IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0192
(Circuit Court Civil Action No. 19-AA-80)

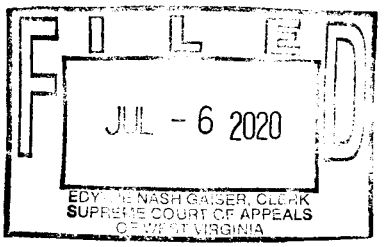
EVERETT J. FRAZIER, COMMISSIONER, WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

Petitioner,

v.

JOSHUA DERECHIN,

Respondent.



BRIEF OF THE DIVISION OF MOTOR VEHICLES

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ASSIGNMENTS OF ERROR

1. **The circuit court erred in finding that Mr. Derechin was actually and substantially prejudiced by the post-hearing delay of the Office of Administrative Hearings.**

2. **In reversing the OAH's findings that the Investigating Officer's credibility was not impeached and that there was no spoliation of evidence, the circuit court arbitrarily and capriciously substituted its judgment for that of the fact finder below.**

3. **The circuit court erred in ordering costs, fees, and expenses against the DMV.**

4. **The Division of Motor Vehicles also suffered actual and substantial prejudice which must be balanced with the prejudice proven by the driver, if any.**

STATEMENT OF THE CASE

On February 1, 2013, at approximately 11:52 p.m., B. A. Lightner of the Charleston Police Department ("CPD"), the Investigating Officer herein, observed a black Toyota Rav 4 traveling on Court Street in Charleston, Kanawha County, West Virginia, make an illegal turn and turn abruptly. (App[1]. at PP. 326, 332.) The Investigating Officer initiated a traffic stop and identified the driver of the vehicle as Joshua Derechin, the Respondent herein. *Id.*

Mr. Derechin had the odor of an alcoholic beverage emanating from his breath; had a nervous attitude; had glassy eyes; was unsteady while exiting the vehicle; was normal while walking to the roadside; was normal while standing; and admitted that he had been drinking alcoholic beverages "not tonight, earlier." (App. at PP. 327, 332.) The Investigating Officer asked Mr. Derechin to perform standardized field sobriety tests. (App. at PP. 327-328, 332-333.)

Prior to administering the Horizontal Gaze Nystagmus ("HGN") Test, the Investigating

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[1] App. refers to the *Appendix* filed contemporaneously with the *Brief of the Division of Motor Vehicles.*

Officer performed a medical assessment of Mr. Derechin's eyes which indicated that Mr. Derechin was a viable candidate for the test because he had equal pupils, equal tracking, and no resting nystagmus. (App. at P. 327.) During the HGN Test, Mr. Derechin exhibited impairment because both of his eyes lacked smooth pursuit, exhibited distinct and sustained nystagmus at maximum deviation, and displayed the onset of nystagmus prior to a 45 degree angle. (App. at P. 327, 333.)

The Investigating Officer explained and demonstrated the Walk-and-Turn Test, and Mr. Derechin exhibited impairment because he started the test too soon, completed an improper turn, missed walking heel-to-toe, and raised his arms to balance. *Id.* The Investigating Officer also noted that Mr. Derechin stumbled while taking this test. (App. at P. 327.)

The Investigating Officer explained and demonstrated the One Leg Stand Test, and Mr. Derechin exhibited impairment clues because he swayed while balancing, used his arms to balance, and hopped. (App. at PP. 328, 333.) The Investigating Officer also noted that Mr. Derechin put his foot down "twice in the first 10 counts." (App. at P. 328.)

Mr. Derechin declined the Investigating Officer's offer to take a preliminary breath test. (App. at PP. 328, 333.) The Investigating Officer arrested Mr. Derechin for DUI and transported him to the CPD for processing and for the administration of a secondary chemical test of the breath. (App. at PP. 325, 333.)

The Investigating Officer read and provided Mr. Derechin with a copy of the W. Va. Implied Consent Statement. (App. at PP. 329, 331, 333.) The CPD has designated the Intox EC/IR-II as the secondary test of the breath. (App. at P. 329.) The Investigating Officer was trained and certified to administer the Intox EC/IR-II at the W. Va. State Police Academy on April 15, 2004. *Id.* The Investigating Officer observed Mr. Derechin for 20 minutes to ensure that he had not ingested food

or drink and to ensure that he had no other foreign matter in his mouth. (App. at PP. 329, 333.) The Investigating Officer completed the remaining steps on the Breath Test Operational Checklist (App. at P. 329), and Mr. Derechin provided a breath sample which indicated that he had a blood alcohol concentration of .071%. (App. at PP. 325, 326, 329, 333.)

On February 22, 2013, the Division of Motor Vehicles ("DMV") sent Mr. Derechin 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. 215.) Because this was Mr. Derechin's first DUI offense (as evidenced by his "A" file number), he had two options for reinstatement of his driving privileges: 1) he could serve 15 days of revocation plus successfully complete 120 days in the W. Va. Alcohol Test and Lock Program ("Interlock"); or 2) he could serve 90 days of revocation. (App. at P. 215.) Both options also required successful participation in the W. Va. Safety and Treatment Program and payment of reinstatement fees. *Id.*

On March 19, 2013, the Office of Administrative Hearings ("OAH") received Mr. Derechin's request for an administrative hearing. (App. at PP. 219-224.) On May 4, 2013, the OAH scheduled a hearing for July 9, 2013. (App. at P. 226.) On June 18, 2013, Mr. Derechin asked for his first continuance. (App. at PP. 237-240.) On June 25, 2013, the OAH granted Mr. Derechin's motion (App. at P. 242), and on June 26, 2013, it rescheduled the matter for September 12, 2013. (App. at P. 245.) On September 12, 2013, the DMV asked for an emergency continuance (App. at PP. 263-264) which the OAH granted the same day. (App. at P. 267.)

During the 2014 legislative session, in order to combat a backlog of cases awaiting both hearing and decision at the OAH, Senate Bill 434 was introduced to amend W. Va. Code § 17C-5A-3a. (App. at P. 93.) The amendments became effective on June 6, 2014, and permitted drivers whose

licenses were revoked for DUI of alcohol to immediately participate in the Test and Lock Program provided that their period of revocation would be served on Interlock and provided the drivers waived their right to ask for an administrative hearing. *Id.* The DMV offered participation to petitioners with DUI cases pending prior to the date of passage. Mr. Derechin did not avail himself of this option.

On August 12, 2014, the OAH rescheduled the matter for February 12, 2015. (App. at P. 270.) The rescheduling notice included *Additional Instructions to the Parties* which put the parties on notice that "[i]f a party intents to present testimony from any person (including any law-enforcement officer) it is the responsibility of that party to obtain the presence of the person at the hearing. The 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." (App. at P. 271.) The OAH also included a *Standing Memorandum Order Governing Motions to Admit Documentary Exhibits*[2] (App. at PP. 274-276), which cautioned the parties, *inter alia*, to "be prepared for the substantial prospect" that in the event the Investigating Officer does not appear, the DUI Information Sheet and other documents prepared by that officer which are part of the DMV's file will be admitted, and the matter may proceed to hearing over the objections of the arrestee. (App. at P. 276.)

Due to a scheduling error by the OAH (App. at P. 279), on February 6, 2015, the matter was rescheduled for hearing on March 12, 2015. (App. at PP. 282-285.) On March 2, 2015, at Mr. Derechin's request, the OAH issued a subpoena *duces tecum* to the Chief of the CPD seeking records related to the Intoximeter and Investigating Officer's disciplinary records. (App. at PP. 310-312.) On

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[2] The *Standing Memorandum* is dated April 23, 2014 and signed by then Chief Hearing Examiner of the OAH, John G. Hackney, Jr. (App. at P. 276.)

March 11, 2015, Mr. Derechin asked for his second continuance of the hearing he requested, and the OAH granted his request. (App. at PP. 314-318.) On March 18, 2015, the OAH rescheduled the matter for August 28, 2015. (App. at PP. 320-323.) The OAH conducted an administrative hearing on August 28, 2015. (App. at P. 474.) The CPD Chief, who had been subpoenaed by Mr. Derechin, did not appear. Mr. Derechin proceeded with the OAH hearing and didn not take any action to enforce the subpoena.

On September 11, 2018, the DMV filed a *Motion for Final Order* with the OAH. (App. at PP. 75, 379-380.) The OAH did not respond to or rule on the DMV's motion. (App. at PP. 74-75, 210-560.) On July 22, 2019, the OAH entered its *Final Order*. (App. at PP. 384-393.)

On July 30, 2019, Mr. Derechin filed a *Petition for Appeal* with the Circuit Court of Kanawha County in which he alleged, *inter alia*, that he was actually and substantially prejudiced as a result of the OAH's delay in entering its *Final Order*. (App. at PP. 189-208.) On August 7, 2019, the circuit court conducted a hearing on Mr. Derechin's request for a stay or *supersedeas* of his license revocation, and Mr. Derechin testified. (App. at PP. 160-188.) On August 20, 2019, the DMV filed a *Cross-Petition for Judicial Review* in which it alleged it was actually and substantially prejudiced as a result of the OAH's delay in entering its *Final Order*. (App. at PP. 109-159.) On November 19, 2019, the circuit court conducted an evidentiary hearing to comply with the requirements in syllabus point 2, *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017).

The circuit court entered its *Final Order Granting Appeal and Reversing Final Order of the Office of Administrative Hearings* on February 4, 2020. (App. at PP. 2-13.) The DMV filed its appeal with this Court on March 5, 2020.

SUMMARY OF ARGUMENT

Mr. Derechin was arrested for DUI, asked for an administrative hearing, and twice continued that hearing. Prior to and after the administrative hearing, he enjoyed the automatic stay of his license revocation but did not continue to move along his appeal by asking the OAH for an order or by filing a *mandamus* action to compel the OAH to enter an order. From the time of his arrest in 2013 through the present, Mr. Derechin has remained with the same employer and does not need a driver's license to perform his job as an engineer. After the OAH issued its *Final Order*, Mr. Derechin appealed, alleging that he was "aggrieved by the two and one-half year delay in receiving the hearing and four years awaiting a decision." (App. at P. 193.)

Mr. Derechin failed to prove that he was presumptively prejudiced by the pre-hearing delay or that he was unable to defend his case, and he failed to prove that there was a detrimental change in his circumstances post-hearing which caused him actual and substantial prejudice. Accordingly, the circuit court erred in finding that Mr. Derechin was actually and substantially prejudiced by the post-hearing delay of the OAH and erred in requiring the DMV to pay his attorney fees, costs and expenses caused by "the overall delay in this matter." (App. at P. 13.)

Further, Mr. Derechin was responsible by OAH rule and policy to enforce any subpoenas which he served. He failed to enforce a subpoena *duces tecum* served upon the CPD and did not prove that there was a spoliation of evidence. At the administrative hearing, Mr. Derechin failed to present any evidence to impeach the Investigating Officer's credibility pursuant to the W. Va. Rules of Evidence. On appeal, the circuit court arbitrarily and capriciously substituted its judgment for that of the fact finder below when it reversed the OAH's findings that the Investigating Officer's credibility was not impeached and that there was no spoliation of evidence.

Finally, the post-hearing delay by the OAH cannot be attributed to the DMV. While this matter was pending, the DMV formally and informally attempted to expedite the OAH's entry of its final orders. Even though the OAH attempts to accommodate drivers' requests to enter final orders, the OAH has not and will not accommodate the DMV's requests. The DMV is mandated to remove impaired drivers from the roadways as quickly as possible, yet the OAH's post-hearing delay severely impedes the DMV's mandate. Because the DMV has also suffered actual and substantial prejudice caused by the OAH's post-hearing delay, this Court must revisit *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017) to require the circuit court to consider the DMV's prejudice when it balances the prejudice proven by the driver, if any.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R. App. Pro. 20 (2010) is appropriate on the basis that this case involves a matter of fundamental public importance.

ARGUMENT

A. Standard of Review

"On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. Syllabus point 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)." Syllabus point 1, *Frazier v. S.P.*, 242 W. Va. 657, 838 S.E.2d 741 (2020). "Further, '[i]n cases where the circuit court has [reversed] the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*.'

Syl. pt. 2, *id.*" 242 W. Va. 657, 838 S.E.2d 741, 746.

B. The circuit court erred in finding that Mr. Derechin was actually and substantially prejudiced by the post-hearing delay of the Office of Administrative Hearings.

This Court first addressed post-hearing delay by the OAH in *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017). There, this Court held that

> [o]n appeal to the circuit court from an order of the Office of Administrative Hearings affirming the revocation of a party's license to operate a motor vehicle in this State, when the party asserts that his or her constitutional right to due process has been violated by a delay in the issuance of the order by the Office of Administrative Hearings, the party must demonstrate that he or she has suffered actual and substantial prejudice as a result of the delay. Once actual and substantial prejudice from the delay has been proven, the circuit court must then balance the resulting prejudice against the reasons for the delay.

Syl. Pt. 2, *Staffileno*, *supra*. This Court also held that "the law governing revocation proceedings before OAH does not impose time constraints on the issuance of decisions by that agency following an administrative hearing. *See* W. Va. Code § 17C-5C-1 *et seq*. and 105 CSR § 1-1 *et seq*." 239 W. Va. 538, 542, 803 S.E.2d 508, 512.

The first step in the *Staffileno* test was for the circuit court to make a finding as to whether Mr. Derechin had been actually and substantially prejudiced as a result of the OAH delaying issuance of its final order. If the circuit court found that Mr. Derechin failed to prove actual and substantial prejudice as a result of the delay, then the court's review on this issue was complete. There was no need to balance the reasons for the delay against a non-existent prejudice.

Here, the circuit court determined that Mr. Derechin suffered substantial and actual prejudice as a result of the delay in this matter and that his due process rights were violated because "he has for an unreasonable period of time foregone career advancement in his present company and a management position in another State. Moreover, as previously discussed, being unable to drive

would disqualify him from continuing in his present job, as analogous to the facts in *Staffileno. . .*" (App. at P. 7.) The circuit court relied on Mr. Derechin's testimony that he "is a bridge design engineer for Michael Baker International in Charleston. He lives in Elkview. . . Thirty (30) percent of his time is spent on assignments outside of West Virginia. He also works in distant parts within the State." (App. at P. 5.)

In making its decision that Mr. Derechin was prejudiced by the post-hearing delay of the OAH, the circuit court also considered that Mr. Derechin

> has been unable to accept or apply for promotions while his license is in question. He was offered a management position with another company in his industry in Mississippi, but has declined due to his license being in jeopardy. . . Between the inception of the case below and 2016, Mr. Derechin was married and his wife was not employed, and until that time would have been available to drive him to his office and to work assignments. . . Mr. Derechin has no children, and no relatives closer than the Chicago area. . . A girlfriend, who does not live with him, had recently been staying with him temporarily to drive him locally if needed, which would not be a long-term solution. She is employed and travels in her work for the West Virginia Primary Care Association far outside the Charleston Area.

Id.

The requirement in this matter is that Mr. Derechin suffer "some type of detrimental **change in ...circumstances** ...related to the delay in OAH issuing its final order." *Straub v. Reed*, 239 W. Va. 844, 851, 806 S.E.2d 768, 775 (2017). [Emphasis added.] *See also*, *Reed v. Boley*, 240 W. Va. 512, 517, 813 S.E.2d 754, 759 (2018) (finding that "Mr. Boley has not actually alleged 'some type of detrimental change in his circumstances, related to the delay in OAH issuing its final order.' ") Here, the circuit court did not make a finding that Mr. Derechin identified some type of detrimental change in his circumstances related to the delay in OAH issuing its final order, yet it concluded that he was actually and substantially prejudiced as a result of the post-hearing delay. The court's

conclusion was clear error because post-hearing there has been no detrimental change in Mr. Derechin's circumstances related to the delay in the OAH entering its *Final Order*.

At the time of his arrest for DUI, Mr. Derechin was employed as a bridge design engineer for Michael Baker International, and he remained employed with Michael Baker International throughout the appeal to the circuit court. (App. at PP. 165, 169.) His office changed locations from Cross Lanes to Charleston (App. at P. 169), which is closer to his home in Elkview. (App. at P. 165.) Mr. Derechin testified that in the months following the administrative hearing, had he been required to serve the statutory license revocation period, he would have had alternate transportation by his wife who did not work. *Id.* He divorced in 2016 (App. at P. 170) and has no family in the area. (App. at P. 166.) He has no one available to take him to his work or work assignment, which are outside of West Virginia approximately 30% of the time. *Id.* Although Mr. Derechin speculated that being unable to drive himself might put his job "***in question***" and "***could*** cause" him to lose his job, he did not testify that his employer would terminate him and did not have his employer testify. (App. at PP. 166-167, 168.) Mr. Derechin's testimony regarding prejudice was remote and speculative.

Further, Mr. Derechin testified that there is "nothing realistic" available to him regarding public transportation options because the public bus runs during irregular hours and would inconvenience him by causing him to walk about a mile. (App. at P. 167.) Mr. Derechin testified that he has been unsuccessful in getting an Uber ride which would cost him about $22 one way from his house in Elkview to his office in Charleston. (App. at PP. 167-168.) There was no evidence before the circuit court that Mr. Derechin could not afford to pay for an Uber or a private driver. Mr. Derechin also testified that an unnamed company in Mississippi has "repeatedly" asked him during an undetermined time frame to move to Mississippi to work, but he "didn't want to go there and try

to have to work this out living in a different state, and you know, who knows what would have happened." *Id.* Again, Mr. Derechin's testimony regarding prejudice was remote and speculative.

Finally, Mr. Derechin did nothing to expedite issuance of the *Final Order* of the OAH: he did not file a *mandamus* action against the OAH seeking entry of a final order (App. at P. 173), and OAH Director and Chief Hearing Examiner Teresa Maynard testified that neither Mr. Derechin nor his counsel contacted the OAH to ask that the *Final Order* be entered. (App. at P. 72). Director Maynard accommodates drivers who contact her office by expediting final orders (App. at PP. 73-74.) The DMV has filed motions for entry of orders in numerous cases, including this one, and the DMV's requests to expedite the OAH final order are not heeded. (App. at PP. 74-75.)

The facts in this case differ substantially from those in *Staffileno, supra.* After the OAH heard Mr. Staffileno's appeal of his license revocation for knowingly permitting another person to drive his vehicle while DUI, Mr. Staffileno retired from his Tax Department position in reliance upon his having obtained a CDL and being employed as a school bus driver. 239 W. Va. 538, 543, 803 S.E.2d 508, 513. There, "the circuit court determined that Mr. Staffileno would not have retired when he did, and changed his employment to that of a school bus driver, if OAH had issued a timely decision." *Id.* This Court agreed.

This case is substantially similar to the facts in *Straub, supra.* There, Mr. Straub testified that he was employed as a pharmaceutical sales representative; his employer issued notices of potential layoffs regularly during the time between his arrest and administrative hearing; he attempted to secure other employment; and once job recruiters learned that his driver's license could possibly be revoked, the recruiters would no longer continue the job search. 239 W. Va. 844, —, 806 S.E.2d 768, 771. As to the post-hearing delay, this Court determined that Mr. Straub "could identify no actual

and substantial prejudice, e.g., some type of detrimental change in his circumstances related to the delay in the OAH issuing the final order." 239 W. Va. 844, —, 806 S.E.2d 768, 775. This Court found that Mr. Straub's speculation about lost employment opportunities was not tantamount to actual and substantial prejudice caused by the post-hearing delay.

Like Mr. Straub, Mr. Derechin could not identify a detrimental change in his circumstances ***as a result of or related to the delay.*** Mr. Derechin is not required to drive for his job like the bus driver in *Staffileno*, and he failed to present evidence that he would actually lose his job if he were required to complete the statutory license revocation requirements. There was no evidence before the circuit court that Mr. Derechin's divorce was a detrimental change or that it was as a result of the delay in the OAH issuing its final order. There was no evidence before the court that had Mr. Derechin taken an unspecified job in Mississippi that he would lose the job because he could not drive as part of its job duties. There was no evidence that any new job would have prohibited him from driving his own vehicle with an Interlock device in order to satisfy the terms of his reinstatement. If Mr. Derechin is unable to drive for his current job, it is because he has to serve a revocation for a DUI offense – not because he was prejudiced by the OAH's delay in issuing an order. Simply put, there is no evidence in the record of an actual change, let alone a substantial one, in Mr. Derechin's circumstances which was ***caused by*** the OAH's delay in issuing its order.

In addition, the *Staffileno* and *Straub* cases are silent regarding whether the licensees remembered if their cases were still pending before the OAH. Here, however, Mr. Derechin testified that he not only knew that his case was still pending, but that he did nothing to move the matter along. (App. at PP. 170, 172-174.) This Court has held that "a party who elects not to seek mandamus relief but who, instead, raises the delay issue for the first time on appeal to the circuit

court, does so at his peril. The reviewing court is free to consider the aggrieved party's failure to pursue a ruling as a factor in determining whether he has suffered actual and substantial prejudice as a result of the delay. .." *Reed v. Staffileno*, 239 W. Va.538, 545, 803 S.E.2d 508, 515 (2017). The DMV raised the issue of Mr. Derechin's failure to seek *mandamus* relief below, and the circuit court ignored the issue.

In sum, Mr. Derechin failed to prove a detrimental change in circumstances and failed to prove that he suffered actual and substantial prejudice ***as a result of the delay*** in the OAH issuing its order. The circuit court found actual and substantial prejudice without identifying a detrimental ***change*** in Mr. Derechin's circumstances. However, once the circuit court erroneously determined that Mr. Derechin had proven actual and substantial prejudice as a result of the post-hearing delay, the circuit court was required to balance the resulting prejudice against the reasons for the delay. *See*, Syl. Pt. 2, *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017) (holding, "Once actual and substantial prejudice from the delay has been proven, the circuit court must then balance the resulting prejudice against the reasons for the delay.") *See also*, Syl. Pt. 4, *Straub v. Reed*, 239 W. Va. 844, 806 S.E.2d 768 (2017); FN 8, *Reed v. Winesburg*, 241 W. Va. 325, 331, 825 S.E.2d 85, 91 (2019).

In *Reed v. Boley*, 240 W. Va. 512, 813 S.E.2d 754 (2018), this Court held that "[a]s ***required*** by *Miller* [*v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011)], we then balanced the resulting prejudice to respondent against the reason for the delay by the OAH and held that '[i]n light of the evidence establishing prejudice from the delay in issuing the order and the absence of any evidence showing the reason for the delay, we find no basis to disturb the circuit court's decision on that . . . issue.' " 240 W. Va. 512, 516, 813 S.E.2d 754, 758 (emphasis added). Here, the OAH Director and

Chief Hearing Examiner, Teresa Maynard, testified as to the reasons for the delay in the OAH issuing its order (App. at PP. 62-90), and the circuit court failed to adhere to this Court's mandate to balance the alleged prejudice with the reasons for the delay. This is clear error.

The OAH offered compelling reasons for the delay. Director Maynard testified that she became OAH Chief Hearing Examiner/Director on September 13, 2016, and Mr. Derechin's hearing was on August 28, 2015, more than a year before her arrival. (App. at PP. 62-63.) When Director Maynard first arrived in September of 2016, there was a backlog of approximately 3,500 pending cases (App. at P. 64) partially because when the OAH started in 2010, the OAH hearing examiners were former DMV hearing examiners and were required to enter the orders from their DMV cases before attending to the OAH orders. (App. at P. 66.) The hearing examiner in this matter, Carolyn Higginbotham, was a former DMV hearing examiner and began working for the OAH with a backlog of hearings to hold and orders to write for the DMV. *Id.*

The backlog from the beginning created a dam which caused a delay in the OAH orders being entered. *Id.* At the time of Mr. Derechin's hearing, Ms. Higginbotham was behind in writing her final orders (*Id.*), and in response to questioning by the Legislature about older cases, Director Maynard directed the hearing examiners to focus on cases with older DUI dates before focusing on cases which had already been heard. (App. at P. 67.) After the *Staffileno* decision was issued, Director Maynard instructed the hearing examiners to focus on writing orders by hearing date. *Id.*

The OAH has 12 hearing examiner positions on the organizational chart. (App. at P. 65.) When Director Maynard started in September of 2016, there were 11 hearing examiners employed, but almost immediately thereafter, two resigned. *Id.* The OAH posted a hearing examiner position, but before it could be filled, another hearing examiner retired, leaving eight examiners to do the job

of 12 throughout the entire State. *Id.* The lack of hearing examiners forced the OAH to continue hearings in some geographical areas and forced the hearing examiners to travel around the State. *Id.* Ms. Higginbotham and another hearing examiner were stationed in Charleston, but the staffing shortage forced Director Maynard to move the other examiner around the State which caused Ms. Higginbotham to cover the entire Charleston docket for a period of time. *Id.* Ms. Higginbotham was holding two dockets of hearings at the same time that Mr. Derechin's order remained unwritten. *Id.* Not only was Ms. Higgenbothom handling two hearing dockets, but she was spending time revising proposed orders sent back to her from the paralegals and from Director Maynard. (App. at P. 72.)

Six months after Mr. Derechin's hearing (approximately February of 2016), Ms. Higginbotham submitted a proposed final order to a paralegal for review. (App. at P. 69). However, the OAH also had issues with staffing paralegal positions. (App. at P. 70.) There are four paralegal positions on the OAH organizational chart, but until May of 2019, there were only two filled positions. *Id.* It took Director Maynard over a year to fill the other two positions because of problems with the Division of Personnel. *Id.* Once the OAH was fully staffed, it was able to make a drastic reduction in its backlog. *Id.*

Director Maynard testified that the backlog of cases was also due, in part, to the number of continuances that were being granted before hearings were held. (App. at P. 64.) When drivers continued hearings, the hearing examiners were required to write orders rescheduling the matters, and the docketing staff was required to fit in the continued matters in the schedule. *Id.* This extra work added to the overall delay in the hearing examiners being able to get their orders written. *Id.* The OAH was not ignoring its duty to enter final orders. From 2012 through November of 2019, the agency has entered final orders in more than 12,000 of the 13,500 appeals filed at the OAH. (App.

at PP. 75-76.) In 2019 alone, the OAH resolved 1,662 cases. (App. at P. 76.)

Unlike in *Staffileno*, *Straub*, and *Boley*, in this matter, the DMV presented reasons for the OAH delay, and the circuit court compounded its error by failing to complete the balancing test as required by *Staffileno*, *supra*.

C. In reversing the OAH's findings that the Investigating Officer's credibility was not impeached and that there was no spoliation of evidence, the circuit court arbitrarily and capriciously substituted its judgment for that of the fact finder below.

In its final order, the circuit court concluded that the "hearing examiner below erroneously found as true all assertions of the arresting officer as factual, in spite of evidence of his demonstrable unreliability. . . Mr. Derechin presented newspaper print and online articles, concerning Lightner's misconduct." (App. at P. 7.) The "evidence" presented by Mr. Derechin does not impeach the Investigating Officer's credibility regarding his DUI investigation which occurred more than a year before the Investigating Officer allegedly committed a property crime unrelated to the instant matter.

At the administrative hearing, Mr. Derechin submitted into evidence an undated newspaper article which reported that the Investigating Officer "threw a homeless man's backpack into the Elk River during a confrontation in August. . ." and that "Kanawha County prosecutors gave Lightner a choice: resign or be charged with destruction of property." (App. at P. 339.) Mr. Derechin also submitted into evidence a newspaper article from November 12, 2014, which reported an incident involving another officer, Shawn Williams, and which mentioned that Brian Lightner "will likely see his last day in January. . . [he] has been on paid administrative leave since Sept. 9 pending the outcome of a criminal and internal investigation. . . Sources told the Charleston Gazette that Lightner took Hunt's backpack and threw it over the side of the bridge into the Elk River." (App. at PP. 343-346.)

The OAH addressed the exhibits submitted by Mr. Derechin and found that the "newspaper article has no relevance to the ultimate issue in this matter and does not speak to the officer's character or truthfulness. The exhibit is therefore excluded and not accorded evidentiary weight." (App. at P. 388.) The OAH did not err in relying on the DMV's evidence.

The information in the newspaper articles is based upon unnamed sources, is a summary of an event which occurred more than a year after Mr. Derechin was arrested for DUI, does not constitute evidence of untruthfulness, has no bearing on the present case, and is not a criminal conviction which would impeach the Investigating Officer's documentary evidence in Mr. Derechin's case.

West Virginia R. Evid. 608(a) (2014) provides that a "witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked." Mr. Derechin failed to present any evidence which is relevant to the truthfulness or untruthfulness of the Investigating Officer. Further, W. Va. R. Evid. 608(b) (2014) provides that

> [e]xcept for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But, the court may, on cross-examination of a witness other than the accused, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
>
> (1) the witness; or
>
> (2) another witness whose character the witness being cross-examined has testified about.

Mr. Derechin failed to present evidence that the Investigating Officer was convicted of a crime, and for all witnesses other than criminal defendants, W. Va. R. Evid. 609(a)(2)(B) (2014)

requires evidence that the witness has been "convicted of a crime if it involved dishonesty or false statement."

Without any mention of the DMV's argument, discussion of the OAH's conclusions, or citation to the W. Va. Rules of Evidence, the circuit court arbitrarily determined that the "hearing examiner below erroneously found as true all assertions of the arresting officer as factual, in spite of evidence of his demonstrable unreliability." (App. at P. 8.) This is clear error as "a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, [and] a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations." Syl. pt. 4, *Frazier v. S.P.*, 242 W. Va. 657, 838 S.E.2d 741 (2020).

This Court "has recognized that credibility determinations by the finder of fact in an administrative proceeding are 'binding unless patently without basis in the record.'" *Webb v. W. Va. Bd. of Med.*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (per curiam) (quoting *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)). " 'Credibility 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)." Syl. Pt. 6, *Dale v. Veltri*, 230 W. Va. 598, 741 S.E.2d 823, 824 (2013).

Next, the circuit court arbitrarily concluded that the "OAH further erred in declining to find that the doctrine of spoliation applied as to the absent video evidence and to accordingly apply an appropriate inference in favor of the Petitioner." (App. at PP. 8-9.) At the administrative hearing, Mr. Derechin's counsel submitted a letter written to the Charleston Police Chief, Brent Webster, which was dated February 20, 2013, and which asks for the preservation of all police video and audio recordings from Mr. Derechin's February 1, 2013, arrest for DUI. (App. at PP. 485-486.) Mr.

Derechin's counsel argued that "the party requesting the evidence is entitled to all reasonable inferences in connection with that evidence. Now in this particular case, he's – this Petitioner is entitled to the inference that had they preserved the video, it would show that he has a lack of impairment, and that would have been evidence that would have been favorable to him, and we would ask the Court to take cognizance of that and grant our spoliation motion, and in the Court's consideration of this case, apply that inference." (App. at P. 489.)

The DMV's counsel argued that Mr. Derechin never sought production of the evidence from the DMV, that formal discovery does not exist,[3] that Mr. Derechin had not produced proof that any video evidence even existed, and that Mr. Derechin had produced no proof that the CPD had refused any lawful order to compel or to produce the evidence in question. (App. at PP. 493-496.) Mr. Derechin did not produce the CPD Chief to testify about the existence or non-existence of the alleged video and to testify about whether the CPD refused to produce the same. In its Final Order, the OAH addressed the DMV's responsive arguments and agreed, thus denying Mr. Derechin's motion. (App. at P. 388.)

"Plenary review is conducted as to [an administrative law judge's] conclusions of law and application of law to the facts, which are reviewed de novo." *Frazier v. S.P.*, 242 W. Va. 657, 838 S.E.2d 741 (2020). Without mention of the DMV's argument, discussion of the OAH's conclusion, or any citation to legal authority, the circuit court arbitrarily concluded that the OAH erred in failing to apply the doctrine of spoliation when Mr. Derechin failed to produce any evidence that a video existed or that production of the same was refused. The circuit court's arbitrary conclusion is clear

[3] "The disclosure and exchange of information between the parties is encouraged; however, there shall be no formal discovery in appeals before the OAH except as noted in this rule." W. Va. Code R. § 105-1-11.10 (2013).

error.

> [A]s this Court explained in *Modi v. West Virginia Bd. of Medicine,* 195 W. Va. 230, 239, 465 S.E.2d 230, 239 (1995), "findings of fact made by an administrative agency will not be disturbed on appeal unless such findings are contrary to the evidence or based on a mistake of law. In other words, the findings must be clearly wrong to warrant judicial interference. ... Accordingly, absent a mistake of law, findings of fact by an administrative agency supported by substantial evidence should not be disturbed on appeal." (citations omitted); *see also Martin v. Randolph County Bd. of Educ.,* 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995) (explaining that "[w]e must uphold any of the [administrative agency's] factual findings that are supported by substantial evidence, and we owe substantial deference to inferences drawn from these facts").
>
> *Lowe v. Cicchirillo*, 223 W. Va. 175, 179, 672 S.E.2d 311, 315 (2008).

Frazier v. S.P., 242 W. Va. 657, 838 S.E.2d 741, 746–47 (2020).

Moreover,"[i]t is well settled that a trial court's rulings on the admissibility of evidence, 'including those affecting constitutional rights, are reviewed under an abuse of discretion standard.' *State v. Kaufman*, 227 W. Va. 537, 548, 711 S.E.2d 607, 618 (2011) (citing *State v. Marple*, 197 W. Va. 47, 51, 475 S.E.2d 47, 51 (1996))." *State v. David K.*, 238 W. Va. 33, 38, 792 S.E.2d 44, 49 (2016). The circuit court failed to address this standard of review in its final order, and instead, arbitrarily substituted its judgment for that of the fact-finder below.

It was not error for the OAH to rely on the Investigating Officer's report and to find that Mr. Derechin was DUI. In administrative proceedings before the OAH, the DMV's records are required to be admitted into evidence pursuant to W. Va. Code § 29A-5-2(b) (1998), which provides 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. Documentary evidence may be received in the form of copies or excerpts or by incorporation

by reference." *See also*, *White v. Miller*, 228 W. Va. 797, 802, 724 S.E.2d 768, 773 (2012); Syl. Pt. 4, *Dale v. McCormick*, 231 W. Va. 628, 749 S.E.2d 227 (2013) (per curiam); Syl. Pt. 6, *Dale v. Dingess*, 232 W. Va. 13, 750 S.E.2d 128 (2013) (per curiam); Syl. Pt. 8, *Dale v. Ciccone*, 233 W. Va. 652, 760 S.E.2d 466 (2014) (per curiam); Syl. Pt. 5, *Reed v. Hill*, 235 W. Va. 1, 770 S.E.2d 501 (2015).

"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." *Crouch v. W. Va. Div. of Motor Vehicles*, FN12, 219 W. Va. 70, 76, 631 S.E.2d 628, 634 (2006). Here, the OAH admitted the evidence per statute and case law, and Mr. Derechin was given the opportunity to testify and to rebut the DMV's evidence. In its *Final Order*, the OAH found as fact that Mr. Derechin did not dispute that on February 1, 2013, he drove a motor vehicle in this state. (App. at P. 387.) The OAH also found as fact that Mr. Derechin did not dispute that he had consumed alcohol, drugs, a controlled substance, or any combination of the aforementioned prior to operating a motor vehicle. *Id.* The OAH also found as fact that Mr. Derechin failed to successfully dispute that he exhibited indicia of intoxication, and that he was unable to adequately perform standardized field sobriety tests. *Id.*

The OAH considered the documentary[4] evidence presented by the DMV and Mr. Derechin's testimonial and documentary evidence, then made a credibility determination about whether Mr. Derechin exhibited indicia of impairment. The OAH opined,

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[4] In *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010), this Court held that there is no preference for live testimonial evidence over documentary evidence and that "our law recognizes no distinction in the context of driver license revocation proceedings."

> With respect to the issue of whether he was impaired by the alcohol he admitted to drinking, he only offered denials without support or reference. For example, the Petitioner testified that he followed the instructions for the horizontal gaze nystagmus test and as to the results of the walk-and-turn and one-leg-stand tests, he stated that the Investigating Officer could have fabricated the results. However, considering the physical indicia of impairment exhibited by the Petitioner, his admission to consuming alcoholic beverages prior to driving the motor vehicle, and the result of the designated secondary chemical test, the Petitioner's assertions that he was not impaired when operating the motor vehicle on the date of the stated offense are less than credible.

(App. at PP. 388-389.)

In this case, "[t]he principal question at the [administrative] hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs. . ." W. Va. Code § 17C-5A-2(e) (2015). "The obvious and most critical inquiry in a license revocation proceeding is whether the person charged with DUI was actually legally intoxicated." *Carte v. Cline*, 194 W. Va. 233, 238, 460 S.E.2d 48, 53 (1995). Here, the circuit court ignored the OAH's findings regarding the substantial evidence of DUI and substituted its judgment for the factual and credibility determinations of the OAH hearing examiner.

D. The circuit court erred in ordering costs, fees, and expenses against the DMV.

In its final order, the circuit court concluded that,

> the costs to vindicate Mr. Derechin from the delay and resulting consequences should not be borne by him in the present action. "[W]e further find that the cumulative effect of the multiple continuances and overall delay in this matter, while not prejudicial to Conniff's defense, warrants an award of attorney fees and costs and therefore remand to the circuit court for a determination as to the reasonable amount of such fees and costs." Syllabus, *Reed v. Conniff*, 779 S.E.2d 568 (W. Va. 2015). In the instant case, according to the record below, the OAH was initially scheduled for a 2013 hearing, and continued based on a timely motion by Mr. Derechin based on a conflict with his counsel's long-standing prepaid travel plans. On the revised date of the hearing, September 12, 2013, at 9:30 a.m., the Respondent DMV filed an Emergency Motion for Continuance based on Officer Lightner's expressed inability to appear because child care plans had fallen through, and he would be unable to appear. Counsel for DMV made that motion twenty-one (21) minutes prior to the

> hearing. The record further reflects that the matter was then first reset for March 12, 2015. A subpoena *duces tecum* was issued by the OAH for production of records concerning the BAC testing device and Officer Lightner's disciplinary records upon then Charleston Chief of Police Brent Webster, at the written request of the [*sic*] Mr. Derechin. The record below reflects that the subpoena was served by certified mail and accepted. However, the record further reflects that Mr. Derechin notified DMV that the then Charleston City Attorney that the city may not comply with the subpoena, and after consulting with and without objection from the DMV, the matter was continued briefly upon Mr. Derechin's motion. The matter was rescheduled for August 28, 2015. Officer Lightner, who by that time was no longer a police officer, did not appear, nor were any records in response to the subpoena *duces tecum* received. The hearing was conducted as scheduled. Based on the foregoing, the initial delay between July and September 2013, are attributable to Mr. Derechin.
>
> Accordingly, consistent with *Conniff*, the overall delay in this matter to the Petitioner warrants an award of attorney fees and costs . . .
>
> It is further ORDERED that the costs of these actions be restored to him. Mr. Derechin is directed to submit to this Court and opposing Counsel an accounting of his overall legal costs, attorney fees and expenses for determination of the amounts to be recovered.
>
> (App. at PP. 11-13.)

1. In this administrative appeal, the circuit court lacked authority to award costs, fees, and expenses.

In his *Petition for Appeal*, Mr. Derechin's requested relief was "that this Court set a briefing schedule in this case, and after proper hearing and reverse the Order of the OAH revoking his license with directions to restore his license with all attendant relief, including dismissal of the action of the DMV with prejudice." (App. at P. 194.)

Whether the circuit court had jurisdiction to *sua sponte* grant unrequested relief is governed by statutory law, namely W. Va. Code § 29A-5-4(g) (1998). *See generally W. Va. Bd. of Med. v. Spillers*, 187 W. Va. 257, 259, 418 S.E.2d 571, 573 (1992) ("[P]rocedures for appeals of decisions by administrative agencies are governed by the State Administrative Procedures Act."). *State ex rel. Frazier v. Thompson*, 842 S.E.2d 250, 256–57 (W. Va. 2020). "In matters involving statutes, we are

bound by the rules of statutory construction. We first must determine the Legislature's intent in enacting the provision. *See* Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975) ("The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.")." 842 S.E.2d 250, 256–57. "Then, we consider the precise words employed in the enactment. Where such language is plain, we apply the subject statutory language as written without any further interpretation. *See* Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968) ("Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation."); Syl. pt. 5, *State v. Gen. Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.")." 842 S.E.2d 250, 256–57.

Here, upon review of an administrative appeal, the circuit court's statutory authority was limited solely to affirming, remanding, reversing, vacating, or modifying the OAH's *Final Order*.

> 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 order are: "(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."
>
> Syl. pt. 2, *Shepherdstown Volunteer Fire Dep't v. State ex rel. State of W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983).

Frazier v. S.P., 242 W. Va. 657, 838 S.E.2d 741, 747 (2020) (emphasis added).

"It is not for this Court to arbitrarily read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted. *Banker v. Banker*, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) (citing *Bullman v. D & R Lumber Co.*, 195 W. Va. 129, 464 S.E.2d 771 (1995)." *Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 671, 815 S.E.2d 474, 482 (2018). Moreover, "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 1, *Consumer Advocate Div. v. Public Serv. Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

The Administrative Procedures Act does not authorize the circuit court to award *sua sponte* attorney fees, costs, or other expenses without a request by the petitioner for the same; therefore, the circuit court acted outside its statutory authority. This is clear error.

2. The circuit court misapplied this Court's decision in *Reed v. Conniff*, 236 W. Va. 300, 779 S.E.2d 568 (2015).

The critical facts in this case are that the DMV was the party opponent below and not the tribunal; that the DMV acted timely in its statutory duty; that Mr. Derechin failed to prove that he was unable to defend his case before the OAH; and that the DMV was not responsible for the delay in the OAH holding a hearing. The DMV and the OAH are separate administrative entities. Effective June 11, 2010, the OAH was created to hear appeals of DUI matters such as the instant matter. W. Va. Code § 17C-5C-5 (2010).

Mr. Derechin was arrested for DUI, and the DMV timely revoked his driver's license. Mr. Derechin appealed the DMV's order to the OAH which scheduled a hearing. Mr. Derechin asked for a continuance which was granted, and the OAH rescheduled the matter for three months later. On the day of the rescheduled hearing, the DMV asked for an emergency continuance due to the

unavailabilty of the Investigating Officer, and the OAH granted a continuance the same day.

The OAH rescheduled the matter and included *Additional Instructions to the Parties* which put the parties on notice that "[i]f a party intents to present testimony from any person (including any law-enforcement officer) it is the responsibility of that party to obtain the presence of the person at the hearing. The 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." (App. at P. 271.) The OAH also included a *Standing Memorandum Order Governing Motions to Admit Documentary Exhibits* (App. at PP. 274-276), which cautioned the parties, *inter alia*, to "be prepared for the substantial prospect" that in the event the Investigating Officer does not appear, the DUI Information Sheet and other documents prepared by that officer which are part of the DMV's file will be admitted, and the matter may proceed to hearing over the objections of the petitioner below. (App. at P. 276.)

The OAH continued the rescheduled hearing due to a scheduling error, and the matter was rescheduled for hearing on March 12, 2015. (App. at PP. 282-285.) On March 2, 2015, at Mr. Derechin's request, the OAH issued a subpoena *duces tecum* to the Chief of the CPD. (App. at PP. 310-312.) The day before the scheduled hearing, on March 11, 2015, Mr. Derechin asked for his second continuance. The OAH rescheduled and held the hearing on August 28, 2015. (App. at PP. 320-323, 474.)

In his epigrammatic *Petition for Judicial Review*, Mr. Derechin alleged that he was "aggrieved by the two and one-half year delay in receiving the hearing. . ." (App. at P. 193.) Mr. Derechin did not provide any "authorities relied upon" or a "discussion of the law" on this issue as required by W. Va. R. Pro. Admin. App. 2(c)(5) (2008). On August 7, 2019, Mr. Derechin testified

at a hearing on his request for a *supersedeas* of his license revocation. (App. at PP. 160-188.) His testimony addressed his alleged irreparable harm if the circuit court did not supersede the DMV's *Order of Revocation*, but the record is devoid of any evidence or argument regarding pre-hearing delay.

On November 19, 2019, the circuit court held an evidentiary hearing to determine if Mr. Derechin's ability to defend his case was compromised, to determine whether Mr. Derechin had been actually and substantially prejudiced by the post-hearing delay, or to determine the reasons for the OAH delay (a.k.a. "a *Staffileno* hearing.") (App. at PP. 60-99.) At this hearing, Mr. Derechin failed to offer any evidence regarding prejudice. He did not appear to testify, but his counsel "offer[ed] the transcript of the hearing on the stay supersedeas so as not to – or rather to streamline these issues." (App. at P. 62.) The circuit court's finding of irreparable harm at the stay/*supersdeas* hearing as required by W. Va. Code § 17C-5A-2(s) (2015) is not a finding of actual and substantial prejudice as a result of the delay. These are two separate inquiries.

At the hearing, the circuit court summarized Mr. Derechin's position as "there wasn't enough evidence and your client has been prejudiced by the sheer delay in the revocation proceedings and it will be two and a half years until he got his hearing, and then four years thereafter." (App. at P. 61.) Mr. Derechin clarified that "our argument basically in a position to – having to defend this case and ***the actions of the hearing commissioner*** has prejudiced by substantial delay. . ." *Id.* (Emphasis added.)

In the *Petitioner's Memorandum* (App. at PP. 47-57), the only mention of pre-hearing delay was a cursory statement that "the costs to vindicate the Petitioner from the delay and resulting consequences should not be borne by him in the present action. '[W]e further find that the

cumulative effect of the multiple continuances and overall delay in this matter, while not prejudicial to Conniff's defense, warrants an award of attorney fees and costs and therefore remand to the circuit court for a determination as to the reasonable amount of such fees and costs.' Syllabus, *Reed v. Conniff*, 779 S.E.2d 568 (W. Va. 2015)." (App. at P. 55.)

In *Reed v. Conniff*, 236 W. Va. 300, 779 S.E.2d 568 (2015), Conniff was arrested for DUI on May 30, 2010.[5] Conniff requested a hearing before the DMV, and it was nearly four years from Conniff's request for a hearing on July 6, 2010, until he received a hearing on the merits on June 4, 2014. During that time, the DMV scheduled and continued four hearings: one for failure of the officer to appear, one for a misplaced file, one for illness of the hearing examiner, and one for the DMV's failure to renew the recording software license. Conniff's attorney demanded that the DMV reimburse him for attorney fees for his continued preparation during the four year delay.

The DMV upheld the license revocation and refused to pay. Conniff appealed to the circuit court, which determined that he was entitled to a dismissal of his license revocation. 236 W. Va. 300, 304, 779 S.E.2d 568, 572. The DMV then appealed to this Court where Conniff claimed that due to the lapse of time, he was unable to locate the tipster who allegedly witnessed the hit and run that gave rise to his arrest and that he incurred attorney fees and costs for each continued hearing, for which the DMV refused to reimburse him. 236 W. Va. 300, 308, 779 S.E.2d 568, 576.

In addressing the overall delay in that proceeding, this Court noted that "due process concerns are raised when there are excessive and unreasonable delays in license suspension cases." 236 W. Va. 300, 307, 779 S.E.2d 568, 575 (quoting *Holland v. Miller,* 230 W. Va. 35, 39, 736 S.E.2d 35,

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[5] In *Miller v. Epling*, 229 W. Va. 574, 729 S.E.2d 896 (2012), this Court held that the Commissioner of the DMV properly retained jurisdiction over the DUI cases with arrest dates prior to June 11, 2010.

39 (2012)). This Court observed that

> "[s]ome delays are presumptively prejudicial, and if found to be presumptively prejudicial, then the government has the burden to rebut the presumption." *Petry v. Stump,* 219 W. Va. 197, 200, 632 S.E.2d 353, 356 (2006). We have little difficulty in concluding that the overall four-year delay in this matter and circumstances surrounding the various continuances are of such a nature as to render the delay presumptively prejudicial. *See Petry,* 219 W. Va. 197, 632 S.E.2d 353 (finding six-year delay presumptively prejudicial); *In re Petition of Donley,* 217 W. Va. 449, 618 S.E.2d 458 (2005) (finding three-year delay unreasonable); *Meadows v. Reed,* No. 14–0138, 2015 WL 1588462 (W. Va. March 16, 2015) (finding four-year delay resulted in prejudice to driver).

236 W. Va. 300, 308, 779 S.E.2d 568, 576.

Based on these prior holdings, this Court found that while the delay was presumptively prejudicial, there was no appreciable prejudice to Conniff that "could not be remedied with lesser measures than outright dismissal." 236 W. Va. 300, 308, 779 S.E.2d 568, 576. This Court's decision was based on several factors . First, Conniff presented no evidence in defense of the DMV's assertion that he was DUI. Moreover, his cross-examination of the investigating officer was largely limited to the issue of whether the officer had been properly subpoenaed to the original hearing. Next, Conniff's inability to locate the tipster witness who called in his hit-and-run was rendered immaterial by Conniff's concession to the investigating officer that he had, in fact, struck another vehicle. Finally, Conniff failed to demonstrate how the DMV's refusal to reimburse him attorney fees and costs for the continued hearings impeded his defense, to whatever extent he intended to present one.

Accordingly, this Court found the DMV's delay in this matter egregious and presumptively prejudicial, but that the DMV rebutted this presumption by demonstrating that

> no actual prejudice to Conniff's defense resulted. *See Donley* (refusing to dismiss license suspension after unreasonable delay because claimant suffered no prejudice); *State ex rel. Cline v. Maxwell,* 189 W. Va. 362, 432 S.E.2d 32 (1993) (holding dismissal too strong a remedy absent prejudice resulting from delay); *David v. Comm'r of W. Va. Div. of Motor Vehicles,* 219 W. Va. 493, 637 S.E.2d 591 (2006)

(declining to dismiss license revocation proceeding after improper continuance and awarding fees instead).

236 W. Va. 300, 308–09, 779 S.E.2d 568, 576–77.

This Court found that the delay and tribunal's mismanagement of the matter warranted some measure of relief to Conniff, and as a result of the *cumulative* effect of those continuances, this Court determined that Conniff was entitled to an award of reasonable attorney fees and costs. 236 W. Va. 300, 309, 779 S.E.2d 568, 577. This Court recognized that "dismissal of the proceedings would run counter to the principle that license revocation proceedings should be, where possible and equitable, resolved on their merits and conducted in a manner 'devoid of those sporting characteristics ... of a game of forfeits [.]' 219 W. Va. at 498, 637 S.E.2d at 596 (quoting *Rosier v. Garron, Inc.,* 156 W. Va. 861, 875, 199 S.E.2d 50, 58 (1973))." 236 W. Va. 300, 309, 779 S.E.2d 568, 577.

Here, in the 25 months between when the matter was first scheduled for hearing and when the matter was heard, the DMV continued the matter once; the OAH continued the matter once; and Mr. Derechin continued it twice. Further, Mr. Derechin failed to enforce the subpoena *duces tecum* which he served upon the Chief of the CPD. The award of costs, fees, and expenses against the DMV is unfounded. The DMV is the party opponent in this administrative appeal and is attributable for only one of the continuances.

Moreover, the DMV was not responsible for securing the Investigating Officer's appearance[6] or for serving or enforcing the subpoena *duces tecum* which Mr. Derechin sent to the CPD. Pursuant to W. Va. Code R. § 105-1-11.9 (2015), "[i]f a person does not obey the subpoena or subpoena duces tecum, the party who caused the service of such subpoena may petition the circuit court wherein the

[6] "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." W. Va. Code R. § 105-1-11.1 (2015). *See also, Additional Instructions to the Parties* (App. at P. 271.)

action lies for enforcement of such subpoena." Mr. Derechin did not ask the OAH to continue the August 28, 2015, hearing for subpoena enforcement against the CPD. Therefore, Mr. Derechin caused his own alleged prejudice, and the DMV should not be required to pay for his delay and failure to enforce his own subpoena.

E. The Division of Motor Vehicles also suffered actual and substantial prejudice which must be balanced with the prejudice proven by the driver, if any.

"The OAH's post-hearing delay in issuing its order affirming the DMV Commissioner's revocation order is seriously troubling. Neither a licensee ***nor the DMV Commissioner*** should be required to wait such a long period of time to obtain a decision in an administrative appeal." *Reed v. Staffileno*, 239 W. Va. 538, 546, 803 S.E.2d 508, 516 (2017) (Loughry, J. dissenting) (emphasis added). Here, it took the OAH almost 47 months to enter a *Final Order.* Clearly, the OAH's delay in entering its order is egregious. *See, Straub v. Reed*, 239 W. Va. 844, 851, 806 S.E.2d 768, 775 (2017) (holding "the OAH's eleven-month delay in issuing its final order in this matter egregious.") Here, the DMV has been actually and substantially prejudiced by the inordinate delay of the OAH in entering its *Final Order*.

On September 11, 2018, the DMV filed a *Motion to Enter Order* with the OAH (App. at PP. 379-380, and Director Maynard testified that the DMV had filed motion for entry of orders in numerous cases, but the OAH was unable to comply with the DMV's requests. (App. at P. 74.) In addition, the DMV had informal discussions with the OAH regarding the process and the DMV's concerns following the issuance of the decision in *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017). (App. at P. 75.) Director Maynard accommodates drivers who contact her office by expediting final orders (App. at PP. 73-74.) She further testified that the DMV has filed motions for entry of orders in numerous cases, including this one, and the DMV's requests to expedite the OAH

final order are not heeded. (App. at PP. 74-75.) The instant matter is not the first time the OAH has favored a petitioner's request to resolve his pending administrative appeal while ignoring the DMV's request to expedite the process.

On July 30, 2018, Director Maynard testified before the Honorable Phillip M. Stowers, Judge of the Circuit Court of Putnam County, in the matter of *Walker v. Reed* (Civil Action No. 18-AA-1), a post-hearing delay case. (App. at PP. 454-457.) There, Director Maynard testified that if a petitioner contacts the OAH seeking a final order, the OAH will enter the order "within a couple of days." (App. at P. 456.) Director Maynard also testified that then DMV General Counsel Adam Holley would also contact her about the status of orders. (App. at P. 457.)

On September 10, 2018, Director Maynard testified before the Honorable Robert A. Waters, Judge of the Circuit Court of Wirt County, during a procedural irregularity hearing in the post-hearing delay case of *Long v. Reed* (Civil Action No. 18-P-2). (App. at PP. 458-462.) Director Maynard testified that the DMV has made efforts to have the OAH issue final orders by filing motions to enter orders and by contacting opposing counsel to resolve outstanding cases. (App. at P. 459.) Director Maynard also testified that the DMV Commissioner has no authority over the OAH, which is a separate agency, and cannot force the OAH to enter orders. (App. at P. 460.) Further, Director Maynard testified that drivers have contacted the OAH seeking final orders, and the OAH accommodates these petitioners. (App. at PP. 460-461.) Finally, Director Maynard testified that there is nothing else the DMV can do to get the OAH to issues orders more expeditiously. (App. at PP. 461-462.)

On July 25, 2019, in Berkeley County, Director Maynard testified before the Honorable Michael D. Lorensen during a procedural irregularity hearing in the post-hearing delay matter of

Burkholder v. Reed (Civil Action No. 19-AA-1) regarding the DMV's efforts to expedite the issuance of final orders by the OAH. (App. at PP. 463-469.) Director Maynard confirmed that the DMV filed a motion for entry of the order in the *Burkholder* matter and in hundreds of other cases, but the DMV's efforts to move the case to disposition had no effect on the OAH's efforts to enter final orders. (App. at PP. 465-466.) She further testified that there was nothing the DMV could have done to expedite the matter. (App. at P. 466.)

The DMV is further prejudiced by the delay of the OAH because in post-hearing delay cases, the DMV, a party litigant, must defend the laggard inaction of the tribunal below in addition to defending its own actions in revoking the driver's license of a drunk driver. By requiring the DMV to present evidence for the reasons for the OAH's delay, *see Reed v. Staffileno*, this Court has eviscerated the purpose of the administrative license revocation process and "thrown open the floodgates to allow a tsunami of drunk drivers to gain reinstatement of their licenses due solely to dilatory administrative practices." 239 W. Va. 538, 803 S.E.2d 508, 516.

"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). This objective of removing substance-affected drivers from our roads in the interest of promoting safety and saving lives is consistent "with the general intent of our traffic laws to protect the innocent public." *Shell v. Bechtold*, 175 W. Va. 792, 796, 338 S.E.2d 393, 396 (1985) (per curiam).

As DMV Assistant General Counsel John T. Bonham, II, testified in the instant matter, the DMV's primary mission is to regulate the driver's license and to ensure public safety and the safety of the motoring public of West Virginia. (App. at P. 91.) "Without a timely process and without

being able to get orders of revocation in the process quickly," the DMV's mission is "severely compromised." *Id.* "The administrative license revocation process is premised upon timely license revocation to avoid the delays that typical[ly] happen in the criminal side. So if we don't meet that, it doesn't work quicker than the criminal system, then it doesn't work at all." (App. at P. 92.)

Mr. Bonham further testified that "[i]f adjudicated drink drivers are having the DUI revocations reversed, it has an effect on the DMV's prejudice that's a direct compromise on our mission to regulate the license, number one, because we are mandated by law and our mission is to address drunk drivers and people who are admittedly drunk drivers get back on the road, continue to stay on the road because they're waiting on a final order, then the public safety mission is prejudiced." *Id.*

In addition, the OAH's egregious delay has prejudiced the DMV by raiding the DMV's coffers each time it must defend the OAH's delay at an evidentiary hearing. Instead of the DMV appearing at a stay hearing pursuant to W. Va. Code § 17C-5A-2(s) (2015) and possibly a final hearing on the merits of the DUI license revocation, the DMV now must expend resources subpoenaing and preparing witnesses from the OAH and the DMV who will testify regarding the OAH delay and the DMV's efforts to mitigate the delay. The DMV also must expend resources for extended travel and related costs for its counsel and witnesses for defending the OAH delay at evidentiary hearings. (App. at P. 92.)

The DMV has taken other steps to mitigate post-hearing delay by the OAH, and those efforts should be part of the circuit court's balancing test outlined in *Staffileno, supra.* For example, in order to combat a backlog of cases awaiting hearing and awaiting decision at the OAH, Senate Bill 434 was introduced during the 2014 legislative session to amend W. Va. Code § 17C-5A-3a. The

amendments became effective on June 6, 2014, and permitted drivers whose licenses were revoked for DUI with alcohol to immediately participate in the Test and Lock Program provided that their period of revocation would be served on Interlock and provided the drivers waive their right to ask for an administrative hearing. (App. at P. 93.)

> According to [former] Commissioner Dale, "The Interlock Program has two primary goals. One is to increase the safety of our roadways by preventing at-risk people from driving while under the influence of alcohol, and the second is to modify the behavior of those at-risk people through the use of these devices. The new law allows entry into Interlock immediately, making the behavior modification more effective, while protecting other drivers and allowing the participants to attend rehabilitation programs, manage their lives and be productive citizens."

https://transportation.wv.gov/DMV/News/Pages/Interlock-Legislation-Increases-Program-Participation.aspx.

> On the administrative side, DMV has noticed a large drop in the number of hearings requested by DUI offenders to challenge their driver's license revocation. This decrease in hearings reduces the need for law enforcement to divert their time to attend these hearings from their primary job of protecting West Virginians. In the last four months, hearing requests have dropped by almost 50% from the same four month span one year ago (974 to 497). The last two months of data available, September and October, show an even sharper decrease in hearing requests compared to September and October 2013.

Id. The DMV's efforts to amend W. Va. Code § 17C-5A-3a (2014) had the added benefit of reducing the number of appeals filed before the OAH, which in turn gave the OAH more time to devote to eliminating the backlog in cases awaiting final order.

Clearly, the egregious delay of the OAH in entering the *Final Order* in this and all other administrative license revocation matters is outside the control of the DMV, and the DMV is actually and substantially prejudiced because it is hindered in its mandate to remove impaired drivers from the roads as quickly as possible, because it is hindered in defending a DUI case on the merits of the DUI, and because it must spend additional money not anticipated in its budget when it defends a

post-hearing delay case.

In *Staffileno, supra*, this Court determined that,

> [o]n appeal to the circuit court from an order of the Office of Administrative Hearings affirming the revocation of a party's license to operate a motor vehicle in this State, when the party asserts that his or her constitutional right to due process has been violated by a delay in the issuance of the order by the Office of Administrative Hearings, the party must demonstrate that he or she has suffered actual and substantial prejudice as a result of the delay. Once actual and substantial prejudice from the delay has been proven, the circuit court must then balance the resulting prejudice against the reasons for the delay.

Syl. pt. 2, *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017).

This Court superimposed a fundamental fairness test which it had previously applied in *Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011) when the DMV was the tribunal and party to the appeal. The *Moredock* test is based upon a fundamental fairness test applied to pre-indictment delay in criminal proceedings. *See*, *State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E.2d 847 (2009). When this Court applied the *Moredock* test to the DMV in 2011,[7] the DMV was both party and adjudicator. In DUI matters with arrest dates on or after June 11, 2010, the OAH is the independent adjudicator, and the DMV's role is solely as party. Delay in issuing the final order is analogous to sentencing delay in the criminal process. In the criminal court, the prosecutor is not answerable for delay of the judge, and there is an additional consideration in the balancing test when determining whether post-hearing delay is prejudicial to the defendant.

In *U. S. v. Lovasco*, 431 U.S. 783 (1977), a case involving pre-indictment delay, the United States Supreme Court applied a balancing test similar to the one applied in *Staffileno*. In *Lovasco*, there was an 18-month delay between the commission of the alleged offenses and the indictment.

[7] The arrest date in *Moredock* occurred prior to June 11, 2010; therefore, the DMV retained jurisdiction of that matter even after the OAH was created. *See*, *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012).

Lovasco alleged that he was prejudiced by the delay because two material witnesses died during the 18-month period. "The Government made no systematic effort in the District Court to explain its long delay." 431 U.S. 783, 786 (1977).

The District Court found that the 18-month delay before the case was presented to the grand jury "had not been explained or justified" and was "unnecessary and unreasonable." The court also found that as a result of the delay, Lovasco had been prejudiced by the deaths of his witnesses and dismissed the indictment. 431 U.S. 783, 786–87. On appeal, the U. S. Supreme Court considered reasons for prosecutorial delay and determined that it

> would be most reluctant to adopt a rule which would have these consequences absent a clear constitutional command to do so. We can find no such command in the Due Process Clause of the Fifth Amendment. In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely "to gain tactical advantage over the accused," *United States v. Marion*, 404 U.S., at 324, 92 S.Ct., at 465, precisely because investigative delay is not so one-sided. Rather than deviating from elementary standards of "fair play and decency," a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of "orderly expedition" to that of "mere speed," *Smith v. United States*, 360 U.S. 1, 10, 79 S.Ct. 991, 997, 3 L.Ed.2d 1041 (1959). This the Due Process Clause does not require. We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.

U. S. v. Lovasco, 431 U.S. 783, 795–96 (1977).

The *Staffileno* decision charges the respondent below, the DMV, with having to present evidence on the reasons for the tribunal's delay in issuing an order. In *Lovasco*, the defendant could not put on his evidence in his case-in-chief. In the present case, the parties were simply waiting on a post-hearing order. The burden placed upon the DMV by this Court in *Staffileno* is greater than the burden placed on prosecutors in a criminal prosecution where a defendant's liberty is in jeopardy!

Staffileno also fails to address why the balancing test measures the driver's prejudice against the reasons for the OAH's delay when the DMV is in fact a prejudiced party. *W. Va. Div. of Motor Vehicles v. Richardson-Powers*, 239 W. Va. 78, 84, 799 S.E.2d 341, 347 (2017) ("With these standards in mind, we proceed to determine whether the rights of the DMV were prejudiced by the ruling of the Commission.")

This Court acknowledged that the DMV did not cause the delay in *Staffileno* and even "appreciate[d] the DMV's efforts to disassociate itself with causing the delay," 239 W. Va. 538, 803 S.E.2d 508, 514; however, this Court placed a burden upon the DMV to answer for the OAH. Because the DMV is a party and is not responsible for the actions of the tribunal, the DMV's efforts to mitigate delay should be an additional factor to be weighed by the circuit court after a driver has proven that he has suffered actual and substantial prejudice (i.e., a detrimental change in circumstances) as a result of the post-hearing delay.

CONCLUSION

For the reasons outlined above, the circuit court's *Final Order* must be reversed.

Respectfully submitted,

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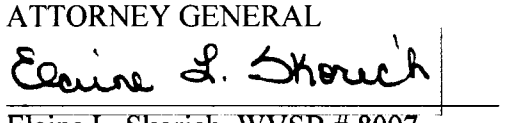
WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0192
(Circuit Court Civil Action No. 19-AA-80)

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

Petitioner,

v.

JOSHUA DERECHIN,

Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 6th day of July, 2020, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, to wit:

Mark McMillian, Esquire
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Charleston, WV 25301

Elaine L. Skorich
Elaine L. Skorich