IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOHN H. FOUCH, III,

Petitioner,

v.

Civil Action No.: 18-AA-223
Judge Jennifer F. Bailey

PATRICIA S. REED, COMMISSIONER WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

Respondent.

ORDER REVERSING OFFICE OF ADMINISTRATIVE HEARINGS' FINAL ORDER

Pursuant to W. Va. Code § 29A-5-1, *et seq.*, the Petitioner appeals the Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner (hereafter "Final Order") entered June 26, 2018, of the Office of Administrative Hearings (hereafter "OAH") that affirmed an *Order of Revocation* and an *Order of Disqualification* issued by the West Virginia Division of Motor Vehicles on April 25, 2013, revoking Petitioner's driver's license for driving under the influence ("DUI") of alcohol, controlled substances or drugs and disqualifying him from driving a commercial vehicle during the period of revocation for DUI.[1]

The Petitioner timely filed his appeal on July 2, 2018, challenging the OAH's Final Order affirming the West Virginia Division of Motor Vehicles' Orders of Revocation. Pursuant to the scheduling order entered August 13, 2018, the Respondent (hereafter, "DMV") filed its brief on October 12, 2018, and the Petitioner filed his reply on October 29, 2018.

The Court has studied the petition, the parties' briefs, and considered the evidence in the record, and reviewed all pertinent legal authorities.

[1] The Final Order issued by the OAH is dated June 26, 2017. However, the 2017 date is a typographical error. The Final Order was actually entered on June 26, 2018, per the Statement of Matters Officially Noted containing the underlying record before the OAH, and the Final Order was mailed to the parties on or about June 26, 2018.

As a result of these deliberations, for the reasons hereinafter set forth, the Court hereby **GRANTS** the Petitioner's petition for appeal, and the Court **REVERSES** the OAH's Final Order entered June 26, 2018, as more fully set forth in the following opinion.

STANDARD OF REVIEW

1. "Appeals from revocation issued by the Commissioner of the West Virginia Department of Motor Vehicles are governed by the West Virginia Administrative Procedure Act." *Donahue v. Cline*, 190 W. Va. 98, 101, 437 S.E.2d 262, 265 (1993). Pursuant to W.Va. Code §29A-5-4(a), a decision of an administrative agency may be reversed if the court finds that the agency's findings, inferences, conclusions, decision and/or order are:

(1) In violation of constitutional or statutory/regulatory provisions; and/or
(2) In excess of the statutory authority or jurisdiction of the agency; and/or
(3) Made upon unlawful procedures; and/or
(4) Affected by other error of law; and/or
(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and/or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

2. An agency's findings of fact and evidentiary rulings are entitled to deference, unless the court concludes that they are clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, or are arbitrary, capricious, or characterized by an abuse of discretion. Syl. Pts. 1 & 2, *Mayhorn v. West Virginia Consolidated Public Retirement Board*, 219 W.Va. 77, 79-80, 631 S.E.2d 635, 637-38 (2006); Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996) ("On appeal of an administrative order . . . this Court is bound by the statutory standards contained in W.Va. Code § 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").

3. In making this determination, a reviewing court "must determine whether the Administrative Law Judge's findings were reasoned, *i.e.*, whether he or she considered the relevant factors and explained the facts and policy concerns on which he or she relied, and whether those facts have some basis in the record." *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995).

4. In *Donahue v. Cline*, 190 W. Va. 98, 102, 437 S.E.2d 262, 266 (1993), the West Virginia Supreme Court of Appeals stated that in administrative appeals:

> [a] reviewing court must evaluate the record of the agency's proceedings to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is to be conducted pursuant to the administrative body's findings of fact regardless of whether the court would have reached a different conclusion on the same set of facts. (*Citing Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Rights Commission*)

5. "Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed *de novo*." Syl. Pt. 1, in part, *Cahill v. Mercer County Board of Education*, 208 W.Va. 177, 539 S.E.2d 437 (2000); Syl. Pt. 2, in part, *Frymier v. Higher Education Policy Commission*, 221 W.Va. 306, 309-10, 655 S.E.2d 52, 55-56 (2007); *Accord Martin v. Randolph County Bd. of Educ.*, 195 W.Va. at 304, 465 S.E.2d at 406.

FINDINGS OF FACT

1. Petitioner is employed as a commercial driver and operates a commercial vehicle for a living. (Tr. 16:3-10).

2. On April 15, 2013, at approximately 0150 hours, Officer Charles M. Thompson (hereafter "Officer Thompson") then of the Kenova Police Department and the Investigating Officer herein, came in contact with John H. Fouch, III, Petitioner herein, at a Shell gas station

located at 1001 Oak Street, Kenova, Wayne County, West Virginia. (SOM, 9).[2]

3. During his testimony, the Petitioner indicated that he and his nephew were in the Shell gas station store when his nephew, who was highly intoxicated, vomited, which resulted in Officer Thompson approaching them and arresting Petitioner for DUI. Another officer, Officer Nicholas Bloomfield of the Ceredo Police Department, assisted with the arrest.

4. Following the arrest, Officer Thompson transmitted the D.U.I. Information Sheet to the DMV as required by law. (SOM, 3).

5. Upon receipt of Officer Thompson's DUI Information Sheet and other documents from the arrest, the Commissioner of the DMV issued Orders of Revocation dated April 25, 2013 revoking Petitioner's driving privileges and commercial driver's license with an effective date of May 30, 2013. (SOM, 3).

6. On May 16, 2013, Petitioner timely requested a hearing challenging the DMV's Order of Revocation which resulted in a stay of the revocation. Petitioner retained counsel to defend him in this matter.[3] Within his hearing request form, Petitioner specifically challenged the results of the secondary chemical test of the breath (hereafter "SCT") pursuant to W. Va. Code §17C-5A-2. Petitioner further requested the presence of any arresting officers and invoked his right to cross-examine the officers pursuant to the legislative changes to W. Va. Code § 17C-5A-2(d). (SOM, 2).[4]

7. More importantly, Petitioner, pre-hearing, specifically objected to any documents

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[2] References are to the Statement of Matters Officially Noted submitted to the Court by the OAH and will be designated as "SOM" followed by the document number.

[3] Petitioner's counsel below was Mr. Charles M. Hatcher.

[4] "Law-enforcement officers shall be compensated for the time expended in their travel and appearance before the Office of Administrative Hearings by the law-enforcement agency by whom they are employed at their regular rate if they are scheduled to be on duty during said time or at their regular overtime rate if they are scheduled to be off duty during said time." W. Va. Code § 17C-5A-2(d).

being admitted into evidence at the OAH hearing until after cross-examination and the opportunity to object to the admissions. Petitioner further argued that the DMV had incorrectly interpreted syllabus point three in *Crouch v. West Virginia Div. Of Motor Vehicles,* 219 W.Va. 70, 631 S.E.2d 628 (2006) to mistakenly mean that everything in the DMV's possession was automatically admitted into evidence and that no other evidence would be considered by the OAH hearing examiner. (SOM, 2).

8. On June 17, 2013, the DMV filed its memorandum requesting representation by the West Virginia Office of the Attorney General and filed its list of automatically admitted documents which contained Officer Thompson's investigative reports along with the results of the secondary breath test and field sobriety test results.[5] (SOM, 9).

9. The OAH hearing was first scheduled for August 20, 2013. (SOM, 5).

10. Petitioner requested the issuance of a subpoena to compel the appearance of the arresting, Officer Thompson. (SOM, 7). On June 19, 2013, a subpoena was issued for Officer Thompson. (SOM, 8).

11. The August 20, 2013 hearing was continued by the OAH due to a family emergency of the hearing examiner. (SOM, 10).

12. The OAH hearing was reset for March 5, 2014. (SOM, 11).

13. The March 5, 2014, hearing was later continued by joint motion of the parties due to illness of Petitioner's counsel and the failure of Officer Thompson to appear while under lawful subpoena. (SOM, 11).

14. The OAH hearing was rescheduled for October 9, 2014. (SOM, 14).

[5] The DMV boldly asserts in the memorandum, "Specifically, these documents are recorded with and maintained by the Division of Motor Vehicles pursuant to W.Va. Code § 17C-5C-1 and are therefore admissible without a witness pursuant to the West Virginia Rules of evidence*[sic]* 901 (b)7 and 902 (4). The documents are clearly relevant under Rule 401 and are exceptions to the hearsay rule under both Rule 803 (6) and (8)."

15. On July 14, 2014, Petitioner's counsel requested subpoenas for both Officer Thompson and assisting officer, Officer Nicholas Bloomfield of the Ceredo Police Department. (SOM, 15).

16. Officer Thompson was served on September 30, 2014. (SOM, 17).

17. The October 9, 2014 hearing was continued by the DMV's counsel for additional time to secure video evidence that DMV's counsel had recently been made aware. (SOM, 18).

18. The hearing was rescheduled for July 28, 2015, and a subpoena was issued for Officer Thompson. (SOM, 20).

19. Officer Thompson failed to appear, despite being under subpoena, and the matter was continued upon the motion of the DMV. (SOM, 23).

20. Petitioner objected to the continuance on the ground that Officer Thompson had previously failed to appear at a prior hearing despite being lawfully subpoenaed. (SOM, 23).

21. The matter was rescheduled for a hearing on February 17, 2016, and Officer Thompson was also subpoenaed for that hearing. (SOM, 24).

22. On February 17, 2016, Officer Thompson again failed to appear despite being under lawful subpoena. The DMV moved for a continuance and the request was granted. (SOM, 26).

23. The matter was rescheduled for June 15, 2016, and a subpoena was issued for Officer Thompson. (SOM, 27, 28).

24. On June 15, 2016, a hearing was finally held before the OAH, and Officer Thompson again failed to appear despite being under lawful subpoena. (Tr. 4:22-5:1)

25. Officer Thompson failed to appear for a hearing on four separate occasions over a three year period despite being lawfully under subpoena. *Id.*

26. Nevertheless, the DMV moved for the admission into evidence of the DUI

Information Sheet which was authored by Officer Thompson. Petitioner objected and moved to dismiss the revocation. (Tr. 5:18-6:7).

27. The hearing examiner explained that she lacked the authority to dismiss for the lack of the presence of the officer because the DMV's documents were admitted pursuant to W. Va. Code § 29A-5-2(b). Accordingly, the hearing examiner admitted Officer Thompson's reports into evidence and denied Petitioner's motion to dismiss. (Tr. 6:8-14).

28. Petitioner testified and denied being impaired on the evening of his arrest. Petitioner testified that he had not drunk any alcohol but that he rinsed his mouth with Listerine and used an Albuterol breathing treatment prior to driving his intoxicated nephew to the Shell Station. Petitioner also testified that he recently had rotator cuff surgery and that his arm was twisted during the arrest causing him extreme pain. Petitioner further testified that he had multiple health problems including suffering a recent heart attack and issues with fainting. Petitioner was subjected to cross-examination by the DMV. (Tr. 8:8-13, 10:4-20, 12:17-13:13, 14:8-9. 18:4-11)

29. Petitioner's defense was that the Listerine use and Albuterol treatment skewed the results of the Secondary Chemical Test of the Breath, the Intoximeter. The DMV cross-examined and attempted to impeach the Petitioner on his apparent lack of training regarding administering the SCT. The hearing examiner independently reasoned that the Intoximeter results, the EC/IR-II printout, would have shown residual mouth alcohol if any were present. The hearing examiner further found that the Petitioner took the SCT more than an hour after this initial contact with the police, and that the Listerine and Albuterol would not have likely lingered in Petitioner's mouth at the time of the SCT. She reached this conclusion on her own and not upon the arguments of counsel or the testimony of the arresting officer who would have been questioned on his certification on administering SCTs. (Tr. 12:17-13:13, Final Order, p. 4, Tr. 19:7-13).

30. The DMV rested its case upon the submission of the absent officer's reports. No live testimony was taken of any witness to prove its case against the Petitioner, with the exception of the cross-examination of the Petitioner. No law enforcement officer ever appeared at this hearing or any prior hearing as a witness.

31. Petitioner's counsel vouched the record during the OAH hearing and explained what types of questions he would have asked of Officer Thompson:

> I would have cross examined him on the interviewing and the four witnesses and how the timeliness of everything that he did came to play. But what this record shows is that he made a decision to have this vehicle towed 12 minutes before any of his indications of this time of arrest, so I don't know if the officer shown up and seen how drunk his nephew was and then seeing him with his medical issues and then put the two and two together, but I'd like to have this document admitted for the purposes of at least looking at it to see what the officer's motive was since we can't question him here today. (Tr. 20:7-18).

Petitioner's counsel was referring to admitting a towing ticket for Petitioner's car pursuant to the business records exception to the rule of evidence against admitting hearsay.

32. Notably, counsel for the DMV made no closing argument and simply stated, "I'll just let the record stand where it's at." (Tr. 21:1-2).

33. Although Officer Thompson did not appear to testify, the hearing examiner relied upon the DUI Information Sheet when she found that the DMV met its burden of proof by the preponderance of the evidence. The Final Order finds that the Petitioner's testimony "simply did not add up" yet no veracity or credibility determinations were made of the absent officer's testimony. (Final Order, pg. 4).

34. The Final Order also made a conclusion of law that the secondary chemical test was administered in accordance with Title 64, *Code of State Rules*, Series 10, i.e, § 64-10-7.1.(c) based solely upon checked boxes found on the DUI Information Sheet. (Final Order, p. 5). Furthermore, there was no testimony of whether the procedures pursuant to the Code of State

Rules § 64-10-7.1.(c) of the State Bureau for Public Health Rules requiring that "the designated instrument shall be capable of the analysis of a reference standard within accuracy and precision limits of plus or minus 0.01 grams percent w/v of higher."

35. A Final Order was issued on June 26, 2018 affirming the order of revocation. The hearing examiner relied nearly exclusively on the DUI Information Sheet to conclude Petitioner was impaired.

36. Petitioner appealed the OAH's Final Order on July 2, 2018, to this Court.

DISCUSSION

Petitioner argues that his constitutional due process rights were violated because he was denied an opportunity to confront his accusers when the hearing examiner admitted all documents proffered by the DMV without allowing Petitioner an opportunity to cross-examine the author of the documents. Petitioner also argues that the documents were admitted in error when they were not authenticated by an author or custodian, in violation of the West Virginia Rules of Evidence. The Petitioner further argues that the DMV's witness was shielded from impeachment and cross-examination when he failed to appear, and lastly, Petitioner argues that there was no proof admitted before the OAH that the SCT was properly administered by the arresting officer which is required by West Virginia Code of State Rules § 64-10-7.1.(c).

The DMV boldly proclaims that there is no burden on the DMV to secure the investigating officer's attendance and testimony at OAH hearings, and the DMV has not held such a burden since the creation of legislative and procedural rules of the OAH. The DMV also argues that Petitioner waived his right to confront the investigating officer when he failed to move to continue the June 15, 2016, hearing to, again, issue a subpoena, and again, hope that the investigating officer would appear on the fifth attempt. The DMV also argues that the constitutional right to

confront one's accusers as found in the Sixth Amendment of the United States Constitution generally only applies to criminal matters and that the West Virginia Supreme Court of Appeals did not specifically address the issue of confronting one's accuser as a constitutional due process matter for administrative DUI cases in *Jordan v. Roberts*, 161 W.Va. 750, 246 S.E.2d 259 (1978) or *North v. W. Virginia Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977), cases cited by the Petitioner.

The DMV further argues that the investigating officer does not have to attend the OAH hearings because she is not a party to the action who has authority to revoke driver's licenses. Lastly, the DMV argues that the evidence admitted before the OAH need not be testimonial in nature and can be documentary relying upon Fn. 5, in part, of *Dale v. Reynolds*, No. 13-0266, 2014 WL 1407375 (W.Va. Apr. 10, 2014), a memorandum decision, and *Dale v. Odum*, 233 W. Va. 601, 607, 760 S.E.2d 415, 421 (2014).

The DMV's main contention and source of all other issues before the Court on appeal, is that the DMV's records are "required to be admitted into evidence pursuant to W. Va. Code §29A-5-2(b)(1998), which provides that 'All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case.'" (Response Brief, p. 13). The Supreme Court of Appeals of West Virginia adopted this argument of the DMV in *Dale v. Odum*, 233 W. Va. 601, 607, 760 S.E.2d 415, 421 (2014).

The DMV's only evidence put forward to prove its case against the Petitioner was the automatically admitted DUI Information Sheet which Officer Thompson previously submitted to the DMV in connection with the Petitioner's arrest. Indeed the DMV had little to do after moving

for the admission of the records in the DMV Commissioner's possession pursuant to W. Va. Code § 29A-5-2(b). Thereafter, Petitioner testified and was subjected to cross-examination. Petitioner's testimony was the only testimony elicited at the OAH hearing.

For the foregoing reasons, the decision of the hearing examiner to admit Officer Thompson's reports and to consider the notes made therein without proper authentication which impermissibly shifted the burden of proof from the DMV to the Petitioner was arbitrary, capricious, and an abuse of discretion. W. Va. Code § 17C-5C-4(c). Furthermore, the Court finds that W. Va. Code § 29A-5-2(b) describes the designation of the record for purposes of appeal and is not a rule concerning the admission of evidence in administrative proceedings as it would directly conflict with the application of the West Virginia Rules of Evidence.

***Crouch v. West Virginia Div. of Motor Vehicles, Dale v. Odum*, and W.Va. Code § 29A-5-2(b)**

It has been a consistent position of the DMV that all law enforcement officers' reports, such as the DUI Information Sheet (which shows the results of the reference checks) and the Intoximeter Intox EC/IR-II printer ticket are part of the DMV Commissioner's file, and as such are required to be automatically admitted and considered at the OAH administrative hearing as a matter of statute in accordance with W. Va. Code § 29A-5-2(b) which provides in whole:

> All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

Following this interpretation, in practical terms, at OAH hearings, the DMV does not have to produce a witness to verify or authenticate documents as required by the West Virginia Rules of Evidence. This interpretation also means that the DMV can simply appear by counsel who moves for all of the records in its possession to automatically be admitted and considered by the hearing examiner. With no requirement for the officer to serve as the witness, the contesting driver

cannot cross-examine his accuser and the hearing examiner hears no testimony regarding the legality of the traffic stop, the propriety of the sobriety tests and procedures, the propriety of any implied consent, the propriety of any SCT procedures, etc. As a result, the hearing examiner is forced to make findings of fact based solely upon the arguments of counsel and the automatically admitted records of the party DMV.[6] Accordingly, there is the absurd result of effectively stripping the DMV of its burden to prove its case against the driver by the preponderance of the evidence.

This interpretation of W. Va. Code § 29A-5-2(b) has been adopted by the OAH as contained in the Standing Memorandum Order Governing Motions to Admit Documentary Exhibits entered April 23, 2014, by Chief Hearing Examiner John G. Hackney, Jr. This memo was issued in response to a consolidated opinion of the Supreme Court of Appeals of West Virginia that adopted the DMV's interpretation of W. Va. Code § 29A-5-2(b).[7]

Specifically, the Supreme Court of Appeals of West Virginia set forth the following syllabus point in the consolidated cases of *Dale v. Odum*, 233 W. Va. 601, 760 S.E.2d 415, 417 (2014),

> 'In an administrative hearing conducted by the Division of Motor Vehicles, a statement of an arresting officer, as described in W. Va. Code § 17C–5A–1(b) (2004) (Repl.Vol.2004), that is in the possession of the Division and is offered into evidence on behalf of the Division, is admissible pursuant to W. Va. Code § 29A–5–2(b) (1964) (Repl.Vol.2002).' Syl. Pt. 3, *Crouch v. W. Va. Div. Of Motor Vehicles,* 219 W.Va. 70, 631 S.E.2d 628 (2006).

This decision substantially implies that Syllabus Point 3 of *Crouch v. West Virginia Division of Motor Vehicles*, 219 W.Va. 70, 631 S.E.2d 628 (2006), applies to current hearings

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[6] W. Va. Code §§ 17C-5A-1 *et seq.* and 29A-5-2(a) require the OAH hearing examiner to make evidentiary rulings based upon the application of the West Virginia Rules of Evidence. Further, pursuant to W. Va. Code § 17C-5A-2(f), the hearing examiner is required by statute to make specific findings of facts.

[7] Until February 11, 2014, the OAH maintained an interpretation of the statutory provisions that prescribe hearing procedures, particularly W.Va. Code § 17C-5C-4(a) & (c), as requiring adherence to the West Virginia Rules of Evidence- as the perceived plain meaning of those statutory provisions. Therefore, the previous policy of the OAH was to interpret the statutory provisions specific to OAH relating to hearing procedures to require adherence to the West Virginia Rules of Evidence in a like manner as practiced by "the court of this state."

conducted before the Office of Administrative Hearings, even though *Crouch* pertains to the previous scheme wherein the West Virginia Division of Motor Vehicles conducted both the revocations and the appellate hearings.[8] In *Crouch,* which was decided in 2006, the "agency" was the Commissioner of the West Virginia Division of Motor Vehicles. However, since the creation of the Office of Administrative Hearings in 2010, the "agency" upon which the circuit court must review pursuant to W.Va. Code 29A-5-4 is the Office of Administrative Hearings and not the DMV, which is only a party.[9]

Furthermore, the West Virginia Code of State Rules § 105-1-3 establishes definitions for the OAH which include:

> 3.7. 'Office of Administrative Hearings' and 'OAH' means the separate operating agency within the Department of Transportation with jurisdiction to hear and determine all appeals pursuant to W. Va. Code § 17C-5C-3, including the Chief Hearing Examiner and all OAH employees designated to act on his or her behalf.
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> . . .
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> 3.9. 'Party' and 'parties' means the petitioner and the respondent.
> 3.10. 'Petitioner' means the person contesting an order or decision of the Commissioner.
> 3.11. 'Respondent' means the Commissioner.

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[8] Inextricably, the DMV regularly raises the argument that cases with revocations prior to the creation of the OAH are inapplicable such as its argument in its Response Brief that *Miller v. Hare*, 227 W.Va. 337, 342, 708 S.E.2d 311 (2011) and *Meadows v. Reed*, 2015 WL 1558462 (2015) were decided "when the DMV was the tribunal..." yet fails to recognize that *Crouch v. West Virginia Division of Motor Vehicles*, 219 W.Va. 70, 631 S.E.2d 628 (2006) falls squarely within that category of cases.

[9] W. Va. Code § 17C-5C-5(a) & (b), Transition from Division of Motor Vehicles to the Office of Administrative Hearings provides, "(a) In order to implement an orderly and efficient transition of the administrative hearing process from the Division of Motor Vehicles to the Office of Administrative Hearings, the Secretary of the Department of Transportation may establish interim policies and procedures for the transfer of administrative hearings for appeals from decisions or orders of the Commissioner of the Division of Motor Vehicles denying, suspending, revoking, refusing to renew any license or imposing any civil money penalty for violating the provisions of any licensing law contained in chapters, seventeen-A, seventeen-B, seventeen-C, seventeen-D and seventeen-E of this code, currently administered by the Commissioner of the Division of Motor Vehicles, no later than October 1, 2010.
(b) On the effective date of this article, all equipment and records necessary to effectuate the purposes of this article shall be transferred from the Division of Motor Vehicle to the Office of Administrative Hearings: *Provided*, That in order to provide for a smooth transition, the Secretary of Transportation may establish interim policies and procedures, determine the how equipment and records are to be transferred and provide that the transfers provided for in this subsection take effect no later than October 1, 2010."

The OAH v. The DMV as The "agency"

In 2010, the West Virginia Legislature made significant changes to the procedures for conducting license revocation hearings. One of the most significant changes was the enactment of W. Va. Code § 17C-5A-1 *et seq.* and the creation of a new agency, the OAH. This change in the law made the Commissioner of the Department of Motor Vehicles a party to the hearings conducted by the OAH under W. Va. Code § 29A-5-2 and not an agency as is the interpretation of the DMV in the *Odum* decision and its progeny. When the Supreme Court of Appeals of West Virginia in *Odum* applied syllabus point 3 of *Crouch*, it did not recognize that the administrative appellate procedure is no longer under the control of the DMV and had instead been assigned to the OAH by the Legislature in 2010. The DMV concedes this point. *See* Response Brief at p. 8.

Recognizing that the OAH, and not the DMV, is responsible for conducting DUI hearings is essential to a plain language reading of W. Va. Code § 29A-5-2, as it establishes who is a proper "party" and which entity is the subject "agency." W. Va. Code § 29A-5-2 (a) reads, in full,

> In contested cases irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the circuit courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. *Agencies* shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record. Any *party* to any such hearing may vouch the record as to any excluded testimony or other evidence. (Emphasis added).

Nevertheless, W. Va. Code § 29A-5-2(b) reads, again, in full, with emphasis,

> All evidence, including papers, records, *agency* staff memoranda and documents in the *possession of the agency,* of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

Subsections (a) and (b) of the W. Va. Code § 29A-5-2 are in direct conflict with one another if one applies *Odum*. Subsection (a) describes what evidence is admissible and what evidence is

excluded in contested administrative hearings. To guide the agency (the OAH) in determining what evidence is admissible and what evidence is excluded, subsection (a) refers the agency to the West Virginia Rules of Evidence. However, subsection (b) states that *all evidence* is admissible so long as it is in the possession of the agency. This inconsistency is made harmonious only by the recognition that subsection (a) establishes rules of evidence and subsection (b) establishes rules of procedure for administrative appeals performed by the OAH, not the DMV. Subsection (a) applies to the parties to the contested hearing and subsection (b) applies to the agency hearing the appeals. In the case before this court, the DMV is a party[10] and must present and prove its case by a preponderance of the evidence. The OAH is the agency as it is the finder-of-fact and trier-of-law, the neutral arbiter, and the entity tasked with issuing findings of facts and conclusions of law for appellate review.[11]

W. Va. Code § 29A-5-2(b) describes what documents the agency OAH is to include as part of the record for judicial review of its final decision if appealed by either *party*. For further guidance, this Court turns to the Supreme Court of Appeals of West Virginia's Rules of Procedure for Administrative Appeals. Rule 1 provides:

> These rules govern the procedures in all circuit courts for judicial review of final orders or decisions from an agency in contested cases that are governed by the Administrative Procedures Act, W. Va. Code § 29A-5 *et seq*. These rules do not apply to extraordinary remedies such as certiorari which are governed by Rule 71B(a) of the West Virginia Rules of Civil Procedure.

Further, Rule 4(c) states,

> The record shall include a copy of the final opinion, order or decision being appealed. Unless otherwise provided by designation or stipulation of the parties, the record shall also include a transcript of all testimony and all papers, motions, documents, exhibits, evidence

[10] The Supreme Court of Appeals of West Virginia considers the DMV a party to OAH proceedings. *See* footnote 8, *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017).

[11] This Court is cognizant of the fact that under state law, both the DMV and OAH are separate agencies under the umbrella of the West Virginia Division of Transportation.

> and records as were before the agency, all agency staff memorandum submitted in connection with the case, all orders or regulations promulgated in the proceeding by the agency and a statement of matters officially noted. The papers shall be arranged, as nearly as possible, in the order of the filing and entry thereof, with a table of contents or index.

Rule 4(c) lays out the proper procedure for the submission of the record for a "determination of the case" as consistent with W. Va. Code § 29A-5-2(b). Rule 4 of the Rules of Procedure for Administrative Appeals as promulgated by the Supreme Court of Appeals of West Virginia is the better worded restatement of W. Va. Code § 29A-5-2(b), and as such, should be applicable here.

Without context or legislative history, and assuming that the DMV is the subject "agency," the DMV's interpretation of W. Va. Code § 29A-5-2(b) leads to an absurd result of virtually nullifying other applicable statutes and state code of regulations, while also violating a contesting driver's due process.

For instance, as the party with the burden of proof, the DMV is the first party to present evidence. If it were able to lawfully and automatically admit evidence into the record without check then the driver would not be able to present any evidence whatsoever under the plain reading of the statute as found by *Odum*. W. Va. Code § 29A-5-2(b) again states with emphasis, "All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and *no other factual information or evidence shall be considered in the determination of the case*." With the DMV's interpretation, the challenging driver could not offer any other factual information or evidence (either through testimony or otherwise) to be considered by the OAH.

Reading the entirety of W. Va. Code § 29A-5-2 together makes it abundantly clear that the OAH is the subject "agency" according to the statute as it is the agency charged with hearing and

deciding disputes between parties. The DMV and licensee are parties to the dispute. For further example, W. Va. Code § 29A-5-2(d) reads, in full with emphasis,

> *Agencies may take notice of judicially cognizable facts.* All *parties shall be notified* either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.

Only finders-of-fact can take judicial notice of facts and it would lead to an absurd result to allow the DMV to take judicial notice of facts. Moreover, subsection (c) states, "Every *party shall have the right of cross-examination* of witnesses who testify, and shall have the right to submit rebuttal evidence."

Finally, W. Va. Code § 29A-5-4(a) states, in full, "*Any party adversely affected by a final order or decision in a contested case is entitled to judicial review* thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law."

Dale v. Odum* is inapplicable as in relies on *Crouch v. West Virginia Div. of Motor Vehicles

The *Odum* opinion, although still precedent, is directly at odds with the requirements set forth above in other applicable statutes and codes of state rules. Its application violates the West Virginia Rules of Evidence, as well as other requirements such as the right to cross-examine witnesses, the DMV's burden to prove its case, and the hearing examiner's charge of making specific findings based upon evidence properly brought forward. To apply *Odum*, leads to the absurd result to allow a party below, the DMV, to automatically admit all of its evidence prior to or during a hearing without any verification or authentication. Since 2014, the DMV has not needed to produce witnesses of any sort to prove its case and the hearing examiner has been bound to admit and consider all of the DMV's evidence in direct violation of the driver's rights of due

process. *Dale v. Odum* and its progeny have misapplied W. Va. § 29A-5-2(b), shifted the burden of proof away from the DMV, and created an impermissible rebuttable presumption of guilt.

This Court, which is charged with the proper interpretation and application of the law, finds that Syllabus Point 3 of *Crouch* is inapplicable to all post OAH creation DMV administrative appeals. Applying the proper interpretation of W. Va. Code § 29A-5-2(b) bears directly on the issue at hand—was Officer Thompson's presence required to properly admit the DMV's evidence under the West Virginia Rules of Evidence for the hearing examiner to consider and weigh when making findings of fact and conclusions of law?

Party DMV's Reliance Upon W. Va. Code § 29A-5-2(b) Fails as a Matter of Law

Based upon the arguments of the Petitioner DMV, the DUI Information Sheet and the Intoximeter Intox EC/IR-II printer ticket need not be admitted pursuant to the West Virginia Rules of Evidence, but rather appear in the record automatically, with no ability to challenge the admissions, pursuant to W.Va. Code § 29A-5-2(b). The Court finds W. Va. Code § 29A-5-2(b) inapplicable and the West Virginia Rules of Evidence applicable. As such, the DMV's counsel was required to move for the admission of the documents pursuant to the relevant West Virginia Rules of Evidence.

In an attempt to reconcile the absurd result from the misapplication of W.Va. Code § 29A-5-2(b), the West Virginia Supreme Court of Appeals in *Odum* also specifically stated, "Of course, we recognized in *Crouch* that although a document is deemed admissible under West Virginia Code § 29A–5–2(b), its contents may still be challenged during the administrative hearing." Of course, in *Crouch*, the DMV both admitted evidence and heard appeals, which made sense at the time for this exception. Here, Petitioner's counsel below adamantly objected to the admission of the documents and the hearing examiner explained that she lacked the authority not to admit them.

The DMV's Evidence Was Improperly Admitted

The DMV revoked the Petitioner's driver's license based upon the submissions of Officer Thompson. The DMV bears the burden of proof by the preponderance of the evidence and the Petitioner bears none. W. Va. Code § 17C-5C-4. Black's Law Dictionary defines burden of proof as,

> A party's duty to prove a disputed assertion or charge; a proposition regarding which of two contending litigants loses when there is no evidence on a question or when the answer is simply too difficult to find. The burden of proof includes both the *burden of persuasion* and the *burden of production.* — Also termed *evidentiary burden; evidential burden; onus probandi.* BURDEN OF PROOF, Black's Law Dictionary (10th ed. 2014).

"Prove" is defined as, "To establish or make certain; to establish the truth of (a fact or hypothesis) by satisfactory evidence." PROVE, Black's Law Dictionary (10th ed. 2014). Evidence is "any matter of fact which is furnished to a legal tribunal, otherwise than by reasoning or a reference to what is noticed without proof, as the basis of inference in ascertaining some other matter of fact." James B. Thayer, *Presumptions and the Law of Evidence*, 3 Harv. L. Rev. 141, 142 (1889).

W. Va. Code § 17C-5C-4(c) provides, "The West Virginia Rules of Evidence governing proceedings in the courts of this state shall be given like effect in hearings held before a hearing examiner. All testimony shall be given under oath." Furthermore, "The rules of evidence as applied in civil cases in the circuit courts of this state shall be followed." W. Va. Code § 29A-5-2(a). Rule 102 of the W. Va. Rules of Evidence provides, "These rules shall be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just discrimination." Evidence must be relevant and admissible to be used at trial or an adverse proceeding. Generally, all relevant evidence is admissible unless an exclusion applies. Moreover, evidence must be authenticated by

someone with personal knowledge or by a records custodian unless an exception applies. Laying a foundation is a prerequisite of moving for the admission of evidence.

The record reflects that the DMV produced no witnesses and elicited no testimony. The admission of Officer Thompson's report was moved and admitted under the Supreme Court of Appeals of West Virginia's decision in *Dale v. Odum*, 233 W. Va. 601, 760 S.E.2d 415 (2014). (Final Order, p. 1). As was detailed above, this Court, which is charged with the proper interpretation and application of the law, finds that Syllabus Point 3 of *Crouch* is inapplicable to all post OAH creation DMV administrative appeals. Therefore, it was necessary for the DMV to lay a foundation before introducing its evidence and thereafter authenticate the documents, unless an exception existed. The DMV took no such action. These actions must be taken before the hearing examiner can make such an evidentiary ruling such as the admission of evidence pursuant to the West Virginia Rules of Evidence as outlined by statute in both Chapters 29A and 17C.

The DMV claims that the Petitioner bears the burden of procuring the arresting officer at OAH hearings, but it is axiomatic that the party bearing the burden of proof must procure its witness to introduce and authenticate its evidence at the OAH hearing. Indeed, the arresting officer is an adverse witness to the Petitioner, and if the absence of the officer would dismiss the matter, as is done in criminal magistrate court, the licensee would never subpoena the officer. The DMV has twisted the application of the OAH rules concerning the subpoena process to mean that the licensee must procure the officer. Nowhere do the rules or statutes state such. Rather, the OAH code of state rules and applicable statutes explain that each party is responsible for obtaining subpoenas for its witnesses, in contrast to the old DMV revocation hearing scheme (prior to the OAH), which explicitly required the DMV to produce the arresting officer.

Without its witness, the DMV must argue some exception found within the West Virginia Rules of Evidence and the hearing examiner must make a ruling. In its Response Brief, the DMV hinted that the DUI Information Sheet was self-authenticating since the officer "signed the DUI Information Sheet which constitutes an oath or affirmation that the statements contained are true..." (Response Brief, p. 10). Regardless, the hearing examiner must hear the arguments for and the objections to the admission of such evidence.

Nonetheless, the hearing examiner always has the discretion to exclude evidence pursuant to Rule 403 of the West Virginia Rules of Evidence which provides, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: *unfair prejudice*, confusing the issues, misleading the jury, *undue delay*, wasting time, or needlessly presenting cumulative evidence." (Emphasis added). Therein lies the issue with the misinterpretation of W. Va. Code § 29A-5-2(b) as a rule of evidence. Such a misinterpretation erroneously concludes that the hearing examiner is without discretion to exclude evidence under the West Virginia Rules of Evidence. This Court does not intend to pronounce a bright-line rule for the admission or exclusion of evidence in OAH hearings. This Court is merely restating what the Legislature intended; for the individual hearing examiners to exercise their own discretion when making evidentiary rulings on the admissibility of evidence at OAH hearings.[12]

The DMV's position that the individual challenging his license revocation must secure the arresting officer when that officer is supposed to be the DMV's witness in proving its case, is nonsensical. *See* W. Va. Code § 17C-5C-4(d). To accept the DMV's position would be to shift that

[12] DMV asserts that the Petitioner received a fair hearing before the OAH "who ruled on evidentiary issues" pursuant to W.Va. Code § 17C-5A-2(a) (2015), when the hearing examiner explained that she had no authority to deny the admission of the DMV's evidence over the objection of Petitioner's counsel. (Response Brief, p. 11).

burden upon the accused. Such burden shifting is impermissible and contrary to established legislative intent.

The OAH has broad discretion to admit or deny evidence under the West Virginia Rules of Evidence. Nevertheless, the OAH is bound by the West Virginia Rules of Evidence when making a ruling on the relevance and admissibility of evidence presented by either side at revocation hearings. When either party to the revocation hearing presents evidence without establishing the proper foundation or authentication, that evidence should not be admitted by the hearing examiner. Assessing probative value of proffered evidence and weighing any factors counseling against admissibility, such as danger of unfair prejudice, is a matter first for the hearing examiner's sound judgment. The reliance on W. Va. Code § 29A–5–2(b) as a rule of evidence is in error as it strips the hearing examiner's ability to determine the admissibility of evidence under the West Virginia Rules of Evidence.

CONCLUSIONS OF LAW

1. In June 2010, the West Virginia Legislature removed specific language from W.Va. Code § 17C–5A–2(d) (2008) which provided: "Any investigating officer who submits a statement ... that results in a hearing pursuant to this section [17C–5A–2] shall not attend the hearing ... unless requested to do so by the party whose license is at issue ... or by the commissioner." *Miller v. Hare*, 227 W. Va. 337, 340, 708 S.E.2d 531, 534 (2011). The current W.Va. Code § 17C-5A-2(d) provides, "Law-enforcement officers shall be compensated for the time expended in their travel and appearance before the Office of Administrative Hearings by the law-enforcement agency by whom they are employed at their regular rate if they are scheduled to be on duty during said time or at their regular overtime rate if they are scheduled to be off duty during said time." As there is no longer a requirement that an investigating officer attend the revocation hearing only

upon specific request of the licensee or the Commissioner, the West Virginia Legislature intended for the law enforcement witnesses to attend all OAH hearings and to be compensated for doing so.

2. Prior to 2010, the administrative hearing process was under the control of the DMV. *See* W. Va. Code § 17C-5C-5(a) (Repl. Vol. 2013) (2010) (recognizing the "transition of the administrative hearing process from the Division of Motor Vehicles to the Office of Administrative Hearings"). In 2010, "[t]he Office of Administrative Hearings [was] created as a separate operating agency within the Department of Transportation." W. Va. Code § 17C-5C-1(a) (2010) (Repl. Vol. 2013). *Reed v. Staffileno*, 239 W. Va. 538, 542, 803 S.E.2d 508, 512 (2017). The OAH and the DMV are separate entities although both are considered government agencies.

3. Pursuant to W.Va. Code § 17C-5C-4a(2012), the OAH has legislative and procedural rule-making authority, and W. Va. Code R. § 105-1-11, *et seq.* and W. Va. Code R. 105-1-1413, *et seq.* concerns the subpoena process and the failure to appear of witnesses. W. Va. Code R. 105-1-1414.3 provides, "The OAH may enter an order reversing the Commissioner's Order of Revocation if the Commissioner, his counsel, or his designee does not abide by the requirements set forth in subdivision 9.5.c. of these rules." W. Va. Code R. 105-1-9.5(c) provides, "If a written motion for an emergency continuance with evidence of good cause is not received by the OAH in a timely manner, the OAH may deem it a failure of the party requesting the continuance to appear at the hearing. The OAH may deem it a failure of the party requesting the continuance to appear at the hearing even if an order continuing the hearing was issued provided that such order was based solely on the oral representations of the party making the motion." When read together, the Court finds that the OAH contemplated the reversal of the Commissioner's revocation when the DMV failed to produce its necessary witness, the arresting officer, at OAH hearings.

4. Syllabus Point 3 of *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 71, 631 S.E.2d 628, 629 (2006) provides, "In an administrative hearing conducted by the Division of Motor Vehicles, a statement of an arresting officer, as described in W. Va. Code § 17C–5A–1(b) (2004) (Repl.Vol.2004), that is in the possession of the Division and is offered into evidence on behalf of the Division, is admissible pursuant to W. Va. Code § 29A–5–2(b) (1964) (Repl.Vol.2002)." This syllabus point is inapplicable as this case concerns a modern administrative review hearing before the OAH, and not the DMV.

5. "'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny.'" *Goldberg v. Kelly*, 397 U.S. 254, 270, 90 S. Ct. 1011, 1021, 25 L. Ed. 2d 287 (1970) citing *Greene v. McElroy*, 360 U.S. 474, 496—497, 79 S. Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).

6. Due process of law extends to actions of administrative offices and tribunals. *Smith v. Siders*, 155 W.Va. 193, 183 S.E.2d 433 (1971).

7. The Supreme Court of Appeals of West Virginia has recognized that "[a] driver's license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution." Syl. Pt. 1, *Abshire v. Cline,* 193 W.Va. 180, 455 S.E.2d 549 (1995), *Straub v. Reed,* 239 W. Va. 844, 848, 806 S.E.2d 768, 772 (2017).

8. The Commissioner of the DMV bears the burden of proof by the preponderance in these proceedings. The party whose license is at issue bears no such burden. W. Va. Code § 17C-5A-2.

9. The Supreme Court of Appeals of West Virginia adopted certain procedural standards in driver's license revocation proceedings when it applied standards previously found in *North v. Board of Regents,* 160 W. Va. 248, 233 S.E.2d 411 (1977), where the Court stated,

> [w]e indicated the requirements of procedural due process may vary depending on the nature of the case. We stated 'the more valuable the right sought to be deprived, the more safeguards will be interposed.' Because of the substantial interests involved in *North*, we held the following due process procedures must be applicable '. . . a formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, **to confront his accusers**, and to present evidence on his own behalf; an unbiased hearing tribunal; and an adequate record of the proceedings. (Emphasis added) *Jordan v.* Roberts, 161 W. Va. 750, 755, 246 S.E.2d 259, 262 (1978) quoting *North v. Board of Regents.*

10. "The rules of evidence as applied in civil cases in the circuit courts of this state shall be followed" in OAH hearings. W. Va. Code § 29A-5-2.

11. "The West Virginia Rules of Evidence governing proceedings in the courts of this state shall be given like effect in hearings held before a hearing examiner. All testimony shall be given under oath." W. Va. Code § 17C-5C-4(c).

12. Officer Thompson's reports were not properly admitted pursuant to the West Virginia Rules of Evidence and, therefore, should not have been considered by the hearing examiner.

13. The OAH's findings, inferences, conclusions, and decision in the Final Order are in violation of the statutory provisions that establish the West Virginia Rules of Evidence as controlling the admission and denial of evidence to be considered by the hearing examiner in making findings of fact and conclusions of law. Any abrogation of the West Virginia Rules of Evidence places at risk the purpose of having rules of evidence, *to-wit*: "These rules shall be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." W. R. Evid. 102.

RULING

Accordingly, the Court hereby **GRANTS** the relief requested in the Petition for Judicial Review. It is hereby **ORDERED** that the above-styled action is **REVERSED**. There being nothing further before the Court, this matter is hereby **DISMISSED** and **STRICKEN** from the docket of this Court.

It is further **ORDERED** that the Clerk of this Court is directed to forward a certified copy of this Order to Patricia S. Reed, Commissioner of the DMV, P.O. Box 17200, Charleston, WV 25317; Elaine L. Skorich, Assistant Attorney General, DMV-AG, P.O. Box 17200, Charleston, WV 25317; to David Pence, Esq. at P.O. Box 3667, Charleston, WV 25336; and to Chief Hearing Examiner Theresa Maynard, Office of Administrative Hearings, 1124 Smith Street, Suite B100, Charleston, WV 25301.

ENTERED this 6th day of March, 2019.

Judge Jennifer F. Bailey
Kanawha County Circuit Court

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
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 7
DAY OF March 2019
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA