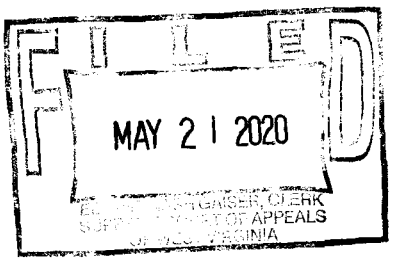
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0127



EVERETT FRAZIER, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Petitioner,

v.

GARLAND HARLESS,

Respondent.

Honorable Jennifer F. Bailey, Judge
Circuit Court of Kanawha County
Civil Action No. 19-AA-47

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. **THE CIRCUIT COURT ERRED IN FINDING THAT THIS COURT'S OPINION IN *DALE V. ODUM*, 233 W.VA. 601, 760 S.E.2D 415 (2014)(PER CURIAM) MISAPPLIED W. VA. CODE § 29A-5-2(b) AND THAT THE DMV'S AGENCY RECORD SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE.**

2. **THE CIRCUIT COURT ERRED IN FINDING THAT THE DMV MUST PRODUCE THE INVESTIGATING OFFICER AT THE HEARING.**

3. **THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT THE DMV IS THE AGENCY FOR PURPOSES OF ADMISSION OF THE RECORD AND IS A PARTY AT THE OAH HEARING.**

4. **THE CIRCUIT COURT ERRED IN FAILING TO GIVE DEFERENCE TO THE OAH HEARING EXAMINER'S CREDIBILITY DETERMINATIONS.**

STATEMENT OF THE CASE

On July 8, 2012, Patrolman M. A. Simms of the South Charleston Police Department ("Investigating Officer") observed the Respondent's motorcycle traveling at excessive speed on MacCorkle Avenue and Chesnut Street in South Charleston, Kanawha County, West Virginia. A.R. 215[1]. The Investigating Officer noted that the Respondent had the odor of an alcoholic beverage on his breath, and he was unsteady when he dismounted, walking to the roadside and standing. A.R. 216. The Respondent admitted at the hearing that he had been drinking beer. A.R. 279.

The Investigating Officer observed that the Respondent had slurred, mumbled speech and bloodshot eyes. The Respondent admitted he had drunk two bottles of beer. A.R. 216.

The Investigating Officer explained the horizontal gaze nystagmus ("HGN") test to the Respondent. The medical assessment prior to the test showed resting nystagmus, which rendered the Respondent a nonviable candidate for the test. A.R. 216.

The Investigating Officer explained and demonstrated the walk and turn test to the Respondent. The Respondent was unable to keep his balance, stepped off the line, missed heel-to-toe and raised his arms to balance. A.R. 216. The Respondent displayed impairment during this test.

[1] Reference is to the *Appendix Record* by page number.

The Investigating Officer explained and demonstrated the one leg stand test. The Respondent swayed while balancing, used his arms to balance, hopped and put his foot down. A.R. 217. The Respondent displayed impairment during this test.

The Investigating Officer administered a preliminary breath test to the Respondent, which showed that he had a blood alcohol content of .131. A.R. 217. The Investigating Officer was trained and certified to administer this test. The Investigating Officer used an individual disposable mouthpiece to administer the test. A.R. 217.

The Investigating Officer then lawfully arrested the Respondent for driving under the influence of alcohol, drugs or controlled substances ("DUI"). The Investigating Officer read the Implied Consent Statement to the Respondent and provided him with a copy. Both the Investigating Officer and the Respondent signed the Implied Consent Statement. A.R. 220.

The Investigating Officer commenced the process of administering the Intoximeter test. He observed the Respondent for 20 minutes to ensure that he had not ingested food, drink or other foreign matter. The Investigating Officer ran the checks on the testing instrument. The instrument was working properly. The Investigating Officer was certified to run the Intoximeter. The Intoximeter ticket reflects that the Respondent had a blood alcohol content of 0.128%. A.R. 218.

The Division of Motor Vehicles ("DMV") issued an order of revocation for DUI and an order of disqualification of the Respondent's commercial driver's license on July 27, 2012. A.R. 34-35.

The Office of Administrative Hearings ("OAH") conducted a hearing on April 17, 2017. A.R. 264. At the hearing, the Investigating Officer did not appear because he was deployed to Germany in his military capacity. A.R. 275. The Respondent appeared and testified at the hearing.

The OAH entered a *Final Order* on April 26, 2019. A.R. 243. The order upheld the revocation for DUI and the disqualification of the Respondent's commercial driver's license.

The Respondent appealed the matter to the circuit court of Kanawha County. Following briefing by the parties, the circuit court entered a Final Order. A.R. 1. It is from that order that the Petitioner appeals.

SUMMARY OF ARGUMENT

The circuit court has concluded that this Court, in deciding *Dale v. Odum*, 233 W. Va. 601, 760 S.E.2d 415 (2014)(per curiam), was unaware that the entire statutory scheme for the administrative process following a DUI arrest was radically changed in 2010, with the creation of the OAH. The circuit court presumes that this Court simply did not perceive that the DMV is only a party and the OAH is the agency in these proceedings. However, what this Court clearly grasps, the circuit court does not. The circuit court failed to perceive that under the new scheme, while the OAH is the agency for purposes of adjudicating cases, the DMV has two roles: it is the agency which produces the record for the agency hearing the case, and it is a party to the hearing.

Several erroneous holdings flow from the circuit court's flawed finding: that the Administrative Procedures Act does not apply to hearings such as the one in this case, that the Rules of Evidence apply to admission of the DMV's agency documents, that the author of the documents must be present at the hearing and authenticate the documents, that the licensee does not have the right to cross-examine or present rebuttal evidence, and that the DMV shifts the burden of proof away from itself in these proceedings. The circuit court incorrectly held that "[*Dale v. Odum*] violates the West Virginia Rules of Evidence, the right of the licensee to cross examine witnesses, the DMV's burden to prove its case, and the OAH Hearing Examiner's charge of making specific findings based upon all of the evidence." A.R. 11.

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). This Court has heard appeals of decisions by the OAH which involved application of 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*, 233 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).

The requirement of admission of the DMV record is long-established. It is admitted pursuant to W.Va. Code § 29A-5-2(b); it is subject to challenge; it does not shift the burden of proof from the DMV; and it does not create a presumption of guilt. Moreover, any party to the proceedings has the right to cross examine any witness who testifies.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R. App. Pro. Rule 19 is appropriate on the bases that this case involves assignments of error in the application of settled law; that the case involves an unsustainable exercise of discretion where the law governing that discretion is settled; and that this case involves a result against the weight of the evidence.

ARGUMENT

A. STANDARD OF REVIEW

This Court's review of a circuit court's order deciding an administrative appeal is made pursuant to W. Va. Code § 29A–5–4(a)(1964). The Court reviews questions of law presented *de novo*; and findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015). "In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law de novo." Syl. Pt. 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

B. THE CIRCUIT COURT ERRED IN FINDING THAT THIS COURT'S OPINION IN *DALE V. ODUM*, 233 W.VA. 601, 760 S.E.2D 415 (2014)(PER CURIAM) MISAPPLIED W. VA. CODE § 29A-5-2(b) AND THAT THE DMV'S AGENCY RECORD SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE.

The circuit court erred in finding that the DMV is only a party to license revocation hearings before the OAH, when it is an agency for purposes of admission of the agency record supporting the revocation, *and* a party to the OAH hearing. The circuit court held, "However, since the creation of the Office of Administrative Hearings in 2010, the 'agency' whose decisions are subject to circuit court review pursuant to W. Va. Code § 29A-5-4 is the Office of Administrative Hearings, and not the DMV, which merely became a party." (A.R. 7). The circuit court further incorrectly held that "[*Dale v. Odum*] violates the West Virginia Rules of Evidence, the right of the licensee to cross examine witnesses, the DMV's burden to prove its case, and the OAH Hearing Examiner's charge of making specific findings based upon all of the evidence." A.R. 11.

The DMV is both a party **AND** an agency in administrative license revocation proceedings. Under West Virginia Code 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 DMV is the agency which enters its file into evidence pursuant to W. Va. Code § 29A-5-2(b). 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 DMV Commissioner. 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." The only role of the OAH is to adjudicate. W. V. Code R. § 105-1-1.1 provides, "This legislative rule shall govern the initiation and administration of appeals that are heard and determined by the Office of Administrative Hearings from orders and decisions

of the Commissioner of the Division of Motor Vehicles." The DMV issues the initial license revocation and is necessarily the agency which must enter its file into evidence, and it is the Respondent at the hearing.

The DMV's records are ***required*** to be admitted at OAH hearings. W. Va. Code §29A-5-2(b)(1964); *Crouch v. W. Va. Division of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006), *Comm'r of W. Va. Div. of Motor Vehicles v. Brewer*, 13-0501, 2014 WL 1272540 (W. Va., Mar. 28, 2014)(memorandum decision), *Dale v. Odum*, 233 W. Va. 601, 760 S.E.2d 415 (2014) (per curiam), *Cain v. W. Va. Div. of Motor Vehicles*, 225 W. Va. 467, 694 S.E.2d 309 (2010), *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010)(per curiam), *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008)(per curiam), *Dale v. Reed*, 13-0429, 2014 WL 1407353 (W. Va., Apr. 10, 2014) (memorandum decision), *Dale v. Reynolds*, 13-0266, 2014 WL 1407375 (W. Va., Apr. 10, 2014) (memorandum decision), *Davis v. Miller*, 11-1189, 2012 WL 6097655 (W. Va., Dec. 7, 2012) (memorandum decision), and *Miller v. Chenoweth*, 229 W. Va. 114, 727 S.E.2d 658 (2012)(per curiam). These cases include admission of the DMV's agency file both when the DMV heard administrative appeals and after the OAH began conducting hearings in 2010.

At the initiation of the license revocation 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. W. Va. Code §17C-5A-1(c). 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. These agency documents must be admitted into evidence because they are the documents upon which the case rests. The OAH does not have possession of those documents until they are presented by the DMV. Thus, the DMV is the agency for purposes of admission of the agency documents.

The standard of proof required to revoke one's driving privileges for driving while under the influence of alcohol in a civil administrative proceeding is preponderance of the evidence. "Where there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway,

exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol." Syllabus Point 2, *Albrecht v. State,* 173 W. Va. 268, 314 S.E.2d 859 (1984). *See*, Syllabus Point 2, *Carte v. Cline,* 200 W. Va. 162, 488 S.E.2d 437 (1997); Syl. Pt. 4, *Lowe v. Cicchirillo,* 223 W. Va. 175, 672 S.E.2d 311 (2008)(per curiam); and *Groves v. Cicchirillo,* 225 W. Va. 474, 481, 694 S.E.2d 639, 646 (2010)("In addition, the evidence reveals that Appellee was given two field sobriety tests, the HGN test and the one-leg stand test. The results from these tests were recorded by the deputy, showing that Appellee had failed in his performance. We find that these facts provide sufficient evidence to support the conclusion that Appellee was driving a motor vehicle while under the influence of alcohol, with or without the Intoximeter results, and thus represent an adequate basis for the Commissioner to revoke Appellee's driver's license.")

In *Comm'r of W. Virginia Div. of Motor Vehicles v. Brewer*, No. 13-0501, 2014 WL 1272540 (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)." 2014 WL 1272540 at *4. In making its decision, the 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." *Id.*

Crouch, supra clearly set forth that the agency's documents are admissible pursuant to the Administrative Procedures Act, and added that even if the documents were not admissible pursuant to the

Administrative Procedures Act, they would be admissible pursuant to the Rules of Evidence. "Assuming arguendo that the West Virginia Rules of Evidence were to apply to this issue, the 'STATEMENT OF ARRESTING OFFICER' would nevertheless be admissible. West Virginia Rule of Evidence 803(8)(C) provides an exception to the hearsay rule for '[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... (C) in civil actions ..., factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.' Subsection (C) would apply to the extent that this Court has characterized administrative revocation hearings as civil in nature. *See, Carte v. Cline,* 200 W.Va. 162, 167, 488 S.E.2d 437, 442 (1997) ('Administrative revocation hearings are civil in nature ....'). Accordingly, as a statement that sets forth 'factual findings resulting from an investigation made pursuant to authority granted by law' as outlined in West Virginia Rule of Evidence 803(8)(c), the 'STATEMENT OF ARRESTING OFFICER' would be admissible under that rule." Fn. 10, *Crouch v. W. Virginia Div. of Motor Vehicles.*

This Court affirmed its position on admission of agency file documents in *Dale v. Reynolds*, No. 13-0266, 2014 WL 1407375 (W. Va. Apr. 10, 2014) (memorandum decision) and found, "there is no requirement that the evidence of record be testimonial as opposed to documentary. *See* W. Va. Code § 29A–5–2(b)." *Reynolds* at Fn. 5. *See*, *Dale v. Reed*, No. 13-0429, 2014 WL 1407353 (W. Va. Apr. 10, 2014) (memorandum decision),"[u]nquestionably, however, the DUI Information Sheet is admissible, affirmative evidence of its contents." 2014 WL 1407353, at *2 and *Reed v. Craig*, No. 14-0346, 2015 WL 3387982 (W. Va. May 15, 2015).

The DMV, which has the burden of proof at administrative hearings, can meet its burden with the admission of the file documents. Any party may call witnesses; yet there is no obligation on any party to do so. Any party may cross examine any witnesses. "The party carrying the burden of proof has the initial opportunity to present evidence. Parties have the right to cross examine witnesses and to submit rebuttal evidence. Following the presentation of all evidence, each party has the right to offer closing arguments." W. Va. Code R. 105-1-15.8.

Admission of the documents before the OAH creates a rebuttable presumption of their accuracy. *Dale v. Judy*, No. 14-0216, 2014 WL 6607609, at *3 (W. Va. Nov. 21, 2014) (memorandum decision) (citing *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010) and *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006)). *See also*, *Dale v. Haynes*, No. 13-1327, 2014 WL 6676546 (W. Va. Nov. 21, 2014) (memorandum decision); *Reed v. Craig*, No. 14-0346, 2015 WL 3387982 (W. Va. May 15, 2015) (memorandum decision); *Reed v. Zipf*, 239 W. Va. 752, 806 S.E.2d 183 (2017) and *Reed v. Lemley*, No. 17-0797, 2018 WL 4944553 (W. Va. Oct. 12, 2018) (memorandum decision).

The circuit court's reasoning is unsupported. The court held, "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 statues and the code of state rules [footnote citing a superceded DMV rule omitted], while also violating a contesting driver's constitutional rights of due process." A. R. 10. In fact, the DMV's interpretation of W. Va. Code § 29A-5-2(b) is that its agency record is admitted into evidence subject to rebuttal at the OAH hearing. If this interpretation nullifies code and legislative rule, then why has it been affirmed by this Court so many times? The circuit court continues, "If the DMV is able to lawfully and automatically admit evidence into the record without check, then the driver is unable to present any evidence whatsoever under the plain reading of the statue as established in *Doyle* [*Dale v. Odum, supra*]." A.R. 10. "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." A.R. 10. The circuit court accuses the DMV of prohibiting the driver from testifying or offering other evidence, which is absurd, not the DMV's position, and contradicted by this very case in which the driver testified. The circuit court's determination to upend 40 years of administrative procedure may have been avoided if it understood that the DMV is both the agency and the Respondent in these proceedings.

The West Virginia 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.

Administrative agencies across the country follow the same procedure. 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." 5 U.S.C.A. § 556(d) (1990).

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." In *State v. Campbell*, 115 Ohio App. 3d 319, 685 N.E.2d 308 (1996), an appellant argued that this Code section switches the burden of proof to the accused on whether the suspension was justified. The court found, "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.

Here, the DMV met its burden with the admission of the file documents. Admission of the agency file alone can meet the preponderance of the evidence standard. The Respondent testified in an attempt to rebut the documentation but was found by the OAH to be not credible. In these proceedings, the tribunal is charged with answering whether the person was DUI[3].

[3]In proceedings such as this, "[t]he principal question at the hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight..." W. Va. Code § 17C-5A-2 (e).

If one party presents evidence and the other does not, the party who fails to challenge adverse evidence or to present its own evidence does not lose because of a presumption of guilt or a shifting of the burden of proof. This Court has looked askance at drivers who ostensibly challenge the evidence in the case against them, yet do not make any actual attempt to rebut the evidence. "In the present case, no effort was made to rebut the accuracy of any of the records, including the DUI Information Sheet, Implied Consent Statement or Intoximeter printout which were authenticated by the deputy and admitted into the record at the DMV hearing." *Groves v. Cicchirillo*, 225 W. Va. 474, 479, 694 S.E.2d 639, 644 (2010) (per curiam); "By citing the fact that Mr. Cain did not testify or present evidence on his behalf, the hearing examiner was not wrongly shifting the burden of proof to the Appellee." *Cain v. W. Virginia Div. of Motor Vehicles*, 225 W. Va. 467, 473, 694 S.E.2d 309, 315 (2010); "Ms. Reed did not testify, nor was there any other affirmative evidence, that she was not given a written implied consent statement to contradict the DUI Information Sheet." *Dale v. Reed*, 13-0429, 2014 WL 1407353 (W. Va. Apr. 10, 2014) (memorandum decision); "The deficiency in Mr. Veltri's argument regarding the concept of retrograde extrapolation is that he failed to present any evidence at trial of the retrograde extrapolation in his individual circumstance." *Dale v. Veltri*, 230 W. Va. 598, 602, 741 S.E.2d 823, 827 (2013) (per curiam); "In fact, the only evidence of record on this issue was Deputy Lilly's testimony which clearly demonstrated that the officer gave the Implied Consent form to the appellee. As there was no testimony in conflict with the officer, we see no reason to contradict his testimony." *Lilly v. Stump*, 217 W. Va. 313, 319, 617 S.E.2d 860, 866 (2005) (per curiam); "To the extent that Ms. McCormick believed Trooper Miller did not perform the test in accordance with the law, she was required to question Trooper Miller in this area." *Dale v. McCormick*, 231 W. Va. 628, 633, 749 S.E.2d 227, 232 (2013) (per curiam); "Pursuant to this Court's decision in McCormick, if Mr. Oakland had a serious inquiry or challenge to the quality or quantity of Officer Wilhelm's response about his credentials, the

onus was on Mr. Oakland to inquire further." *Dale v. Oakland*, 234 W. Va. 106, 112, 763 S.E.2d 434, 440 (2014) (per curiam); ". . . [W]hile Mr. Doyle objected to the admission of the statement of the arresting officer, he did not come forward with any evidence challenging the content of that document. Consequently, there was unrebutted evidence admitted during the administrative hearing that established a valid stop of Mr. Doyle's vehicle, and the hearing examiner's finding to the contrary was clearly wrong." *Dale v. Odum*, 233 W. Va. 601, 609, 760 S.E.2d 415, 423 (2014) (per curiam).

In this case, the Respondent testified and attempted to rebut the evidence in the record, but was found by the trier of evidence to be not credible. Therefore, the OAH properly found that the DMV had met its burden of proof by admission of the agency documents. The OAH found that the stop of the Respondent's motorcycle was valid, that he had the odor of alcohol on his breath, that he was unsteady getting off the motorcycle, walking and standing, that his speech was slurred and mumbled, and that his eyes were bloodshot. He failed two field sobriety tests and admitted to drinking alcohol prior to driving. The results of the Intoximeter showed that his blood alcohol content was 0.128%. A.R. 248. The OAH went so far as to conclude, "Moreover, even if he was telling the truth about his alcohol consumption, and/or his tobacco use during the incident, and/or his claimed physical issues affecting his steadiness and his test performance, he still admitted to operating a motor vehicle and consuming alcoholic beverages, and he failed to rebut the documentary evidence indicating intoxication. That is all that is necessary to find the Petitioner operated a motor vehicle in this state while impaired." A.R. 248. The circuit court erred in finding, "Accordingly, there is the absurd result of effectively stripping the DMV of its burden to prove by a preponderance of the evidence its case against the driver." A.R. 6. The DMV met its burden of proof.

"An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law." Syl. Pt. 4, *Musick v. Univ. Park at Evansdale, LLC*, 241 W. Va. 194, 820 S.E.2d 901 (2018). From 2006 (*Crouch*) through 2018 (*Lemley*) this Court has reviewed the statutory language in W. Va. Code § 29A-5-2 (1964) from and has consistently determined that the evidentiary exception in W. Va. Code § 29A-5-2(b) (1964) applies to the Commissioner's file. There has been no change in the administrative procedures below, nor has there been judicial error by this Court in its interpretation to warrant departure from the case law.

C. THE CIRCUIT COURT ERRED IN FINDING THAT THE DMV MUST PRODUCE THE INVESTIGATING OFFICER AT THE HEARING.

There is no requirement that the DMV produce the Investigating Officer, or any witness, at a hearing. The circuit court further erred in implicitly finding that the absence of the Investigating Officer at the administrative hearing should be held against the DMV. "With no requirement for the arresting officer to appear as a witness, the contesting driver cannot cross examine his accuser and the OAH Hearing Officer hears no testimony regarding the legality of the traffic stop..." A.R. 5. In a clear example of its myopic study of the statutes and rules which govern OAH/DMV procedure, the circuit court cited W.Va. Code R. 91-1-3.7.2,[4] which is a DMV legislative rule which is superceded by the legislative rules of the OAH found at W. Va. Code R. Title 105, Series 1 to 18.

[4]The rule states, inter alia, "[t]hat where the arresting officer fails to appear at the hearing, but the licensee appears, the revocation ... may not be based solely on the arresting officer's affidavit or other documentary evidence."

When the OAH became the tribunal in 2010, the DMV was relieved of the statutory burden of causing the officers' attendance. The OAH promulgated legislative 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). Here, the Respondent chose not to subpoena the Investigating Officer to the hearing.

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 legislative 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.

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.) Indeed, the only penalty for failure to appear lies with the driver who requests a hearing: "The OAH may enter an order affirming the Commissioner's Order of Revocation and striking the appeal from the docket if a Petitioner fails to appear either in person or by his or her attorney. . ." W. Va. Code R. §105-1-14.1.

The circuit court's implicit bias toward the DMV because of the Investigating Officer's inability to appear at the hearing is unfounded. "Neither the Investigating Officer nor any witness for the Respondent appeared at the hearing to testify, and the Respondent rested its case entirely on the Commissioner's file." A.R. 4. The Administrative Procedures Act provides that "[e]very party shall have the right of cross-examination of witnesses ***who testify***, and shall have the right to submit rebuttal evidence." [Emphasis added] W. Va. Code § 29A-5-2(c) (1998). The circuit court erred in finding that there is a "right of the licensee to cross examine witnesses" (A. R. 11) outside of the aforementioned right (witnesses who testify). The circuit court takes it a step further; and its bias against the DMV/OAH procedures is evident: "The application of *Doyle* [*Dale v. 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, authentication, or challenge. Since 2014, the DMV has not been required to produce a single witness to prove its case, and the OAH Hearing Examiner has been mandated to admit and consider all of the DMV's evidence, with no judicial discretion, in direct violation of the driver's constitutional right of due process. Doyle and its progeny have misconstrued the provisions of W. Va. Code 29A-5-2(b) by eliminating the DMV's burden of proof, and creating a presumption of guilt." A.R. 11.

This Court 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). West Virginia's statutes, rules and caselaw provided the Respondent with the opportunity to present evidence, to subpoena any witness which he desired to examine, and to rebut any of the DMV's evidence. The Respondent chose not to subpoena the Investigating Officer. The Court determined in *Jordan, supra* 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).

D. THE CIRCUIT COURT ERRED IN FAILING TO GIVE DEFERENCE TO THE OAH HEARING EXAMINER'S CREDIBILITY DETERMINATIONS.

The OAH Hearing Examiner made an adverse credibility determination against the Respondent. "This testimony is not credible." A.R. 247. "This testimony is both self-serving and convenient once again; the Petitioner's credibility is strained at best." A.R. 248. "Simply stated, the Petitioner's testimony was not credible." A.R. 248. This finding was owed deference by the circuit court. Yet that court summarily dismissed the OAH's credibility determination, finding that "Petitioner offered testimony that challenged and rebutted the information contained in the Commissioner's file, including testimony that cast doubt on the reliability of both breath tests and all three (3) field sobriety tests." A. R. 15. This is an improper substitution of judgment by the lower court. "This Court has made clear that '[s]ince a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations.' Syllabus Point 1, in part, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000)." *Reed v. Winesburg*, 241 W. Va. 325, 333, 825 S.E.2d 85, 93 (2019). "Indeed, if the

lower tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact. [citation omitted]. Moreover, we must afford the lower tribunal's findings great weight in this case because the factual determinations largely are based on witness credibility. Upon reviewing the evidence in its entirety, we conclude that the ALJ's findings of fact were based on a plausible view of the evidence. The ALJ conducted the hearing and observed the witnesses firsthand, so he was in the best position to make credibility determinations." *Bd. of Educ. of Cty. of Mercer v. Wirt*, 192 W. Va. 568, 579, 453 S.E.2d 402, 413 (1994).

This Court has held, "Our cases have 'recognized that credibility determinations by the finder of fact in an administrative proceeding are binding unless patently without basis in the record.' *Webb v. West Virginia Bd. of Medicine,* 212 W.Va. 149, 156, 569 S.E.2d 225, 232 (2002) (internal quotations and citation omitted). That is, '[c]redibility determinations made by an administrative law judge are ... entitled to deference.' Syl. pt. 1, in part, *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000)." *Dale v. McCormick,* 231 W. Va. 628, 635, 749 S.E.2d 227, 234 (2013);Syl. Pt. 6, *Dale v. Veltri,* 230 W. Va. 598, 741 S.E.2d 823 (2013). Where there is a conflict between the testimony or evidence of two different witnesses, *Muscatell v. Cline,* 196 W. Va. 588, 474 S.E.2d 518 (1996), a finder of fact may make implicit credibility determinations which a court must defer to as much as an explicit finding of credibility. Elaborate, extended, or explicit analysis is not required. "[T]his Court has recognized that '[c]redibility determinations made by an administrative law judge are ... entitled to deference.' Syl. pt. 1, in part, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000). This is so because the hearing examiner who observed the witness testimony is in the best position to make credibility judgments. *Cf. Gum v. Dudley,* 202 W.Va. 477, 484, 505 S.E.2d 391, 398 (1997) ('The trial court ... observed the demeanor of the witnesses and other nuances of a trial that a record simply cannot

convey.')." *Sims v. Miller*, 227 W. Va. 395, 402, 709 S.E.2d 750, 757 (2011), citing *Muscatell, supra.* Simply put, "A reviewing court cannot assess witness credibility through a record."*Michael D.C. v. Wanda L.C.*, 201 W.Va. 381, 388, 497 S.E.2d 531, 538 (1997).

There is no "law requiring the ALJ to use particular words or to write a minimum number of sentences or paragraphs." *Francis v. Astrue*, No. 3:09-cv-01826 (VLB), 2011 WL 344087, at * 4 (D. Conn. Feb. 1, 2011). Indeed, an ALJ is not required to make "'explicit credibility findings' as to each bit of conflicting testimony, so long as his factual findings as a whole show that [the ALJ] 'implicitly resolve[d]' such conflicts." *N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 26 (1st Cir. 1999) (quoting *N.L.R.B. v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir.1982)). *Accord J.P. ex rel. Peterson v. County Sch. Bd.*, 516 F.3d 254, 261 (4th Cir. 2008) ("While the hearing officer did not explicitly state that he found the School Board's witnesses more persuasive, our case law does not require an IDEA hearing officer to offer a detailed explanation of his credibility assessments. . .. Moreover, because the hearing officer ultimately determined that J.P. made more than minimal progress under the 2004 IEP and that the 2005 IEP was adequate (views that were advocated by the School Board's witnesses and disagreed with by the parents' witnesses), it is apparent that the hearing officer in fact found the School Board's evidence more persuasive."); *N.L.R.B. v. Katz's Delicatessen,* 80 F.3d 755, 765 (2d Cir.1996) (An ALJ may resolve credibility disputes implicitly rather than explicitly where his "treatment of the evidence is supported by the record as a whole."); *see also Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995) (emphasis added) ("The ALJ, who *apparently* disbelieved the plaintiff's recollection of the circumstances leading up to the continuance, did not exceed permissible bounds in accepting testimony of the defendant's witnesses about this exchange.").

CONCLUSION

The circuit court's *Final Order* must be reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0127

EVERETT FRAZIER, COMMISSIONER OF THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

Petitioner,

v.

GARLAND HARLESS,

Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Petitioner's Brief* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 21st day of May, 2020, addressed as follows:

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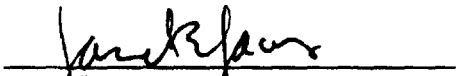

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