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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 19-0350**

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

**Petitioner,**

**v.**

**JOHN H. FOUCH, III,**

**Respondent.**

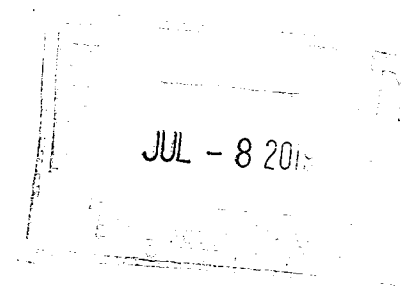
**BRIEF OF THE DIVISION OF MOTOR VEHICLES**

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Division of Motor Vehicles,**

**By Counsel,**

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Now comes Adam Holley<sup>1</sup>, Acting Commissioner of the West Virginia Division of Motor Vehicles (“DMV”), by and through his undersigned counsel, and hereby submits the *Brief of the Division of Motor Vehicles* pursuant to the *Scheduling Order* entered by this Court on March 21, 2019.

### **I. ASSIGNMENTS OF ERROR**

- A. The circuit court erred in determining that this Court improperly decided *Dale v. Odum v. Doyle*, 223 W. Va. 601, 760 S.E.2d 415 (2014) (per curiam) and, therefore, erred in determining that the Office of Administrative Hearings properly considered the Division of Motor Vehicle's file from evidence.
- B. The circuit court erred in determining that the burden is on the DMV to secure the Investigating Officer's attendance at OAH hearings.

### **II. STATEMENT OF THE CASE**

On April 15, 2013, Officer Charles M. Thompson of the Kenova Police Department encountered John H. Fouch, III, after four eyewitnesses observed him driving a vehicle which almost struck a Shell gas station located in Kenova, Wayne County, West Virginia. (App<sup>2</sup>. at P. 208.) Mr. Fouch had the odor of an alcoholic beverage on his breath, staggered while walking, staggered while standing, had slurred speech, had a lethargic attitude, had bloodshot eyes, and admitted to drinking and taking sleeping medication then driving. (App. at P. 209.)

Officer Thompson explained and administered the Horizontal Gaze Nystagmus Test. *Id.* During the pre-test medical assessment, Officer Thompson noted that Mr. Fouch had resting nystagmus; therefore, the OAH did not give the results of this test any weight. (App at P. 237, FOF

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<sup>1</sup> At the time the DMV filed the Notice of Appeal in this matter, Deputy Commissioner Linda Ellis was responsible for the operation of the DMV. Thereafter, Governor Justice appointed Adam Holley as Acting Commissioner; therefore, pursuant to Revised Rule of Appellate Procedure 42(c), Deputy Commissioner Ellis's successor has been automatically substituted as a party herein.

<sup>2</sup> “App.” refers to the Appendix filed contemporaneously with the *Brief of the Division of Motor Vehicles*.

5.) Officer Thompson also explained and demonstrated the Walk-and-Turn Test. (App. at P. 209.) During the instruction stage, he could not keep his balance, and during the test, he stopped while walking, stepped off the line, missed heel-to-toe, and took an incorrect number of steps. *Id.* Mr. Fouch could not perform the One Leg Stand Test because he could barely stand. (App. at P. 210.)

Officer Thompson arrested Mr. Fouch for DUI and transported him to the Kenova Police Department for the purpose of administering the secondary chemical test (“SCT”) to determine the alcohol concentration in Petitioner’s blood. (App. at PP. 207-208.) The SCT designated by the Kenova Police Department is the SCT of the breath. (App. at P. 207.) Officer Thompson was trained at the WV State Police Academy to administer SCTs of the breath and was certified as a test administrator by the WV Department of Health. (App. at P. 211.)

Officer Thompson read and provided Mr. Fouch with a copy of the WV Implied Consent Statement, which Mr. Fouch signed. (App. at P. 213.) Officer Thompson next completed the required steps on the Breath Test Operational Check List (App. at P. 211), and Mr. Fouch provided a breath sample which indicated that his blood alcohol content was .120%. (App. at PP. 207, 211.) Gas reference checks before and after the test were .082, which indicated that the instrument was working properly. *Id.* After taking the SCT, Mr. Fouch started to complete a post-arrest interview but could not finish because he was too intoxicated and kept passing out. (App. at P. 212.)

On April 25, 2013, the DMV sent Mr. Fouch an *Order of Revocation* for driving a motor vehicle in this state while under the influence (“DUI”) of alcohol, controlled substances and/or drugs (App. at P. 96) and an *Order of Disqualification* (App. at P. 95) for his commercial driver’s license. Mr. Fouch, through his then counsel, Chad Hatcher, appealed the same to the OAH. (App. at PP. 88-93.) Pursuant to W. Va. Code § 17C-5A-2(c)(3) (2015) and as requested by Mr. Fouch’s counsel



below, on February 22, 2016, the OAH issued a subpoena for Officer Thompson to appear at the hearing held on June 15, 2016. (App. at P. 205.) The DMV also emailed a subpoena to Officer Thompson. (App. at P. 271.) Officer Thompson failed to appear (App. at P. 270), and the OAH hearing examiner offered, "If you do want the officer here, we can continue it and, you know, try to get him –." (App. at P. 272.) Mr. Fouch, through his counsel below, waived the opportunity for subpoena enforcement stating, "No, I certainly don't want my client to have to incur further expenses." *Id.* Mr. Fouch voluntarily proceeded with the hearing and testified on his own behalf. (App. at PP. 272-285.)

On June 26, 2017, the OAH entered a Final Order upholding the DMV's orders of revocation and disqualification. (App. at PP. 218-223.) On July 2, 2018, Mr. Fouch filed his appeal with the circuit court alleging that he was denied his right to confront his accuser and that he has suffered actual prejudice because the DMV did not secure the presence of an essential witness at the administrative hearing. (App. at PP. 243-265.)

On March 6, 2019, the circuit court entered its final order granting Mr. Fouch's appeal. (App. at PP. 1-27.) The circuit court erroneously determined that "the decision of the hearing examiner to admit the Investigating Officer'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" (App. at P. 12); 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" (App. at P. 12); that the OAH erred in admitting the DMV's evidence because this Court improperly decided *Dale v. Odum v. Doyle*, 223 W. Va. 601, 760 S.E.2d

415 (2014) because this Court erroneously relied on *Crouch v. West Virginia Division of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006) (App. at PP. 11-13, 17-18); and that the burden is on the DMV to secure the Investigating Officer's attendance at OAH hearings. (App. at P. 21.)

### **III. SUMMARY OF ARGUMENT**

This Court is well aware that the OAH obtained jurisdiction over administrative license revocation appeals in 2010. *See, Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012); *Miller v. Epling*, 229 W. Va. 574, 729 S.E.2d 896 (2012). In that context, this Court has heard appeals of decisions by the OAH which involved application of the W. Va. Code § 29A-5-2(b) (1964) and has determined that in driver's license revocation proceedings before the OAH, the statement of the investigating officer is admissible under W. Va. Code § 29A-5-2(b) (1964). *See, Dale v. Odum*, 223 W. Va. 601, 760 S.E.2d 415 (2014) (per curiam) upholding Syl. Pt. 3, *Crouch v. W. Virginia Div. of Motor Vehicles*, 2019 W. Va. 70, 631 S.E.2d 629 (2006). In making its decision, this Court considered that “although W. Va. Code § 29A-5-2(a) has made the rules of evidence applicable to DMV proceedings generally, W. Va. Code § 29A-5-2(b) has carved out an exception to that general rule in order to permit the admission of certain types of evidence in administrative hearings that may or may not be admissible under the Rules of Evidence.” *Comm'r of W. Virginia Div. of Motor Vehicles v. Brewer*, No. 13-0501, 2014 WL 1272540, at \*4 (W. Va. Mar. 28, 2014) (memorandum decision).

Regardless of this Court's abundant decisions specifically applying this exception to the DMV's records at OAH hearings, the Circuit Court of Kanawha County erroneously determined that “Syllabus Point 3 of *Crouch* is inapplicable to all post OAH creation DMV administrative appeals.” (App. at P. 19.) In so holding, the circuit court determined that this Court “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.” (App. at P. 15.)

Further, unlike criminal proceedings, there is no constitutional *right* to confront one’s accusers at a civil administrative license revocation hearing. Instead, the *opportunity* to confront one’s accusers is the procedural due process protection afforded a drunk driver in the administrative process. *See, North v. W. Virginia Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977). Here, pursuant to W. Va. Code § 17C-5A-2(c)(3) (2015) and W. Va. Code R. § 105-11.1 (2016), Mr. Fouch asked the OAH to issue a subpoena, which Mr. Fouch served upon the Investigating Officer. When the officer failed to appear at the administrative hearing, the OAH Hearing Examiner offered Mr. Fouch the opportunity to continue the hearing in order to secure the officer’s attendance, and Mr. Fouch declined the offer. It is clear that Mr. Fouch’s due process rights were protected in that he was given an opportunity to confront the Investigating Officer yet waived that opportunity. By requiring the DMV to produce the Investigating Officer, the circuit court has placed a higher burden on the DMV than that which is provided by the Legislature by statute, the OAH by rule, or this Court by its decision in *North, supra*.

The circuit court’s response to this Court’s decision in *Odum, supra*, is a complete departure from the intent of the Administrative Procedures Act and has turned administrative law into a quasi-criminal proceeding. In essence, the circuit court overturned this Court’s library of decisions requiring the DMV’s record to be admitted at the administrative hearing and replaced the OAH’s application of this Court’s analysis of administrative law with the circuit court’s preferred application of criminal law to find a that drunk person was sober. The circuit court’s insertion of criminal standards in the civil, administrative license revocation process has far

reaching consequences in all administrative hearings in which the W. Va. Code § 29A-5-2(b) (1964) pertains.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 19 of the Revised Rules of Appellate Procedure (2010), the DMV requests oral argument because that this case involves assignments of error in the application of settled law and that the case involves a narrow issue of law.

#### **V. ARGUMENT**

##### **A. Standard of Review**

Judicial review of license revocations is under the Administrative Procedures Act. *Dean v. W. Va. Dep't of Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995) (per curiam).

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court 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, decisions, or orders 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.

Syl. Pt. 3, *Reed v. Pompeo*, 240 W. Va. 255, 810 S.E.2d 66 (2018).

Findings of fact are accorded deference unless the reviewing court believes the findings to be clearly wrong, and conclusions of law are reviewed *de novo*. *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010) (per curiam). “Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

**B. The circuit court erred in determining that this Court improperly decided *Dale v. Odum v. Doyle*, 223 W. Va. 601, 760 S.E.2d 415 (2014) (per curiam) and, therefore, erred in determining that the Office of Administrative Hearings properly considered the Division of Motor Vehicle's file from evidence.**

In its *Order*, the Circuit Court of Kanawha County concluded as a matter of law that 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.

(App. at P. 25.) In determining that this Court's decision in *Dale v. Odum v. Doyle, supra*, was made upon a misapprehension of the law, the circuit court found that "[r]ecognizing 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'." (App. at P. 15.)

Further, the circuit court found that "[r]eading 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." (App. at PP. 17-18.) A more thorough review of the process and the law applicable thereto shows that in fact the DMV is the agency for purposes of admission of the record being challenged and is a party at the OAH hearing.

The Administrative Procedures Act established "with enumerated exceptions. . . the conduct of contested administrative cases, together with a plan for the systematic preparation, public consideration, orderly promulgation, preservation and public availability of the body of law, policy and administrative decisions within the purview of this chapter." W. Va. Code § 29A-1-1 (1982). "Administrative revocation hearings are civil in nature." *Carte v. Cline*, 200 W. Va. 162, 167, 488

S.E.2d 437, 442 (1997). *See also Cain v. W. Va. Div. of Motor Vehicles*, 225 W. Va. 467, 473, 694 S.E.2d 309, 315 (2010); *Miller v. Toler*, 229 W. Va. 302, 306, 729 S.E.2d 137, 141 (2012). “The purpose of this State’s administrative driver’s license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible. Syl. Pt. 3, *In re Petition of McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005).” Syl. Pt. 2, *Miller v. Toler*, 229 W. Va. 302, 303, 729 S.E.2d 137, 138 (2012).

As the circuit court observed, for the purposes of Chapter 29A, “‘Agency’ means any state board, commission, department, office or officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches.” W. Va. Code § 29A-1-2(a) (2015). The circuit court also pointed out that pursuant to W. Va. Code R. § 105-1-3.9 (2016), “‘Party’ and ‘parties’ means the petitioner and the respondent.” Subsection 3.10 defines “Petitioner” as “the person contesting an order or decision of the Commissioner,” and subsection 3.11 defines “Respondent” as the Commissioner. Further, W. Va. Code R. § 105-1-3.7 provides, “‘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.” (App. at P. 14.)

The circuit court’s reliance on the definitions in Chapter 29A of the W. Va. Code and Chapter 105, Series 1 of the Code of State Rules is misplaced. First, the circuit court fails to recognize that the DMV is both a party **AND** an agency in administrative license revocation proceedings. At the initiation of the process, the DMV is the agency which must review the Investigating Officer’s written statement and issue an order of revocation if the agency determines that the person committed a DUI offense. *See W. Va. Code §17C-5A-1(c)* (2008). In

making its decision to revoke a driver's license for a DUI offense, the DMV relies on the documents provided by the Investigating Officer.

If a licensee decides to appeal the Commissioner's order of revocation pursuant to W. Va. Code §17C-5A-2(a) (2015), the licensee is appealing the Commissioner's decision. Therefore, the Commissioner's reasons for revoking are necessarily relevant to the administrative proceeding before the OAH. West Virginia Code § 29A-5-2(a) (1964) provides: "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.**" [Emphasis added.]

The Public Employees Grievance Board, W. Va. Code § 6C-3-1 (2007) *et seq.*, has a similar process. When a classified public employee is terminated and files a grievance, the respondent employer has the burden of proof at the administrative hearing. In these grievance proceedings in which W. Va. Code Chapter 29A is also applicable, "all documents admitted and the decision, agreement or report become part of the record." W. Va. Code § 6C-2-3(m) (2008). The respondent's letter of termination and any letters of reprimand or documents showing progressive discipline must be admitted into evidence before the Public Employees Grievance Board, a separate agency authorized to act as a tribunal, to show the reasons upon which the agency acted.

In the instant matter, the document upon which the DMV relied in issuing its order of revocation must also be admitted into evidence at hearings before the OAH. The DMV is the agency in possession of the file being contested.

Being mindful of the civil nature of the administrative process, we can look at the administrative procedures followed by other jurisdictions in civil administrative license revocation proceedings. The federal Administrative Procedures Act provides,

except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. **Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.** The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required **for a full and true disclosure of the facts.** In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

[Emphasis added.] 5 U.S.C.A. § 556(d) (1990). Under the federal rule, the DMV would be required to produce the statement of the Investigating Officer for a full and true disclosure of the facts upon which the DMV acted in revoking a driver's license.

Pursuant to the contested case provisions of Maryland's Administrative Procedures Act, "Each party in a contested case shall offer all of the evidence that the party wishes to have made part of the record. . . [and] If the agency has any evidence that the agency wishes to use in adjudicating the contested case, the agency shall make the evidence part of the record." Md. Code Ann., State Gov't §§ 10-213(a)(1) (1993) and 10-213(a)(2) (1993). Further, the "sworn statement of the police officer and of the test technician or analyst shall be prima facie evidence of a test refusal, a test result indicating an alcohol concentration of 0.08 or more at the time of testing, or a test result



indicating an alcohol concentration of 0.15 or more at the time of testing.” Md. Code Ann., Transp. § 16-205.1(f)(7)(ii) (2019).

In Ohio, Ohio Rev. Code Ann. § 4511.191(D)(3) (2017) provides, “The sworn report of an arresting officer completed and sent to the registrar and the court under divisions (D)(1)(c) and (D)(2) of this section is prima facie proof of the information and statements that it contains and shall be admitted and considered as prima facie proof of the information and statements that it contains in any appeal under division (H) of this section relative to any suspension of a person's driver's or commercial driver's license or permit or nonresident operating privilege that results from the arrest covered by the report.” *State v. Campbell*, 115 Ohio App. 3d 319, 330, 685 N.E.2d 308, 315 (1996). There, an appellant argued that Ohio Rev. Code § 4511.191(D)(3) (2017) switches the burden of proof to the accused on whether the suspension was justified.

In *State v. Campbell*, the Seventh District Court of Appeals of Ohio found that

Evid.R. 802 provides: “Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.”

Evid.R. 803(8) excludes the following from the rule of inadmissibility: “Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.”

The sanctions imposed pursuant to R.C. 4511.191, the ALS, are civil in nature. As Evid.R. 803(8) excludes matters observed by law enforcement personnel only in criminal cases, admitting the officer's report does not circumvent the Ohio Rules of Evidence.

115 Ohio App. 3d 319, 330–31, 685 N.E.2d 308, 315–16.

Per the Administrative Procedures Act for the Commonwealth of Kentucky, “[h]earsay evidence may be admissible, if it is the type of evidence that reasonable and prudent persons would rely on in their daily affairs, but it shall not be sufficient in itself to support an agency's findings of facts unless it would be admissible over objections in civil actions.” Ky. Rev. Stat. Ann. § 13B.090(1) (2018). *See, Giberson v. City of Ludlow*, No. 2012-CA-002191-MR, 2015 WL 1880755, at \*9 (Ky. Ct. App. Apr. 24, 2015) (“The written reports documenting Giberson's misconduct and infractions of the department's rules and regulations are evidence that a reasonable and prudent police chief would rely upon when assessing an officer's job performance.”)

Finally, contrary to the circuit court’s musings that when this Court “in *Odum* applied syllabus point 3 of *Crouch*, it did not recognize that the administrative appellate procedure is no longer under the control of DMV and had instead been assigned to the OAH by the legislature in 2010” (App. at P. 15), this Court has consistently acknowledged the change in administrative control to the OAH and has applied the evidentiary exception in W. Va. Code § 29A-5-2(b) (1964) to the DMV’s file.

In *Comm'r of W. Virginia Div. of Motor Vehicles v. Brewer*, No. 13-0501, 2014 WL 1272540, at \*4 (W. Va. Mar. 28, 2014) (memorandum decision), an appeal of a decision of the OAH, this Court determined that “in the context of driver's license revocation proceedings, we have held that the statement of an arresting officer is admissible under West Virginia Code § 29A-5-2. Syl. Pt. 3, *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006).” In making its decision, this Court considered that “[a]lthough W. Va. Code § 29A-5-2(a) has made the rules of evidence applicable to DMV proceedings generally, W. Va. Code § 29A-5-2(b) [footnote omitted] has carved out an exception to that general rule in order to permit the admission of certain

types of evidence in administrative hearings that may or may not be admissible under the Rules of Evidence, [footnote omitted]. Moreover, inasmuch as we view W. Va. Code § 29A-5-2(a) as a statute pertaining to the application of the Rules of Evidence to administrative proceedings generally, while W. Va. Code § 29A-5-2(b) specifically addresses the admission of particular types of evidence, W. Va. Code § 29A-5-2(b) would be the governing provision.” *Comm’r of W. Virginia Div. of Motor Vehicles v. Brewer*, No. 13-0501, 2014 WL 1272540, at \*4 (W. Va. Mar. 28, 2014).

In *Dale v. Reynolds*, No. 13-0266, 2014 WL 1407375 (W. Va. Apr. 10, 2014) (memorandum decision), this Court reviewed a decision from an administrative hearing conducted by the OAH and determined that

there is no requirement that the evidence of record be testimonial as opposed to documentary. *See* W. Va. Code § 29A-5-2(b) (“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.”). *See also* Syl. pt. 3, *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006) (holding that statements of the arresting officer are admissible in the context of driver’s license revocation proceedings); *Dale v. Odum*, —W. Va. —, — S.E.2d —, 2014 WL — (Nos. 12-1403 & 12-1509 Feb. 11, 2014) (per curiam) (relying on *Crouch* to reinstate a license revocation where the driver argued that the evidence contained in the DUI Information Sheet was inadmissible hearsay).

FN 5, No. 13-0266, 2014 WL 1407375, at \*4.

In *Dale v. Reed*, No. 13-0429, 2014 WL 1407353, at \*2 (W. Va. Apr. 10, 2014) (memorandum decision), an appeal of an OAH decision, this Court held that “[u]nquestionably, however, the DUI Information Sheet is admissible, affirmative evidence of its contents.”

In *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006) and *Dale v. Odum*, 233 W. Va. 601, 609, 760 S.E.2d 415, 423 (2014), this Court ruled that documents (such as statements of arresting officers) that are not typically admissible during normal court proceedings are admissible in

administrative hearings, and that there is no foundational requirement for the admission of these documents. We concluded in *Crouch* that

[w]ithout a doubt, the Legislature enacted W. Va. Code § 29A-5-2(b) with the intent that it would operate to place into evidence in an administrative hearing “[a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself ....”

W. Va. Code § 29A-5-2(b). Indeed, admission of the type of materials identified in the statute is mandatory, as evidenced by the use of the language “*shall* be offered and made a part of the record in the case ....”

219 W. Va. at 76, 631 S.E.2d at 634.

In *Dale v. Judy*, No. 14-0216, 2014 WL 6607609, at \*3 (W. Va. Nov. 21, 2014) (memorandum decision), this Court reviewed a circuit court<sup>3</sup> appeal from an OAH decision and opined that

[i]n *Groves v. Cicchirillo*, this Court noted “ ‘that the fact that a document is deemed admissible under West Virginia Code § 29A-5-2(b) ] 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.’ ” 225 W. Va. 474, 479, 694 S.E.2d 639, 644 (2010) (quoting *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 76 a 12, 631 S.E.2d 628, 634 al2 (2006).).

No. 14-0216, 2014 WL 6607609, at \*3.

In *Dale v. Haynes*, No. 13-1327, 2014 WL 6676546 (W. Va. Nov. 21, 2014) (memorandum decision), an opinion entered on the same day as *Dale v. Judy*, *supra*, this Court recognized that the OAH was the tribunal which properly admitted the DMV’s file pursuant to W. Va. Code § 29A-5-2(b) (1964). “The circuit court acknowledged that the Incident Report and the DUI Information Sheet were ‘properly admitted into evidence at the administrative hearing and [were] admissible under [West Virginia Code § ] 29A-5-2(b).’ The circuit court also noted that, pursuant to *Crouch v.*

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<sup>3</sup> The Honor Jennifer F. Bailey presided in *Dale v. Judy* as she did in the present matter.

*West Virginia Division of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006), the admission of those documents created a rebuttable presumption as to their accuracy. *Id.* at 76 n. 12, 631 S.E.2d at 634 n. 12. However, the circuit court found that respondent's counsel rebutted the accuracy of [the Commissioner's] evidence by illustrating [the investigating officer's] inconsistent statements regarding what he observed and his role in the arrest.” No. 13-1327, 2014 WL 6676546, at \*3.

In *Reed v. Craig*, No. 14-0346, 2015 WL 3387982, at \*4 (W. Va. May 15, 2015) (memorandum decision), another appeal of an OAH decision, this Court noted, as we recognized in *Crouch*, that even though a document is deemed admissible at an administrative hearing, under West Virginia Code § 29A-5-2(b), its contents may still be challenged during the hearing. 219 W. Va. at 76 n. 12, 631 S.E.2d at 634 n. 12. In conducting the administrative hearing, as required pursuant to West Virginia Code § 17C-5A-2, and providing respondent with an opportunity to present rebuttal evidence, the OAH will fulfill its important role as fact finder and determine the credibility of all of the evidence relevant to the revocation of respondent's license to drive, both documentary and testimonial.” FN 6, *Reed v. Craig*, *supra*.

In *Reed v. Zipf*, 239 W. Va. 752, 806 S.E.2d 183 (2017), this Court found that “[d]espite the circuit court’s assertion<sup>4</sup>, Mr. Zipf’s DUI Information Sheet was part of the record before the OAH, and it revealed that Officer Lindsey observed ‘slurred speech’ and an ‘odor of alcoholic beverages’ coming from Mr. Zipf. On the admission of a DUI Information Sheet as evidence in a driver’s license revocation hearing, we have held: 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

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<sup>4</sup> The Honorable Judge Jennifer F. Bailey also presided in *Reed v. Zipf*.

evidence on behalf of the Division, is admissible pursuant to W. Va. Code § 29A-5-2(b) (1964) (Repl. Vol. 2002).” 239 W. Va. 752, 756, 806 S.E.2d 183, 187.

In *Reed v. Lemley*, No. 17-0797, 2018 WL 4944553 (W. Va. Oct. 12, 2018) (memorandum decision), this Court was acknowledged that the administrative hearing procedure was no longer under the control of DMV and had instead been assigned to the OAH by the legislature in 2010. There, this Court opined,

We begin by noting that West Virginia Code § 29A-5-2(b) directs that

[a]ll 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.

We have previously stated that “[w]ithout a doubt, the Legislature enacted W. Va. Code § 29A-5-2(b) with the intent that it would operate to place into evidence in an administrative hearing “[a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself.” *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 76, 631 S.E.2d 628, 634 (2006). As evidenced by the use of the word “shall,” admission of the evidence identified in the statute is mandatory. *Id.* The secondary chemical test result was in the DMV’s possession, and the DMV sought to avail itself of the result. Accordingly, the result of the secondary chemical test should have been admitted into evidence, subject to a rebuttable presumption as to its accuracy. *Id.* at 76, n.12, 631 S.E.2d at 634, n.12 (“We point out that 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.”).

No. 17-0797, 2018 WL 4944553, at \*4.

The circuit court’s analysis is in error in failing to acknowledge that DMV is the agency in possession of the record and a party at the administrative hearing. The lower court also erred in finding that this Court has failed to acknowledge transition to the OAH of administrative duties, particularly as it relates to admission of the administrative record. Clearly, the circuit

court erred in holding that this Court's decisions in *Dale v. Odum v. Doyle* and its progeny are in error.

**C. The circuit court erred in determining that the burden is on the DMV to secure the Investigating Officer's attendance at OAH hearings.**

In its final order, the circuit court erroneously reasoned that 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 2010, the DMV has not needed to produce witnesses of any sort to prove its case and the OAH Hearing Examiner has been bound to admit and consider all 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." (App. at PP. 18-19.)

Further, the circuit court found that "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." (App. at P. 21.)

In 2008, when the DMV was the tribunal, there was no requirement that the DMV produce any witnesses to prove its case. "Any investigating officer who submits a statement pursuant to section one of this article that results in a hearing pursuant to this section shall **NOT** attend the hearing on the subject of that affidavit **UNLESS** requested to do so by the party whose license is

at issue in the hearing or by the commissioner.” [Emphasis added.] W. Va. Code § 17C-5A-2(d) (2008). If the licensee requested the appearance of the officer, the “Division of Motor Vehicles [was] solely responsible for causing the attendance of the investigating officers.” *Id.*

When the OAH became the tribunal in 2010, the DMV was relieved of the statutory burden of causing the officer(s)’ attendance. The OAH promulgated procedural rules which place the responsibility of any party desiring testimony from *any* person, including the Investigating Officer, to secure that person’s attendance. W. Va. Code R. § 105-11.1 (2016). The OAH issues subpoenas at the request of the party or the party’s legal representative, and the party is responsible for service of the same. W. Va. Code R. § 105-11.2 (2016). Contrary to the circuit court’s protestations, nothing has changed regarding the DMV’s requirement to produce witnesses.

In placing the burden on the DMV for producing the Investigating Officer for cross-examination at the administrative hearing, the circuit court relied on *Goldberg v. Kelly*, 397 U.S. 254, 270, 90 S. Ct. 1011, 1021, 25 L.Ed. 2d 287 (1970) (holding in part, “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.”) (App. at P. 25.)

*Goldberg*’s discussion of protections of constitutional rights in the administrative context is not persuasive considering this State’s considerable body of law which has held, over many years, that license revocation proceedings satisfy due process rights. *Jordan v. Roberts*, 161 W. Va. 750, 246 S.E.2d 259 (1978). Moreover, the facts of *Goldberg, supra*, are distinguishable from the instant matter. There, the “city’s procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility.



Thus, a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.” *Goldberg v. Kelly*, 397 U.S. 254, 268, 90 S. Ct. 1011, 1021, 25 L. Ed. 2d 287 (1970). West Virginia’s statutes, rules and caselaw provided Mr. Fouch with the opportunity to present evidence, to subpoena any witness which he desired to examine, and to rebut any of the DMV’s evidence. Mr. Fouch, in fact, availed himself of these opportunities by subpoenaing the Investigating Officer and by testifying.

The Sixth Amendment to the U.S. Constitution provides in pertinent part that in “all **criminal** prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.” [Emphasis added.] Article III, § 14 of the West Virginia Constitution also provides in pertinent part that for “Trials of **crimes**, and of **misdemeanors**. . . the accused shall be confronted with the witnesses against him.” [Emphasis added.] This Court has discussed similar due process protections in administrative proceedings.

We recognized in *Clarke I* that due process in the civil context “is a flexible concept which requires courts to balance competing interests in determining the protections to be accorded one facing a deprivation of rights.” *Id.* at 710, 279 S.E.2d at 175; accord *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 483, 102 S.Ct. 1883, 1898, 72 L.Ed.2d 262 (1982) (commenting that “no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause”). Despite the inherent need to embrace due process issues with flexibility, certain fundamentals concerning the minimal procedural protections that must be employed are well-established. Those requirements were identified in *Clarke I* as 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.’ ” 166 W. Va. at 710, 279 S.E.2d at 175 (quoting Syl. Pt. 3, in part, *North v. West Virginia Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)).

*Barazi v. W. Virginia State Coll.*, 201 W. Va. 527, 531, 498 S.E.2d 720, 724 (1997). *See also*, *Jordan v. Roberts*, 161 W. Va. 750, 756, 246 S.E.2d 259, 263 (1978) (“Certainly the standards set in *North* should be applicable to such [driver’s license] suspension.”) The Confrontation

Clause is applicable in criminal cases. The administrative process allows for a licensee to subpoena any witness and to enforce the subpoena.

This Court determined in *Jordan* that a “driver's license is a property interest which requires the protection of this State's Due Process Clause. . .” *Id.* at Syl. Pt. 1. Further, the *Jordan* Court determined that the “administrative proceedings for suspension of a driver's license under W. Va. Code, 17C-5A-1, Et seq., do not violate this State's Due Process Clause.” Syl. Pt. 3, *Jordan v. Roberts*, 161 W. Va. 750, 246 S.E.2d 259 (1978).

Not only does the DMV not have the obligation to secure an officer's attendance, there is no requirement that an officer testify. In cases in which the officer has failed to appear, this Court has held, “there is no requirement that the evidence of record be testimonial as opposed to documentary. Fn. 5, in part, *Dale v. Reynolds*, No. 13-0266, 2014 WL 1407375 (W. Va. Apr. 10, 2014) (memorandum decision); “Although there was no direct testimony in the record from Officer Wigal, this Court found that it was reasonable to conclude that such erratic driving was sufficient probable cause to suspect that the driver was under the influence of alcohol or other controlled substances.” *Dale v. Odum*, 233 W. Va. 601, 607, 760 S.E.2d 415, 421 (2014); “Although there was no testimonial evidence presented on this issue, our review of the record shows that documentary evidence was submitted during the hearing that established that the stop of Mr. Doyle's vehicle by Officer Anderson was valid.” *Id.* at 233 W. Va. 608, 760 S.E.2d 422.

Here, Mr. Fouch was provided with an opportunity to subpoena the Investigating Officer, and ultimately, he waived the officer's appearance. Pursuant to W. Va. Code § 17C-5A-2(c)(3) (2015) and as requested by Mr. Fouch's counsel below, the OAH issued a subpoena for the

Investigating Officer to appear at the hearing held on June 15, 2016.<sup>5</sup> (SOMON 28.) At the administrative hearing, the OAH hearing examiner gave Mr. Fouch an opportunity to obtain the officer's attendance by offering, "If you do want the officer here, we can continue it and, you know, try to get him --." (SOMON 37 at P. 6.) Mr. Fouch, through his counsel below, waived the opportunity for subpoena enforcement and to examine his accuser stating, "No, I certainly don't want my client to have to incur further expenses." (App. at P. 272.)

West Virginia Code R. § 105-11.6 (2016) provides,

[u]pon a second consecutive failure of a person under subpoena to appear when the first nonappearance did not result from a personal emergency, ***the hearing may be conducted and completed without the testimony of the person at the discretion of the hearing examiner*** -- unless the parties otherwise agree or the party proponent of such witness petitioned for enforcement of the second consecutive subpoena in circuit court. In the event the subpoenaed witness fails to appear in spite of the party proponent having petitioned for enforcement of the subpoena, the matter may be continued unless the opposing party shows he or she will be substantially prejudiced by allowing another continuance in the matter. "Substantial prejudice" as used herein means prejudice that may not be significantly mitigated, which virtually affects a party's right to due process of law and which, by its existence, will likely affect the outcome of the proceeding.

[Emphasis added.] The procedural rules and the hearing examiner provided Mr. Fouch with the opportunity to continue the matter so that he could secure the appearance of *his* subpoenaed witness, yet he chose not to avail himself of those procedural safeguards. Accordingly, the hearing examiner exercised her authorized discretion to conduct the hearing without the officer's testimony.

The DMV did not trample over Mr. Fouch's procedural due process protections as the DMV has not overseen the administrative hearing process for nine years. Effective June 11, 2010, the "Office of Administrative Hearings is created as a separate operating agency within the

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<sup>5</sup> Per W. Va. Code § 17C-5A-2(c)(2) (2015), the "party requesting the subpoena shall be responsible for service of the subpoena upon the appropriate individual." The record is devoid of any proof that Petitioner perfected service of the subpoena upon the Investigating Officer, and he has not claimed otherwise.

Department of Transportation.” W. Va. Code § 17C-5C-1(a) (2010). Pursuant to W. Va. Code § 17C-5C-4a (2012), the OAH has legislative and procedural rule-making authority, and W. Va. Code R. § 105-1-11.1 (2016) makes clear that if “a party intends to present testimony from any person, it is the responsibility of that party to obtain the presence of the person at the hearing. This responsibility will be considered fulfilled by a party if the person whose testimony is desired has been subpoenaed by the party who desires his or her presence.” The procedural rule comports with the provisions of W. Va. Code § 17C-5A-2(c)(3) (2015), authorizing the OAH to issue subpoenas to petitioners or their counsel and placing the responsibility for service upon the party requesting the subpoena.

The circuit court further erred in finding that the line of cases providing for admission of the record shifts the burden of proof from the DMV to the licensee and that it creates a presumption of the driver’s guilt. First, statutorily the burden is on the DMV. Admission of the record alone may meet the DMV’s burden of proof. Second, there is no presumption of guilt. The clear duty of the OAH as tribunal is to weigh the evidence presented by both parties. When viewed in light of this State’s administrative procedures law, and not in light of the criminal law, all due process requirements were met, and there are no violations of constitutional rights in this matter.

## **VI. CONCLUSION**

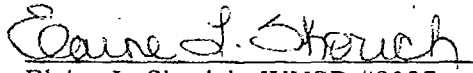
For the reasons outlined above, the DMV respectfully requests that this Court reverse the circuit court order.

Respectfully submitted,

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