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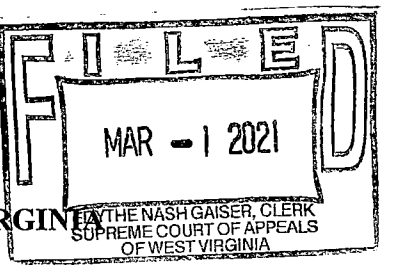


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**
**NO. 20-0969**
**(Circuit Court Civil Action No. 19-AA-88)**

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

**Petitioner,**

**v.**

**DINOS J. SMITH,**

**Respondent.**



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# BRIEF OF THE DIVISION OF MOTOR VEHICLES

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## ASSIGNMENT OF ERROR

**The circuit court erred in finding that Mr. Smith was actually and substantially prejudiced by the delay of the Office of Administrative Hearings ("OAH") in issuing its Final Order.**

## STATEMENT OF THE CASE

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. (App[1]. 465, 472, 554, 569.) 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. (App. 465, 472, 554, 569-570.)

The Investigating Officer also found Dinos J. Smith, the Respondent herein, Stephanie Rizo, the owner of the Jeep, and Mary Franciso, the owner of the Cavalier. (App. 465, 554, 570.) 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. (App. 467, 472, 555-556, 576-577.)

Mr. Smith had slurred speech, bloodshot and water eyes, the odor of an alcoholic beverage on his breath, and was unsteady while standing. (App. 466, 472, 554, 557.) In response to further questioning, Mr. Smith admitted to the Investigating Officer that he had consumed five beers earlier. (App. 466, 472, 554-555.) The Investigating Officer asked Mr. Smith to perform standardized field sobriety tests. (App. 472, 556, 557.)

Prior to administering the Horizontal Gaze Nystagmus ("HGN") Test, the Investigating

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[1] App. refers to the *Appendix* filed contemporaneously with this brief.

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. (App. 466, 557-558.) 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. (App. 466, 472, 558-559.)

The Investigating Officer explained and demonstrated the Walk-and-Turn Test (App. 466, 559), 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. (App. 466, 472, 560.)

The Investigating Officer explained and demonstrated the One Leg Stand Test (App. 467, 472, 560), 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. (App. 467, 472, 571.)

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. (App. 467, 472, 563.) The result of the test indicated that Mr. Smith had a blood alcohol concentration of .157%. (App. 467, 472.)

The Investigating Officer lawfully arrested Mr. Smith for driving a motor vehicle in this State while under the influence ("DUI") of alcohol, controlled substances and/or drugs and transported him to the Beckley Police Department for processing and administration of the designated secondary chemical test. (App. 468, 472, 463-464.) The Investigating Officer read and provided Mr. Smith with a copy of the West Virginia Implied Consent Statement, which Mr. Smith signed. (App. 471, 564.)

The Beckley Police Department has designated the Intox EC/IR-II as the secondary test of the breath. (App. 553.) 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. (App. 468, 553.)

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. (App. 468, 565, 580.) The Investigating Officer completed the remaining steps on the Breath Test Operational Checklist (App. 468, 565), and Mr. Smith provided a breath sample which indicated that he had a blood alcohol concentration ("BAC") of .144%. (App. 468, 470, 466.) Pursuant to W. Va. Code § 17C-5A-1(b) (2008), the Investigating Officer sent the West Virginia Division of Motor Vehicles ("DMV") a copy of the West Virginia DUI Information Sheet. (App. 473.)

On September 25, 2014, the DMV sent Mr. Smith an *Order of Revocation* for DUI. (App. 238.) 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. *Id.*

On October 25, 2014, Mr. Smith, through counsel, requested an administrative hearing from the OAH. (App. 226.) 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. (App. 245.) On January 28, 2015, the OAH noticed the matter for hearing on February 27, 2015. (App. 252.) On February 26, 2015, the DMV requested its first continuance of the administrative hearing (App. 290-293), which the OAH granted on February

27, 2015. (App. 295.)

On March 10, 2015, the OAH rescheduled the hearing for August 14, 2015. (App. 303.) On April 13, 2015, the OAH *sua sponte* rescheduled the administrative hearing for May 13, 2015. (App. 325.) On April 27, 2015, the OAH rescheduled the administrative hearing for October 8, 2015. (App. 333.) On September 14, 2015, the DMV requested its second continuance of the administrative hearing (App. 368-369), which the OAH granted on September 17, 2015. (App. 372.) The OAH rescheduled the hearing for June 1, 2016. *Id.*

On March 24, 2016, Mr. Smith requested his first continuance of the administrative hearing (App. 377), which the OAH granted on March 28, 2016. (App. 381.) On May 12, 2016, the OAH rescheduled the matter for August 25, 2016. (App. 384.) Mr. Smith graduated from osteopathic school in Lewisburg in May of 2016. (App. 65, 100.) Mr. Smith began his internship at Grandview Medical Center in Dayton, Ohio on July 1, 2016, *Id.*, and applied to match with a residency program in the Fall of 2016. (App. 66, 100.)

On August 16, 2016, the OAH *sua sponte* rescheduled it for November 3, 2016. (App. 452.) On October 28, 2016, Mr. Smith requested his second continuance of the administrative hearing (App. 458-459), which the OAH granted on October 29, 2016. (App. 461.) The OAH rescheduled the matter for hearing on February 22, 2017. *Id.*

OAH Hearing Examiner Lou Ann Proctor conducted an administrative hearing on February 22, 2017 (App. 544); however, prior to submitting a proposed final order, Ms. Proctor retired from employment with the OAH. (App. 475, FN2.) Mr. Smith found out whether he matched with a residency program in March of 2017. (App. 66, 100.) At the time of his administrative hearing, he had already put in for the match and had already been ranked among the programs to which he

applied. (App. 29.) Grandview in Dayton was his first choice, and he had not had his administrative hearing yet. (App. 67.) On July 18, 2019, the OAH entered its *Final Order*. (App. 483.) Hearing Examiner Robert L. DeLong authored the proposed final order. (App. 482.)

On August 15, 2019, Mr. Smith filed an administrative appeal with the Circuit Court of Kanawha County. (App. 186-217.) Mr. Smith alleged that the OAH erred in upholding his license revocation for DUI and that his due process rights were violated because of the OAH's delay in entering its final order. (App. 195.) On October 10, 2019, the circuit 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[2]. (App. 38-185.) Mr. Smith testified regarding his alleged irreparable harm if the circuit court did not grant a *superseseas* of the order of revocation and his alleged prejudice due to the delay in receiving a final order. (App. 46-64.) DMV Assistant General Counsel John T. Bonham, II, testified regarding the DMV's efforts to hasten cases pending before the OAH including letting drivers go immediately onto Interlock if the OAH has delayed its final order. (App. 150-161.) OAH Director and Chief Hearing Examiner Teresa D. Maynard testified regarding the reasons for the OAH delay and Mr. Smith's failure to file a mandamus action or to contact the OAH seeking a final order sooner even though the OAH generally accommodates those types of requests. (App. 124-149.)

On October 30, 2020, the circuit court entered its "Final Order Granting Petition for Judicial Review Based Upon *Staffileno* Delay." (App. 2-12.) The circuit court found and concluded that Mr. Smith "suffered actual and substantial prejudice as a result of the delay of the OAH in issuing its *Final Order*, and proved to the satisfaction of this Court that the prejudice he experienced as a result

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[2] The parties refer to an evidentiary hearing regarding the OAH's delay in entering a final order as a "Staffileno" hearing in reference to this Court's decision in *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017).

of the delay, when balanced against the reasons for the delay, inures to the benefit of [Mr. Smith.]" (App. 11.) The circuit court's order is devoid of any mention of the DMV's offer to permit Mr. Smith to immediately go onto Interlock so that he could fulfill his remaining revocation time while driving in an Interlock equipped vehicle. (App. 151-152.) The circuit court did not address the merits of the DUI appeal.

On November 30, 2020, the DMV filed the instant matter with this Court.

## SUMMARY OF ARGUMENT

The DMV agrees that the OAH's pattern of delay in issuing final orders was unacceptable and egregious. Such delay resulted in not only the elimination of the OAH but also the administrative license revocation process. W. Va. Code § 17C-5C-1a (2020) *et seq*. However, in *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017), this Court provided a remedy to a driver if she could prove that she was actually and substantially prejudiced by the OAH's delay because she experienced a detrimental change in her circumstances. In the instant case, the circuit court erroneously determined that Mr. Smith suffered actual and substantial prejudice because Mr. Smith "would have made other professional choices had the OAH convened and ruled on his matter in a timely fashion. . .Petitioner testified that he would not have chosen the residency in Dayton if he knew his license would be revoked. . ." (App. 9.)

The Respondent was arrested for DUI while in osteopathic school in Lewisburg, asked for an administrative hearing, and was given a hearing. He matched with a residency program in Dayton, Ohio months ***before*** the OAH conducted his administrative hearing. The OAH issued its order 29 months after the hearing, and at the time the order was entered, Mr. Smith had completed almost all of his residency and signed a contract for a job in Bridgeport, WV. Mr. Smith alleged that he would

have chosen a residency program in Cleveland because of better public transportation options had he know his driving privileges would be revoked. While living in Dayton, Mr. Smith had a valid Ohio driver's license, and a revocation on his West Virginia license did not affect his privilege to drive in Ohio. Therefore, before the circuit court entered its final order, Mr. Smith had completed all 90 days of required revocation for reinstatement of his West Virginia driver's license even though he was validly driving in Ohio.[3] However, the circuit court determined that Mr. Smith was actually and substantially prejudiced by the delay in the OAH issuing its final order although Mr. Smith had already matched with a hospital in Dayton and had decided to complete his residency there before the administrative hearing was held and although he had effectively completed all revocation time.

There was no detrimental change in Mr. Smith's circumstances due to the post-hearing delay: he had already matched with the residency of his choice before he even had an administrative hearing, and that was not going to change while waiting on a final order from the OAH. The circuit court erred in finding that Mr. Smith was actually and substantially prejudiced by post-hearing delay.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to R. App. Pro. 19 (2010) is appropriate on the basis that this case involves a narrow issue of law, and the Court would benefit from being able to question the parties regarding this fact specific case.

## ARGUMENT

### A. Standard of Review

"On appeal of an administrative order from a circuit court, this Court is bound by the

[3] To reinstate his West Virginia license, he only needed to successfully complete the West Virginia Alcohol Safety and Treatment Program and pay reinstatement fees. While Mr. Smith was validly driving in Ohio, he could have completed a comparable safety and treatment program there.

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 erred in finding that Mr. Smith was actually and substantially prejudiced by the delay of the OAH in issuing its Final Order.**

In its final order, the circuit court opined that Mr. Smith asserted that he "would have made other professional choices had the OAH convened and ruled on his matter in a timely fashion. . .Petitioner testified that he would not have chosen the residency in Dayton if he knew his license would be revoked. . ." (App. 9.) The circuit court further opined that Mr. Smith "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.'" (App. 10.) Finally, the circuit court found and concluded that Mr. Smith "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 the Petitioner." (App. 11.)

This Court has set forth the balancing test which a circuit court must make when considering allegations of prejudice due to OAH post-hearing delay.

> 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.

Syl. Pt. 2, *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017).

The first step in the *Staffileno* test was for the circuit court to make a finding as to whether Mr. Smith had been actually and substantially prejudiced because the OAH delayed issuance of its final order. If the circuit court found that he failed to prove actual and substantial prejudice as a result of the delay, then that court's review would be complete, and there would be no need to balance the reasons for the delay against a non-existent prejudice. Here, the circuit court went too far in its inquiry. Pursuant to this Court's holding in *Straub v. Reed*, 239 W. Va. 844, 806 S.E.2d 768 (2017), the requirement in this matter is that the Respondent suffer "some type of detrimental **change in ...circumstances ...related to the delay in OAH issuing its final order.**" 239 W. Va. 844, 851, 806 S.E.2d 768, 775 (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.' ")

In the instant matter, there has been no detrimental change in the Respondent's circumstances

due to the delay in the OAH entering its *Final Order.* Here, Mr. Smith did not identify some type of detrimental change in his circumstances related to the delay in OAH issuing its final order but complained of choices he made ***before*** had an administrative hearing.

Mr. Smith graduated from osteopathic school in May of 2016; began his internship at Grandview in Dayton on July 1, 2016; and applied to match with a residency program in the Fall of 2016. The OAH held the administrative hearing on February 22, 2017, and Mr. Smith found out that he matched with Grandview in March of 2017. At the time of his administrative hearing, he had already put in for the match months before and had already ranked with his first choice, Grandview. The OAH entered its *Final Order* on July 18, 2019, almost three years after Mr. Smith had already chosen Grandview.

Mr. Smith testified that Grandview is part of four hospitals in the county, and at the time of the *Staffileno* hearing on October 10, 2019, he traveled to all four hospitals. (App. 49.) The Respondent speculated that had he known he would have to serve his 90 day revocation sooner than two and a half years after February 22, 2017, he could have chosen to complete his residency at the Cleveland Clinic or University Hospital in Cleveland where there is public transportation and where he could have completed his residency without a driver's license. (App. 49-50.) He also testified before the circuit court in October of 2019, that he if he knew that his license was going to be revoked, he would not have taken a job in Dayton with Grandview because he would not have been able to drive to complete his anesthesiology residence. (App. 60-61.) Mr. Smith, however, did not know if he matched with the Cleveland Clinic or University Hospital because he matched with his top choice, Grandview in Dayton. (App. 61-62.)

Specifically, the Respondent 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." (App. 80.) However, Mr. Smith applied for the residency in the Fall of 2016, months ***before*** his administrative hearing in February of 2017. At the time that he made his choice of residency, there could not have been post-hearing delay by the OAH because there had not even been a hearing. There certainly could not have been a detrimental change in circumstances related to the delay in the OAH entering its order. Clearly, his choice of residency was not affected by the entry of the OAH entering its *Final Order*, and the circuit court erred in finding that Mr. Smith was actually and substantially prejudiced because he would have chosen a different residency if the OAH had been timely in adjudicating his case.

Moreover, at the time of the *Staffileno* hearing below, the issue of which residency Mr. Smith would have chosen was moot because the residency ended June 30, 2020, two weeks ***before*** the OAH entered its *Final Order*. (App. 82, 100.) The circuit court stayed the Respondent's license revocation (App. 132) for 150 days, which ended on March 10, 2020, and Mr. Smith never asked the circuit court for a consecutive stay of his license revocation.[4] (App. 1.) Therefore, Mr. Smith was able to complete his residency in Dayton while his West Virginia license had been revoked (i.e., between entry of the OAH order on July 18, 2019 and the stay hearing on October 10, 2019 and

[4] "A stay or supersedeas of the order issued pursuant to W. Va. Code § 17C–5A–2(s) (2012) must contain an express provision limiting the duration to no more than 150 days, although the circuit court is not precluded from issuing consecutive stays for good cause shown." Syl. Pt. 4, *State ex rel. Miller v. Karl*, 231 W. Va. 65, 743 S.E.2d 876 (2013).

again after the stay expired on March 10, 2020.)

Mr. Smith further 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. (App. 50-51.) The job with United started in July 2020. (App. 84.) The Respondent was unaware and could not answer his counsel's question about public transportation being available in the Bridgeport area, but he testified that without a valid license, he would not be able to perform his job because he would not be able to drive. (App. 51.) Further, he speculated that his actual and substantial prejudice would be not matching a place where he could have participated in his job without having to drive and *"possible* loss of employment with a contract that I signed." (Emphasis added.) (App. 58.)

However, Mr. Smith's driving privileges were revoked when the 150 day stay expired on March 10, 2020, and he did not seek a consecutive stay from the circuit court. Therefore, Mr. Smith was able to fulfill his contractual obligations with United without having a valid West Virginia driver's license[5] and has not proven that there has been a detrimental change in his circumstances caused by the delay in the OAH issuing its *Final Order*. Because Mr. Smith did not petition the circuit court for further relief after the initial stay hearing, presumably he was able to complete his residency in Dayton and fulfill his contractual obligations with United while his license was revoked in West Virginia. Therefore, Mr. Smith did not prove a detrimental change in his circumstances post-hearing which caused him actual and substantial prejudice.

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[5] Because Mr. Smith did not surrender his Ohio license to West Virginia until January 6, 2021, he presumably was driving in West Virginia on a valid Ohio license when he moved back to West Virginia in July of 2020 to work for United even though his West Virginia license status showed "revoked" until the circuit court entered its final order on October 30, 2020.

In *Staffileno,* in reliance upon his having obtained a commercial driver's license and being employed as a school bus driver, Mr. Staffileno retired from his Tax Department desk job. 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.* Unlike in *Staffileno*, Mr. Smith cannot demonstrate that he was prejudiced by the OAH's delay because he chose to match with Grandview in Dayton ***before*** the OAH conducted the administrative hearing.

This case is substantially similar to the facts in *Straub*. 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.

Like Mr. Straub, Mr. Smith could not identify a detrimental change in his circumstances **as a result of or related to the delay.** He chose his residency location months before the OAH held his hearing yet the circuit court improperly found that Mr. Smith's "case was pending 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." (App. 11.) The circuit court further castigated the DMV's position, "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." *Id.*

First, Mr. Smith did not complain of pre-hearing delay and asked for two of the hearing continuances; therefore, it was improper for the circuit court to combine pre-hearing and post-hearing delay in making the required finding as to whether Mr. Smith suffered "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).

Also of note is the fact that Mr. Smith did not testify that he contacted his attorney or the OAH to ask about the status of the final order in his case. There is nothing in the OAH's file to show that Mr. Smith or his counsel contacted the OAH to expedite issuance of its *Final Order*. (App. 139.) The OAH attempts to accommodate petitioners who request entry of their final orders. (App. 139-140.) The record also contains no evidence that Mr. Smith filed a mandamus action against the OAH, requesting that a final order be entered in his case. (App. 141.) Mr. Smith's failure to seek mandamus relief and raising the delay issue for the first time on appeal to the circuit court warranted a finding that she did not suffer actual and substantial prejudice as a result of the delay. 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." 239 W. Va.538, 545, 803 S.E.2d 508, 515. Here, the circuit court ignored the Respondent's failure to move his appeal along.

## CONCLUSION

Mr. Smith failed to demonstrate that he suffered "some type of detrimental change in

...circumstances ...related to the delay in OAH issuing its final order." 239 W. Va. 834, 851, 806 S.E.2d 768, 775. There has been no detrimental change in the Respondent's circumstances due to the delay in the OAH issuing a decision. He voluntarily changed his circumstances ***before*** he had an administrative hearing. In addition, he did not seek relief in *mandamus*. Accordingly, Mr. Smith failed to prove that he suffered actual and substantial prejudice ***as a result of the delay*** and the circuit court erred in so holding.

For the reasons outlined above, the circuit court's final order must be reversed.

Respectfully submitted,

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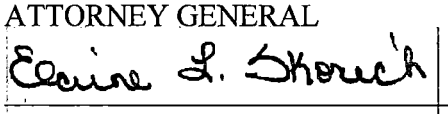
OF MOTOR VEHICLES,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**
**NO. 20-0969**
**(Circuit Court Civil Action No. 19-AA-88)**

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

**Petitioner,**

**v.**

**DINOS J. SMITH,**

**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 1st day of March, 2021, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, to wit:

Joseph H. Spano, Jr., Esquire
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714½ Lee Street, East, Suite 204
Charleston, WV 25301

Elaine L. Skorich
Elaine L. Skorich