IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0371

CLINT CASTO,

Petitioner,

v.

EVERETT FRAZIER, COMMISSIONER OF THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

Respondent.

Honorable Maryclaire Akers, Judge
Circuit Court of Kanawha County
Civil Action No. 20-AA-86

RESPONSE BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

JANET E. JAMES #4904
ASSISTANT ATTORNEY GENERAL
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304)558-2522
Janet.E.James@wv.gov

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STATEMENT OF THE CASE

On April 13, 2019 at approximately 2:54 a.m., Patrolman R. C. Montagu of the Charleston Police Department (the "Investigating Officer") observed the Petitioner at the 7-11 at 1630 Washington Street East in Charleston, Kanawha County, West Virginia. A.R.[1] 259, 279, 370. The Petitioner pulled into the parking lot and parked diagonally across a parking space. A.R. 260, 370. The Petitioner appeared to be impaired. A.R. 260. He was disoriented and unsteady as he got out of his car and walked to the front door of the store, and he left his car running. A.R. 260, 279, 370, 374. He stood in the store for several moments then came out. A.R. 279.

The Investigating Officer made contact with the Petitioner and asked him if he had ingested any alcohol, drugs or controlled substances. The Petitioner denied that he had. A. R. 279, 375. The Investigating Officer did not believe the Petitioner and thought the Petitioner was impaired. The Investigating Officer observed that the Petitioner was disoriented, and he had bloodshot, watery eyes. A.R. 260, 279, 375.

The Investigating Officer explained the horizontal gaze nystagmus ("HGN") test to the Petitioner. During the test, the Petitioner had attention problems and could not keep his head still. A. R. 261, 376.

The Investigating Officer explained and demonstrated the walk and turn ("WAT") test to the Petitioner. He had to explain the test several times. During the instruction phase of the test, the Petitioner could not maintain his balance. During the test, the Petitioner exhibited impairment because he stopped while walking, made an improper turn, raised his arms for balance and took an incorrect number of steps. A. R. 261, 376.

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[1]Reference is to the page number in the Appendix Record.

The Investigating Officer explained and demonstrated the one leg stand ("OLS") test to the Petitioner. During the test, the Petitioner exhibited impairment because he used his arms to balance and estimated 30 seconds as 25. The Petitioner failed to hold his foot parallel to the ground as instructed. A. R. 261, 377-78.

The Investigating Officer has been trained and certified to administer the Also-Sensor preliminary breath test. The test showed no alcohol in the Petitioner's blood. A. R. 261, 280.

The Investigating Officer, who was trained at the West Virginia State Police Academy, was also trained in Advanced Roadside Impairment Detection ("ARIDE") and was a Drug Recognition Expert. A.R. 367-68. The Investigating Officer administered the Modified Romberg test. On the test, the Petitioner estimated 24 seconds as 30 seconds. He also had body tremors and eyelid tremors, which are indicative of drug use. He had a four-inch cumulative sway of his body front to back. A. R. 262, 378.

The Investigating Officer administered the Lack of Convergence test. On the test, the Petitioner's left eye failed to converge. Lack of convergence is indicative of drug use, specifically central nervous system depressants, inhalants, dissociative anesthetics and cannabis. A. R. 262, 378-79.

Following administration of the field sobriety tests, the Investigating Officer believed that the Petitioner showed a high level of impairment. A. R. 280.

The Investigating Officer placed Petitioner under arrest for driving under the influence ("DUI") of alcohol, controlled substances or drugs at 3:14 a.m. on April 13, 2019. A. R. 259, 278.

The Investigating Officer asked the Petitioner to take a blood test, and the Petitioner requested a blood test. Katie Dawn Cole, a phlebotomist who was medically trained and authorized

to draw blood for purposes of chemical analysis at CAMC General Hospital, drew the Petitioner's blood. A. R. 264, 280, 284-5, 379-80. The West Virginia State Police Forensic Laboratory analyzed the sample. The result was that there were no positive findings of toxicological significance when testing for the compounds listed on the West Virginia State Police Toxicology Drug Panel. A.R. 289-294, 381-82.

The Division of Motor Vehicles ("DMV") sent the Petitioner an Order of Revocation on April 22, 2019. A.R. 73. The Petitioner requested a hearing on the revocation from the Office of Administrative Hearings ("OAH"). The OAH conducted an administrative hearing at which the Petitioner appeared with counsel. A.R. 357 *et seq.*

The OAH entered its *Final Order* on December 10, 2020, and upheld the revocation of the Petitioner's driver's license. A.R. 296 *et seq.*

The Petitioner appealed the *Final Order* to the circuit court of Kanawha County. A. R. 318 *et seq.* By Final Order entered April 9, 2021, the circuit court affirmed the OAH's *Final Order*. A.R. 2-10.

SUMMARY OF ARGUMENT

The circuit court applied the proper, deferential standard of review in this matter, and found that there was sufficient evidence in the record to support the findings of the OAH's *Final Order*. The OAH found that the Petitioner's testimony was not credible, and found that there was sufficient evidence that the Petitioner was driving while under the influence of drugs or controlled substances to uphold the revocation of his license for DUI.

Although the blood test results in this case showed that no compounds were detected in the Petitioner's blood specimen, the blood test result is not dispositive proof that the Petitioner had no

drugs or controlled substances in his system. The blood test does not impugn the evidence of intoxication shown on the Investigating Officer's written submissions and testimony.

Secondly, the Petitioner's argument that this mater is subject to dismissal because of the dissolution of the OAH is without merit. W. Va. Code § 17C-5C-1a (c)(1) provides, "If any appeal of a revocation or suspension order, described in § 17C-5C-3(3) of this code, is pending before the office [of Administrative Hearings] on or after July 1, 2021, the underlying revocation or suspension order shall be dismissed." The OAH entered its Final Order in this matter on December 10, 2020. A.R. 307. Therefore, this matter was not pending before the OAH on July 1, 2021 and is not subject to dismissal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R.A.P Rule 19 is appropriate on the basis that this case involves assignments of error in the application of settled law.

ARGUMENT

I. STANDARD OF REVIEW

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

II. THE CIRCUIT COURT CORRECTLY AFFIRMED THE OAH FINAL ORDER.

The circuit court applied the proper standard of review in this matter, and found that there was sufficient evidence in the record to support the findings of the OAH's *Final Order*. "[A]

reviewing court must evaluate the record of the agency's proceedings to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is to be conducted pursuant to the administrative body's findings of fact regardless of whether the court would have reached a different conclusion on the same set of facts." *Donahue v. Cline*, 190 W. Va. 98, 102, 437 S.E.2d 262, 266 (1993) (per curiam). The OAH's *Final Order* provided an extremely thorough recitation of the evidence, the Hearing Examiner's assessment of the credibility of the witnesses, and the reasons for giving the weight he did to the evidence. A. R. 296-307.

The circuit court noted that the Hearing Examiner explicitly found that the "irrelevant, wandering, and/or incomprehensible" testimony of the Petitioner "render[s] the Petitioner to have no credibility." A.R. 5. Nonetheless, the Hearing Examiner undertook to discern the defenses the Petitioner was trying to make. The Hearing Examiner noted that with regard to the field sobriety tests, the Petitioner testified that he felt "intimidated and nervous," that the parking lot was "pitch black," he was wearing steel-toed tennis shoes, and he had a right-leg injury. A.R. 5. The Hearing Examiner also noted that the Petitioner argued that the result of the blood test exonerated him. *Id.* The Hearing Examiner noted the conflicts within the Petitioner's own testimony. A.R. 304. The OAH Hearing Examiner properly reconciled the conflicts in the evidence. "Where there is a direct conflict in the critical evidence upon which an agency proposes to act, the agency may not elect one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court." Syl. Pt. 6, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996).

The Petitioner's argument that "evidence of drug consumption versus impairment" (Pet. Brf. at 9) should be the standard by which this matter is judged, is unpersuasive. "The principal question

at the hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs." W. Va. Code § 17C-5A-2 (e). The standard of proof required to revoke one's driving privileges for driving while under the influence of alcohol in a civil administrative proceeding is a preponderance of the evidence. "Where there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol." Syllabus Point 2, *Albrecht v. State,* 173 W. Va. 268, 314 S.E.2d 859 (1984). *See*, Syllabus Point 2, *Carte v. Cline,* 200 W. Va. 162, 488 S.E.2d 437 (1997); Syl. Pt. 4, *Lowe v. Cicchirillo,* 223 W. Va. 175, 672 S.E.2d 311 (2008) (per curiam); and *Groves v. Cicchirillo*, 225 W. Va. 474, 481, 694 S.E.2d 639, 646 (2010) ("In addition, the evidence reveals that Appellee was given two field sobriety tests, the HGN test and the one-leg stand test. The results from these tests were recorded by the deputy, showing that Appellee had failed in his performance. We find that these facts provide sufficient evidence to support the conclusion that Appellee was driving a motor vehicle while under the influence of alcohol, with or without the Intoximeter results, and thus represent an adequate basis for the Commissioner to revoke Appellee's driver's license.) "Also worth noting is the underlying preponderance of the evidence standard pertaining to administrative revocation proceedings." *White v. Miller*, 228 W. Va. 797, 802, 724 S.E.2d 768, 773 (2012). The circuit court correctly found that the standard was met in this case.

In this case, the evidence shows that the Petitioner pulled into the 7-11 parking lot and parked diagonally, left the car running and went into the store. There he lingered for several minutes, did not buy anything, and came back out. The Petitioner was unsteady as he got out of the car. He

appeared to be confused, disoriented and impaired. When the Investigating Officer talked to the Petitioner, he observed that the Petitioner had bloodshot, watery eyes. The Petitioner showed no standard impairment clues on the HGN test; however this is consistent with impairment by drugs or controlled substances, such as central nervous system stimulants, hallucinogens, narcotic analgesics and cannabis. During the HGN test, the Petitioner had problems with attention and following instructions. On the WAT test, the Petitioner exhibited clues of impairment. On the OLS test, the Petitioner used his arms for balance, could not follow instructions, did not keep his right foot parallel to the ground, and estimated the passage of 30 seconds as 25 seconds. The Petitioner also exhibited signs of impairment on the two ARIDE tests, namely the Modified Romberg and and Lack of Convergence. This is clearly sufficient under the proper standard to affirm the revocation of his license. *See*, Syl. Pt. 3, *White v. Miller*, 228 W. Va. 797, 724 S.E.2d 768 (2012): "A driver's license to operate a motor vehicle in this State cannot be administratively revoked solely and exclusively on the results of the driver's horizontal gaze nystagmus test. Rather, additional evidence in conjunction with the horizontal gaze nystagmus test is required for revocation: for example, the results of other field sobriety tests; the results of a secondary chemical test; whether the vehicle was weaving on the highway; whether the driver admitted consuming an alcoholic beverage; whether the driver exhibited glassy eyes or slurred speech; and/or whether the odor of an alcoholic beverage was detected."

The blood test results do not outweigh the evidence of impairment. The blood test result is merely one piece of evidence in the case, and "There are no provisions in either W.Va.Code, 17C–5–1 (1981), et seq., or W.Va.Code, 17C–5A–1 (1981), et seq., that require the administration of a chemical sobriety test in order to prove that a motorist was driving under the influence of

alcohol or drugs for purposes of making an administrative revocation of his driver's license." *Albrecht v. State*, 173 W. Va. 268, 269–70, 314 S.E.2d 859, 861 (1984).

Further, the results of the blood test do not prove that the Petitioner was drug-free. As the West Virginia State Police Toxicology Drug Panel states, "A negative reporting statement can signify that no compounds were detected in the specimen, reporting criteria was not met or that the Limit of Detection/Limit of Quantification reporting threshold was not met." A.R. 293. The Petitioner may have ingested an inhalant or other rapidly-dissipated drug, or a drug for which the State Police Lab does not test. It is not dispositive proof that the Petitioner had no drugs or controlled substances in his system.

The Hearing Examiner found that the Investigating Officer's testimony was credible and the Petitioner's was not. The circuit court appropriately affirmed this finding, giving the Hearing Examiner's credibility determinations deference. A.R. 9. "Our cases have 'recognized that credibility determinations by the finder of fact in an administrative proceeding are binding unless patently without basis in the record.' *Webb v. West Virginia Bd. of Medicine*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (internal quotations and citation omitted); "The circuit court erred in disturbing this credibility determination. . .'This is so because the hearing examiner who observed the witness testimony is in the best position to make credibility judgments.' *Sims v. Miller*, 227 W.Va. 395, 402, 709 S.E.2d 750, 757 (2011)." *Dale v. McCormick*, 231 W. Va. 628, 635, 749 S.E.2d 227, 234 (2013) (per curiam); " 'Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an

administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo.' Syl. pt. 1, *Cahill v. Mercer County Board of Education,* 208 W. Va. 177, 539 S.E.2d 437 (2000)." Syl. Pt. 2, *Hammond v. W. Virginia Dep't of Transp., Div. of Highways*, 229 W. Va. 108, 727 S.E.2d 652 (2012) (per curiam). With credibility determinations, elaborate, extended, or explicit analysis is not required. There is no "law requiring the ALJ to use particular words or to write a minimum number of sentences or paragraphs." *Francis v. Astrue*, No. 3:09-cv-01826 (VLB), 2011 WL 344087, at * 4 (D. Conn. Feb. 1, 2011). Indeed, an ALJ is not required to make "'explicit credibility findings' as to each bit of conflicting testimony, so long as his factual findings as a whole show that [the ALJ] 'implicitly resolve[d]' such conflicts." *N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 26 (1st Cir. 1999) (quoting *N.L.R.B. v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir.1982)). *Accord J.P. ex rel. Peterson v. County Sch. Bd.*, 516 F.3d 254, 261 (4th Cir. 2008) ("While the hearing officer did not explicitly state that he found the School Board's witnesses more persuasive, our case law does not require an IDEA hearing officer to offer a detailed explanation of his credibility assessments. . . Moreover, because the hearing officer ultimately determined that J.P. made more than minimal progress under the 2004 IEP and that the 2005 IEP was adequate (views that were advocated by the School Board's witnesses and disagreed with by the parents' witnesses), it is apparent that the hearing officer in fact found the School Board's evidence more persuasive."); *N.L.R.B. v. Katz's Delicatessen,* 80 F.3d 755, 765 (2d Cir.1996) (An ALJ may resolve credibility disputes implicitly rather than explicitly where his "treatment of the evidence is supported by the record as a whole."); *see also Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995) (emphasis added) ("The ALJ, who *apparently* disbelieved the plaintiff's

recollection of the circumstances leading up to the continuance, did not exceed permissible bounds in accepting testimony of the defendant's witnesses about this exchange.").

The circuit court found no basis on which to overturn the findings of the OAH. "An appellate court may not set aside the factfinder's resolution of a swearing match unless one of the witnesses testified to something physically impossible or inconsistent with contemporary documents." *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995). Here, the question of whether the Petitioner drove under the influence was a question of fact that the trier of fact resolved against the Petitioner. "'[A] reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations.' Syllabus point 2, in part, *Cahill v. Mercer County Board of Education,* 208 W. Va. 177, 539 S.E.2d 437 (2000)." Syl. Pt. 4, *Dale v. Dingess*, 232 W. Va. 13, 750 S.E.2d 128 (2013) (per curiam).

III. THIS MATTER IS NOT SUBJECT TO DISMISSAL PURSUANT TO W. VA. CODE § 17C-5C-1a.

W. Va. Code § 17C-5C-1a (c)(1) provides, "If any appeal of a revocation or suspension order, described in § 17C-5C-3(3) of this code, is pending before the office [of Administrative Hearings] on or after July 1, 2021, the underlying revocation or suspension order shall be dismissed." The OAH entered its Final Order in this matter on December 10, 2020. A.R. 307. Therefore, this matter was not pending before the OAH on July 1, 2021 and is not subject to dismissal. The Petitioner's reliance on *Frazier v. Talbert*, 858 S.E.2d 918 (W. Va. 2021) does nothing to support his argument to the contrary. *Talbert* merely cited the statutes pertaining to the dissolution of the OAH.

CONCLUSION

For the above reasons, this Court should affirm the circuit court's *Final Order*.

Respectfully submitted,

EVERETT FRAZIER, COMMISSIONER OF THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

Janet E. James #4904
Assistant Attorney General
Post Office Box 17200
Charleston, WV 25317
Telephone: (304) 558-2522
Janet.E.James@wv.gov

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CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Response Brief* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 23rd day of September, 2021, addressed as follows:

Jeremy B. Cooper, Esq.
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215

JANET E. JAMES