

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

Cheryl L. Yoder, Petitioner,

vs.

**Everett Frazier, Commissioner,
West Virginia Division of Motor
Vehicles, Respondent.**

**Case No. 21-AA-5
OAH No. 398133AB**

FINAL ORDER

This matter comes before the Court upon the papers and proceedings formerly read and had herein; upon the Final Order of the Office of Administrative Hearings (OAH) in case number 398133AB entered on June 29, 2021, affirming the decision of the Commissioner of the West Virginia Division of Motor Vehicles (DMV), dated July 29, 2017, revoking the Petitioner's personal and commercial driver's licenses for driving a motor vehicle in this State while under the influence of controlled substances or drugs to be effective September 1, 2017; upon the Second Petition for Judicial Review filed herein on July 20, 2021; upon the Court's prior Orders entered October 1, 2021 and November 12, 2021, scheduling the submission of briefs and amending the same; upon the respective briefs of the parties; upon the appearance of the Petitioner, Cheryl Yoder, by counsel, B. Craig Manford, Esq.; and upon the appearance of the Respondent, Everett Frazier, Commissioner of the West Virginia Division of Motor Vehicles, by Janet E. James, Esq.

Procedural History

The Court notes that this matter is a continuation of the case in Berkeley County Case Number 2019-P-353, the prior administrative appeal, which involved the same set

of operative facts and issues. In that matter, this Court entered a Final Order on March 25, 2020, reversing the Final Order of the OAH of September 6, 2019, and ordering the Petitioner's personal and commercial driver's licenses reinstated. The Commissioner then appealed that decision to the West Virginia Supreme Court of Appeals. On February 19, 2021, the Supreme Court issued a Memorandum Decision, Docket No. 20-0336, reversing this Court's Order of March 25, 2020, and remanding the case for reconsideration pursuant to the rulings in *Frazier v. Fouch*, 853 S.E.2d 587 (W.Va. 2020). *Frazier v. Yoder*, Docket No. 20-0336, 2021 Westlaw 653244 (Feb. 19, 2021) (Memorandum Decision).

In its decision to reverse and remand this matter, the Supreme Court of Appeals stated: "[c]onsistent with the *Fouch* decision, the circuit court's order was erroneous to the extent that it found that the officer's failure to testify at the OAH hearing implicated respondent's due process rights to a full and fair hearing", *Frazier v. Yoder*, *supra*, at page 3.

Because the Supreme Court of Appeals reversed and remanded this Court's decision on the above ground alone, the opinion did not reach this Court's prior ruling that the evidence was insufficient, or sufficiently rebutted by the evidence brought forth by the Petitioner at the OAH hearing, such that Petitioner's personal and commercial driver's licenses should not have been revoked.¹

Nevertheless, in light of the Supreme Court of Appeal's admonitions that the

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The Supreme Court also declined to address the arguments of the Commissioner that the circuit court erred in substituting its judgment for the OAH and failed to give deference to the factfinder's credibility determinations as it already found the circuit court's ruling ran afoul of the decision in *Fouch*, *supra*.

reviewing Court in an APA cases appealing driver's license revocations should not reweigh the evidence, reassess the credibility of witnesses, substitute its judgment for that of the Hearing Examiner, *see Syl. Pt. 4, Frazier v. S.P.*, 242 W. Va. 657, 838 S.E.2d 741 (2020), or indicate a preference for live testimony over documentary evidence, *see Groves v. Cicchirillo*, 225 W. Va. 474, 481, 694 S.E.2d 639, 646 (2008), this Court decided that the matter should be remanded to the OAH for a new evidentiary hearing to permit the record to be developed as to what substances the Valley Health Urgent Care Eleven (11) Panel Non-DOT Urine Drug Screen (hereafter "11 Panel Drug Screen") tested for, what a negative screen would thus mean in the context of this case and in light of all the other evidence, and to provide the Respondent the opportunity to meet that evidence. Accordingly, by Final Order Upon Remand entered June 20, 2021, the matter was remanded to the OAH for further proceedings consistent with this Court's directives regarding the 11 Panel Drug Screen.

On June 28, 2021, a hearing was had before Acting Chief Hearing Examiner William A. Freeman via M.S. Teams, upon the remand from this Court. On June 29, 2021, the OAH issued an Order, once again affirming the original July 29, 2017 Order of Suspension, finding that despite the presentation of credible evidence as to which drugs the 11 Panel Drug Screen tested for, the evidence indicated that more likely than not the Petitioner was driving while under the influence of one or more controlled substances or drugs not tested for in an 11 Panel Drug Screen such as the one Petitioner utilized.

On July 20, 2021, the Petitioner filed her Second Petition for Judicial Review in

this Appeal, denominated Berkeley County Case No. 21-AA-5, specifically incorporating all arguments, facts and law previously set forth in her original Petition for Judicial Review in Case No. 19-P-353.

With all of the foregoing pleadings, arguments of the parties, rulings, analysis and directives of the Supreme Court contained in its Memorandum Decision of February 19, 2021, in mind, and the Court having carefully reconsidered the entire administrative record filed herein including the Petition, the respective briefs of the parties, the records in both appeals, Cases 19-P-353 and 21-AA-5, the Court hereby makes the following findings of fact and conclusions of law:

Proceedings Before the Office of Administrative Hearings

1. Petitioner is a CDL license holder and drives commercial trucks as part of her profession. On July 29, 2017, the Commissioner of the DMV issued two Orders revoking the Petitioner's personal driving privileges and her commercial driver's license for the alleged offense of Driving Under the Influence of Controlled Substances or Drugs stemming from a traffic stop occurring on July 3, 2017.
2. The hearing was scheduled but then continued several times. In granting the final continuance on June 26, 2018, after which the October 4, 2018 hearing was scheduled and proceeded, Hearing Examiner Andrew Myers noted that "... Petitioner's Counsel has indicated it has recently come to his attention that exculpatory evidence exist[s] that is necessary for a full and fair determination of this case. Counsel for Petitioner has indicated medical paperwork exists showing Petitioner was not under the influence of controlled substances or drugs during

the time of her arrest."

3. On October 4, 2018, an Administrative Hearing was had at Martinsburg DMV Regional Office before Hearing Examiner Andrew Myers. At the start of the hearing, Hearing Examiner Myers asked Harley Wagner, then counsel for the Petitioner: "Has there been a guilty plea in the criminal case or not?" To which Mr. Wagner responded: "No sir, Your Honor. It was dismissed by the City [of Martinsburg] Attorney in full. Not an agreement. Just outright dismissed." Next, the Respondent moved to continue the proceedings due to the failure of both Patrolmen Jarvis [the officer who processed Petitioner's arrest] and Williamson to appear pursuant to the Respondent's subpoenas. The Petitioner objected and the Hearing Examiner denied the continuance request.
4. The Respondent then presented for admission into evidence the following documents contained in the West Virginia DMV File pursuant to W.Va. Code § 29A-5-2(b): the West Virginia DMV Form 314, DUI Information Sheet; the Implied Consent Statement; and the narrative criminal complaint of the arresting officer, all marked Respondent's Exhibit No. 1. The Respondent then rested his case.
5. The criminal complaint was prepared by Patrolman First Class (PFC) C. R. Williamson of the Martinsburg Police Department ("Officer Williamson"). It recites that on Monday, July 3, 2017, the officer was traveling south on Queen Street behind the Petitioner's vehicle. The complaint further recites that the officer observed the vehicle driving slowly and weaving in the traffic lane. It then recites that the vehicle made a wide slow right turn onto King Street and then suddenly

pulled off the road and into a parking spot around the 200 block of West King Street. The complaint next recites that the officer passed the vehicle and watched it immediately pull in behind him. The officer then proceeded through the intersection of King Street and Maple Avenue and pulled into a parking spot and waited for the vehicle which was stopped at a red traffic light. The complaint next recites that as the light turned green, the officer observed the vehicle come within inches of his front bumper and attempt to park directly in front of his squad car. The complaint next recites that the vehicle then over corrected, pulled out of the spot and attempted to back up. The complaint then recites that the vehicle ended up crossways in the middle of the road. The complaint next recites that the vehicle then drove away when [the driver] could not park properly. The officer then initiated a vehicle stop one block farther down the street, in the 300 block of West King Street.

6. Next the complaint recites that the Petitioner stumbled out of the vehicle and started walking back to the officer's cruiser. The Court notes that this recitation in the Complaint is in conflict with a portion of the West Virginia DUI Information Sheet ("DMV Form 314") offered into evidence by the Respondent, which noted under the Personal Contact section of the form, wherein the three boxes "Normal" are each checked by the officer, in qualifying how the Petitioner exited the vehicle, walked to the roadside and stood.
7. The complaint then states that the officer ordered the Petitioner back into her vehicle, several times, and that she complied. The officer observed that the

Petitioner's eyes were red and she had slightly slurred speech. The complaint next recites that the officer continued to speak to the Petitioner, while she was in her car, until he was "sure" she was under the influence of prescription drugs.

8. The Complaint then states that the officer had the Petitioner exit her vehicle. He then administered three standardized field sobriety tests ("SFST's"). Williamson stated the Petitioner had difficulty following the instructions for the SFST's and that she failed all three. Details of the officer's markings on the SFST results are recorded on the form. The complaint then recites that the officer arrested the Petitioner for DUI for being under the influence of prescription drugs.
9. The Court notes that the DMV Form 314 contains a section denominated as "Additional Impairment Tests" wherein the Modified Romberg and Lack of Convergence Tests are listed with spaces for notations by the officer administering each test as to the subject's performance thereon. The Petitioner points out that the DMV Form 314 itself dictates that these tests are to be administered only by an A.R.I.D.E. certified officer. There is no information in the record as to whether or not Officer Williamson was A.R.I.D.E. certified. This portion of the DMV Form 314 also has a section for the officer to note normal, dilated or constricted pupils, which were in this instance left blank. Petitioner asserts that this section of the form does not require A.R.I.D.E. certification for the officer to complete it. The record does not contain information from the officer's observations as to the Petitioner's pupils being dilated or constricted or normal.

10. The criminal complaint next recites that the officer observed the Petitioner for twenty (20) minutes after having her sign the implied consent statement. The officer then administered the secondary chemical test which yielded a 0.00 result.
11. The criminal complaint next recites that the officer placed a call to the Petitioner's parents who "stated she was on a lot of prescription drugs." The evidence is devoid of any information as to the nature of the prescription drugs to which Petitioner's parents were referring and whether any of such prescription drugs were impairing substances. The Court believes that little or no weight should have been given by the Hearing Examiner to this hearsay statement.
12. The WV DMV Form 314 indicates that Officer Williamson first made contact with the Petitioner at 12:39 a.m., on July 3, 2017; placed her under arrest at 12:53 a.m. and transported her to the station. According to the officer's DMV Form 314, the breath test reflecting 0.000% blood alcohol was administered at 1:44 a.m. The Petitioner was held for the remainder of the night at the Eastern Regional Jail until she she bonded out the next morning. Petitioner then attempted to get a drug test at Berkeley Medical Center but was informed that she needed a physician's order. Petitioner obtained a negative 11 Panel Non-DOT Urine Drug Screen from Valley Health Urgent Care, Martinsburg, dated July 3, 2017 and marked with the time "11:19 a.m."
13. The Petitioner then presented her case to the Hearing Examiner and testified on her own behalf. She stated that on February 28, 2017, she had lung surgery to remove a cancerous tumor. She further stated, however, that the only

medications she was on at the time of stop, July 3, 2017, were an Anoro Inhaler and a nasal spray. The Petitioner denied using any narcotics and testified that she specifically asked Officer Williamson after the traffic stop to take her to the hospital for a blood draw but that he did not do so.

14. The Petitioner then authenticated and moved into evidence her Exhibit No. 1, which was the document showing the result of the 11 Panel Urine Drug Screen given to the Petitioner at her request by Valley Health Urgent Care on July 3, 2017, at 11:19 a.m., which was admitted without objection showing negative results for the substances for which it tested. The Petitioner also testified that she obtained additional 11 panel drug screens on July 14, 2017 and on August 23, 2017, which were authenticated, marked Petitioner's Exhibit Nos. 2 and 3 and again admitted without objection showing negative results. The Petitioner also testified that on the night of her arrest she had no impairing substance in her body whatsoever; no alcohol or any prescription medication.
15. On cross-examination, the Petitioner admitted she had received pain medication the first week after her surgery in February of 2017, but testified that thereafter she was told by her physician to take Tylenol for pain.
16. On cross-examination, the Petitioner did admit to driving in the manner described by Officer Williamson in his Complaint but denied positioning her vehicle only inches from his bumper.
17. On cross-examination, the Petitioner testified that she talks with a lisp and had recently had some dental work done when asked about the allegation that she

had slurred speech. Regarding the results of the HGN test, the Petitioner stated that Officer Williamson attempted to administer the test for 6 to 10 minutes during which time she kept following his finger and telling him she wasn't impaired and to please take her to the hospital to get a blood test.

18. The Petitioner then rested and her Counsel argued that the July 3, 2017, 11 Panel Drug Screen clearly showed negative results, i.e., that no impairing drugs were in her system, as did the screens for July 14 and August 23. Counsel argued that the field sobriety tests are strictly for determining probable cause to arrest because non-impaired people may fail these tests and impaired people may pass and that is why field sobriety tests are only of limited value. Counsel also argued that due to the arresting officer's failure to appear, the Hearing Examiner would not have the opportunity to hear testimony as to how the SFST's were administered, i.e., if they were administered properly in conformity with the National Highway Traffic and Safety Administration (NHTSA) guidelines. Counsel also pointed out that the paperwork relied upon by the Respondent was suspect as, even though the Petitioner held a commercial driver's license, nothing in the record indicates that the arresting officer read the CDL section to the Petitioner pertaining to enhanced revocation periods for her CDL. Also, the officer's failure to appear meant that there was no evidence in the record to explain why Officer Williamson refused to honor the Petitioner's request (as she alleges she made) to be taken to the hospital for a blood draw.
19. In rebuttal, Counsel for the Respondent argued that although he conceded that

the admitted drug screens were "actually taken," there was nothing in the record to indicate what "drugs were and were not screened for," and suggested that the timing of the drug screens showed that they were of limited value.

20. In the Final Order of the OAH, dated September 6, 2019, the Hearing Examiner noted the following about the SFSTs administered by the Arresting Officer as set forth in the DMV Form 314:
 - A. On the Horizontal Gaze Nystagmus Test, after the Medical Assessment was performed, the Petitioner['s] eyes showed a lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation and onset of nystagmus prior to forty-five degrees.
 - B. On the Walk-and-Turn Test the Petitioner could not keep her balance and started too soon in the instruction stage; that she then stopped while walking, stepped off the line, made an improper turn; missed heel to toe, raised [her] arms to balance; and took an incorrect number of steps.
 - C. On the One-Leg-Stand Test, the Petitioner used her arms for balance and put her foot down and the Officer noted he then stopped the test for the Petitioner's safety.
21. The Hearing Examiner found that based upon the documents admitted into evidence, "[t]here is evidence of the use of alcohol, drugs, controlled substances or any combination of the aforementioned based on the following: the Petitioner's driving pattern, her physical appearance and her performance on the standard field sobriety tests."

22. Further the Hearing Examiner appears to have given little if any weight to the Petitioner's Exhibits 1 through 3 and stated in his decision:

"While I admitted the Petitioner's Exhibits 1 through 3 relating to her blood [sic: urine] tests, no evidence was presented to explain the results to include what substances the tests were designed to discover and what substances the test would not discover. The results indicate "normal" but no information was presented as to what that means. As such, the relevance of those documents are [sic] minimal, only indicating that either the Petitioner believed she was not under the influence or that the Petitioner knew the tests would not reveal the substances she had taken."

23. The Hearing Examiner then stated the following regarding the Petitioner's testimony that she requested a blood draw but that the Investigating Officer refused such request:

"The Petitioner alleges she asked the Investigating Officer to take her to get a blood test and claims that he did not. No other evidence was presented that clearly supports this claim. She did go to Valley Health and get a blood [sic: urine] test that day, but this decision could have been made after her interactions with the Investigating Officer when she had a chance to talk to others. No clear evidence was presented that she requested the assistance of the Investigating Officer in obtaining a blood test; in any case, she was able to obtain a blood [sic: urine] test that day - even though she did not present evidence explaining the results of the blood [sic: urine] test."

24. The record does not reflect any questions by the Hearing Examiner to the Petitioner or her counsel regarding what drugs would have been tested for by Valley Health's 11 Panel Drug Screen performed on July 3, 2017 or the two subsequent dates.

25. The Hearing Examiner concluded as follows:

"I find by a preponderance of the evidence, the Petitioner was under the influence of alcohol, controlled substances and/or drugs at the time [she] was driving [her] motor vehicle. Pursuant to *Crouch v. W.Va. Div. of Motor Vehicles*, 219 W.Va. 70, 631 S.E.2d 628 (2006), when Respondent's Exhibit No. 1 is admitted into evidence, a rebuttable presumption is

created as to its accuracy. While the Investigating Officer did not testify, his account of his interactions with the Petitioner, as recounted in Respondent's Exhibit 1, are more credible and in line with common sense [than] the Petitioner's testimony. His narrative detailing the Petitioner's behavior and appearance is consistent with one who was impaired by a controlled substance or drugs. The Petitioner's testimony as to her driving pattern and the reasons why she drove this way, does not make sense, especially in light of the Investigating Officer's account that she almost hit his patrol car while trying to park in front of him - ending up crossways in the middle of the road. Furthermore, her decision to get out of her car and walk back to his patrol car is indicative of impaired judgment. Overall, the preponderance of the evidence supports that the Petitioner was under the influence of a controlled substance or drug that impeded her ability to split her attention and impaired her judgment."

26. On October 5, 2019, the Petitioner filed her Petition for Judicial Review of the foregoing Final Order of the Office of Administrative Hearings, in Berkeley County Circuit Court Case No. 19-P-353. On February 4, 2020, the Respondent filed an Answer to the Petition for Judicial Review. The parties also filed briefs in support of their respective positions.
27. On March 25, 2020, the Circuit Court issued its Order overturning the Final Order of the OAH entered September 6, 2019, affirming the Revocation Order of the Division of Motor Vehicles dated July 29, 2017, revoking the Petitioner's driving privileges as well as her commercial driver's license for driving a motor vehicle in this State while under the influence of controlled substances or drugs.
28. The Commissioner then appealed the Circuit Court's decision to the West Virginia Supreme Court of Appeals. On February 19, 2021, the Supreme Court issued a Memorandum Decision, Docket No. 20-0336, reversing this Court's Order of March 25, 2020, and remanding the case for reconsideration pursuant to the rulings in *Frazier v. Fouch*, 853 S.E.2d 587 (W.Va. 2020). *Frazier v. Yoder*, *supra*.

29. On June 20, 2021, this Court entered its Final Order Upon Remand, sending the case back to the OAH to conduct a new evidentiary hearing to permit the record to be developed as to what substances the Valley Health Urgent Care 11 Panel Non-DOT Urine Drug Screen tested for, what a negative screen would thus mean in the context of this case and in light of all the other evidence, and to provide the Respondent the opportunity to meet that evidence.
30. On June 28, 2021, a hearing was had before Acting Chief Hearing Examiner William A. Freeman via M.S. Teams, upon the remand from Circuit Court.
31. At the June 28, 2021, hearing, the parties agreed that the matter had been remanded for determination of what a Valley Health Urgent Care 11 Panel Non-DOT Urine Drug Screen was and what drugs it tested for on July 3, 2017. The contents of OAH File were admitted containing Documents 1 - 15 and 16 - 26; the Final Order of Revocation of July 29, 2017; the Appeal from that Order; the Circuit Court's Remand Order and the transcript from the prior hearing. Also admitted were the Petitioner's original Exhibits 1 - 3.
32. The Petitioner presented the testimony of Kristina Malloy, who was employed at Valley Health Urgent Care in Martinsburg, on July 3, 2017. Ms. Malloy testified to administering the subject 11 Panel Urine Drug Screen to the Petitioner. Ms. Malloy testified that prior to the hearing she had a chance to review the July 3, 2017 11 Panel Urine Drug Screen result, Petitioner's Exhibit No. 1. Ms. Malloy then authenticated the exhibit and testified it was administered for the personal use of the person being screened. She testified that if any positive results were

obtained from the screen, it would be sent off to a laboratory for further testing and confirmation. Ms. Malloy testified to writing on the Petitioner's drug screen in all capital letters the words "NEGATIVE EXAMINE!" She confirmed that the time of the test that day given to the Petitioner was 11:19 am. She also testified that it was an 11 panel urine drug screen. She confirmed that if there were no positive results, nothing further is done with the tests and that was the case with the Petitioner on July 3, 2017. Malloy testified that if she had noticed any evidence of impairment, she would have so noted in the remarks section on "Step Three" of the test. She then explained the process of taking a sample for testing: first she would check the subject's photo ID; next she would lock up all of the subject's personal belongings making sure the subject's pockets were empty. She then would instruct the subject to go to restroom and rinse their hands with water and dry them. She would then give the subject a cup and explain to fill the cup up and leave it on the counter when done. The subject was also instructed to not flush the toilet or further wash their hands. When done, the subject was instructed to come out of the restroom and let her know the process was complete. Malloy then said she would look at the values on the cup and write down the results on the screen test form, then discard the urine as long as it was a negative result. She also testified there was blue dye in the toilet water to guard against foul play. She said she had no reason to believe any foul play occurred in the screen taken by Ms. Yoder.

33. Next to testify was Kelly Peters. Ms. Peters testified that she has an Associates,

Bachelor's and Master's degrees in Nursing. She also has several credits towards her Ph.D. She is a Registered Nurse, Nurse Practitioner and Forensic Nurse examiner. As a Forensic Nurse Examiner she has administered thousands of drug screen urinalysis testing. She testified she was also a Nurse Practitioner in Pain Management for over five years. She told the Court she was familiar with 11 Panel Drug screens. She also testified that she has experience as a trauma and flight nurse and has worked in ICUs most of her career. She has also worked in Urgent Cares, Family Medical Practices and in Pain Management practices. She was then qualified as an expert in Forensic Nurse Examination and Urinalysis.

34. Ms. Peters testified that she is familiar with 11 Panel Urine Drug Screens from 2017 to the present. She stated that there is a standard 11 drug panel. She then testified that she had been provided a copy of the Petitioner's Exhibit No. 1, the result of the Urine Drug Screen dated July 3, 2017 and had thoroughly reviewed it. She agreed that the actual test form did not specifically list which drugs were tested for but that the industry standard for drugs tested in a standard 11 Panel Urine Drug Screen includes marijuana; cocaine; basic opioids including morphine, hydrocodone, Demerol, Dilaudid; amphetamines, PCP, benzodiazepines, barbiturates, methadone, propoxyphene, methaqualone, and Oxycontin. While she testified that she was not certain if the exact same drugs were tested for in Ms. Yoder's case, she testified that in the industry, when reference is made to an 11 Panel Urine Drug Screen "these are generally the drugs we think of and which

are standard." She then testified that DOT tests are administered for federal employees such as employees of the Departments of Transportation or Defense.

35. Ms. Peters testified that she was certified and licensed in West Virginia. She also testified that she was able to review Yoder's prescription history. She testified that if someone is prescribed a narcotic, the pharmacist has to enter that prescription into the WV Narcotic Monitoring System. She verified that her review of the System showed the last time Ms. Yoder was prescribed a narcotic was February 2017, which was Dilaudid. She also testified that she was aware that in February of 2017, Ms. Yoder had surgery for a cancerous mass in her lung and Dilaudid would have been a typical drug prescribed for post-surgery pain, especially for the lung. She testified that only ten pills were prescribed for the Petitioner at that time and that she has not been prescribed any other narcotic or impairing drugs since that time, according to her review of the System.
36. Ms. Peters then testified to her opinion that a person who would have used any of those 11 drugs tested for within a 24 hour period would not have tested negative on the 11 Panel Urine Drug Screen. She said this would be true even for drug usage within 48 hours and that a person would test positive for up to seven days after taking any such drugs.
37. Peters testified that she had no firsthand knowledge of the administration of the urine screen given to Ms. Yoder on July 3, 2017, and agreed that the results were negative for only those 11 drugs. She admitted that the 11 Panel Drug Screen does not test for Gabapentin and stated that there are many drugs that are not

tested for in an 11 Panel Drug Screen and the WV State Police Toxicology Drug Panel tests for 90 different drugs – but the 11 drugs tested for in this case were the most abusive or commonly abused drugs. Ms. Peters also testified that she had reviewed the entire record in the case including the OAH Order and the Circuit Court's Order on Remand.

38. In closing argument, the Petitioner contended that after being arrested she asked for a blood draw but Officer Williamson did not take her for one and that was unrebutted because the officer failed to appear at the administrative hearing. On the DMV Form 314, the arresting officer marked that no blood draw was given but nothing else was marked. When the Petitioner bonded out of jail, she tried to get a blood draw but could not, being informed that she did not have a doctor's order, but was advised to obtain the next best thing: a drug urine screen from Valley Health Urgent Care. On the exam Ms. Malloy wrote in all caps NEGATIVE EXAMINE! Petitioner argued that this negative result was proof that adequately rebutted Officer Williamson's determination that she was impaired on the night in question.
39. Respondent argued that the drug test was required to be administered within four hours, according to West Virginia Code, and that officers are held to this standard. Petitioner's response was that because she was incarcerated and denied a blood draw, she was unable to obtain a screen within the said four hour period.
40. On June 29, 2021, Acting Chief Hearing Examiner William A. Freeman issued his Final Order in this matter. In affirming the original Order of Suspension of the

DMV of July 29, 2017, he stated the following:

At the administrative hearing held on June 28, 2021, the Petitioner presented two witnesses who testified about the drug test of the Petitioner's urine. The Petitioner's first witness, Chrissy C. Malloy, testified that she was employed by Valley Health Urgent Care on the date of this incident and that she was the one who tested the Petitioner's urine. Ms. Malloy testified that this was an 11 panel drug screen. Ms. Malloy testified that the 11 panel drug screen tests for 11 different types of drugs. Ms. Malloy testified that she did not know what the 11 drugs are, however, the result of this test was "negative." Ms. Malloy testified that "negative" means that the test did not detect the presence of any of the 11 types of drugs that the test can detect. The Acting Chief Hearing Examiner found Ms. Malloy's testimony to be credible.

The Petitioner's second witness was Kelly J. Peters a certified forensic nurse examiner who testified as an expert. Ms. Peters testified that the typical 11 panel drug screen tests for 11 different types of drugs. Ms. Peters testified that these drugs were 1) Marijuana, 2) Cocaine, 3) basic opioids, 4) Amphetamine, 5) PCP, 6) Benzodiazepines, 7) Barbiturates, 8) Methadone, 9) Propoxyphene, 10) Methaqualone and 11) Oxycontin. Ms. Peters testified that these 11 drugs are the most abused drugs. Ms. Peters testified that there are many other types of drugs that the 11 panel drug screen does not test for, including Gabapentin. The Acting Chief Hearing Examiner found Ms. Peter's testimony to be credible.

Simply because the Acting Chief Hearing Examiner found the Petitioner's two witnesses to be credible this does not mean that the Petitioner was not under the influence. As stated above, Ms. Peters testified that there are many drugs that the 11 panel drug screen test does not test for. The 11 drugs that Ms. Peters testified that the 11 panel drug screen test for does not include drugs or substances that are often abused such as Gabapentin, inhalants or synthetic marijuana. In the final order dated September 6, 2019, written by Hearing Examiner Andrew Myers, Mr. Myers upholds the DMV's order of revocation because he finds that the evidence indicated that the Petitioner displayed clues of intoxication that were consistent with one who was impaired by a controlled substance or drugs. Hearing Examiner Myers found the evidence presented by the respondent to be credible and in line with common sense. Hearing Examiner Myers did not find the Petitioner's testimony to be credible and indicated that part of it did not make sense. Hearing Examiner Myers also found that the Petitioner drove erratically, that she stumbled out of her vehicle, that her speech was slurred, her eyes were red, she was disoriented, confused, had a dry mouth, a raspy voice, she displayed six (6) clues of possible impairment on the horizontal gaze nystagmus test,

displayed eight (8) clues of possible impairment on the walk and turn test, and displayed two (2) clues of possible impairment on the one leg stand test. Thus, there was a lot of evidence presented that indicated that the Petitioner was driving while impaired. Considering that the evidence presented in the second hearing indicated that the 11 panel drug screen does not test for all drugs, and considering the evidence presented at the first hearing that indicated that the Petitioner displayed so many clues indicating impairment, the evidence indicates that more likely than not, the Petitioner was driving while under the influence of a controlled substances or drugs that the 11 panel drug screen test does not test for.

Accordingly, the Respondent successfully demonstrated by a preponderance of the evidence standard that on July 3, 2017, the Petitioner was driving while under the influence of controlled substances or drugs.

41. The Acting Chief Hearing Examiner then ruled that the Commissioner's Order of Revocation and Order of Disqualification entered on July 29, 2017 is AFFIRMED.
42. The Acting Chief Hearing Examiner not only took evidence on the issue remanded to the OAH, but without addressing any of the other issues raised below (Case No.19-P-353) *sua sponte* decided to rule upon the underlying revocations rather than to provide the Circuit Court with the evidence it requested upon remand.
43. As a consequence, the Petitioner filed her Second Petition for Judicial Review on July 20, 2021, being denominated as Case No. 21-AA-5. In that Second Petition, the Petitioner specifically incorporated all arguments, facts and law previously set forth in her original Petition for Judicial Review in 19-P-353.
44. Essentially the appeals in 19-P-353 and 21-AA-5 are the exact same proceeding as 21-AA-5 is the result of the new Order of the OAH upon remand, except that the matter was remanded to the OAH for determination of the sole issue of what

substances the Valley Health Urgent Care 11 Panel Non-DOT Urine Drug Screen tested for and what a negative screen would thus mean in the context of the case and in light of all the other evidence.

Petitioner's Argument

45. The Petitioner argues in her Appeal that:

- A. The finding of the OAH hearing examiner that "[n]o clear evidence was presented that the Petitioner requested the assistance of the investigating officer in obtaining a blood test" is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; was not rebutted by the respondent as the investigating officer failed to appear at the hearing; and arbitrary and capricious and constitutes a clear abuse of discretion or a clear unwarranted exercise of discretion.
- B. The OAH committed clear error of law by not finding that the Petitioner's due process rights were violated when the arresting officer denied the Petitioner's request/demand for a blood test especially in light of the finding in the final Order of June 28, 2021, that despite presenting credible evidence that she tested negative for 11 different and most common drugs of abuse, the Petitioner must have been under the influence of a drug not tested for in an 11 panel drug screen and impaired while operating a motor vehicle.
- C. The OAH's factual determination that the Petitioner was under the influence of a drug not tested for in 11 Panel Drug Screen and thus

impaired while operating a motor vehicle is clearly wrong in view of the reliable, probative and substantial evidence on the whole record and arbitrary and capricious constituting an abuse of discretion or a clearly unwarranted exercise of discretion given the rebuttal evidence provided by the Petitioner.

Respondent's Argument

46. The Respondent argues in reply that:
- A. The Hearing Examiner properly found that neither the Petitioner nor the Investigating Officer requested or required the Petitioner to be taken for a blood test on the night of July 3, 2017.
 - B. The urine test evidence submitted by the Petitioner was properly discounted, and the OAH properly found that there was sufficient evidence to prove that the Petitioner was DUI on the night of July 3, 2017.

Standard of Review

47. A circuit court's review of an agency's administrative order is conducted pursuant to the West Virginia Administrative Procedures Act, W.Va. Code Section 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.
48. "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).
49. "On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code Section 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, 474 S.E.2d 518 (1996).

The Court's Analysis on Remand

50. The Court finds that Officer Williamson did have a reasonable articulable suspicion or probable cause to effect a traffic stop of the Petitioner from his descriptions of her driving and her own admissions regarding the same.
51. The Court finds there is persuasive evidence that the Petitioner did in fact request the arresting officer to take her for a blood draw either during or at the conclusion of the traffic stop. The Petitioner's testimony that she requested a blood draw, at least twice during her encounter with Officer Williamson, was not

rebutted by the documentary evidence of record. Pursuant to the DMV Form 314, Respondent's Exhibit No. 1 at page 6 of the document, Officer Williamson, suspecting the Petitioner was impaired by drugs, did not request the Petitioner to submit to a blood draw, which would have been the next logical step in his investigation after his stated belief, in the complaint, (Respondent's Exhibit No. 1), that the Petitioner was under the influence of controlled substances or drugs.

52. Respondent's Exhibit No. 1, the DMV Form 314 at page 6 of the document under the heading of "BLOOD TEST," provides the investigating officer with the ability to document whether a blood test was done; the time it was requested; whether the request for a blood sample was made by the arresting officer or at the request of the suspected impaired driver; and whether or not it was refused. Officer Williamson checked the box noting no blood test was done on his DMV Form 314, and failed to mark either the "yes" or "no" box under the question "[w]as request for a blood sample directed by the arresting officer?" The Court notes that the form also contains a notation "did suspect request blood sample" which is a right provided for by W.Va. Code § 17C-5-6. The Court notes that W.Va. Code § 17C-5-6 provides in pertinent part: "The person tested may, at his or her own expense, have a doctor of medicine or osteopathy, or registered nurse, or trained medical technician at the place of his or her employment, of his or her own choosing, administer a chemical test in addition to the test administered at the direction of the law-enforcement officer." This section was also left blank. Officer Williamson also did not note in his complaint that he

requested the Petitioner to submit to a blood draw, despite his suspicion that she was impaired by drugs.

53. The most significant reason the Court believes the Petitioner did request a blood draw from officer Williamson is the fact that within ten (10) hours and twenty-six (26) minutes after her arrest, release from jail and the refusal of Berkeley Medical Center to draw her blood without a physician's order, the Petitioner obtained an 11 Panel Urine Drug Screen from Valley Health Urgent Care producing negative results for the most common drugs of abuse in 2017, to-wit: marijuana; cocaine; basic opioids including morphine, hydrocodone, Demerol, Dilaudid; amphetamines, PCP, benzodiazepines, barbiturates, methadone, propoxyphene, methaqualone, and Oxycontin, as testified to by Forensic Nurse Examiner Kelly Peters whose testimony was found credible by the Acting Chief Hearing Examiner.
54. To this Court, the negative urine screen bolsters the veracity of the Petitioner's testimony that she had requested a blood draw from Officer Williams at the time of her arrest.
55. Accordingly, the Court finds by a preponderance of the evidence that the Petitioner did request and demand a blood draw from Officer Williamson and that the same was denied to her. In making this finding, the Court is cognizant that it may not reweigh the evidence or reassess the credibility of witnesses or substitute its judgment for that of the Hearing Examiner. *See Syl. Pt. 4, Frazier v. S. P.*, 242 W.Va. 657, 830 S.E.2d 741 (2020). The Court finds the

conclusion of the Hearing Examiner set forth in the Final Order of September 6, 2019, that the Petitioner did not demand or request a blood draw to be clearly wrong in view of the reliable, probative and substantial evidence on the whole record, as set forth above, and that the Hearing Examiner's refusal or neglect in considering such probative and substantial evidence was arbitrary, capricious, and an abuse of discretion. Further, the Petitioner's testimony that she requested of Officer Williamson to be taken for a blood test was not rebutted by the documentary evidence of record.

56. The Court is also cognizant that it must give deference to the fact finder's credibility determinations (*see Cahill v. Mercer County Board of Ed.*, 208 W.Va. 177, 539 S.E.2d 437 (2000)) unless clearly wrong, arbitrary, capricious, or an abuse of discretion. It is clear to this Court that the Hearing Examiner made his credibility determinations without addressing or considering the favorable rebuttal evidence presented by the Petitioner as has been outlined and analyzed by the Court herein. The Petitioner's rebuttal evidence was not just her testimony but all of the actions she took on July 3, 2017 immediately after being released from jail.

57. W.Va. Code §17C-5-9 provides:

Any person lawfully arrested for driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs shall have the right to demand that a sample or specimen of his or her blood or breath to determine the alcohol concentration of his or her blood be taken within two hours from and after the time of arrest and a sample or specimen of his or her blood or breath to determine the controlled substance or drug content of his or her blood, be taken within four hours from and after the time of arrest, and that a chemical test thereof be made. The analysis disclosed by such chemical test shall be made available to

such arrested person forthwith upon demand.

58. *Dale v. Painter*, 234 W.Va. 343, 765 S.E.2d 232 (2014) holds that W.Va. Code §17C-5-9 provides a driver a statutory right to a blood test when properly invoked, i.e., the request made to the arresting officer and that the officer's failure to provide a blood test constitutes a violation of the driver's right to due process, i.e., the right to preserve exculpatory evidence. See also *Reed v. Hall*, Syl. Pt. 5, 235 322, 773 666 (2015) and *In re Burks*, 206 W.Va. 429, 525 S.E.2d 310 (1999).
59. Further, the provisions of W.Va. Code §17C-5-9 are triggered by the driver's request or demand for a blood test. Mere acquiescence to an investigating officer's request that the driver take a blood test does not invoke application of the provisions of W.Va. Code §17C-5-9 but rather W.Va. Code §17C-5-6, which provides:

Only a doctor of medicine or osteopathy, or registered nurse, or trained medical technician at the place of his or her employment, acting at the request and direction of the law-enforcement officer, may withdraw blood to determine the alcohol concentration in the blood, or the concentration in the blood of a controlled substance, drug, or any combination thereof.... The person tested may, at his or her own expense, have a doctor of medicine or osteopathy, or registered nurse, or trained medical technician at the place of his or her employment, of his or her own choosing, administer a chemical test in addition to the test administered at the direction of the law-enforcement officer. Upon the request of the person who is tested, full information concerning the test taken at the direction of the law-enforcement officer shall be made available to him or her.

See *Frazier v. Bragg*, 244 W.Va. 40, 851 S.E.2d 486 (2020) holding that a blood test performed at the request of the arresting officer and only agreed to by the driver does not implicate W.Va. Code §17C-5-9.

60. Accordingly, the Court finds that the arresting officer's failure to provide a blood test to the Petitioner upon her request and demand for the same constitutes a violation of the Petitioner's right to due process, to-wit the right to preserve exculpatory evidence. *See also Reed v. Hall*, Syl. Pt. 5, 235 322, 773 666 (2015) and *In re Burks*, 206 W.Va. 429, 525 S.E.2d 310 (1999). Therefore, on this ground alone, the Order of the West Virginia DMV dated July 29, 2017, revoking the Petitioner's personal and commercial driver's licenses for driving a motor vehicle in this State while under the influence of controlled substances or drugs must be overturned.
61. The Court further finds that the Hearing Examiner's finding that although the Petitioner "did go to Valley Health and get a [blood sic] test that day, but this decision could have been made after her interactions with the Investigating Officer when she had a chance to talk to others" is without any basis in the record, constitutes speculation and as the Petitioner recites in her brief, "is the quintessential example of being arbitrary or capricious or characterized by abuse of discretion or clearly the unwarranted exercise of discretion." The Court finds that such speculation is inconsistent with the evidence presented, and must not be sustained.
62. The Court further finds that the Acting Chief Hearing Examiner arbitrarily concluded that despite having been provided evidence of what a standard 11 Panel Drug Screen would have tested for in July 2017, being the most often used and abused drugs at the time, the subject 11 Panel Drug Screen just did not

happen to test for the drugs the Petitioner was under the influence of at the time she was operating a motor vehicle. All of these facts demonstrate to the satisfaction of this Court that both Final Orders of the OAH were clearly wrong in view of the reliable, probative and substantial evidence on the whole record on the issue of whether or not the Petitioner requested a blood test from Officer Williamson.

63. Since the Petitioner blew a 0.0000% on the breath test, she was negative for alcohol. Since she screened negative for 11 substances on the urine test in such close temporal proximity to her arrest, this is clear evidence to this Court that she was negative for a dozen of the most commonly abused impairing and addicting substances at the time of her arrest. To admit this powerful evidence and then basically ignore it, in this Court's view, was clear error.
64. This Court handles abuse and neglect cases involving children where urine drug screens virtually identical to the one in the case at bar are routinely the basis for reuniting children with their parents when the parents screen negative over a period of time. Clearly, if the use of an 11 panel drug screen is a sufficient and reliable tool for gauging whether or not it is safe to return a child to a previously drug addicted parent, it most certainly should be sufficient to be utilized in a driving while impaired case. Similarly, circuit courts throughout the state routinely rely upon 11 panel drug screens as term and condition of both bond and probation in criminal cases. If relied upon to the detriment of a criminal defendant's liberty, it should be sufficient to defend against a driving impaired

case. Conversely, if the test results were positive for an impairing substance, it would rightfully be used against one charged with driving impaired.

65. Admission of the documentary evidence contained in the DMV's file under W.Va. Code §29A-5-2(b), as noted by the Supreme Court of Appeals in *Crouch v. Commissioner*, 219 W.Va. 70, 76, n.12, 631 S.E.2d 628, 634, n.12 (2006), merely creates a rebuttable presumption of accuracy:

"the fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy."

66. Therefore, the Court finds that the Petitioner adequately, sufficiently and by a preponderance of the evidence, challenged and rebutted the presumption of accuracy contained in the Respondent's admitted documentary evidence that on July 3, 2017, she was driving her vehicle while under the influence of an impairing substance in light of all of the evidence presented. The Court finds that the Acting Chief Hearing Examiner's findings in his decision issued June 29, 2021 to the contrary are clear error.

Conclusion and Ruling

For the foregoing reasons, it is ADJUDGED and ORDERED that the Final Order of the Office of Administrative Hearings entered on June 29, 2021, affirming the decision of the Commissioner of the West Virginia Division of Motor Vehicles dated July 29, 2017, revoking the Petitioner's personal driving privileges and her commercial driver's license for driving a motor vehicle in this State while under the influence be, and hereby is, REVERSED.

This is a Final Order. The Clerk shall transmit attested copies of this Order to Everett Frazier, Commissioner of the West Virginia Division of Motor Vehicles, 5707 MacCorkle Ave., S.E., Charleston, WV 25304; to the OAH, 1124 Smith St., B-100, Charleston, WV 25301; and to counsel of record for the parties electronically by filing on the WV E-File electronic filing system.



R. Steven Redding, Judge
Berkeley County Circuit Court