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

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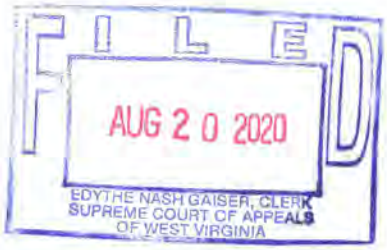
**EVERETT J. FRAZIER, COMMISSIONER**
**WEST VIRGINIA DIVISION OF MOTOR VEHICLES,**

**Petitioner,**

**v.**

**JOSHUA DERECHIN,**

**Respondent.**




**Docket No. 20-0192**
**(Circuit Court Action No. 19-AA-80)**

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## SUMMARY RESPONSE OF RESPONDENT JOSHUA DERECHIN

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## SUMMARY RESPONSE OF JOSHUA DERECHIN

Comes now the Respondent, Joshua Derechin, by Counsel, and as provided by Rule 10(e) of the *West Virginia Rules of Appellate Procedure* responds to the Brief of Appellant, West Virginia Division of Motor Vehicles ("DMV"). The Appellant asserts four assignments of error, each addressed hereinafter in turn.

> 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.

## ARGUMENT

**1. DMV's position that "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."**

The parties both here and in the Court below rely substantially on the holdings of Reed v. Staffileno, 803 S.E.2d 508 (W. Va. 2017 ).

> Consequently, we now hold that on 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.
>
> *****
>
> In the context of a delay in issuing an order after a hearing has been held, the issue of prejudice necessarily involves prejudice to a party that occurred after the hearing was held. As a general matter, under *Miller* [*Miller v. Moredock*, 229 W.Va. 66, 726 S.E.2d 34 (2011)] the standard for post-hearing prejudice will ordinarily involve some type of change in a party's circumstances that may have been substantially prejudiced because of the delay in issuing a final order by OAH.

*Staffileno* at 513.

With those authorities in mind, the Court below clearly did not err in its findings. The Court properly found, based on the uncontroverted testimony of Mr. Derechin "Petitioner is regularly sent considerable distances on assignments by his company both in-state and out-of-state." (App. 004). "Petitioner is a bridge design engineer for Michael Baker International in Charleston. He lives in Elkview. (Aug. 7, 2019 Hrg. Tr. 6). Thirty percent of his time is spent on assignments outside of West Virginia. He also works in distant parts of the State. (Tr. 8)." (App.005).

Even reaching his office from his home without the ability to drive is clearly next to impossible. "He would first have to walk about a mile off a mountain to reach a bus line. The busses run infrequently and he often works irregular hours. Uber rates are $20-22

one-way to Charleston and on each of several attempts to use that service resulted in 'no cars available.' (Tr. 8-9)."(App. 006).

In terms of "some type of change in a party's circumstances" the record is clear. The Court below, based on the evidence, found:

> Between the inception of the case below and 2016, Petitioner was married and his wife was not employed, and until that time would have been available to drive him his office and to work assignments. (Tr. 6, 11).Petitioner has no children, and no relatives closer than the Chicago area. (Tr. 7). 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. (Tr. 18, 20).
>
> There is "nothing realistic" available by way of public transportation for Petitioner even to reach his office. He would first have to walk about a mile off a mountain to reach a bus line. The busses run infrequently and he often works irregular hours. Uber rates are $20-22 one-way to Charleston and on each of several attempts to use that service resulted in "no cars available." (App. 005-006)

Simply stated, though a driver's license is not an explicit requirement of Mr. Derechin's position, the absence of his ability to drive would make it impossible for him to attend to the core responsibilities of his job. Had a timely decision been reached by the OAH, he could have at least for the short term had his then-wife drive him both to his office and to distant assignments.

Moreover, the post-hearing delay in this case can only be described as excessive to the point of a violation of due process.

> Nevertheless, this Court has recognized that "[a] driver's license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution." Syl. Pt. 1, Abshire v. Cline, 193 W.Va. 180, 455 S.E.2d 549 (1995). Thus, "due process concerns are raised when there are excessive and unreasonable delays in [driver's] license suspension cases." Holland v. Miller, 230 W.Va. 35, 39, 736 S.E.2d 35, 39 (2012). [T]his Court has long recognized the constitutional mandate that " 'justice shall be administered without ... delay.' W.Va. Const. Art. III, § 17." Frantz v. Palmer, 211 W.Va. 188, 192, 564 S.E.2d 398, 402 (2001). See Petry v. Stump, 219 W.Va. 197, 200, 632 S.E.2d 353, 356 (2006) ; and Allen v. State, Human Rts. Comm'n, 174 W.Va. 139, 157, 324 S.E.2d 99, 118 (1984). We have further declared that "[j]ust as circuit court judges 'have an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission,' Syl. Pt. 1, in part, State exrel. Patterson v. Aldredge, 173 W.Va. 446, 317 S.E.2d 805 (1984), the obligation to act in a timely fashion is similarly imposed upon administrative bodies[.]" Frantz, 211 W.Va. at 192, 564 S.E.2d at 402. Indeed, as we held in syllabus point 2 of Frantz ," '[A]dministrative agencies performing quasi-judicial functions have an affirmative duty to dispose promptly of matters properly submitted.' Syl. Pt. 7, in part, Allen v. State, Human Rights Comm'n, 174 W.Va. 139, 324 S.E.2d 99 (1984)."Miller v. Moredock, 229 W.Va. 66, 70, 726 S.E.2d 34, 38 (2011).
>
> Straub v. Reed, 806 S.E.2d 768, 773-774 (W. Va. 2017)

But, as recited *ante*, this Court has held that the resulting prejudice must be balanced against the reasons for the delay. The Court below clearly heard and considered evidence offered by the DMV and on balance, found it unpersuasive. *See*, Paragraphs numbered 16-17 of the Circuit Court's *Order Granting Appeal and Reversing Final Order Entered Below* (App. 010-011).

**2. Appellant's Argument that "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."**

The only evidence presented against the Petitioner was the Division of Motor Vehicles file. "In an administrative hearing conducted by the Division of Motor Vehicles, a statement of an arresting officer, as described in W. Va.Code § 17C–5A–1(b) (2004) (Repl.Vol.2004), that is in the possession of the Division and is offered into evidence on behalf of the Division, is admissible pursuant to W. Va.Code § 29A–5–2(b) (1964) (Repl.Vol.2002)." Syl. Pt. 7, Dale v. Odum, 233 W.Va. 601, 760 S.E.2d 415 (W. Va. 2014) citing Syl. Pt. 3, Crouch v. West Virginia Div. Of Motor Vehicles, 219 W.Va. 70, 631 S.E.2d 628 (2006).

While the OAH may have been obliged to admit the record submitted by the arresting officer, B. A. Lightner, that record is subject to challenge. "Of course, we recognized in Crouch that although a document is deemed admissible under West Virginia Code §29A–5–2(b), its contents may still be challenged during the administrative hearing. 219 W.Va. at 76 n. 12, 631 S.E.2d at 634 n. 12" Dale v. Odum, 233 W.Va. 601, 760 S.E.2d 415 (W. Va. 2014).

The Credibility of Officer B. A. Lightner

It was undisputed at any level below that Officer Lightner had left his employment with the Charleston Police Department for reasons of official misconduct. The OAH proceedings had been continued at the request of the DMV for purposes of securing his attendance, which ultimately proved unsuccessful. At the Request of Mr. Derechin a subpoena duces tecum was issued and served upon then police chief Brent Webster for,

*inter alia*, disciplinary records concerning Lightner (App. 310-311). Chief Webster did not appear or respond in any way to the subpoena. However Mr. Derechin offered Newspaper Articles, as authorized by Rule 902(6) of the West Virginia Rules of Evidence, referring to Lightner's official dishonesty leading to his forced resignation. (App. 339, 343-346).

Aside from the foregoing, Lightner's reports, as contained in the DMV record admitted in the OAH matter, are internally irreconcilable as to factual accuracy. Lightner reports on his DUI information forms that he initially came in contact with Mr. Derechin on February 1, 2013 at "2352" (11:52 p.m.), conducted a number of field sobriety checks, offered him a PBT breath test (for which there is a mandatory 15 minute observation period prior thereto), arrested him, had his vehicle towed away, drove him to the police station, once there and taken inside conducted the mandatory 20 minute observation prior to the secondary breath test and conducted the intoxilyzer test there – all by 12:28 a.m.(App. 295-301), a total of 36 minutes, which is simply implausible by any stretch of the imagination. The Circuit Court on appeal correctly found it improper to have credited the officer's report over the testimony of Mr. Derechin.

The Spoliation Issue

The report of Officer Lightner indicated "In car video" with "yes" checked by Lightner (App. 296). On February 20, 2013 a letter was sent by registered mail to Chief Webster requesting preservation of evidence, including video records relating to the arrest

and detention of Mr. Derechin (App. 336). The letter was delivered of February 21, 2013. (App. 337). However, a later-submitted document, under the cover "DUI Arrest Packet" (App. 341) prepared by Lightner lists "Vehicle Video Evidence" with "No" circled, followed by the instruction "If No, Explain". No explanation was given.

> We hold that before a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. Tracy v. Cottrell, 524 S.E.2d 879, 890 (W. Va. 1999).

In the present case, Officer Lightner affirmatively indicated that an in car video was made. Mr. Derechin had justifiable confidence that production of the video would serve to vindicate him. He clearly recalled that he had not been under the influence and testified accordingly. His purported BAC was .071. Lightner reported his "walking to roadside" and "standing" as "normal" (App. 297). The video evidence, had it been preserved, would have arguably resolved all contested issues.

Turning to the factors enumerated in *Cottrell*, supra, factor 1 and 3 are clearly present. First, Lightner was a "party" to the action. "An arresting officer in a DUI case is a party to a license revocation hearing, within the meaning of W.Va.Code § 17C-5A-1, et seq., and within the meaning of the State Administrative Procedures Act,W.Va.Code § 29A-1-1, et seq.[.]" Syl. Pt. 1, Carte v. Cline, 488 S.E.2d 437, (W. Va. 1997). By letter

delivered by certified mail to the police chief, he was specifically notified of need for the video. Concerning factor 2, Mr. Derechin was entitled to rely on the objective video evidence to oppose the irreconcilably inconsistent evidence provided by Lightner, who did not avail himself to the opportunity to clarify; and chose not to appear before the OAH where he would be subjected to cross-examination. While no explanation was obtained, even as required by the referenced form, as to why the video no longer existed, factor 4 must be decided in favor of Mr. Derechin, who exhausted means to have it preserved for his use and had no conceivable means to otherwise prevent its destruction.

**3. Appellant's contention that "The circuit court erred in ordering costs, fees, and expenses against the DMV."**

The salient portion of DMV's argument on this point is distilled to that appearing in its brief at Page 30:

> 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 or for serving or enforcing the subpoena duces tecum which Mr. Derechin sent to the CPD.

In fact, Mr. Derechin requested one continuance because the matter was set, without

consideration of the parties availability[1], at a time when his counsel had longstanding prepaid, non-refundable international travel reservations. The second continuance that DMV attributes to Mr. Derechin was actually to secure compliance to the subpoena duces tecum, particularly with respect to the disciplinary records of Officer Lightner, which was ultimately abandoned given the additional collateral legal pursuits, costs and further delay of the hearing that would result. As discussed *ante*, the officer, and by extension the department to which he was accountable, are in the applicable sense a party to the action. In that vein, while the DMV eventually went forward without Lightner's appearance, on a prior occasion, it had requested an emergency continuance minutes before the commencement of the hearing because of Lightner's announcement that he could not appear for personal reasons. In sum, only a single continuance can be arguably attributed to Mr. Derechin. Deducting that time from the 25 months still leaves remaining an unreasonably long delay in having the matter heard, particularly as combined with the subsequent 47 month delay awaiting the final order. "[W]e further find that the cumulative effect of the multiple continuances and overall delay in this matter, while not prejudicial to Cormiffs 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). The Court

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[1]In fairness, this was a departure from the ordinary practice of the OAH. Normally, prior to scheduling hearings, a range of dates available dates have been provided before setting matters for hearings.

below appropriately found, consonant with Conniff, that fees and costs were appropriate.

**4. Petitioner's asserted error: "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 DMV, makes no secret of its ambition to, through present appeal, have *Staffileno* overturned (DMV's Counter-Petition below, App. 120). It has clearly selected the wrong case, and the wrong time. Mr. Derechin's case, for reasons set forth the decision and the record below, presents a compelling case supporting the need for the continuing vitality of *Staffileno.* The matter has been looming over him since February 1, 2013, at this writing seven and one-half years. Soon after moving here from Massachusetts, he was greeted by an officer with an existing record of misconduct who, in spite of evidence to the contrary arrested him for DUI with an alleged BAC of .071, and individually and through the auspices of the DMV subjected him through the ensuing years to the injustice and legal costs attendant to his vindication. While the DMV has an undeniable interest in public safety, urging this Court to abandon the well reasoned principles of *Staffileno* is a misguided effort.

The DMV argues that the reasons offered for the delays outweigh the prejudice to Mr. Derechin.

> If Petitioner is able to meet his burden of demonstrating actual substantial prejudice, then the trial court should proceed to consider the reasons offered by the State for the delay and determine, after weighing the tendered justifications against the demonstrated prejudice, if due process was denied

based on the preindictment delay. Staffileno at 514, citing State ex rel. Knotts v. Facemire, 223 W.Va. 594, 604, 678 S.E.2d 847, 857 (2009).

As aptly addressed by the Court below, and accordingly a full recitation is unnecessary here, it considered the testimony and reasons from both Chief Counsel for the DMV and the Chief Hearing Examiner from the Office of Administrative Hearings and could not find the reasoning DMV now advocates.

Moreover, with the revisions to West Virginia Code Article 5A of Chapter 17C phasing out the OAH, the policy reasons argued by the DMV are virtually moot.

## CONCLUSION

For reasons above, as otherwise found in the record of this action and otherwise appearing to the Court, the Respondent Joshua Derechin respectfully prays that the within appeal be denied, that the Order of the Kanawha County Circuit Court be affirmed, along with such further relief found proper by this Court, including an award of his legal fees and costs attendant to this action.

Respectfully Submitted,

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Respondent.

Docket No. 20-0192
(Circuit Court Action No. 19-AA-80)

**CERTIFICATE OF SERVICE**

Undersigned Counsel hereby certifies that a true copy of the accompanying *Summary Response of Respondent Joshua Derechin* was served upon Counsel for the Petitioner this the 20th day of August, 2020 by United States mail, postage paid, addressed as follows:

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