

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

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Petitioner/Respondent Below,

KANAWHA CO. CIRCUIT COURT

v.

Civil Action No. 19-AA-123  
The Honorable Tera L. Salango  
OAH File No. 402481AB

JOSEPH SLYE,

Respondent/Petitioner Below.

**FINAL ORDER DENYING PETITION FOR JUDICIAL REVIEW**

Pursuant to W.Va. Code §29A-5-4 (1998), this case is an appeal from the *Final Order* of the Office of Administrative Hearings ("OAH") entered September 10, 2019, which modified a decision of the Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), revoking the Respondent's driver's license for driving a motor vehicle in this State while under the influence of alcohol, controlled substances, and/or drugs, and for refusing to submit to the designated secondary chemical breath test. The OAH upheld the revocation for DUI but reversed the DMV's revocation for refusal to submit to the designated secondary chemical test.

***Findings of Fact***

1. On May 23, 2018, the arresting officer of the Berkeley County Sheriff's Department received a call from Central Dispatch of a male asleep behind the wheel and blocking Rutherford Lane.
2. Upon arriving on scene, the arresting officer observed a parked GMC Sierra in the middle of Rutherford Lane blocking the roadway.
3. The arresting officer also observed the Respondent sleeping behind the wheel



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with the truck running, and the keys in the ignition.

4. The arresting officer opened the driver's side door and woke up the Respondent who appeared to be confused and drowsy. The arresting officer noted the Respondent had slurred speech and detected an odor of alcoholic beverage.

5. In response to the arresting officer's inquiry as to whether Respondent had been drinking alcohol, the Respondent advised he had been drinking heavily the night before.

6. The arresting officer requested that Respondent perform Standard Field Sobriety Testing. Respondent refused to do so without an attorney present and further refused to submit to a preliminary breath test (PBT).

7. The arresting officer then placed the Respondent under arrest for DUI, transported him to the Berkeley County Sheriff's Department, read him the Implied Consent Statement, and then observed him for 20 minutes.

8. The Respondent initially refused to sign the Implied Consent Statement and the arresting officer waited an additional 15 minutes and then asked the Respondent if he would submit to the secondary chemical test of his breath and Respondent refused.

9. According to the testimony of the arresting officer, at no point during Respondent's arrest did he provide Respondent with a copy of the Implied Consent Statement. However, the arresting officer testified that he read the Implied Consent Statement to the Respondent and that the Respondent refused to sign the same. All parties agree that the Respondent refused to undergo the secondary chemical test.

10. In its Final Order dated September 10, 2019, the OAH ruled that the Respondent committed an offense described in West Virginia Code §17C-5-2, in that the Respondent drove

a motor vehicle in this State while under the influence of alcohol, controlled substances and/or drugs on May 23, 2018.

11. The OAH found that Respondent “was not provided with a written statement containing the penalties for refusal to submit to a designated secondary chemical test, required by W.Va. Code §17C-5-4, and the time limit for refusal, specified in W.Va. Code §17C-5-7.”

12. The OAH held that the Respondent was not properly advised of the consequences for refusing to submit to the designated secondary chemical breath test as set forth in W.Va. Code §17C-5-4, and therefore he did not refuse to submit to the designated chemical breath test on May 23, 2018.

#### *Standard of Review*

A circuit court’s review of an agency’s administrative order is conducted pursuant to the West Virginia Administrative Procedures Act, W.Va. Code §29A-5-4, which provides:

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.

W.Va. Code §29A-5-4(g) (1998).

“In reviewing the judgment of the lower court, this Court does not accord special weight to the lower court’s conclusions of law, and will reverse the judgment below when it is based on

an incorrect conclusion of law. Syllabus Point 4, *State ex rel. Miller v. Reed*, 203 W.Va. 673, 510 S.E.2d 507 (1988).

### *Conclusions of Law*

1. W.Va. Code §17C-5-4(c) provides:

(c) A secondary test of blood or breath is incidental to a lawful arrest and is to be administered at the direction of the arresting law-enforcement officer having probable cause to believe the person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

2. W.Va. Code §17C-5-7(a) provides:

(a) If any person under arrest as specified in section four of this article refuses to submit to any secondary chemical test, the tests shall not be given: *Provided*, That prior to the refusal, the person is given an oral warning and a written statement advising him or her that his or her refusal to submit to the secondary test finally designated will result in the revocation of his or her license to operate a motor vehicle in this state for a period of at least forty-five days and up to life; and that after fifteen minutes following the warnings the refusal is considered final. The arresting officer after that period of time expires has no further duty to provide the person with an opportunity to take the secondary test. . . .<sup>1</sup>

3. The purposes and policies underlying W.Va. Code §17C-5-4, and other implied consent laws, are numerous. However, the Supreme Court of Appeals of West Virginia has found that the policy is to “fulfill the need for a fair, efficient and accurate system of detection and prevention of drunken driving.” *Reed v. Hall*, 235 W.Va. 322, 773 S.E.2d 666 (2015) *citing Lee v. Department of Motor Vehicles*, 142 Cal.App.3d 275, 191 Cal.Rptr. 23 (1983). In addition, the Court noted that the purpose also included production of the most reliable evidence of

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<sup>1</sup> The language of this statute was changed during the 2020 Legislative Session. However, the applicable statute in this matter is the statute in effect at the time of the underlying incident, as reflected above. The Court notes that even under the amended language, its analysis would not change.

intoxication to deter intoxicated persons from driving on the highway. *Id.*

4. Further clarifying the Legislature's intent is the alteration made to the statute between its 1983 and 1986 versions, in which they elected to include a requirement that written notice be provided to a driver who refused a secondary chemical test. The rule against surplusage requires courts to give each word or clause of a statute operative effect, where possible.<sup>2</sup> Stated differently, courts should not interpret any statutory provision in a way that would render another part of the statute inoperative or redundant.<sup>3</sup> In this matter, the Court cannot read the terms "oral" and "written" notice to be one and the same.

5. The OAH's factual finding that the Respondent was not provided with a physical copy of the Implied Consent Statement is eminently reasonable. The undisputed facts in this matter indicate that the Implied Consent Statement was read and explained to the Respondent. Similarly, the OAH's interpretation of the plain language, statutory mandate of §17C-5-7 requiring the arresting officer provide an oral and written notice to the arrestee, is also reasonable.

6. The arresting officer failed to comply with W.Va. Code §17C-5-7's mandate when he did not provide the Respondent with a written copy of the Implied Consent Statement, and Petitioner provides no facts or legal reasoning to remediate the failure. Thus, OAH's ruling that the Respondent's "refusal" did not satisfy the statutory requirements for a refusal under §17C-5-7 cannot be "clearly wrong" or an error of law. Petitioner's argument that this Court should employ a totality of the circumstances test to determine whether the arresting officer's

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<sup>2</sup> See *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

<sup>3</sup> See, e.g., *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) ("Appellants' argument . . . would make either the first or the second condition redundant or largely superfluous, in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative."). See also, e.g., *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (plurality opinion) (declining to read statute so as to "significantly overlap" with a distinct

actions were in compliance with the purpose and spirit of the statute, when Petitioner admits it did not comply with the clear terms of the statute, is unavailing.

7. It gives this Court no pleasure to affirm the OAH's ruling – specifically in a matter where the Respondent was so clearly under the influence and so clearly refused to comply with any officer requests. However, the clear, plain language of the applicable statute, the manner in which courts are required to interpret the will of the Legislature through its written word, and the testimony of the arresting officer, gives this Court little alternative.

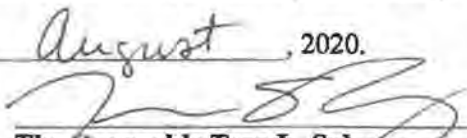
8. Finding no error of law or fact, the decision of the OAH is **AFFIRMED** and the *Petition for Judicial Review* is hereby **DENIED**.

It is hereby **ORDERED, ADJUDGED** and **DECREED** that the decision of the OAH is **AFFIRMED** and this matter is **STRICKEN** from the docket of this Court.

It is further **ORDERED** that the Clerk of this Court is hereby directed to forward a certified copy of this Order to Emmett Frazier, Commissioner of the West Virginia Division of Motor Vehicles, P.O. Box 17300, Charleston, West Virginia 25317; to Kit Thornton, Esq., Assistant Attorney General, DMV-Legal Division, P.O. Box 17200, Charleston, WV 25317; B. Craig Manford, Esq., P.O. Box 3021, Martinsburg, WV 25402; and The Office of Administrative Hearings, 300 Capitol Street, 10<sup>th</sup> Floor, Charleston, WV 25301.

Petitioner's objections and exceptions to this ruling are hereby noted and preserved.

ENTERED THIS 24<sup>th</sup> day of August, 2020.

  
The Honorable Tera L. Salango  
Judge of the Circuit Court of  
Kanawha County, West Virginia

statute, resisting a reading that would "render superfluous an entire provision passed in proximity as part of the same Act")