IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

v.

Civil Action No. 20-AA-46
OAH Case No. 333545B
Judge Louis H. Bloom

HARRY G. ICKES,
Respondent.

FINAL ORDER

Pending before the Court is a *Petition for Judicial Review* filed on May 18, 2020, by the Petitioner, Everett J. Frazier as Commissioner of the West Virginia Division of Motor Vehicles, by counsel Steven E. Dragisich. The *Petition* seeks to reverse the *Final Order* entered by the Office of Administrative Hearings ("OAH") on March 26, 2020. On August 14, 2020, the Petitioner filed his *Brief*. The Respondent, Harry G. Ickes, did not file either a response to the *Petition* or a response brief. Pursuant to Rule 2(g) of the *West Virginia Rules of Procedure for Administrative Appeals*, Respondent's failure to file a response to the *Petition for Judicial Review* operates as a denial of the declarations made therein.[1] On October 7, 2020, the Court held a hearing regarding the Petitioner DMV's appeal. The Petitioner appeared by counsel Steven E. Dragisich, while the

[1] "When the circuit court does not order the filing of a responsive pleading, the declarations contained in the petition for judicial review shall be taken as denied." The Court notes that this silence-as-denial is in contrast to Rule 10(d) of the *Rules of Appellate Procedure* governing the Supreme Court of Appeals of West Virginia, which states that "[t]he respondent must file a brief in accordance with this subsection, or a summary response in accordance with subsection (e) of this Rule . . . If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue." The contrast between these two rules creates an anomalous result whereby Respondent's failure to file a response in this Court operates as a blanket denial of the *Petition*, while Respondent's failure to file a brief in the State Supreme Court would operate as an agreement with Petitioner's arguments. This disparity places this Court in the position of almost certainly being reversed in the likely event that Respondent again fails to file a response on appeal, as his silence will be treated as an admission on appeal rather than a denial as it is treated here. This Court is of the opinion that these two rules require conformity with one another, regardless of which rule is made the default.

Respondent failed to appear altogether. Upon reviewing the record, applicable law, and pleadings, the Court finds and concludes as follows.

STANDARD OF REVIEW

Pursuant to W. Va. Code § 29A-5-4(g), a circuit court reviewing an administrative agency's decision

> May affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the Petitioner or Petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedures; or
> (4) Affected by other error of law; or
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g) (1998). The reviewing court "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."[2]

FINDINGS OF FACT

1. On October 31, 2018, Corporal Kristen L. Richmond of the Brooke County Sheriff's Office was at a Wendy's restaurant in Wellsburg, WV, when she was alerted by three employees that a possibly impaired individual was in the drive-thru lane.[3] Cpl. Richmond made contact with the driver while still at the restaurant; she identified the driver as Harry G. Ickes, the Respondent in this matter.[4]

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[2] Syl. pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 590, 474 S.E.2d 518, 520 (1996).
[3] *Hearing Transcript*, p. 13, lines 9 – 19
[4] *Id.* at p. 15, lines 9 – 16.

2. Cpl. Richmond observed the Respondent to have bloodshot and watery eyes, droopy eyelids, and slurred speech.[5] The Respondent stated that he had prescriptions for Clonazepam and Methadone.[6] Cpl. Richmond testified that the Respondent informed her that he had taken the Clonazepam roughly one hour prior and that he takes the Methadone daily, though no specific time was given.[7] Cpl. Richmond did not detect the odor of alcohol and instead suspected that the Respondent was under the influence of his prescribed medication.[8]
3. Cpl. Richmond asked Respondent to exit the vehicle, which he did, in order to perform field sobriety tests.[9] The Respondent exhibited unsteadiness in exiting the vehicle.[10]
4. During the horizontal gaze nystagmus test, Respondent exhibited a lack of smooth pursuit in both eyes, distinct and sustained nystagmus at maximum deviation in both eyes, and an onset of nystagmus prior to 45 degrees in both eyes.[11] Cpl. Richmond testified that Respondent scored a six on the test, meaning he displayed every indicator for impairment during this test.[12]
5. Cpl. Richmond next conducted a lack of convergence test, during which the Respondent's eyes stopped prior to completely converging and displayed a lack of convergence.[13]
6. The Respondent then performed a walk-and-turn test, during which Respondent twice broke the mandated starting stance and attempted to begin the test before being told to do so.[14] Cpl. Richmond noted that Respondent scored a six out of a possible eight indicia of impairment.[15]

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[5] *Id.* at p. 14, lines 11 – 13.
[6] *Id.* at p. 16, lines 5 – 6.
[7] *Id.* at p. 27, lines 1 – 11.
[8] *Id.* at lines 1 – 4.
[9] *Id.* at lines 13 – 15.
[10] *Id.* at lines 18 – 20.
[11] *Id.* at p. 19, lines 3 – 7.
[12] *Id.* at lines 8 – 18.
[13] *Id.* at p. 21, lines 8 – 11.
[14] *Id.* at p. 22, lines 12 – 16.
[15] *Id.* at lines 16 – 21.

7. During the one-leg-stand test Respondent placed his foot on the ground to balance himself, used his arms for balancing, and generally swayed while standing.[16] Respondent thus exhibited three of the four possible indicia of impairment.[17]

8. Finally, Respondent swayed roughly six inches while performing the Modified Romberg test, although his estimation of time passage did not indicate impairment.[18]

9. Cpl. Richmond placed the Respondent under arrest for driving under the influence.[19] Cpl. Richmond testified that the Respondent informed her that he was under the influence of benzodiazepams (Clonazepam) and Methadone.[20] Cpl. Richmond's notes from the interview reflect as much.[21]

10. Cpl. Richmond testified that she asked Respondent to submit to a blood draw test, to which he agreed.[22] However, Cpl. Richmond testified that the EMT was "unable to obtain blood, for whatever reason, from the subject."[23] When asked on cross-examination why the EMT made only a single attempt to draw blood, Cpl. Richmond testified "[t]hat's not my decision."[24] The Respondent testified that he "may have offered" to submit to a blood test before Cpl. Richmond asked for the same.[25] The Respondent testified that the EMT, in trying to obtain a blood draw, stated that it would be difficult to obtain a sample for testing and asked "[i]s this important?" to which Cpl. Richmond stated "[n]o, it's not that big of a deal."[26]

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[16] *Id.* at p. 25, lines 21 – 22.
[17] *Id.* at lines 17 – 18.
[18] *Id.* at p. 26, lines 9 – 10.
[19] *Id.* at p. 27, lines 12 – 16.
[20] *Id.* at p. 31, lines 2 – 4.
[21] *Id.*
[22] *Id.* at p. 28, lines 7 – 8.
[23] *Id.* at lines 8 – 9.
[24] *Id.* at p. 38, lines 18 – 24.
[25] *Id.* at p. 50, lines 5 – 8.
[26] *Id.* at p. 50, lines 12 – 16.

APPLICABLE LAW

11. W. Va. Code § 17C-5-9, "Right to demand test," provides as follows:

> Any person lawfully arrested for driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs shall have the right to demand that a sample or specimen of his or her blood or breath to determine the alcohol concentration of his or her blood be taken within two hours from and after the time of arrest and a sample or specimen of his or her blood or breath to determine the controlled substance or drug content of his or her blood, be taken within four hours from and after the time of arrest, and that a chemical test thereof be made. The analysis disclosed by such chemical test shall be made available to such arrested person forthwith upon demand.

12. In *State v. York*, the Supreme Court of Appeals of West Virginia held that

> Rather, W. Va. Code § 17C-5-9 accords an individual arrested for driving under the influence of alcohol, controlled substances, or drugs a right to demand and receive a blood test within two hours of his arrest. Furthermore, this statutory right is hardly a new development. Historically, one charged with intoxication has enjoyed a constitutional right to summon a physician at his own expense to conduct a test for alcohol in his system. To deny this right would be to deny due process of law because such a denial would bar the accused from obtaining evidence necessary to his defense. The defendant's right to request and receive a blood test is an important procedural right that goes directly to a court's truth-finding function.

175 W. Va. 740, 741, 338 S.E.2d 219, 221 (1985).[27]

13. In its *In re Burks* decision, the Supreme Court of Appeals of West Virginia held that "[a] person who is arrested for driving under the influence who requests and is entitled to a blood test, pursuant to W. Va. Code, § 17C-5-9, must be given the opportunity, with the assistance and if necessary the direction of the arresting law enforcement entity, to have a blood test that insofar as possible meets the evidentiary standards of 17C-5-6."[28] [29]

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[27] The Court notes that *State v. York* was a criminal case rather than an administrative proceeding. This Court nonetheless finds the discussion regarding the historical importance of a driver's right to a blood test to be informative and relevant to this matter.

[28] Syl. Pt. 2, 206 W. Va. 429, 433, 525 S.E.2d 310, 314 (1999).

[29] *In re Burks* was decided on the issue of whether police were required to furnish the results of a completed test to the driver. While no test was completed here, the Court's interpretation of § 17C-5-9 nonetheless applies.

14. In *Reed v. Hall*, the driver arrested for DUI requested a blood test.[30] The blood draw was performed but the blood sample was never submitted for testing.[31] The DMV argued that the burden is on the driver to obtain a blood test because he had requested the test, and that the police satisfy their obligation by providing the blood draw.[32] The State Supreme Court held that W. Va. Code § 17C-5-9 creates a statutory and due process right to both demand and receive a blood test, and that the burden is on police to submit the blood for testing.[33] The Court reversed the driver's DUI license revocation because police failed to submit the blood sample for testing.[34]

15. In *Reed v. Divita*, the driver was arrested for DUI of a controlled substance; both the driver and arresting officer requested a blood test.[35] The blood sample was submitted to the West Virginia State Police Lab where it was tested only for alcohol and returned to the officer with instructions that it may be resubmitted for further testing if necessary.[36] Rather than resubmitting the sample or preserving it for the license revocation hearing, the officer destroyed the sample at the conclusion of the criminal matter.[37] Citing *Hall*, the Court held that the "respondent was denied her statutory and due process rights under West Virginia Code § 17C-5-9."[38]

CONCLUSIONS OF LAW

16. Here, the Petitioner DMV disputes the OAH's finding that Respondent Ickes' due process rights were violated by Cpl. Richmond's failure to provide a blood test. The facts in the instant

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[30] 235 W. Va. 322, 325, 773 S.E.2d 666, 669 (2015).
[31] *Id.*
[32] *Hall*, 235 W. Va. at 332, 773 S.E.2d at 676.
[33] *Hall*, 235 W. Va. at 333, 773 S.E.2d at 677.
[34] *Id.*
[35] No. 14-11018, 2015 WL 5514209, at *1 (W. Va. Sept. 18, 2015).
[36] *Id.*
[37] *Id.*
[38] *Id.* at *3.

matter do not rise to the situation in *Reed v. Hall* where the driver's blood was drawn but never tested. Nor do they resemble *Reed v. Divita* where the blood sample was tested for alcohol, then destroyed. Instead, the simple fact is that Respondent Ickes was not afforded a blood test in any capacity. Indeed, his blood was never even drawn. During the hearing and in its *Brief*, the Petitioner DMV argued that it was the EMT who decided not to draw the blood, not Cpl. Richmond. The Petitioner then postulated that the EMT may have been adhering to EMT policy and that Cpl. Richmond had no authority to order the EMT to perform the test.

17. This shifting of the blame to the EMT is entirely unconvincing. Precedent from the Supreme Court of Appeals of West Virginia provides the Respondent with a due process right to a blood test upon his arrest for DUI. This due process right is not alleviated simply because an individual outside the police department, the EMT, stated that it would be difficult to obtain a blood sample and asked if the blood test was absolutely necessary. Instead, it is clear that Respondent was denied his due process right to a blood test, regardless of who is blamed for such failure. The Petitioner offered no point of law relieving the obligation to provide a blood test when the test would be difficult to perform. Instead, both W. Va. Code § 17C-5-9 and State Supreme Court precedent make clear that the due process right to a blood test is absolute and must be provided.

18. The Petitioner DMV argues that Respondent is not entitled to either this due process right or the statutory protection of W. Va. Code § 17C-5-9 because Cpl. Richmond asked Respondent to submit to a blood test rather than Respondent affirmatively demanding a test. The Court first notes that Cpl. Richmond testified that she asked for the blood test while Respondent testified that he may have also requested a test. Accordingly, it is not entirely clear that the Respondent merely complied with the blood test rather than requesting it himself.

19. However, this Court's holding is not affected by who requested the blood test. When the arresting officer requests a blood draw, the impetus upon the driver to also request a blood draw is removed, as the driver has been assured by the officer that a blood draw will occur if they acquiesce. To say that the driver loses constitutional and statutory protections by trusting that the officer will do as they say is unfounded and inconsistent with the Supreme Court of Appeals of West Virginia's precedent. This Court declines to hold that drivers' due process rights are contingent upon a race between the driver and the police officer to first request a blood draw and/or analysis thereof. In other words, the Court finds no meaningful distinction between a driver affirmatively demanding a test and a driver agreeing with an officer's request to be tested. Instead, this Court holds that the Respondent's due process rights were violated by Cpl. Richmond's failure to provide a blood test regardless of who first requested the test.

20. Moreover, under Petitioner's reasoning, a driver's due process and statutory rights to have one's blood tested following an arrest for DUI cannot be violated as long as the officer requests the blood draw, not the driver. This would assumedly remain true in instances of bad faith on the arresting officer's part, including if the officer intentionally destroys the sample. This Court refuses to adopt such a holding.

21. The Petitioner DMV's remaining argument amounts to an attack on the State Supreme Court precedent holding that due process is implicated when drivers accused of DUI are denied a blood test. This Court agrees with this precedent and declines to disregard both the Supreme Court of Appeals of West Virginia and W. Va. Code § 17C-5-9.

22. In sum, this Court **CONCLUDES** that Respondent Ickes was denied his statutory right to a blood test pursuant to W. Va. Code § 17C-5-9. The Court further **CONCLUDES** that under precedent from the Supreme Court of Appeals of West Virginia, Respondent Ickes' due

process right to a blood test were violated when Cpl. Richmond failed to provide Ickes with a blood test after either Ickes' request for the same or Cpl. Richmond's request that Ickes submit to a blood test.

DECISION

Accordingly, the Court **ORDERS** that the *Final Order* of the OAH be **AFFIRMED** in its entirety. The *Order of Revocation* entered November 16, 2018, is thus **REVERSED** and **VACATED**. There being nothing further, the Court **ORDERS** this action **STRICKEN** from the docket of the Court. The Clerk is **DIRECTED** to send a certified copy of this *Final Order* to all counsel as well as the Office of Administrative Hearings at 1124 Smith Street, Suite B100, Charleston, WV 25301.

ENTERED this 16 day of October 2020.

Louis H. Bloom

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY [illegible] CLERK OF [illegible] OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND THIS [illegible] DAY OF [illegible] 2020
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

10/19/20
M. ICKES
E. Dragisich
Ickes