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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0969
(Circuit Court Civil Action No. 19-AA-88)

EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Petitioner,

v.

DINOS J. SMITH,

Respondent.

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REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

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Now comes Petitioner Everett J. Frazier, Commissioner of the West Virginia Division of Motor Vehicles (“DMV”), by and through his undersigned counsel, and pursuant to R. App. Pro. 10(g) (2010) submits the *Reply Brief of the Division of Motor Vehicles*.

ARGUMENT

In his response brief¹, Mr. Smith alleges that the DMV “is incorrect in claiming that the Respondent complained of choices he made before the administrative hearing. The Respondent clearly testified under oath that because of the long delay, he did not know when or if there would ever be ruling after years passed. (App. 57-59) The Respondent also clearly testified that there was clearly a detrimental change related to the OAH [Office of Administrative Hearings] issuing a final order 29 months after a formal hearing. Undersigned counsel asked “So at that point, if you knew your license was going to be suspended, you would have not taken the job with Dayton?” in which the Respondent replied ‘yes.’ (App. 60).” (Resp. Br. at P. 10.)

The circuit court discussed that

[Mr. Smith] testified that he would not have chosen the residency in Dayton if he knew his license would be revoked: “I would have definitely did [*sic*] something different if I knew my license was getting suspended. I would have definitely ranked those other hospitals first and went [*sic*] somewhere where, like I said, that I would not have to travel because, you know, one, I can’t make it work. I will, more than likely not be able to complete residency because I don’t have time off that I can take like that and I have no means to work.”

App. at PP. 9-10.

The circuit court’s reliance on Mr. Smith’s testimony about choosing a different residency as proof of a detrimental change in his circumstances caused by the post-hearing delay is

¹ The Respondent, via counsel, certified in his *Certificate of Service* that he placed his responsive brief in the mail to the undersigned on May 12, 2021. As of the date of the filing of this reply, counsel for the Petitioner has not received the copy of the Respondent’s brief allegedly mailed by the Respondent’s counsel. Instead, the Petitioner’s counsel requested a copy from this Court.

unreasonable.

To refresh the Court's memory, Mr. Smith was arrested for driving a motor vehicle in this state while under the influence ("DUI") on August 30, 2014. On October 25, 2014, Mr. Smith appealed his license revocation with the OAH and knew that he could lose at the administrative hearing which would mean that he would have to serve a license revocation. Mr. Smith graduated from osteopathic school in May of 2016; began his internship at Grandview Medical Center in Dayton on July 1, 2016; and applied to match with a residency program in the Fall of 2016. The OAH held the administrative hearing on February 22, 2017, and Mr. Smith found out that he matched with Grandview Medical Center in March of 2017. Mr. Smith appealed the DMV's *Order of Revocation* before he made his choice of residency location, and he made his residency choices before he even had his administrative hearing. Mr. Smith learned that he had matched with his first choice, Dayton, in March of 2017, approximately a month after the OAH held his administrative hearing. There is no possible and logical way that the delay in the OAH issuing a final order could be blamed for him deciding in the Fall of 2016 to choose a residency in Dayton over a residency in Cleveland: his choice was finalized before the OAH held the administrative hearing. The circuit court's reliance on this part of the Respondent's testimony as proof of a detrimental change in his circumstances caused by the delay in the OAH issuing its *Final Order* is clearly wrong and an abuse of discretion.

As further proof of a detrimental change in his circumstances caused by the delay of the OAH in entering its *Final Order*, the circuit court also considered Mr. Smith's testimony that in May of 2019, he signed a contract to work at United Hospital Center in Bridgeport, West Virginia, where he would have to travel to different hospitals in the United Hospital System. The circuit court noted

that Mr. Smith testified that “without a valid license, he will not be able to perform his job because he will not be able to drive. He testified that his actual and substantial prejudice will be the inability to fulfill his employment contract requirements without having to drive and ‘possible loss of employment with a contract that I signed’ (original emphasis).” (App. at P. 10.)

In his responsive brief, Mr. Smith argues that “the Respondent clearly testified that he chose to work at United Hospital instead of staying on at Dayton because he did not know his license was ever going to get suspended [*sic*]. (App. 51) . . . The Respondent further testified he could have agreed to stay and work in Dayton where he had done his residency instead of moving to Bridgeport where he had to drive to different hospitals. (App. 51). The Petitioner fails to address this second set of facts pertaining to the detrimental change in circumstances.” (Resp. Br. at P. 10.)

As argued on page 12 of the *Brief of the Division of Motor Vehicles*, the Respondent’s driving privileges were revoked when the 150 day stay of his license revocation expired on March 10, 2020. Mr. Smith did not seek a consecutive stay from the circuit court; therefore, it can be presumed that he was driving to his job using his valid Ohio driver’s license². Because he was able to fulfill his contractual obligations with United Hospital without having a valid West Virginia driver’s license, there was no detrimental change in his circumstances caused by the delay of the OAH in issuing its *Final Order*. There was no evidence that he suffered actual and substantial

² Mr. Smith was able to obtain an Ohio license when he moved to Dayton while the matter was pending before the OAH. When West Virginia revoked his license upon entry of the OAH’s *Final Order* on July 18, 2019, Mr. Smith’s license status in Ohio remained valid until his license in that state was to be renewed. At that time, the West Virginia revocation would prevent him from renewing his license in Ohio without satisfying the reinstatement requirements in West Virginia. Because Mr. Smith did not surrender his Ohio license to West Virginia until January 6, 2021, he presumably was driving in West Virginia on a valid Ohio license when he moved back to West Virginia in July of 2020 to work for United Hospital even though his West Virginia license status showed “revoked” until the circuit court entered its final order on October 30, 2020.

prejudice because of the post-hearing delay.

CONCLUSION

For the reasons outlined above as well as in the *Brief of the Division of Motor Vehicles*, the DMV respectfully requests that this Court reverse the circuit court order.

Respectfully submitted,

EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,

By Counsel,

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CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 28th day of May 2021, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, to wit:

Joseph H. Spano, Jr., Esquire
714½ Lee Street, East, Suite 204
Charleston, WV 25301


Elaine L. Skorich