed an Emergency Motion for Continuance based on Officer Lightner’s expressed inability to appear because child care plans had fallen through, and he would be unable to appear. Counsel for DMV made that motion twenty-one (21) minutes prior to the hearing. The record further reflects that the matter was then first reset for March 12, 2015. A subpoena *duces tecum* was issued by the OAH for production of records concerning the BAC testing device and Officer Lightner’s disciplinary records upon then Charleston Chief of Police Brent Webster, at the written request of the Mr. Derechin. The record below reflects that the subpoena was served by certified mail and accepted. However, the record further reflects that Mr. Derechin notified DMV that the then Charleston City Attorney that the city may not comply with the subpoena, and after consulting with and without objection from the DMV, the matter was continued briefly upon Mr. Derechin’s motion. The matter was rescheduled for August 28, 2015. Officer Lightner, who by that time was no longer a police officer, did not appear, nor were any records in response to the subpoena *duces tecum* received. The hearing was conducted as scheduled. Based on the foregoing, the initial delay between July and September 2013, are attributable to Mr. Derechin.

Accordingly, consistent with *Conniff*, the overall delay in this matter to the Petitioner warrants an award of attorney fees and costs.

COURT'S ORDERS

WHEREFORE, for reasons appearing above and otherwise of record in this action, this Court, **FINDS, DECREES and ORDERS** that Mr. Derechin's license revocation is **REVERSED** and **RESCINDED** as though never having occurred and the action is **DISMISSED** with prejudice. It is further **ORDERED** that the costs of these actions be restored to him. Mr. Derechin is directed to submit to this Court and opposing Counsel an accounting of his overall legal costs, attorney fees and expenses for determination of the amounts to be recovered.


The Clerk of this Court is directed to send a copy of the within Order to all counsel of record as follows:

- (1) Mark McMillian, Esq., 1018 Kanawha Blvd., East, Suite 900, Charleston, WV 25301;
- (2) Elaine L. Skorich, Esq., DMV Legal Division, P.O. Box 17200, Charleston, WV 25317.

ENTERED: February 4, 2020

Joanna I. Tabit
THE HONORABLE JOANNA I. TABIT

Submitted By: *(Entered as Modified by the Court)*


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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA
I, CATHY S. GATSON, 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. GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 5th day of February 2020
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA *mk*