

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2007 FEB 23 AM 11:20

JEFFREY D. CARPENTER,

Petitioner,

v.

F. DOUGLAS STUMP, Commissioner
of the West Virginia Division of Motor
Vehicles, and the STATE OF WEST
VIRGINIA,

Respondent.

OK
DATHY S. PATSEL
KANAWHA COUNTY

Civil Action Number: 04-AA-134
Judge Jennifer Bailey Walker

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ATTORNEY GENERAL'S OFFICE
TAX DIVISION

OPINION AND ORDER
REVERSING ADMINISTRATIVE ORDER

This matter came before the Court upon a "Petition" filed by Jeffrey D. Carpenter (hereinafter, "Petitioner"). Petitioner seeks appellate review and relief from an October 4, 2004, Order of Revocation issued by the West Virginia Division of Motor Vehicles which ordered the suspension of Petitioner's license. The Court has studied the petition for appeal, the record as a whole, the memoranda of law submitted by the parties, and other legal authorities. As a result of these deliberations, for the reasons set forth in the following opinion, the Court concludes the Commissioner's Order should be **REVERSED**.

The Court reviews this matter pursuant to West Virginia Code §29A-5-1, *et seq.* W.Va. Code §29A-5-4(g) clearly states that the decision of an agency shall be upheld unless the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or

(4) Affected by other error of law, or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.' "

Syl. Pt. 1, *Smith v. Bechtold*, 190 W.Va. 315, 438 S.E.2d 347 (1993), quoting Syl. Pt. 2, *Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983).

The scope of review under the foregoing provision is "extremely limited." *Frank's Shoe Store v. W.Va. Human Rights Comm'n*, 179 W.Va. 53, 56, 365 S.E.2d 251, 254 (1986). In considering the propriety of the Commissioner's Final Order, the reviewing court must be careful to avoid substituting its judgment for that of the administrative decision-maker. *Morris Nursing Homes v. W.Va. Human Rights Comm'n*, 189 W.Va. 314, 431 S. E. 2d 353 (1993).

A ground for reversal set forth by the Petitioner is that the Commissioner erred in denying the Petitioner's motion to dismiss the administrative proceedings on the grounds that the arresting officer failed to submit his Statement of Arresting Officer to the Division of Motor Vehicles within forty-eight (48) hours of the petitioner's arrest. West Virginia Code § 17C-5A-1(b) requires an officer who makes a DUI arrest to report such arrest "to the commissioner of the division of motor vehicles by written statement within forty-eight hours." The administrative record shows that the Statement of Arresting Officer was not received at the Division of Motor Vehicles until June 11, 2003, approximately three weeks after the petitioner's arrest for the offense of driving while under the influence of alcohol.

The arresting officer testified that he attempted to submit the Statement of Arresting Officer at normal procedure. However, the Division later notified the officer that another Statement of

Arresting Officer was needed to properly commence the administrative proceeding against the Petitioner. Tr. at p.7. No reason for this sequence of events is apparent from the administrative record. The arresting officer testified that he cannot recall the reason that he had to submit additional paperwork to the Division. Tr. at p. 7. Further, there are no documents in the record that supply any possible explanation as to why additional paperwork was needed.

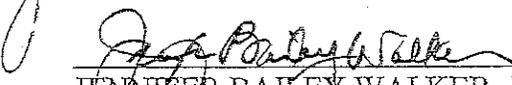
The Court agrees with the Petitioner's contention that there are no statutory provisions that authorize the West Virginia Division of Motor Vehicles, or its employees, to assist the arresting officer in the revocation process. Accordingly, the administrative record contains no evidence to refute the Petitioner's contention that the Division of Motor Vehicles failed to be fair and impartial to the Petitioner by, in effect, assisting the arresting officer to submit the proper paperwork to aid in the revocation process. Thus, the Court finds that the Division's actions in this matter violate the Petitioner's due process right to a fair and impartial hearing tribunal. The Court further finds that these actions warrant reversal of the Commissioner's Final Order.

The Petitioner has cited additional grounds for reversal of the Commissioner's Order. However, as this Court has determined that the Final Order should be reversed based on the preceding discussion, it is not necessary to address the remaining grounds for reversal.

Accordingly, this Court **ORDERS**:

The October 4, 2004, Final Order of Revocation issued by the DMV is hereby **REVERSED** and **VACATED**. It is further **ORDERED** that the Circuit Clerk distribute certified copies of this Order to all counsel of record and the West Virginia Division of Motor Vehicles.

Entered this 22nd day of February, 2007.


JENNIFER BAILEY WALKER, Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 27
DAY OF February, 2007
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA lt