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FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DINOS J. SMITH,

OCT 30 PM 2:11

Petitioner,

Civil Action No. 19-AA-88
The Hon. Carrie L. Webster
OAH File No. 380428A

v.

ADAM HOLLEY, ACTING COMMISSIONER
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Respondent.

**FINAL ORDER GRANTING PETITION FOR JUDICIAL REVIEW
BASED UPON *STAFFILENO* DELAY**

Pending before the Court is the "Petition for Judicial Review," filed by Dinos J. Smith, ("Petitioner") by Joseph H. Spano, Esq. This is an appeal filed pursuant to W. Va. Code § 17C-5A-2(s) (2015) and W. Va. Code § 29A-5-4 (1998), from the *Final Order* of the Office of Administrative Hearings ("OAH") entered July 18, 2019, which upheld a decision of the Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), revoking Mr. Smith's driver's license for driving a motor vehicle in this State while under the influence ("DUI") of alcohol, controlled substances, and/or drugs.

On October 10, 2019, Petitioner appeared in person and by counsel, and also came the Adam Holley, Acting Commissioner of the West Virginia Division of Motor Vehicles¹, ("Respondent"), in person and by counsel, Elaine Skorich, for hearing on Petitioner's Motion to Dismiss on *Staffileno* Delay.

The Court, after receiving the proffer of counsel and reviewing their written submissions, makes and files the following Findings of Fact, Conclusions of Law and Order.

¹ The current Commissioner of the Division of Motor Vehicles is Everett Frazier.

STANDARD OF REVIEW

Review of the OAH's *Final Order* is made under the judicial review provisions of the Administrative Procedures Act. *Groves v. Cicchirillo*, 225 W. Va. 474, 478, 694 S.E.2d 639, 643 (2010) (per curiam).

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court 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, decisions 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."

Syl. Pt. 2, *Shepherdstown VFD. v. State ex rel. State of W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983).

"When the party asserts that his constitutional right to due process has been violated by a delay in the issuance of the revocation order by the Commissioner of the Division of Motor Vehicles, he must demonstrate that he 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*, 803 S.E.2d 508 (W. Va. 2017).

FINDINGS OF FACT

1. On August 30, 2014, at approximately 2:12 a.m., Officer R. C. Cuevas, a member of the Beckley Police Department and the Investigating Officer herein, responded to the parking lot of Morgan's Bar in the 1900 block of Harper Road in Beckley, West Virginia, to investigate a

report of a motor vehicle accident involving two cars.

2. Upon arriving at 2:31 a.m., the Investigating Officer determined that a Jeep Cherokee and a Chevrolet Cavalier had been involved in a minor collision where the Jeep backed out of its parking space and sideswiped the Cavalier parked next to it.

3. The Investigating Officer also found Dinos J. Smith, the Petitioner herein, Stephanie Rizo, the owner of the Jeep, and Mary Franciso, the owner of the Cavalier.

4. In response to questioning, Mr. Smith advised the Investigating Officer that he had hit the Cavalier, and Ms. Rizo advised the officer that Mr. Smith was driving her Jeep while she was in the front passenger seat when the accident occurred.²

5. Mr. Smith had slurred speech, bloodshot and water eyes, the odor of an alcoholic beverage on his breath, and was unsteady while standing.

6. In response to further questioning, Mr. Smith admitted to the Investigating Officer that he had consumed five beers earlier.

7. The Investigating Officer asked Mr. Smith to perform standardized field sobriety tests.

8. Prior to administering the Horizontal Gaze Nystagmus ("HGN") Test, the Investigating Officer performed a medical assessment of Mr. Smith's eyes which indicated that Mr. Smith was a viable candidate for the test because he had equal pupils, equal tracking, and no resting nystagmus. During the HGN Test, Mr. Smith exhibited impairment because both of his eyes lacked smooth pursuit, exhibited distinct and sustained nystagmus at maximum deviation, and displayed the onset of nystagmus prior to a 45-degree angle.

² At the revocation hearing, Petitioner testified that he did not tell the Investigating Officer he was driving when the accident happened and later appeared to qualify his testimony. This order will not conduct an analysis of the testimony or otherwise address issues surrounding the DUI because this ruling is being made pursuant to *Staffileno*.

9. The Investigating Officer explained and demonstrated the Walk-and-Turn Test, and Mr. Smith exhibited impairment because he could not keep his balance while listening to instructions regarding the test, stopped while walking, raised his arms for balance, took an incorrect number of steps, and stopped after taking nine steps, prompting the Investigating Officer to remind him he needed to complete the remainder of the test.

10. The Investigating Officer explained and demonstrated the One Leg Stand Test, and Mr. Smith exhibited impairment clues because he swayed while balancing, used his arms for balance, and did not keep his raised foot off the ground.

11. After ensuring that Mr. Smith had not smoked or drank alcohol for 15 minutes prior to the test, the Investigating Officer administered a preliminary breath test to Mr. Smith. The result of the test indicated that Mr. Smith had a blood alcohol concentration of .157%.

12. The Investigating Officer lawfully arrested Mr. Smith for DUI and transported him to the Beckley Police Department for processing and administration of the designated secondary chemical test.

13. The Investigating Officer read and provided Mr. Smith with a copy of the W. Va. Implied Consent Statement, which Mr. Smith signed. The Beckley Police Department has designated the Intox EC/IR-II as the secondary test of the breath. The Investigating Officer was trained and certified to administer the Intox EC/IR-II at the W. Va. State Police Academy on April 26, 2014.

14. The Investigating Officer observed Mr. Smith for 20 minutes to ensure that he had not ingested food or drink and to ensure that he had no other foreign matter in his mouth. The Investigating Officer completed the remaining steps on the Breath Test Operational Checklist,

and Mr. Smith provided a breath sample which indicated that he had a blood alcohol concentration ("BAC") of .144%.

15. On September 25, 2014, the DMV sent Mr. Smith an *Order of Revocation* for DUI. Because this was Mr. Smith's first DUI offense (as evidenced by his "A" file number), he had two options for reinstatement of his driving privileges: 1) he could serve 15 days of revocation plus successfully complete 120 days in the West Virginia Alcohol Test and Lock Program ("Interlock"); or 2) he could serve 90 days of revocation. *Id.* Both options also required successful participation in the West Virginia Safety and Treatment Program and payment of reinstatement fees.

16. On October 25, 2014, the Petitioner requested an administrative hearing from the OAH.

17. On November 19, 2014, before a hearing was even noticed and as requested by Mr. Smith's then counsel, John D. ("Jody") Wooton, the OAH issued a subpoena for the appearance of the Investigating Officer.

18. On January 28, 2015, the OAH noticed the matter for hearing on February 27, 2015.

19. On February 26, 2015, the DMV requested a continuance of the administrative hearing, which the OAH granted on February 27, 2015.

20. On March 10, 2015, the OAH rescheduled the hearing for August 14, 2015.

21. On April 13, 2015, the OAH *sua sponte* rescheduled the administrative hearing for May 13, 2015.

22. On April 27, 2015, the OAH rescheduled the administrative hearing for October

8, 2015.

23. On September 14, 2015, the DMV requested a continuance of the administrative hearing, which the OAH granted on September 17, 2015. The OAH rescheduled the hearing for June 1, 2016.

24. On March 24, 2016, Mr. Smith requested a continuance of the administrative hearing, which the OAH granted on March 28, 2016.

25. On May 12, 2016, the OAH rescheduled the matter for August 25, 2016.

26. On August 16, 2016, the OAH *sua sponte* rescheduled it for November 3, 2016.

27. On October 28, 2016, Mr. Smith requested a continuance of the administrative hearing, which the OAH granted on October 29, 2016. The OAH rescheduled the matter for hearing on February 22, 2017.

28. OAH Hearing Examiner Lou Ann Proctor conducted an administrative hearing on February 22, 2017; however, prior to submitting a proposed final order, Ms. Proctor retired from employment with the OAH.

29. On July 18, 2019, the OAH entered its *Final Order*. Hearing Examiner Robert L. DeLong authored the proposed final order.

30. On August 15, 2019, Mr. Smith filed the instant appeal with this Court.

31. On October 10, 2019, this Court held a hearing on Mr. Smith's *Motion to Stay* and conducted an evidentiary hearing on the issue of post-hearing delay by the OAH.

32. On October 16, 2019, this Court entered an *Order of Stay*, which was corrected on October 29, 2019, by the entry of an *Order Modifying Order of Stay* which ordered that "the supersedeas of the Petitioner's license revocation is limited to 150 days from October 10, 2019,

the date of the hearing in this matter.”

DISCUSSION

In his petition, Petitioner contests the factual findings made regarding the DUI itself, and raises as his primary argument 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*, 239 W.Va. 538 (2017). Respondent counters Petitioner’s claim and maintains that (with regard to *Staffileno* factors) Petitioner failed to prove that he was actually and substantially prejudiced by the delay.

The Court agrees with Petitioner and believes he has shown actual and substantial prejudice as a result of the delay, and has further shown a change in circumstances that may be substantially prejudiced because of the OAH’s delay in issuing its *Final Order*. Because the Court determines that Petitioner was prejudiced by the delay, the Court will not address the arguments raised by either party with regard to the merits of the underlying DUI.

Preliminarily, the Court notes as was pointed out in *Staffileno*, while “the law governing revocation proceedings before OAH does not impose time constraints on the issuance of decisions by that agency following an administrative hearing,” at the same time, “administrative agencies performing quasi-judicial functions have an affirmative duty to dispose promptly of matters properly submitted” (citations omitted).

Ultimately, the holding of *Staffileno* is articulated in Syllabus Point 2 as follows:

On 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.

In this case, the *Final Order* itself observes that the hearing on this matter convened on February 22, 2017, almost two and one-half years after the arrest of September 25, 2014. The *Final Order* was not entered until July 18, 2019, nearly an additional two and one-half years after the hearing. As a result, this matter was on the OAH's docket for two months short of five years.

Petitioner asserts as actual and substantial prejudice as a result of the delay in convening the administrative hearing and receipt of the *Final Order* that he would have made other professional choices had the OAH convened and ruled on his matter in a timely fashion. In this case, Petitioner graduated from medical school in Lewisburg in May of 2016. He began his internship at Grandview Medical Center in Dayton, Ohio on July 1, 2016, and applied to match with a residency program in the Fall of 2016. The OAH held the administrative hearing below on February 22, 2017. Petitioner found out whether he matched with a residency program in March of 2017. At the time of his administrative hearing, he had already put in for the match and had already ranked. The OAH *Final Order* was entered July 18, 2019, and Mr. Smith received it two days later, by which time Petitioner – now a parent – was applying for post-residency employment.

Petitioner testified that he would not have chosen the residency in Dayton if he knew his license would be revoked: "I would have definitely did [*sic*] something different if I knew my license was getting suspended. I would have definitely ranked those other hospitals first and went [*sic*] somewhere where, like I said, that I would not have to travel because, you know, one, I can't make it work. I will, more than likely, not be able to complete residency because I don't

have time off that I can take like that and I have no means to work.”

Petitioner testified that in May of 2019, he signed a contract to work at United Hospital Center in Bridgeport, West Virginia, where he will have to travel to different hospitals through the United Hospital System. Mr. Smith testified that without a valid license, he will not be able to perform his job because he will not be able to drive. He testified that his actual and substantial prejudice will be the inability to fulfill his employment contract requirements without having to drive and “*possible* loss of employment with a contract that I signed.”

The Court **FINDS** Petitioner reasonably articulated substantial prejudiced from the OAH's delay the issuing of the *Final Order*, as his employment choices and opportunities are substantially affected by working as a physician without a driver's license in West Virginia.

Having found Petitioner established post-hearing prejudice, *Staffileno* requires the Court to consider the reasons offered by Respondent for the delay and determine if due process was denied based on the delay.

In its “Response Brief of the Division of Motor Vehicles,” Respondent asserts as reasons for the delay that Lou Ann Proctor, the hearing examiner who heard the testimony in the case had other duties which took away from her time as hearing examiner. Additionally, Ms. Proctor resided in Fairmont but was assigned to handle the Beckley cases to deal with the backlog of cases there. Respondent says that when Ms. Proctor retired, Petitioner’s case was one of approximately 100 cases for which Ms. Proctor had not written a proposed final order. Respondent detailed the backlog on the docket and issues with the OAH being understaffed and apparently improperly managed until Teresa Maynard was hired as Director to sort the backlog and oversee the docket.

Moreover, as a final counter to the arguments raised by Petitioner, Respondent argues that Petitioner could have chosen residencies and employment in areas that have access to public transportation while he knew his driver's license revocation was pending.³

The Court, when balancing the resulting prejudice experienced by Petitioner against the explanation offered by Respondent **FINDS** the reasons offered by Respondent to be insufficient. Petitioner's case was pending for nearly five years with the OAH before the *Final Order* was issued. Certainly, this delay – both in convening the hearing *and* in the issuing of the *Final Order* – is unacceptable under any set of circumstances. Even in light of a significant docket and staffing issues, it should not have taken an agency five years to bring a matter to conclusion. Simply put, a governmental agency's failure to properly manage its responsibilities should not inure to the detriment of a citizen.

The Court is satisfied that Petitioner demonstrated actual and substantial prejudice both in the delay, prior to and after the hearing, and does not find that Respondent's reasons overcome the prejudice Petitioner experienced.

Accordingly, the Court **FINDS** and **CONCLUDES** as follows:

1. Petitioner suffered actual and substantial prejudice as a result of the delay by the OAH in issuing its *Final Order*, and proved to the satisfaction of the Court that the prejudice he experienced as a result of the delay, when balanced against the reasons for the delay, inures to the benefit of Petitioner.

2. The West Virginia Supreme Court has long recognized the constitutional mandate that " 'justice shall be administered without ... delay.' W. Va. Const. Art. III, § 17." *Frantz v.*

³ Frankly, the Court does not believe that in light of the explanation for the delay offered by Respondent, it is in a position to chastise professional choices Petitioner made in the ensuing five-years this matter languished before the OAH.

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*, 803 S.E.2d 508 (W. Va., 2017).

3. The delay in issuing the *Final Order* in this matter violated Petitioner's due process rights.

RULING

For the forgoing reasons, the Court hereby **GRANTS** the relief requested in the *Petition for Judicial Review*. It is therefore **ORDERED, ADJUDGED** and **DECREED** that the revocation of Petitioner's driver's license is **REVERSED** above-styled action is **DENIED** and **STRICKEN** from the docket of this Court. In accord with this ruling, the Respondent is **ORDERED** to reinstate Petitioner's driving privileges effective **IMMEDIATELY**.

It is further **ORDERED** that the Clerk of this Court is directed to forward a certified copy of this Order to **Everett J. Frazier**, Commissioner of the WV Division of Motor Vehicles, P. O. Box 17300, Charleston, WV 25317; **Elaine L. Skorich**, Assistant Attorney General, DMV-Legal Division, P. O. Box 17200, Charleston, WV 25317; **Joseph H. Spano, Jr.**, Esquire, Pritt & Spano, PLLC, 714½ Lee Street, East, Suite 204, Charleston, WV 25301; and **The Office of Administrative Hearings**, 1124 Smith Street, Suite B100, Charleston, WV 25301.

The Petitioner's objections and exceptions to this ruling are hereby noted and preserved.

ENTER this 30th day of October, 2020.



The Honorable Carrie L. Webster, Judge