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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO.: 20-0969
(Circuit Court Civil Action No. 19-AA-99)

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

Petitioner,

DO NOT REMOVE FROM FILE

v.

DINOS J. SMITH,

Respondent.

RESPONSE BRIEF ON BEHALF OF DINOS J. SMITH

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I. STATEMENT OF THE CASE

On August 30, 2014, at approximately 2:12 a.m., Officer R. C. Cuevas, a member of the Beckley Police Department and the Investigating Officer herein, responded to the parking lot of Morgan's Bar in the 1900 block of Harper Road in Beckley, West Virginia, to investigate a report of a motor vehicle accident involving two cars. (App . 465, 472, 554, 569.) Upon arriving at 2:31 a.m., the Investigating Officer determined that a Jeep Cherokee and a Chevrolet Cavalier had been involved in a minor collision where the Jeep backed out of its parking space and sideswiped the Cavalier parked next to it. (App. 465, 472, 554, 569-570.)

The Investigating Officer also found Dinos J. Smith, the Respondent herein, Stephanie Rizo, the owner of the Jeep, and Mary Franciso, the owner of the Cavalier. (App. 465, 554, 570.) In response to questioning, Officer Cuevas testified that the Respondent advised that he had hit the Cavalier (App. 467, 472, 555-556, 576-577.) The Respondent denies ever making this statement to Officer Cuevas.

The Investigating Officer asked Mr. Smith to perform standardized field sobriety tests in which he testified that the Respondent failed all three tests (App. 466, 472, 558-560). After ensuring that Mr. Smith had not smoked or drank alcohol for 15 minutes prior to the test, the Investigating Officer administered a preliminary breath test to Mr. Smith. (App. 467, 472, 563.) The result of the test indicated the Mr. Smith has a blood alcohol concentration of .157%. (App. 467, 472.)

The Investigating Officer arrested Mr. Smith for driving a motor vehicle in this State while under the influence ("DUI") of alcohol, controlled substances and/or drugs and transported him to the Beckley Police Department for processing and administration of the designated secondary chemical test. (App. 468, 472, 463-464.) The Investigating Officer read and provided

Mr. Smith with a copy of the West Virginia Implied Consent Statement, which Mr. Smith signed. (App. 471, 564.)

The Beckley Police Department has designated the Intox EC/IR-II as the secondary test of the breath. (App. 553.) The Investigating Officer was trained and certified to administer the Intox EC/IR-II at the W. Va. State Police Academy on April 26, 2014. (App. 468, 553.)

The Investigating Officer observed Mr. Smith for 20 minutes to ensure that he had not ingested food or drink and to ensure that he had no other foreign matter in his mouth. (App. 468, 565, 580.) The Investigating Officer completed the remaining steps on the Breath Test Operational Checklist (App. 468, 565), and Mr. Smith provided a breath sample which indicated that he had a blood alcohol concentration ("BAC") of .144% (App. 468, 470, 466.) Pursuant to W. Va. Code §17C-5A-1(b) (2008), the Investigating Officer sent the West Virginia Division of Motor Vehicles ("DMV") a copy of the West Virginia DUI Information Sheet. (App. 473.)

On September 25, 2014, the DMV sent Mr. Smith an Order of Revocation for DUI. (App. 238.) Because this was Mr. Smith's first DUI offense (as evidence by his "A" file number), he had two options for reinstatement of his driving privileges: 1) he could serve 15 days of revocation plus successfully complete 120 days in the West Virginia Alcohol Test and Lock Program ("Interlock"); or 2) he could serve 90 days of revocation. Id. Both options also required successful participation in the West Virginia Safety and Treatment Program and payment of reinstatement fees. Id.

On October 25, 2014, Mr. Smith, through counsel, requested an administrative hearing from the OAH. (App. 226.) On November 19, 2014, before a hearing was even noticed and as requested by Mr. Smith's then counsel, John D. ("Jody") Wooton, the OAH issued a subpoena for the appearance of the Investigating Officer. (App. 245.) On January 28, 2015, the OAH

noticed the matter for hearing on February 27, 2015. (App. 252.) On February 26, 2015, the DMV requested its first continuance of the administrative hearing (App. 290-293), which the OAH granted on February 27, 2015. (App. 295.)

On March 10, 2015, the OAH rescheduled the hearing for August 14, 2015. (App. 303.) On April 13, 2015, the OAH sua sponte rescheduled the administrative hearing for May 13, 2015. (App. 325.) On April 27, 2015, the OAH rescheduled the administrative hearing for October 8, 2015. (App. 333.) On September 14, 2015, the DMV requested its second continuance of the administrative hearing (App. 368-369), which the OAH granted on September 17, 2015. (App. 372.) The OAH rescheduled the hearing for June 1, 2016. Id.

On March 24, 2016, Mr. Smith requested his first continuance of the administration hearing (App. 377), which the OAH granted on March 28, 2016. (App. 381.) On May 12, 2016, the OAH rescheduled the matter for August 25, 2016. (App. 384.) On August 16, 2016, the OAH sua sponte rescheduled it for November 3, 2016. (App. 452.) On October 28, 2016, Mr. Smith requested his second continuance of the administrative hearing (App. 458-459), which the OAH granted on October 29, 2016. (App. 461.) The OAH rescheduled the matter for hearing on February 22, 2017. Id.

OAH Hearing Examiner Lou Ann Proctor conducted an administrative hearing on February 22, 2017 (App. 544); however, prior to submitting a proposed final order, Ms. Proctor retired from employment with the OAH. (App. 475, FN2.)

On August 15, 2019, Mr. Smith filed an administrative appeal with the Circuit Court of Kanawha County. (App. 186-217.) Mr. Smith alleged that the OAH erred in upholding his license revocation for DUI and that his due process rights were violated because of the OAH's delay in entering its final order. (App. 195.) On October 10, 2019, the circuit court held a hearing

on Mr. Smith's Motion to Stay and conducted an evidentiary hearing on the issue of post-hearing delay by the OAH. (App. 38-185.) Mr. Smith testified regarding his alleged irreparable harm if the circuit court did not grant a suppression of the order of revocation and his alleged prejudice due to the delay in receiving a final order. (App. 46-64.) DMV Assistant General Counsel John T. Bonham, II, testified regarding the DMV's efforts to hasten cases pending before the OAH including letting drivers go immediately onto Interlock if the OAH has delayed its final order. (App. 150-161.) OAH Director and Chief Hearing Examiner Teresa D. Maryland testified regarding the reasons for the OAH delay. (App.124-149.)

On October 30, 2020, the circuit court entered its "Final Order Granting Petition for Judicial Review Based Upon Staffileno Delay." (App. 2-12.) The circuit court found and concluded that Mr. Smith "suffered actual and substantial prejudice as a result of the delay of the OAH in issuing its Final Order, and proved to the satisfaction of this Court that the prejudice he experienced as a result of the delay, when balanced against the reasons for the delay, inures to the benefit of [Mr. Smith.]" (App. 11.) The circuit court's order is devoid of any mention of the DMV's offer to permit Mr. Smith to immediately go onto Interlock so that he could fulfill his remaining revocation time while driving in an Interlock equipped vehicle. (App. 151-152.) The circuit court did not address the merits of the DUI appeal.

On November 30, 2020, the DMV filed the instant matter with this Court.

II. SUMMARY OF ARGUMENT

A. The circuit court did not erroneously conclude that the Petitioner suffered actual and

substantial prejudice as a result of the delay by the OAH in issuing it Final Order, and proved to the satisfaction of the Court that the prejudice he experienced as a result of the delay, when balanced against the reasons for the delay, inures to the benefit of the plaintiff.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent does not believe oral argument is necessary unless the Court determines that issues should be addressed in said manner. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

IV. ARGUMENT

A. Standard of Review

On appeal of an administrative order from the circuit court, this Court is bound by the statutory standards contained in W. Va. Code s. 29A-5-4(a) and reviews questions of law presented de novo; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. Syllabus point 1, *Muscatell v. Cline,* 196 W.Va. 588 (1996). "Further, in cases where the circuit court has reversed the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under **abuse of discretion standard** and reviews questions of law de novo." Syl. Pt. 2 *id.* 242 W.Va. 657.

"When the party asserts that his or her constitutional right to due process has been violated by a delay in the issuance of the order by the Office of Administrative Hearings, the party must demonstrate that he or she has suffered actual and substantial prejudice as a result of the delay. Once actual and substantial prejudice from the delay has been proven, the circuit court

must then balance the resulting prejudice against the reasons for the delay" *Reed v. Staffileno*, 239 W.Va. 238 (2017).

B. The circuit court did not erroneously conclude that the Petitioner suffered actual and substantial prejudice as a result of the delay by the OAH in issuing it Final Order, and proved to the satisfaction of the Court that the prejudice he experienced as a result of the delay, when balanced against the reasons for the delay, inures to the benefit of the plaintiff.

The long delay in ruling on the OAH hearing has actually and substantially prejudiced the petitioner. "When the party asserts that his or her constitutional right to due process has been violated by a delay in the issuance of the order by the Office of Administrative Hearings, the party must demonstrate that he or she has suffered actual and substantial prejudice as a result of the delay. Once actual and substantial prejudice from the delay has been proven, the circuit court must then balance the resulting prejudice against the reasons for the delay" *Reed v. Staffileno,* 239 W.Va. 238 (2017). In *Reed* the administrative hearing was held on August 1, 2012 and the OAH decision was rendered on October 18, 2015. During that time petitioner had left his desk job for the state and become a school bus driver. The Court opined that he suffered actual and substantial prejudice due to the delay in the OAH's decision.

In the present case, the petitioner's administrative hearing was held on February 22, 2017 and the OAH decision was rendered on July 18, 2019. During that time the Respondent clearly testified that he signed to work with United Hospital Center, where he has to drive to the many locations, instead of Dayton Hospital with one location. (App.9-10) He also testified that he would have chosen a different match he had known about the upcoming suspension. (App. 60) The circuit court correctly followed the balancing test set out by *Reed.* First, the circuit court found there was in fact actual and substantial prejudices because the OAH delayed it decision **by 29 months.** The Petitioner 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 a ruling after years passed. (App. 57-59) The Respondent also clearly testified that there was clearly a detrimental change related to the OAH 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).

The Petitioner next argues that the "match" argument is not valid, but the Respondent testified that he would have chosen a different match **and would have chosen a different job.** 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. (App. 51) The case just lingered out there for years after the hearing and the Respondent truly believed it was gone and over. 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 the different hospitals. (App. 51). The Petitioner fails to address this second set of facts pertaining to the detrimental change in circumstances and the actual and substantial prejudice.

The Petitioner continually incorrectly argues that the Respondent was not prejudiced by the OAH's decision because he chose to match with Grandview in Dayton before the OAH conducted the administrative hearing. The circuit court clearly decided on this issue as well. The circuit court found that the Respondent was "reasonably articulated substantial prejudiced from the OAH's delay in issuing the *Final Order*, as his employment choices and opportunities are substantially affected by working as a physician without a driver's license in West Virginia." (App. 10). The circuit court "is satisfied that Petitioner (now Respondent) demonstrated actual

and substantial prejudice both in the delay, prior to and after the hearing, and does not find the Respondent's reasons overcome the prejudice Petitioner experienced." (App. 11).

The Petitioner's weak timeline arguments cannot get over the fact that the OAH took 29 months to rule on a hearing that lasted less than one half a day. The prejudice to the Respondent was egregious as determined by the circuit court. To overturn the circuit court's ruling on a weak factual argument would be even more prejudice to the Dr. Smith who is still dealing with the repercussions of a DUI charge from 2014.

Finally, the Petitioner argues that the Respondent, nor counsel ever contacted the OAH or filed a writ of mandamus action against the OAH. This argument whole-heartedly fails as a matter of common sense. The OAH, a state agency, failed to do its job in using orders in this case as well as in many other cases. Now the OAH would argue to this Court that the Respondent is in the wrong because he did not ask them to do their job paid for by tax-payer monies.

VI. CONCLUSION

WHEREFORE, for the reasons set forth above the Respondent respectfully requests that this Honorable Court review and uphold the Final Order of the circuit court.

DINOS JUSTIN SMITH
By Counsel

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Petitioner,

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CERTIFICATE OF SERVICE

I, Joseph H. Spano, Jr., counsel for Dinos J. Smith, Respondent, do hereby certify that service of the foregoing ***Respondent's Response to the Petitioner's Brief*** in the above styled case have been made upon the following:

Elaine Skorich, Esq.
Assistant Attorney General
DMV Legal Division
PO Box 17200
Charleston, WV 25317

this the 12 day of May 2021, via United States mail, in a sealed envelope, postage prepaid.

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