

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

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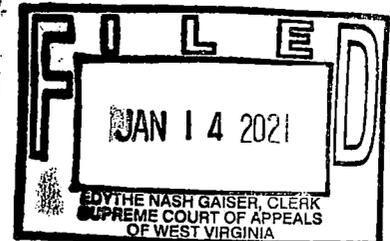
**EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES**

Petitioner,

v.

TAYLOR BRALEY,

Respondent.



**RESPONSE BRIEF ON BEHALF OF
TAYLOR BRALEY**

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TABLE OF AUTHORITIES

CASES:

1. *Reed v. Staffileno*, 239 W. Va. 239, 803 S.E.2d 508 (2017)..... p. 6, 8, 9
2. *Muscatell v. Cline* 196 W.Va. 588, 474 S.E.2d 518 (1996)..... p. 7
3. *Straub v. Reed*, 239 W. Va. 538, 542, 806 S.E.2d 768 (2017)p. 8, 10

STATUTES:

1. West Virginia Code §29A-5-4(a)..... p. 7

I. STATEMENT OF THE CASE

On March 13, 2018, Taylor Braley, the Respondent herein, was involved in a crash in 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, arrested Mr. Braley for driving a motor vehicle in this State while under the influence ("DUI") of alcohol. (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 due to a scheduling conflict with undersigned counsel. (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 due to a hearing conflict with undersigned counsel. (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 due to undersigned counsel having a scheduling conflict. (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 due to undersigned counsel having a scheduling conflict. (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 due to undersigned counsel having a scheduling conflict. (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 commercial driver's license ("CDL"), and he delivered packages to businesses using a Mercedes Sprinter. (App. at PP. 32-33) The record reflects that 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) This statement was due to the length of time the OAH took to enter prior orders in undersigned counsels cases.

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 before he would be let go. (App. at PP. 30-32) He would not be able to work as a courier for FedEx with no valid license. (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 Mr. Braley had been actually and substantially prejudiced by the 10 ½ 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.

II. SUMMARY OF ARGUMENT

- A. The Circuit Court clearly did not act arbitrarily and capriciously in finding that a 10 ½ month delay by the Office of Administrative Hearings in issuing its final order was extremely egregious.
- B. The Circuit Court did not err in finding that Mr. Braley was actually and substantially prejudiced “as a result of the long delay in the OAH decision, which, if upheld, would have a devastating effect on his ability to keep his job and earn a living.”

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent does not believe oral argument is necessary unless the Court determines that issues should be addressed in said manner. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

IV. ARGUMENT

Standard of Review

On appeal of an administrative order from the circuit court, this Court is bound by the statutory standards contained in W. Va. Code s. 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 (1996). “Further, in 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 **abuse of discretion standard** and reviews questions of law de novo.” Syl. Pt. 2 *id.* 242 W.Va. 657.

“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” *Reed v. Staffileno*, 239 W.Va. 238 (2017).

A. The Circuit Court clearly did not act arbitrarily and capriciously in finding that a 10 ½ month delay by the Office of Administrative Hearings in issuing its final order was extremely egregious.

The commissioner's argument that anything less than eleven months pertaining to an OAH ruling after a hearing is faulty and the argument is a far stretch. In *Straub v. Reed*, 239 W.Va. 538, 542 (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." Now, the commissioner has the audacity to argue that a 10 ½ month delay is not egregious. This argument is laughable and it seems the commissioner argues that the 15 day difference from this case to *Straub* does make this case distinguishable in the delay issue.

Next, the commissioner argues that the circuit court "violated its mandate in several matters which were appealed to the Court yet arbitrarily concluded that Mr. Braley was denied justice by the OAH after waiting 10 ½ months for a decision." (Pet. Brief at pg. 7). The commissioner goes on to state numerous rulings by the Circuit Court Judge Bailey on unrelated OAH circuit appeal cases that were over the mandatory six months deadline per W. Va. R. Pro. Admin. App. 6(d) (2008). First, this argument has no bearing on this Courts previous rulings that an eleven-month delay was egregious. Second, it seems the commissioner would like to point fingers at other courts instead of correcting the issues with their own. The ruling of the circuit court that the 10 ½ month delay on issuing the order by the OAH was correct. In the present case, the final order was issued on December 18, 2019 affirming the revocation; 321 days after the hearing. During the 321 days, the Petitioner was promoted at work from a handler to a courier and this extended time for the OAH to issue a final order is egregious.

B. The Circuit Court did not err in finding that Mr. Braley was actually and substantially prejudiced “as a result of the long delay in the OAH decision, which, if upheld, would have a devastating effect on his ability to keep his job and earn a living.”

The circuit court ruled that the respondent was actually and substantially prejudiced as a result of the OAH’s egregious delay in making a ruling after the evidentiary hearing. “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” *Reed v. Staffileno*, 239 W.Va. 238 (2017).

The commissioner first argues that the Respondent’s case can be distinguished from Staffileno because the Respondent took his promotion only two months after the administrative hearing on February 10, 2020. The commissioner’s argument fails because the delay of ten months did cause a meaningful change in the Respondent’s circumstances. The Respondent relied on undersigned counsel’s proffer that the OAH would not render a decision for years because in every other case before the OAH from 2015 to late 2019, it took years for a final OAH order to be entered with no known exceptions to undersigned counsel. Knowing there would not be a decision for quite some time, the commissioner would argue that the Respondent should have declined a promotion to be a courier because the OAH would somehow get its act together 10 months later. The Respondent relied on the lackluster past performance of the OAH in issuing orders and took a promotion to better serve himself and his family by earning more money.

Second, the Respondent did in fact “identify 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 (2017). The Respondent testified that he would be immediately fired from his current job and his previous job was no longer available. The detrimental change is clearly related to the delay of the OAH in issuing its final order. The commissioner now argues that the Respondent could have immediately served his suspension and never had these issues. (Pet. Brief at pg. 10). This is not a valid argument and the Respondent has the constitutional right to challenge his DUI arrest and DMV charges in administrative court.

The commissioner further argues that the Respondent did nothing to further expedite the issuance of an order from OAH by filing a mandamus action seeking entry of a final order (Pet. Brief at pg. 11). This argument fails as well. Why would the Respondent file a mandamus action asking the OAH to do their job in a more efficient manner.

VI. CONCLUSION

WHEREFORE, for the reasons set forth above the Respondent respectfully requests that this Honorable Court review and uphold the Final Order of the circuit court.



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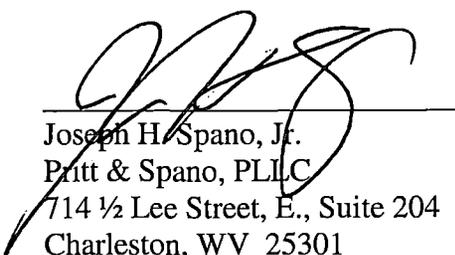
Respondent.

CERTIFICATE OF SERVICE

I, Joseph H. Spano, Jr., counsel for Taylor Braley, Respondent, do hereby certify that service of the foregoing *Respondent's Response to the Petitioner's Brief* in the above styled case have been made upon the following:

Elaine Skorich, Esq.
Assistant Attorney General
DMV Legal Division
PO Box 17200
Charleston, WV 25317

this the 14 day of January 2021, via United States mail, in a sealed envelope, postage prepaid.



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