

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

NICHOLAS DEEMS,  
Petitioner,

v.

CASE NO. 19-AA-11-P  
DMV File # 399913A  
DARL W. POLING, JUDGE

EVERETT J. FRAZIER, COMMISSIONER  
WV DIVISION OF MOTOR VEHICLES  
Respondent.

ORDER GRANTING PETITION and REVERSING OFFICE OF ADMINISTRATIVE  
HEARINGS' FINAL ORDER

Pursuant to West Virginia Code §29A-5-1, *et seq.*, the Petitioner appeals the Final Order and decision of the Chief Hearing Examiner (hereinafter OAH") entered on August 19, 2019 that affirmed an Order of Revocation issued by the West Virginia Division of Motor Vehicles on December 4, 2017, revoking the Petitioner's driver's license for a refusal of the secondary chemical test pursuant to W.Va. Code §17C-5-7.

The Petitioner timely filed his *Petition for Judicial Review* on September 13, 2019, challenging the OAH'S Final Order on File Number 399913A, which affirmed the West Virginia Division of Motor Vehicles' *Order of Revocation*.

The Court, having reviewed the Petition, the case file, pertinent authorities, and having the benefit of oral argument in this matter and as a result of such measured review, for reasons more fully set forth hereinbelow, does hereby GRANT the Petitioner's petition for appeal, and the Court REVERSES the OAH'S *Final Order* entered August 15, 2019 for File Number 399913A.



### STANDARD OF REVIEW

1. "Appeals from revocation issued by the Commissioner of the West Virginia Department of Motor Vehicles are governed by the West Virginia Administrative Procedure Act." *Donahue v. Cline*, 190 W.Va. 98, 101, 437 S.E.2d 262, 265 (1993). Pursuant to W.Va. Code §29A-5-4(g), a decision of an administrative agency may be reversed if the court finds that the agency's findings, inferences, conclusions, decision and/or order are:
  - a) In violation of constitutional or statutory/regulatory provisions; and/or
  - b) In excess of statutory authority or jurisdiction of the agency; and/or
  - c) Made upon unlawful procedures; and/or
  - d) Affected by other error of law; and/or
  - e) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; and/or
  - f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
  
2. An agency's findings of fact and evidentiary rulings are entitled to deference, unless the court concludes that they are clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, or are arbitrary, capricious, or characterized by an abuse of discretion. Syl. Pts. 1 & 2, *Mayhorn v. West Virginia Consolidated Public Retirement Board*, 219 W.Va. 77, 79-80, 631 S.E.2d 635, 637-38 (2006); Syl Pt. 1, *Muscatelli v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).
  
3. In making this determination, a reviewing court "must determine whether the Administrative Law Judge's findings were reasoned, *i.e.*, whether he or she considered the relevant factors and explained the facts and policy concerns on which on which he or she relied, and whether those facts have some basis in the record." *Martin v. Randolph County Bd. of Education*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995).
  
4. In *Donahue v. Cline*, 190 W.Va. 98, 102, 437 S.E.2d 262, 266 (1993), the West Virginia Supreme Court of Appeals stated that in administrative appeals:

"[a] reviewing court must evaluate the record of the agency's proceedings to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is to be conducted pursuant to the administrative body's findings of fact regardless of whether the court would have reached a different conclusion on the same set of facts." (Citing *Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Rights Commission*, 187 W.Va. 312, 418 S.E.2d 758)

5. "Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed *de novo*." Syl. Pt. 1, in part, *Cahill v. Mercer County Board of Education*, 208 W.Va. 177, 539 S.E.2d 437 (2000); Syl. Pt. 2, in part, *Frymier v. Higher Education Policy Commission*, 221 W.Va. 306, 309-310, 655 S.E.2d 52, 55-56 (2007).

#### DISCUSSION

The matter before the Court originates from the Petitioner's arrest for Driving Under the Influence on November 19, 2017. On December 4, 2017 a revocation order was issued revoking the Petitioner's driving privileges for Driving Under the Influence and Refusal to Submit to a Secondary Chemical Test. An administrative hearing was held on February 7, 2019, and on August 19, 2019 the OAH entered a Final Order upholding the revocation of the Petitioner's driving privileges for Driving Under the Influence of Alcohol and Refusal to Submit a Secondary Chemical Test. On November 19, 2017 the officer arrested the Petitioner for driving under the influence of alcohol. He transported the Petitioner to the Raleigh County Sheriff's Office where the Petitioner was read, and subsequently signed, the Implied Consent statement. The officer offered a secondary chemical test to the Petitioner and he refused. The officer testified the Petitioner became irate, refused further processing and was transported to jail.

The single issue presented before the Court, is whether the Petitioner was given the allotted amount of time to deem the refusal final pursuant to W.Va Code § 17C-5-7. The Petitioner does not challenge the fact he initially refused to submit to the secondary chemical

test, and there is no dispute that the Petitioner did, in fact, refuse to provide a sufficient sample on the first secondary chemical testing as evidenced in the record.

The record shows the Petitioner was offered a breath test at 2:23 a.m., a refusal was entered, and the Petitioner was offered a blood test at 2:24 a.m. The officer's live testimony at the administrative hearing indicates the Petitioner was transferred within 10-minutes or less after signing the Implied Consent directly contradicting the officer's written report and EC/IR-II Subject Test slip contained in the DMV File. The OAH concluded that the DMV satisfied its burden of proof that the Petitioner refused the secondary chemical test of his breath pursuant to W.Va Code § 17C-5-7.

It is the opinion of the Court the hearing examiner made his decision against the weight of the evidence presented at the hearing and the OAH erred in its decision to uphold the revocation for refusal to submit to secondary chemical testing by relying on evidence presented by the DMV that was clearly in contradiction to the requirements set forth by West Virginia Code for what constitutes a refusal. The Court finds there is no evidence in the record that would show that the officer waited the required 15-minutes before he elected to remove the Petitioner from the law enforcement agency's office and transport him to jail. The Court is not calling into question whether or not the Petitioner was belligerent, as those factors alone do not relieve the officer of waiting the required 15-minutes for a refusal of secondary chemical testing. Simply put, if the officer had waited an additional 5-minutes in this matter the refusal would have been final. However, the evidence is clear and uncontested that the officer did not wait the required 15-minutes, therefore, this Court finds that the Respondent has failed to show that the Petitioner's rights with regard to the refusal were properly followed and that the Petitioner was denied the opportunity to reconsider his refusal of the secondary chemical test.

### CONCLUSIONS OF LAW

1. Due process of law extends to administrative hearings and procedures. *Smith v. Siders*, 155 W.Va. 193, 183 S.E.2d 433 (1971).
2. The West Virginia Supreme Court of Appeals has previously held that a driver's license is a property interest that 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).
3. The Respondent has the burden of proof by a preponderance of the evidence in these proceedings pursuant to West Virginia Code § 17C-5A-2.
4. There is no evidence in the record to support a finding that the officer waited the required 15-minutes to deem the Petitioner failed to provide a sufficient sample pursuant to W.Va. Code §17C-5-7.
5. The Petitioner's refusal was not properly processed under the due process requirements and, therefore, the finding is clearly wrong and contrary to the evidence which was submitted in this case.
6. This Court finds the OAH's decision to be in violation of constitutional and statutory provisions; made upon unlawful procedures; and clearly wrong in view of the reliable, probative, and substantial evidence properly admitted.

### RULING

Accordingly, the Court hereby GRANTS the relief requested in the *Petition for Judicial Review*. It is hereby **ORDERED** that the decision of the OAH in affirming the revocation of Petitioner's driver's license in above-styled action is **REVERSED** with respect to the Petitioner's refusal of the secondary chemical test, and the Petitioner's driver's license is hereby **REINSTATED** for File Number 399913A. There being nothing further before the Court, this matter is hereby **DISMISSED** and **STRICKEN** from the Docket of this Court.

It is further **ORDERED** that the Clerk of this Court is directed to forward a certified copy of this Order to: Everett Frazier, Commissioner of the WV DMV, P.O. Box 17200, Charleston, WV 25317; Chelsea Walker-Gaskins, Attorney General, DMV-AG, P.O. Box 17200,

Charleston, WV 25317, to John D. Wooton, Jr., 201 N. Kanawha St., Beckley, WV 25801; and to the Chief Hearing Examiner Theresa Maynard, Office of Administrative Hearings, 1124 Smith Street, Suite B100, Charleston, WV 25301

ENTER: 6-2-20

Darl W. Poling  
DARL W. POLING, JUDGE

Prepared by:

[Handwritten Signature]

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The foregoing is a true copy of an order entered in my office on the 04 day of June, 2020.  
PAUL H. FLANAGAN, Circuit Clerk of Raleigh Co., WV  
By [Signature] Deputy