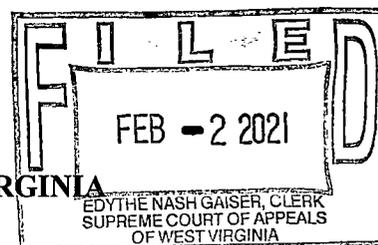


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0726

(Circuit Court Civil Action No. 20-AA-6)

**FILE COPY**

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

Petitioner,

v.

TAYLOR BRALEY,

Respondent.

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REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

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**PATRICK MORRISEY  
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Now comes Everett J. Frazier, Commissioner of the West Virginia Division of Motor Vehicles (“DMV”), by and through his undersigned counsel, and pursuant to Rev. R. App. Pro. 10(g) submits the *Reply Brief of the Division of Motor Vehicles*.

The circuit court erred in finding that the Respondent was prejudiced by the delay between the hearing and the entry of the final order and in ignoring the fact that the Respondent caused a delay of seven months by requesting five continuances. Had the Office of Administrative Hearings (“OAH”) held the administrative hearing in June 2019, Mr. Braley would have had a final order by the time he took a new position.

In his response brief, Mr. Braley admits that he relied on his counsel’s proffer that the OAH would not render a decision for years because according to his counsel’s limited knowledge of all pending OAH cases from 2015 to 2019, his counsel was unaware of the OAH entering timely orders. (Resp. Br. at P. 9.) Of the 4,771 driving while under the influence (“DUI”) administrative license revocation proceedings with dates of arrest between 2015 and 2019 which were appealed to the OAH, Mr. Braley’s counsel represented 18<sup>1</sup> of the petitioners. Therefore, Mr. Braley’s counsel has knowledge of 2.65% of the OAH case dispositions for those DUI arrests and could not have predicted when the OAH would enter a final order in the instant matter.

The Respondent’s decision to change jobs was in detrimental reliance upon his counsel’s uninformed proffer and not caused by any delay by the OAH in entering its order. Moreover, if the Respondent took a new job because he relied on his counsel’s representation that the matter would not be disposed for another three years, his complaint is that the OAH acted too quickly in entering

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<sup>1</sup> The majority of matters before the OAH are resolved without the OAH holding a hearing and writing a final order. A large number of OAH appeals are disposed of when the driver withdraws his hearing request or is convicted in the companion criminal matter as occurred in eight of the 18 matters involving the Respondent’s counsel.

its final order – not that the OAH delayed in entering its order – and the circuit court erred in finding that the Respondent was actually and substantially prejudiced by any OAH delay.

The instant matter is distinguishable from *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017). In *Staffileno*, this Court noted that the circuit court in that matter “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.” 239 W. Va. 538, 543, 803 S.E.2d 508, 513. Here, Mr. Braley changed his employment hoping that the OAH would take three years to enter a decision. Any detrimental change in his circumstance was due to the OAH entering an order sooner than the Respondent anticipated.

Finally, it is important to note that the Legislature eliminated the administrative license revocation process and OAH because, in part, of its false impression that the administrative license revocation process was slower than the collateral criminal process because the OAH delayed issuing some final orders. In Mr. Braley’s case, he was arrested for DUI on March 14, 2018; had an administrative hearing on February 1, 2019; and received an order from the OAH on December 18, 2019. Therefore, his administrative case has been resolved for more than a year. However, his companion criminal matter has been pending in the magistrate court since his hearing was continued on July 17, 2018.

The delay in disposing the companion criminal matter far exceeds the delay in the OAH disposing the administrative matter and may still result in a conviction which will, in turn, result in a license revocation. The relative speed of resolution between the faster administrative license revocation process and the slower collateral criminal process in this case is typical of most cases since 80 to 90% of administrative matters are uncontested and settled upon receipt of an officer’s

statement and issuance of an order of revocation.<sup>2</sup> The disparity here is detrimental to the Respondent's claims of prejudice because he is subject to the same consequence, license revocation, from the still pending criminal matter and has abandoned any pretense of innocence. No matter the process, administrative or criminal, gamesmanship should not prevail.

Without a doubt, the OAH had several cases in which it should have produced a final order more quickly. This court repeatedly recognized it, rightfully admonished the delay, and created a remedy for those that were genuinely prejudiced. Unfortunately, the OAH's delay in some cases created the reputation for the entire administrative license revocation process which fell victim to a legislative response in 2020. In this case, if the Court applies the Staffileno remedy and prohibits a license revocation, it will prevent the DMV from protecting the public from an impaired driver again not because of delay by the DMV, but because of delay by OAH *and delay by the Kanawha County Magistrate Court.*

### CONCLUSION

For the reasons outlined in the *Brief of the Division of Motor Vehicles* as well as those outlined above, the circuit court's *Order* must be reversed.

Respectfully submitted,

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

By Counsel,

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<sup>2</sup> The records of DMV reflect that over 60% of DUI arrests from the month of July 2020 remain adjudicated in the criminal process as of the writing of this reply brief, and thus far 73% of total DUI arrests have *not* been adjudicated by the criminal courts in the 7 months since the administrative process was eliminated.

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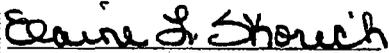
**TAYLOR BRALEY,**

**Respondent.**

**CERTIFICATE OF SERVICE**

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 2<sup>nd</sup> day of February 2021, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, to wit:

Joseph H. Spano, Jr., Esquire  
Pritt & Spano, PLLC  
714½ Lee Street, E., Suite 204  
Charleston, WV 25301

  
Elaine L. Skorich