IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0726
(Circuit Court Civil Action No. 20-AA-6)

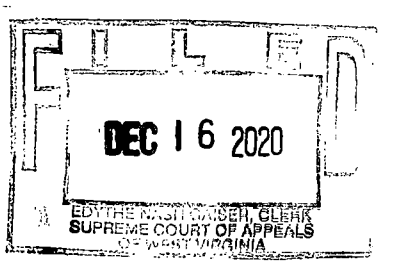
EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Petitioner,

v.

TAYLOR BRALEY,

Respondent.



BRIEF OF THE DIVISION OF MOTOR VEHICLES

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ASSIGNMENTS OF ERROR

1. **The circuit court acted arbitrarily and capriciously in finding that a less than 11 month delay by the Office of Administrative Hearings in issuing its final order was egregious.**

2. **The circuit court erred in finding that Mr. Braley was actually and substantially prejudiced "as a result of the delayed OAH decision, which, if upheld, would have a devastating effect on his ability to earn a living."**

STATEMENT OF THE CASE

On March 13, 2018, Taylor Braley, the Respondent herein, crashed his pickup truck on Everest Avenue in Kanawha County, West Virginia. (App. at PP. 261, 269.) Deputy D.J. Dorsey of the Kanawha County Sheriff's Department, the Investigating Officer herein, responded to the scene of the crash, conducted standardized field sobriety tests, lawfully arrested Mr. Braley for driving a motor vehicle in this State while under the influence ("DUI") of alcohol, and administered a secondary chemical test of Mr. Braley's breath which showed that he had a .147% blood alcohol concentration. (App. at PP. 260-271.)

On March 27, 2018, the Division of Motor Vehicles ("DMV") sent the Respondent an *Order of Revocation* for DUI of alcohol, controlled substances, drugs or a combination of those. (App. at P. 79.) The *Order of Revocation* explained Mr. Braley's four options for satisfying reinstatement of his driving privileges. *Id.* First, if he was not contesting whether he was DUI, he could waive his right to an administrative hearing, avoid having to do any revocation time, and immediately go onto Interlock for at least 140 days. *Id.* Second, he could serve a 15 day revocation then go onto Interlock for at least 125 days. *Id.* Third, he could serve 90 days of revocation. *Id.* For these options, he would also have to complete the DMV approved Safety and Treatment Program and pay reinstatement fees. *Id.* His fourth option was to ask for an administrative hearing to contest the license revocation. *Id.*

On April 17, 2018, Mr. Braley, through counsel, appealed the DMV's order to the Office of Administrative Hearings ("OAH.") (App. at P. 73.) The OAH set the matter for hearing on June 13, 2018 (App. at P. 114), and on June 4, 2018, Mr. Braley asked for his first continuance. (App. at PP. 138-141.) The OAH rescheduled the hearing for August 9, 2018 (App. at P. 148), and on August 8, 2018, Mr. Braley asked for his second continuance. (App. at PP. 160-164.) The OAH rescheduled the matter for hearing on October 4, 2018 (App. at P. 188), and on September 25, 2018, Mr. Braley requested his third continuance. (App. at PP. 198-201.)

The OAH rescheduled the matter for hearing on December 7, 2018 (App. at P. 205), and on December 6, 2018, Mr. Braley asked for his fourth continuance. (App. at PP. 211-215.) The OAH rescheduled the matter for hearing on January 25, 2019 (App. at P. 226), and on January 8, 2019, Mr. Braley requested his fifth continuance of the matter. (App. at PP. 232-235.) The OAH conducted an administrative hearing on February 1, 2019. (App. at P. 311.)

At the time of the administrative hearing, Mr. Braley worked as a handler at FedEx Express, and three months after the hearing, in early April of 2019, he was promoted to courier, which included a $10.00 per hour salary increase and required him to hold a valid driver's license. (App. at PP. 29-31.) The courier position does not require Mr. Braley to hold a commercial driver's license ("CDL"), and he delivered packages to businesses using a Mercedes Sprinter. (App. at PP. 32-33.) Mr. Braley knew that a possible license revocation was still pending when he took the new job three months after the administrative hearing. (App. at P. 34.) His attorney told him that it would be approximately three years before the OAH entered an order after his hearing, and he thought that he had a three year "cushion." (App. at P. 34.)

On December 18, 2019, ten and a half months after the administrative hearing, the OAH

entered its *Final Order* upholding the DMV's *Order of Revocation.* (App. at PP. 274-281.) Mr. Braley testified that after his license was revoked following entry of the *Final Order*, FedEx permitted him to return temporarily to a handler position for 60 days. (App. at PP. 30-32.) He was unsure if he would be permitted to work as a courier for FedEx if the DUI remained on his driving history. (App. at P. 35.)

On January 6, 2020, Mr. Braley filed an administrative appeal before the Circuit Court of Kanawha County (App. at PP. 50-64) which alleged that his "constitutional right to due process has been violated by the delay in the issuance of the order by the OAH under *Reed v. Staffileno.* The petitioner has suffered actual and substantial prejudice as a result of the delay." (App. at P. 53.) On February 7, 2020, the circuit court conducted a hearing on Mr. Braley's request for a stay or *supersedeas* of his license revocation, and Mr. Braley testified. (App. at PP. 24-45.)

On March 25, 2020, Mr. Braley filed a brief in support of his petition for judicial review. (App. at PP. 19-23.) On May 13, 2020, the DMV filed its response brief (App. at PP. 11-18), and Mr. Braley filed his reply brief. (App. at PP. 7-10.) On August 18, 2020, the Circuit Court of Kanawha entered its final *Order* finding that Mr. Braley had been actually and substantially prejudiced by the 10½ month delay in the OAH entering its *Final Order*, and the court reversed the DMV's *Order of Revocation* for DUI. (App. at PP. 2-6.) The DMV filed its appeal with this Court on September 17, 2020.

SUMMARY OF ARGUMENT

Mr. Braley was arrested for DUI in March of 2018, opted to have an administrative hearing instead of immediately addressing his license revocation, and continued the hearing five times in almost two years. Prior to and after the administrative hearing, he enjoyed the automatic stay of his

license revocation, and three months after the hearing, chose to take a new job which requires him to drive because he believed that the OAH would take three years to enter an order. After the OAH issued its *Final Order* less than 11 months later, Mr. Braley appealed to the circuit court alleging solely that the "delay" by the OAH in issuing its order caused him actual and substantial prejudice. Mr. Braley's reliance on an assumption that the OAH would take three years to enter a final order caused the change in his circumstances post-hearing; therefore, he failed to prove that he was actually and substantially prejudiced by any delay by the OAH. Accordingly, the circuit court erred in finding that his was actually and substantially prejudiced by the less than 11 month delay of the OAH.

Further, while there is no statute or rule which mandates when the OAH must enter a *Final Order* within a specified time, this Court has determined that a delay of 11 months was egregious. In the instant matter, the OAH entered its *Final Order* in 10½ months, which is not violative of any statute or rule and which, under case law, does not constitute egregious delay.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R. App. Pro. 19 (2010) is appropriate on the bases that this case involves assignments of error in the application of settled law; an unsustainable exercise of discretion where the law governing that discretion is settled; and a narrow issue of law.

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 acted arbitrarily and capriciously in finding that a less than 11 month delay by the Office of Administrative Hearings in issuing its final order was egregious.

The circuit court concluded that "[i]f the OAH decision would have been rendered in a timely fashion, [Mr. Braley] could have served his licensure suspension and maintained his previous work position which did not require a driver's license to perform." (App. at P. 6.) There is no specified deadline in statute or rule for the OAH to enter its *Final Order*, and the circuit court arbitrarily found that a 10½ month delay was untimely.

In the seminal matter on post-hearing delay by the OAH, this Court noted 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.* However, this 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). We further have recognized that "administrative 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).

Reed v. Staffileno, 239 W. Va. 538, 542, 803 S.E.2d 508, 512 (2017).

In *Straub v. Reed*, 239 W. Va. 844, 851, 806 S.E.2d 768, 775 (2017), this Court held that "the OAH's eleven-month delay in issuing its final order in this matter is egregious. A driver should not

have to wait this long to receive an order following an administrative hearing, and these delays cannot be condoned. Nevertheless, we decline to grant Mr. Straub relief because he can identify no actual and substantial prejudice, e.g., some type of detrimental change in his circumstances, related to the delay in OAH issuing its final order."

In *Staffileno*, there was a 39 month period between the time the OAH held the administrative hearing and when the OAH entered its *Final Order.* 239 W. Va. 538, 543, 803 S.E.2d 508, 513. In *Reed v. Boley*, 240 W. Va. 512, 813 S.E.2d 754 (2018), this Court considered a two-and-a-half year delay in the issuance of the OAH's order but determined that Mr. Boley had not specifically identified some type of detrimental change in his circumstances that was related to the delay in OAH issuing its final order itself.

Although post-hearing delay by the OAH was not an issue before this Court in *Reed v. Winesburg*, 241 W. Va. 325, 825 S.E.2d 85 (2019), this Court was troubled by the four year pre-hearing delay and noted,

> This Court discussed unreasonable delay in the context of an administrative proceeding in *Frantz v. Palmer*, 211 W. Va. 188, 192, 564 S.E.2d 398, 402 (2001):
>
> > Among the list of guarantees set forth in article III, section 17 of our state constitution is the laudatory mandate that "justice shall be administered without ... delay." W. Va. Const. art. III, § 17. Just 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 ex rel. 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, as we recognized in syllabus point seven of *Allen v. State Human Rights Commission*, 174 W. Va. 139, 324 S.E.2d 99 (1984): "[A]dministrative agencies performing quasi-judicial functions have an affirmative duty to dispose promptly of matters properly submitted."

241 W. Va. 325, 331, 825 S.E.2d 85, 91.

Unlike the OAH, the circuit court has codified deadlines for disposing of an administrative appeal. The West Virginia Rules of Procedure for Administrative Appeals mandates that "a final judgment ***shall*** be entered in an administrative appeal within six (6) months of the filing of the appeal." (Emphasis added.) W. Va. R. Pro. Admin. App. 6(d) (2008). Likewise, the W. Va. Trial Court Rules also mandate that "a final judgment in an appeal from an administrative agency ***shall*** be entered within six (6) months of the filing of the appeal." [Emphasis added.] W. Va. Tr. Ct. R. 16.11(c) (1999).

Despite the mandatory six month deadline for disposing of administrative appeals, the circuit court below violated its mandate in several matters which were appealed to this Court yet arbitrarily concluded that Mr. Braley was denied justice by the OAH after waiting 10½ months for a decision. In *Frazier v. Fouch*, No. 19-0350, 2020 WL 7222839 (W. Va. Nov. 6, 2020) (memorandum decision), the "OAH entered its final order upholding the DMV's orders of revocation and disqualification on June 26, 2017." *Id.* at *3. Although this Court's decision in *Fouch* is silent as to when the matter was appealed to the circuit court, pursuant to W. Va. Code § 29A-5-4(b) (1998), Mr. Fouch was required to file his administrative appeal within 30 days of the date the OAH entered its order, which was presumably on or before July 26, 2017. The Circuit Court of Kanawha County, Judge Jennifer F. Bailey presiding, "entered its final order on March 6, 2019," *Frazier v. Fouch* at *4, which is **18½ months** after the matter was appealed to the circuit court.

In *Frazier v. Riddel*, No. 19-0197, 2020 WL 4355641, at *2 (W. Va. July 30, 2020) (memorandum decision), "the OAH entered a final order on April 27, 2015." In that matter, the DMV "appealed the reversal of the 'aggravated' enhancement to the Circuit Court of Kanawha

County," *Id.*, presumably by May 27, 2015. *See*, W. Va. Code § 29A-5-4(b) (1998). The circuit court, Judge Jennifer F. Bailey presiding, "entered an order on February 6, 2019[,]" *Id.*, which was **44 months** after the administrative appeal was filed with the circuit court.

Similarly, the W. Va. Trial Court Rules mandate that "a final judgment or decree ***shall*** be entered in extraordinary, declaratory judgment, and equitable proceedings within one month of submission." [Emphasis added.] W. Va. Tr. Ct. R. 16.12 (1999). On "March 30, 2011, Mr. Sizemore filed a petition for a writ of prohibition and an application for stay in the Circuit Court of Kanawha County." *Dale v. Sizemore*, 234 W. Va. 421, 423, 765 S.E.2d 310, 312 (2014). "On January 30, 2013, the Commissioner filed a motion to dismiss the petition for writ of prohibition on its merits and for lack of prosecution." *Id.* On October 3, 2013, **30 months** after the matter was filed, the circuit court, Judge Jennifer F. Bailey presiding, entered its *Opinion and Order Granting Writ of Prohibition and Application for Stay*, which prohibited the DMV from conducting a second administrative hearing. 234 W. Va. 421, 423–24, 765 S.E.2d 310, 312–13.

The circuit court below had a clear mandate to dispose of an administrative appeal within six months and extraordinary proceedings within one month yet did not do so in the *Fouch*, *Riddel*, and *Sizemore* matters. Even though the OAH is not constrained by the same compulsory time frames for disposing of its cases, the circuit court arbitrarily determined that the OAH decision should have been "rendered in a timely fashion." (App. at P. 6.) The circuit court failed to cite to any authority to justify its determination that 10½ months was untimely, and based upon the circuit court's precedent for its entry of final orders in *Fouch*, *Riddel*, and *Sizemore*, the OAH was timely in disposing of Mr. Braley's matter. Accordingly, pursuant to this Court's holding in *Straub, supra*, the OAH's entry in 10½ months was not egregious.

C. The circuit court erred in finding that Mr. Braley was actually and substantially prejudiced "as a result of the delayed OAH decision, which, if upheld, would have a devastating effect on his ability to earn a living."

Assuming, *arguendo*, that this Court determines that the 10½ month delay in the OAH issuing its *Final Order* was egregious, this Court must determine whether Mr. Braley was actually and substantially prejudiced because of some detrimental change in circumstances caused by the OAH's abbreviated delay. 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.*

The first step in the *Staffileno* test was for the circuit court to make a finding as to whether Mr. Braley had been actually and substantially prejudiced because the OAH delayed issuance of its final order. If the circuit court found that Mr. Braley failed to prove actual and substantial prejudice as a result of the delay, then that court's review was complete. There would have been no need to balance the reasons for the delay against a non-existent prejudice. Here, Mr. Braley did not identify "actual and substantial prejudice, e.g., some type of detrimental change in his circumstances, related to the delay in OAH issuing its final order." *Straub v. Reed*, 239 W. Va. 834, 851, 806 S.E.2d 768, 775 (2017). Mr. Braley's inability to drive for his job was related to the DUI revocation which he must serve to reinstate his driving privileges and was not caused by any delay in the OAH issuing

its *Final Order*. Therefore, this matter must be reversed.

Here, the circuit court determined that in the future, Mr. Braley "would suffer actual and substantial prejudice as a result of the delayed OAH decision which, if upheld, would have a devastating effect on his ability to earn a living. Indeed, [Mr. Braley] testified that he would immediately be fired from a job that pays twice as much as the job he held at the time of the hearing, and further, that the prior job was no longer available for him to return to. If the OAH decision would have been rendered in a timely fashion, [Mr. Braley] could have served his licensure suspension and maintained his previous work posotion which did not require a driver's license to perform." (App. at PP. 5-6.)

The requirement in this matter is that Mr. Braley 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.' ")

First, it is important to note that Mr. Braley did not appeal the OAH's finding that he was DUI: he only alleged that because of the 10½ month period in getting an order, the required license revocation period would now affect his employment. It was Mr. Braley, not the OAH, who made a series of decisions which affected when his revocation period must be served. Prior to asking for an administrative hearing, when he was still working as a handler, Mr. Braley could have avoided any revocation time and could have immediately gone onto Interlock for at least 140 days. (App. at P. 79.) Alternately, he could have chosen to serve a 15 day revocation then go onto Interlock for at least 125 days. *Id.* Mr. Braley could have also chosen to serve 90 days of revocation while he was still a

handler. *Id.* Instead, he asked for an administrative hearing then chose to delay having that hearing five times in 10½ months. (App. at PP. 138-141, 160-164, 198-201, 211-215, 232-235.)

In addition, Mr. Braley 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 nor did he or his counsel contact the OAH to ask that the *Final Order* be entered. (App. at PP. 65-386.) Instead, Mr. Braley knew that a possible license revocation was still pending when he took the courier job three months after the administrative hearing. (App. at P. 34.) His attorney told him that it would be approximately three years before the OAH entered an order after his hearing, and he thought that he had a three year "cushion." (App. at P. 34.) Mr. Braley chose to gamble on having a three year cushion before receiving the *Final Order*, and the OAH called his bluff.

Mr. Braley's series of choices differ substantially from the facts in *Staffileno, supra.* In the 39 months 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. Braley could not identify a detrimental change in his circumstances ***as a result of or related to the delay.*** The 10½ month period for the OAH to enter its *Final Order* did not put Mr. Braley's courier position in jeopardy. Instead, Mr. Braley may lose his courier position as a result of or related to the decisions he made to ask for an administrative hearing instead of immediately serving his revocation period or going onto Interlock, to delay the administrative hearing five times, and to take the courier position in the hope that the OAH would not enter its order for three years.

Moreover, Mr. Braley presented no evidence that he would be prohibited from working as a courier in the future. When asked if he knew if FedEx would continue to allow him to work as a courier after having a DUI on his record, Mr. Braley replied, "I have to sit out for a certain amount of time, but I am not sure. I haven't gone that far in the process. . . I have to speak with my senior manager first." (App. at P. 35.) Further, the record is devoid of any evidence that Mr. Braley has sought alternate employment or that he would be prohibited from installing the Interlock device on his work related vehicle so that he could continue to drive for FedEx as a courier while completing the requirements for license reinstatement. If Mr. Braley 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 abbreviated delay in issuing an order. Simply put, there is no evidence in the record of a

substantial detrimental change in Mr. Braley'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. Braley did not seek relief in *mandamus* but testified that he not only knew that his case was still pending but that he specifically made a choice to change positions in the hopes that the OAH would take three years to make a decision. (App. at P. 34.) 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). Mr. Braley did not seek *mandamus* relief below, and the circuit court ignored the issue.

CONCLUSION

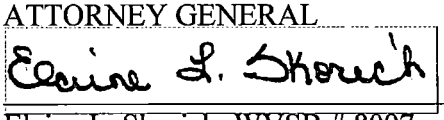
The circuit court arbitrarily determined that the 10½ month period between the administrative hearing and the issuance of the *Final Order* was untimely. Mr. Braley failed to prove a detrimental change in circumstances ***as a result of the delay*** in the OAH issuing its order. Accordingly, the circuit court's *Order* must be reversed.

Respectfully submitted,

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

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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NO. 20-0726
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EVERETT J. FRAZIER, COMMISSIONER,
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MOTOR VEHICLES,

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TAYLOR BRALEY,

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 16th day of December, 2020, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, to wit:

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Elaine L. Skorich
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