IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0568

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

Petitioner,

v.

CHERYL L. YODER,

Respondent.

Honorable R. Steven Redding
Circuit Court of Berkeley County
Civil Action No. 19-P-353

PETITIONER'S BRIEF

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STATEMENT OF THE CASE

On July 3, 2017, PFC C.R. Williamson of the Martinsburg City Police ("Investigating Officer") observed a vehicle weaving and traveling below the speed limit on Queen Street in Martinsburg, Berkeley County, West Virginia. A.R. 147, 154[1]. The Investigating Officer followed the vehicle as it made a slow right turn on to King Street and suddenly pulled off the road into a parking lot on West King Street. A.R. 154. The Investigating Officer continued past the vehicle and observed that it pulled in behind him. The Investigating Officer went through the light at the intersection of King and Maple and pulled into a parking spot. The vehicle sat through a red light, and when the light turned green, the vehicle came within inches of the Investigating Officer's front bumper and attempted to park in front of the Investigating Officer's car. During this attempt to park, the vehicle ended up crossways in the road. The vehicle then drove away. A.R. 154. The Investigating Officer initiated a stop of the vehicle in the 300 block of West King Street at 12:38 a.m. A.R. 147, 154. The driver, later identified as the Respondent herein, stumbled out of her car and started walking back to the Investigating Officer's car. The Investigating Officer ordered the Respondent back to her car. She complied. A.R. 154.

The Investigating Officer observed that the Respondent had slurred speech and red eyes. She was disoriented and had a dry mouth and a raspy voice. A.R. 148, 154.

The Investigating Officer then explained the horizontal gaze nystagmus ("HGN") test to the Respondent. The medical assessment prior to the test showed equal pupils and equal tracking, and no resting nystagmus, which rendered the Respondent a viable candidate for the test. A.R. 149.

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[1] Reference is to the Appendix Record filed herewith.

During the test, the Respondent exhibited impairment because she had lack of smooth pursuit in both eyes, distinct and sustained nystagmus at maximum deviation in both eyes and onset of nystagmus prior to 45 degrees in both eyes. A.R. 149.

The Investigating Officer then explained and demonstrated the walk and turn test ("WAT") to the Respondent. The Respondent exhibited impairment because she was unable to keep her balance and started the test too soon. A.R. 149. The Respondent also exhibited impairment because she stopped while walking, stepped off the line, made an improper turn, missed heel-to-toe, raised her arms to balance and took an incorrect number of steps. A.R. 149.

The Investigating Officer then explained and demonstrated the one leg stand test ("OLS"). The Respondent exhibited impairment because she used her arms to balance and put her foot down. The Investigating Officer stopped the test for the Respondent's safety. A.R. 149.

The Investigating Officer then lawfully arrested the Respondent at 12:53 a.m. for driving under the influence of alcohol, drugs or controlled substances ("DUI"). A.R. 147, 154. The Investigating Officer suspected that the Respondent was impaired by prescription drugs. A.R. 154.

The Investigating Officer administered an Intoximeter test. The result was a zero, showing that she had no alcohol in her blood. A.R. 150, 154.

The Division of Motor Vehicles ("DMV") sent the Respondent an Order of Revocation Notice (A.R. 44) and an Order of Disqualification of her commercial driver's license on July 28, 2017. A.R. 58.

The Respondent requested a hearing from the Office of Administrative Hearings ("OAH") on the revocation of her license for DUI. A.R. 28.

The OAH conducted an evidentiary hearing on October 4, 2018. A.R. 217 *et seq*. At the hearing, the OAH admitted the DMV's agency documents into evidence. A.R. 222. The Investigating Officer and the processing officer, Patrolman Jarvis of the Martinsburg Police Department, were subpoenaed by the DMV but did not appear at the hearing. The DMV moved for a continuance of the hearing, and the OAH denied the continuance request. A.R. 223. The Respondent testified that

on the night of the arrest she was not taking any narcotic drugs, and that the only medications she takes are an Anoro inhaler and a nasal spray. A.R. 225. The Respondent offered three exhibits into evidence. A.R. 144-46. Exhibit 1 showed that the Respondent obtained a Non-DOT Rapid Drug Screen on July 3, 2017 at 11:19 a.m, more than 10 hours after her arrest. The urine test was negative for an 11-panel test. A.R. 142. The other exhibits showed drug screen results from July 14, 2017 and August 23, 2017. A.R. 145-46.

The OAH entered a *Final Order* on September 6, 2019. A.R. 156 *et seq*. The *Final Order* upheld the revocation and disqualification for DUI.

The Respondent appealed the matter to the circuit court of Berkeley County in Civil Action No. 19-P-353. A.R. 286-87. The circuit court reversed the OAH's *Final Order* on March 25, 2020 with entry of an *Order*. The DMV appealed the *Order* to this Court. This Court entered a Memorandum Decision in *Frazier v. Yoder*, No. 20-0336, 2021 WL 653244 (W. Va. Feb. 19, 2021). This Court held, "Since we have determined that the circuit court's ruling ran afoul of our recent holding in *Fouch* [*Frazier v. Fouch*, 244 W. Va. 347, 853 S.E.2d 587 (2020)], this case requires remand for consideration in light of the *Fouch* decision." *Frazier v. Yoder* at 4.

On remand, the circuit court entered a *Final Order upon Remand* on June 20, 2021 and once again reversed the OAH's September 6, 2019 *Final Order*; remanded the matter to the OAH for a hearing at which the Respondent could present evidence as to the meaning and import of the Valley Health Urgent Care Non-DOT 11 panel negative urine screen which she obtained on July 3, 2017; and ordered that the DMV "shall be taxed with the costs of these proceedings." A.R. 1-20. It is this order which is presently appealed by the DMV.

The OAH conducted a hearing pursuant to the circuit court's *Final Order upon Remand* on June 28, 2021, during which the OAH took additional evidence. The OAH affirmed the revocation of the Respondent's license by Final Order entered June 29, 2021. The Respondent appeal the OAH Final Order to the circuit court of Berkeley County in Civil Action No. 21-AA-5. That matter is currently pending before the circuit court.

SUMMARY OF ARGUMENT

The circuit court summarily and *sua sponte* assessed costs to the Petitioner in its *Final Order upon Remand.* The court held, "It is ORDERED that the West Virginia Division of Motor Vehicles shall be taxed with the costs of these proceedings." A.R. 20. The circuit court gave neither specificity as to what costs it was attempting to assess nor the basis therefor. Neither party moved for costs in the proceeding.

There is no statutory or contractual basis for an assessment of costs against the DMV, and there is no evidence that the DMV acted in bad faith, vexatiously, wantonly or for oppressive reasons. Syl. Pt. 3, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986). "As a general rule awards of costs and attorney fees are not recoverable in the absence of a provision for their allowance in a statute or court rule." *Nelson v. W. Va. Pub. Emps. Ins. Bd.*, 171 W. Va. 445, 450, 300 S.E.2d 86, 91 (1982).

Further, the circuit court improperly substituted its judgment for the OAH Hearing Examiner and failed to give deference to the factfinder's determinations in once again reversing the OAH's September 6, 2019 Final Order. A reviewing court is obligated to give deference to factual findings rendered by an administrative law judge and is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Syl. Pt. 1, *Cahill v. Mercer Cty.Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000). It is also well-settled that credibility determinations made by an administrative law judge are similarly entitled to deference. *Id.*

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to R. App. Pro. 19 is appropriate on the bases that this case involves assignments of error in the application of settled law, claiming an unsustainable exercise of discretion where the law governing that discretion is settled, and claiming insufficient evidence or a result against the weight of the evidence.

ARGUMENT

A. STANDARD OF REVIEW

This Court's review of a circuit court's order deciding an administrative appeal is made pursuant to W. Va. Code § 29A-6-1 (1964). The Court reviews questions of law presented *de novo*; and findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. Syl. Pt. 1, *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015). "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 an abuse of discretion standard and reviews questions of law *de novo*." *Id.* at Syl. Pt. 2.

B. THE CIRCUIT COURT ERRED IN *SUA SPONTE* TAXING THE DIVISION OF MOTOR VEHICLES WITH COSTS.

The circuit court summarily and *sua sponte* assessed costs to the DMV in its *Final Order upon Remand*. The court held, "It is ORDERED that the West Virginia Division of Motor Vehicles shall be taxed with the costs of these proceedings." A.R. 20. The circuit court gave neither specificity as to what costs it was attempting to assess nor the basis therefor. Neither party moved for costs in the proceeding.

In the Mandate (March 23, 2021) to the Memorandum Decision in *Frazier v. Yoder*, No. 20-0336, 2021 WL 653244 (W. Va. Feb. 19, 2021)(memorandum decision) by which this Court remanded the matter to the circuit court, this Court decreed, "It is hereby ordered that the parties shall each bear their own costs." On remand to the circuit court, no hearings were held, no briefs were filed and only counsel for the Petitioner submitted a proposed order. The only activity on remand to the circuit court, other than the Petitioner's submission of a proposed order, was the circuit court's entry of its *Final Order upon Remand* four months after this Court's Memorandum Decision. The only action by the DMV between the circuit court's September 6, 2019 *Final Order*, in which no costs were awarded, and the circuit court's *Final Order Upon Remand* entered June 20, 2021 is the appeal the DMV took to this Court in the initial appeal, Civil Action No. 19-P-353. The DMV did nothing to justify an award of costs against it.

Costs against the State are generally prohibited in the absence of statutory or contractual authority. "In cases involving the State of West Virginia or an agency or officer thereof, if an award of costs against the State is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the State." W. Va. R. App. P. 24(b). "As a general rule awards of costs and attorney fees are not recoverable in the absence of a provision for their allowance in a statute or court rule." *Nelson v. W. Va. Pub. Emps. Ins. Bd.*, 171 W. Va. 445, 450, 300 S.E.2d 86, 91 (1982). *See also*, Syl. Pt. 2, *Sally-Mike Properties v. Yokum, supra*, (holding, "[a]s a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement.")

Attorney fees were not awarded by the circuit court, however, an analysis of the legitimacy of assessing costs against the State involves an examination of the relationship of attorney fees to costs. "This Court has previously held that attorney fees are not 'costs.'" *Id.* at 171 W. Va. 451, 300 S.E.2d 92, although "[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl. Pt. 3, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246-(1986).

Regardless, costs, with or without attorney fees, were not justified against the DMV. The circuit court's summary award of costs is without basis in law or fact. The circuit court's authority,when reviewing cases such as the present case, is governed by the Administrative Procedures Act. "The court may affirm the order or decision of the agency or remand the case for further proceedings." W. Va. Code § 29A-5-4 (g) (1998). There is no statutory authority for a court to award costs as part of an administrative review.

In determining whether to award costs, possibly including attorney fees, this Court has held, "[a] proper factual record demonstrating obduracy must be established." *Horkulic v. Galloway*, 222 W. Va. 450, 464, 665 S.E.2d 284, 299 (2008). This Court has awarded and denied costs and attorney fees, but not without an evidentiary basis. "[W]e find that it was inequitable to permit an award of attorney fees against

TIG without a full evidentiary hearing and the opportunity for TIG to participate fully." *Id.* at 222 W. Va. 464, 665 S.E.2d 298. *See also, In re John T.*, 225 W. Va. 638, 643, 695 S.E.2d 868, 873 (2010) (per curiam) ("the circuit court found sufficient evidence in the record of bad faith, vexatious, wanton, and oppressive conduct on the part of Jean K. to trigger application of the exception to the American rule regarding attorney's fees as set forth in Syllabus Point 3 of *Yokum* [*Sally–Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986)]. In fact, the circuit court found that Jean K.'s conduct was the sole reason that this abuse and neglect proceeding was filed."); *Corp. of Harpers Ferry v. Taylor*, 227 W. Va. 501, 506, 711 S.E.2d 571, 576 (2011) (per curiam) ("Mr. Taylor filed a motion for attorney's fees. Mr. Taylor submitted, as an exhibit, an itemized statement of his fee request. As a result of the motion, the trial court entered a scheduling order pursuant to Rule 22 of the West Virginia Trial Court Rules. The scheduling order was a general form order that had two separate choices: the first option indicated the court would decide a motion on the pleadings and record; the second option indicated that a motion would be decided after a hearing. The scheduling order had a check mark by the provision for deciding a motion on the pleadings and record."); *Bd. of Rev. of Bureau of Emp. Programs v. Gatson,* 210 W. Va. 753, 758, 559 S.E.2d 899, 904 (2001) ("the Bureau employees in this case do not admit to willfully refusing to obey the law nor to deliberately disregarding the law. That is the threshold in the cases in which we previously awarded attorney fees without statutory authority. Also unlike *Richardson* and *Nelson*, the petitioner in the case at bar did not request attorney fees."); *Pritt v. Suzuki Motor Co.*, 204 W. Va. 388, 395, 513 S.E.2d 161, 168 (1998) (per curiam) ("[W]e are convinced that the trial court did not abuse its discretion in awarding attorneys' fees and costs to Suzuki as a sanction for Appellant's conduct in bringing a fraudulent claim. Moreover, the record reflects that the lower court considered the appropriate factors in determining that the itemized amount of fees submitted by Suzuki were reasonably and necessarily incurred.").

The test for determining whether to award attorney fees is set out at Syl. Pt. 4 of *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986): "Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based

on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." In the present case, the circuit court gave absolutely no reasoning for its taxing costs to the DMV. Certainly none of the foregoing factors was considered in the one-sentence decree.

This Court's Mandate ordering the parties to bear their own costs controls the remand to the circuit court. "When this Court's decision of a matter results in the case being remanded to the circuit court for additional proceedings, our mandate controls the framework that the circuit court must use in effecting the remand." *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 809, 591 S.E.2d 728, 735 (2003). *See also, Quicken Loans, Inc. v. Brown*, 236 W. Va. 12, 28, 777 S.E.2d 581, 597 (2014): "The mandate required the parties to 'bear their own costs.' Therefore, the circuit court abused its discretion by awarding litigation costs for the appellate proceeding." The *Quicken* Court also noted: "Neither party has requested an award of attorney fees and costs for these appellate proceedings. We conclude that this case does not warrant such an award." 236 W. Va. 31, 777 S.E.2d 600.

In a case in which "expenses and fees" were awarded by this Court against the DMV, the Court did not apply the *Aetna Casualty & Surety Co. v. Pitrolo*, *supra* standard but found that the DMV violated the Petitioner's due process rights by continuing a hearing at which his paid expert had appeared. In *David v. Comm'r of W. Virginia Div. of Motor Vehicles*, 219 W. Va. 493, 637 S.E.2d 591 (2006), this Court held, "we hold that where the West Virginia Department of Motor Vehicles has improperly delayed a driver's license revocation proceeding held pursuant to W.Va.Code, 17C–5A–2 [2004] and thereby denied due process of law to a licensee, a licensee who has incurred substantial expenses and fees as a result of the improper delay and denial may recover the party's expenses and fees so incurred from the DMV in order to place the licensee in the position in which he or she would have been absent the improper

granting of a continuance by the Department." 219 W. Va. 498, 637 S.E.2d 596 (2006). In the absence of statutory authority or finding that the DMV had acted in bad faith, vexatiously, wantonly or for oppressive reasons, the Court's resolution was more contractual in nature. The Court found, "because absent such payment of the appellant's expenses and fees, the DMV would be acting in excess of its jurisdiction in conducting a hearing that violates the appellant's due process right to a full and fair hearing on the merits of his case." 219 W. Va. 498–99, 637 S.E.2d 596–97. The Court gave the DMV a choice: "Any dispute regarding the amount of fees and expenses should be resolved in the first instance by the Circuit Court of Kanawha County. The DMV, of course, has the option of dismissing the license revocation proceedings instead of payment of the appellant's fees and expenses." Fn. 6, *David v. Comm'r of W. Virginia Div. of Motor Vehicles*.

In *Reed v. Conniff*, 236 W. Va. 300, 779 S.E.2d 568 (2015), the Court determined the resolution of the matter itself: uphold the revocation ("we find that in this case there is no appreciable prejudice to Conniff that cannot be remedied with lesser measures than outright dismissal." 236 W. Va. 308, 779 S.E.2d 576) and award the driver reasonable attorney fees and costs. "We find that three of the four continuances (excluding the hearing examiner's illness) were occasioned exclusively by the DMV's negligence in matters which in fairness ought to be routine for that agency. As a result of the cumulative effect of those continuances, Conniff is entitled to an award of reasonable attorney fees and costs pursuant to Syllabus Point 2 of *David*." 236 W. Va. 309, 779 S.E.2d 577 (2015).

In *Miller v. Hare*, 227 W. Va. 337, 708 S.E.2d 536 (2011), this Court reversed the circuit court's award of attorney fees to the driver. "Simply put, none of the grounds we relied upon in *David* to remand the case for a possible award of attorney's fees are present in this case." 227 W. Va. 342, 708 S.E.2d 536.

In *David*, *Conniff* and *Hare*, the DMV was the tribunal. The expenses awarded in *David* and *Conniff* were based on the DMV's procedural handling of the cases. In the present case, the OAH was the tribunal, and the appeal was taken on the merits of the case, not on any procedural complaints.

The circuit court abused its discretion by summarily and *sua sponte* assessing costs against the DMV. "In reviewing the ruling of the circuit court with respect to costs and attorney fees, 'the standard

is whether such ruling by the trial court constitutes an abuse of discretion.' *Hopkins v. Yarbrough*, 168 W.Va. 480, 489, 284 S.E.2d 907, 912 (1981) (citations omitted)." *Chevy Chase Bank v. McCamant*, 204 W. Va. 295, 303, 512 S.E.2d 217, 225 (1998) (per curiam). The circuit court provided no basis on which to justify such an award. *See, Bd. of Rev. of Bureau of Emp. Programs v. Gatson*, 210 W. Va. 753, 758, 559 S.E.2d 899, 904 (2001)("Furthermore, the circuit judge gives us no clue as to why attorney fees were awarded *sua sponte*.... We cannot and will not second-guess the circuit court's rationale.")

This matter was brought to this Court in No. 20-0336 in good faith by the DMV as an appeal from a circuit court order which the DMV believed ran afoul of *Frazier v. Fouch*, 244 W. Va. 347, 853 S.E.2d 587 (2020), and this Court agreed. On remand to the circuit court, the circuit court wrote a 20-page order in which it removed the holdings which ran afoul of *Frazier v. Fouch*, *supra;* once again reversed the OAH; remanded the matter to the OAH for the taking of further evidence; and summarily assessed "costs" to the Respondent. There is no statutory or contractual basis for an assessment of costs against the DMV, and there is no evidence that the DMV acted in bad faith, vexatiously, wantonly or for oppressive reasons. Accordingly, the circuit court's award of attorney fees and costs was an abuse of discretion.

C. THE CIRCUIT COURT ERRED IN FINDING THAT THE EVIDENCE IN THIS MATTER WAS INSUFFICIENT TO UPHOLD THE REVOCATION OF THE RESPONDENT'S LICENSE AND THAT THE RESPONDENT REBUTTED THE DMV'S EVIDENCE.

In its *Final Order upon Remand*, the circuit court acknowledged this Court's admonitions in *Frazier v. Yoder*, No. 20-0336, 2021 WL 653244 (W. Va. Feb. 19, 2021)(memorandum decision) regarding the admissibility of the DMV record and the non-appearance of the Investigating Officer at the administrative hearing; however, the Court once again made findings that the DMV's evidence was insufficient to uphold the order of revocation and that the Respondent rebutted the DMV's evidence. A.R. 3,19.

The primary basis for the circuit court's reversal of the OAH's September 6, 2019 *Final Order* seems to be that the Hearing Examiner gave "no or minimal weight" (A.R. 15) to the drug screen evidence

presented by the Respondent. First, the test was taken more than four hours after the Respondent's arrest, rendering it of no evidentiary value in this proceeding. "[E]vidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by a chemical analysis of his or her blood or breath, is admissible, if the sample or specimen was taken within the time period provided in subsection (g)." W. Va. Code §17C-5-8(a) (2013). Subsection (g) of that statute provides, "For the purposes of the admissibility of a chemical test under subsection (a):...(2) For a sample or specimen to determine the controlled substance or drug content of a person's blood, must be taken within four hours of the person's arrest." In *Sims v. Miller*, 227 W. Va. 395, 709 S.E.2d 750 (2011), this Court affirmed the provisions of W. Va. Code § 17C-5-8.

Further, there was no evidence presented which showed that the urinalysis met the standards set forth in W. Va. Code St. R. § 64-10-9 (2005), entitled "Urine Analysis; Methods and Standards." The onus was on the Respondent to provide sufficient evidence of the validity of the urine test. She failed to do so. "It is certainly 'rational' to require that certain procedures must be required before a chemical test may be afforded *prima facie* legal weight." *State v. Coleman*, 208 W. Va. 560, 563, 542 S.E.2d 74, 77 (2000) (per curiam).

Moreover, the persuasive value of the urine test to the circuit court is unfounded as evidenced by the circuit court's failure to give deference to the factfinder and its substitution of judgment. As the Hearing Examiner implied, it was the duty of the Respondent to make her case with the urine test evidence: "[N]o evidence was presented to explain the results to include what substances the tests were designed to discover and what substances the tests would not discover." A.R. 159. The Hearing Examiner noted, "no evidence was presented to explain the results to include what substances the tests were

designed to discover ...The results indicated 'normal' but no information was presented as to what that means." A.R. 159.

Yet the circuit court placed the onus on the Hearing Examiner to make the Respondent's case. The court found, "the failure of the Hearing Examiner to develop the record as to what substances the July 3 screen tested for, as well as the opportunity for the Respondent to meet that evidence, was clearly wrong...." A.R. 17. The court noted, "The record is devoid of any inquiry by the Hearing Examiner to anyone at the hearing as to what an 11-panel drug screen tested for....If the Hearing Examiner did not know or was unsure what the evidence presented and admitted was, it was his duty to inquire and not simply ignore the significance of the evidence." A.R. 15-16. "He also failed to inquire of the Petitioner or her counsel regarding its relevance if he did not know its significance and the drugs it tested for." A.R. 17. The court surmised that if the Hearing Examiner had properly developed the evidence, he "may well" have found that this rebutted the DMV's evidence (A.R. 17), and proceeded to note that the 11-panel test is used in abuse and neglect and criminal cases. A.R. 17-18. In a clear substitution of judgment, the court concluded, "To admit this powerful evidence and then basically ignore it, was clear error." A.R. 18.

This was an improper substitution of judgment and a failure to give deference to the factfinder's conclusions. "The [circuit court] review shall be conducted by the court without a jury and shall be upon the record made before the agency." W. Va. Code § 29A-5-4 (f) (1998). The record supports the determinations of the Hearing Examiner. "In the present case, the circuit court failed to give deference to the OAH's factual finding that, based on the totality of the evidence, Mr. Winesburg exhibited numerous signs of impairment." *Reed v. Winesburg*, 241 W. Va. 325, 333, 825 S.E.2d 85, 93 (2019). The circuit court did not find that the Hearing Examiner's findings were without basis in the record; instead, it set forth its opinions about the 11-panel test and the way the Hearing Examiner conducted the hearing. "The circuit court, however, concluded that these factual findings of the OAH were clearly wrong. In order to

sustain such a finding, the circuit court is required to show that these findings are 'patently without basis in the record.'[citing *Webb v. West Virginia Bd. of Med.*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232.]" *Reed v. Pompeo*, 240 W. Va. 255, 262, 810 S.E.2d 66, 73 (2018).

A second basis upon which the circuit court seemed to find that the Respondent had successfully rebutted the DMV's documentary evidence is the question whether she requested a blood draw. However, this is nothing more than a prime example of the circuit court's failure to give deference to the OAH factfinder. The DUI Information Sheet reflects a box checked "no" in answer to whether there was a blood test. A.R. 152. (The circuit court's predisposition to rule in favor of the Respondent is evident in the court's excoriation of the Investigating Officer for not checking any of the other boxes in the "Blood Test" box on the DUI Information Sheet, all of which were irrelevant after checking the "No" box. A.R. 14-15.) The Respondent testified that she asked the Investigating Officer to take her to get a blood test. A.R. 226, 231. In the OAH Final Order, the Hearing Examiner reconciled this evidence, finding, "No clear evidence was presented that she requested the assistance of the Investigating Officer in obtaining a blood test." A.R. 159. Yet the circuit court found, "There is persuasive evidence that the Petitioner did in fact request the arresting officer to take her for a blood draw either during or at the conclusion of the traffic stop." A.R. 14. Erroneously, the court noted, "The Petitioner's testimony that she requested a blood draw, at least twice during her encounter with Officer Williams, was not rebutted by the documentary evidence." A.R. 14. Clearly the evidence was rebutted, as noted on the DUI Information Sheet. The circuit court also noted, "The most significant reason the Court believes the Petitioner did request a blood draw from officer [sic] Williamson is the fact that within ten (10) hours and twenty-six (26) minutes after her arrest, release from jail and the refusal of Berkeley Medical Center to draw her blood without a physician's order, the Petitioner obtained an 11-panel urine drug screen from Valley Health Urgent Care..." A.R. 15. With no

deference to the factfinder, the circuit court continued, "To this Court, the negative urine screen bolsters the veracity of the Petitioner's testimony that she had requested a blood draw from Officer Williams at the time of her arrest." A.R. 15. Yet, the circuit court explicitly made "no ruling on the issue of whether the determination of the Hearing Examiner that the Petitioner failed to prove that she requested a blood draw of the arresting officer should be revisited." A.R. 15.

The issue of the purported blood test request does not affect the outcome of this case. In *Frazier v. Talbert*, 245 W. Va. 293, 858 S.E.2d 918 (2021), this Court held, "we imprudently concluded that law enforcement's failure to follow West Virginia Code § 17C-5-9 when a driver demands a blood test is, per se, a violation of due process in the context of the administrative revocation of a driver's license, automatically requiring a rescission of the revocation order without consideration of the entire record." 858 S.E.2d 927–28. This Court found, "For purposes of appellate review, it is imperative that the trier of fact make specific findings relative to these factors[2] in its decision." 858 S.E.2d 930. No such findings were made in the present case.

Further evidence of the circuit court's pervasive substitution of judgment is found in its recitation of "Proceedings Before the Office of Administrative Hearings." A.R. 3-11. The court spent an entire paragraph regarding the "Additional Impairment Tests" section of the DUI Information Sheet (A.R. 150), making such comments as, "There is no information in the record as to whether or not PFC Williamson was A.R.I.D.E. certified." A.R. 6, ¶ 14. In fact, there is no evidence of any field sobriety tests given other than the standard HGN, OLS and WAT. There is no evidence on the DUI Information Sheet (A.R. 150) that any ARIDE tests were given, and there is no mention of any such tests in the OAH Final Order. A

[2] "[T]he trier of fact must consider (1) the degree of negligence or bad faith involved in the violation of the statute; (2) the importance of the blood test evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the proceeding to sustain the revocation." *Frazier v. Talbert*, 858 S.E.2d 929.

second example is the court's notation that the Investigating Officer noted on his criminal complaint (A.R.154) that he called the Respondent's parents on the night in question and they said the Respondent was on a lot of drugs. The circuit court noted, "The Court believes that little or no weight should have been given by the Hearing Examiner to this hearsay statement." A.R. 6-7. The OAH Final Order does not mention the call to the parents. Clearly, the OAH Hearing Examiner did not rely on that evidence but found, "the Petitioner's driving pattern, her physical appearance and her performance on the standard field sobriety tests" were his basis for finding evidence of the use of alcohol, drugs or controlled substances. A.R. 157, ¶ 7.

The standard of review for an administrative proceeding such as the present case and a grievance hearing are the same. "In *Randolph County Board of Education v. Scalia,* 182 W.Va. 289, 292, 387 S.E.2d 524, 527 (1989), Justice Miller compared the standard of review applicable to a review of an ALJ's decision under W.Va.Code, 18–29–7, [footnote omitted] to that of an administrative decision under the Administrative Procedures Act, W.Va.Code, 29A-5-4(g) (1964): 'Both statutes contain virtually the same criteria for reversal of the factual findings made at the administrative level, i.e., that they are 'clearly wrong in view of the reliable, probative and substantial evidence on the record as a whole.'" *Martin v. Randolph Cty. Bd. of Educ.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995). "'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. Va. Dep't of Transp., Div. of Highways*, 229 W. Va. 108, 727 S.E.2d 652 (2012)(per curiam).

The circuit court erred in failing to give deference to the Hearing Examiner's credibility determination. The OAH Hearing Examiner's "credibility determinations are binding unless patently without basis in the record." *Martin v. Randolph Cty. Bd. of Educ.*, 195 W. Va. at 304, 465 S.E.2d at 406. *See also*, *Reed v.Grillot*, No. 17-0691, 2019 WL 1012160 (W. Va. Mar. 4, 2019) (memorandum decision). The Hearing Examiner found that the documents created by the Investigating Officer "are more credible and in line with common sense that [*sic*] the Petitioner's testimony." A.R. 159-60. "[The Investigating Officer's] narrative detailing the [Respondent's] behavior and appearance is consistent with one who was impaired by a controlled substance or drugs. The [Respondent's] testimony as to her driving pattern and the reasons why she drove this way, does not make sense, especially in light of the Investigating Officer's account that she almost hit his patrol car." A.R. 159-60. "We cannot overlook the role that credibility places in factual determinations, a matter reserved exclusively for the trier of fact. We must defer to the ALJ's credibility determinations and inferences from the evidence, despite our perception of other, more reasonable conclusions from the evidence. ... Whether or not the ALJ came to the best conclusion, however, she was the right person to make the decision. 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. ... The ALJ is entitled to credit the testimony of those it finds more likely to be correct. [*Martin v. Randolph Cty. Bd. of Educ.*] at 306, 465 S.E.2d at 408 (internal citations and quotations omitted)." *Frazier v. S.P.*, 242 W. Va. 657, 664, 838 S.E.2d 741, 748 (2020).

The Hearing Examiner reconciled the evidence, and his conclusions are supported by the record. "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. at 306, 465 S.E.2d at 408. 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. at 306, 465 S.E.2d at 408 (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."). "[I]f the circuit court's account of the evidence is plausible in light of the record viewed in its entirety, we may not reverse it, even though convinced that had we been sitting as the trier of fact, we would have weighed the evidence differently. We will disturb only those factual findings that strike us wrong with the 'force of a five-week-old, unrefrigerated dead fish.' *United States v. Markling,* 7 F.3d 1309, 1319 (7th Cir.1993), *cert. denied,* 514 U.S. 1010, 115 S.Ct. 1327, 131 L.Ed.2d 206 (1995)." *Brown v. Gobble*, 196 W. Va. 559, 563, 474 S.E.2d 489, 493 (1996). *See also*, *Holley v. Crook*, No. 18-0637, 2019 WL 4257299, at *5 (W. Va. Sept. 9, 2019) (memorandum decision) ("we find that there were sufficient facts to support the OAH's conclusion that respondent was driving a motor vehicle while under the influence of alcohol, and the OAH's findings were not clearly wrong in light of the probative and reliable evidence in the record.").

The circuit court, however, concluded that the factual findings of the OAH were clearly wrong, and reversed the findings of the trier of fact simply because the reviewing court would have decided the case differently. "[W]e agree with the DMV, and find that the circuit court abused its discretion by failing to examine the totality of the evidence, by failing to give deference to the findings of fact made by the OAH, and by substituting its own judgment in contravention of our established standards of review." *Frazier v. S.P.* at 664, 838 S.E.2d at 748.

CONCLUSION

This Court should find that the circuit court abused its discretion in assessing costs to the DMV and find that the circuit court improperly substituted its judgment for the OAH factfinder, and reverse the *Final Order Upon Remand* entered June 20, 2021.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0568

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

Petitioner,

v.

CHERYL L. YODER,

Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Petitioner's Brief* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 20th day of October, 2021, addressed as follows:

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