

NO. 35560

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CRAIG A. HARE,

Petitioner Below/Respondent,

v.

STATE OF WEST VIRGINIA ex rel.
JOE MILLER,
COMMISSIONER, WEST VIRGINIA
DEPARTMENT OF MOTOR VEHICLES,

Respondent Below/Petitioner

Appellees Brief

RESPONDENT'S RESPONSE TO PETITIONER'S "INITIAL BRIEF"

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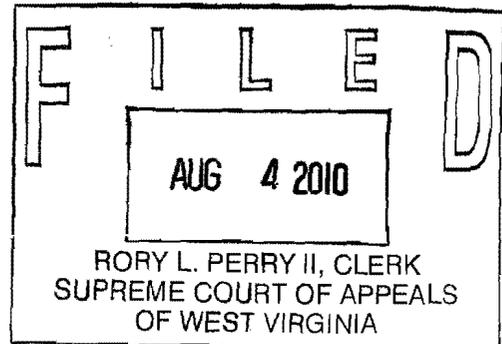


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RESPONDENT'S RESPONSE TO PETITIONER'S "INITIAL BRIEF"

I. INTRODUCTION

Comes now the Respondent, Craig A. Hare, by counsel, Carter Zerbe, David Pence, and Lisa Hyre, and submits this response in reply to Petitioner's *Initial Brief* (hereinafter "Petitioner's Brief"), filed in the above styled case. This is an appeal from an *Order Granting Petitioner's Writ of Prohibition*, entered October 12, 2009, and an *Order Granting Motion for Attorney Fees*, entered December 22, 2009 from The Honorable Louis H. Bloom, Kanawha County Circuit Court, in an action titled *Craig A. Hare v. Joe E. Miller, Commissioner, West Virginia Division of Motor Vehicles*, Civil Action No. 09-MISC-322. In that decision, the Circuit Court

determined that the Respondent exceeded his jurisdiction in scheduling a second administrative hearing based exclusively on the arresting officer's failure to appear after being properly subpoenaed and without ever requesting, or being granted, a continuance in the matter. Because the Petitioner violated Respondent's fundamental due process rights, an award of attorney fees was granted.

II. KIND OF PROCEEDING AND THE NATURE OF THE RULING BELOW

Following his arrest for first offense driving under the influence of alcohol (hereinafter "DUI"), Respondent timely and appropriately requested an administrative hearing with the Division of Motor Vehicles (hereinafter "DMV"). In his request, Respondent requested the presence of the arresting officer. Consequently, the arresting officer was timely and properly subpoenaed to appear at the administrative hearing scheduled for April 15, 2009. Despite the subpoena, the arresting officer failed to appear. Counsel moved for dismissal, which was taken under advisement by the hearing examiner.

Absent any request for a continuance by either party, emergency or otherwise, the DMV scheduled a second hearing for July 22, 2009. A continuance requested by Respondent's counsel was granted for the July 22, 2009 hearing. The second hearing was then scheduled for September 24, 2009. On September 4, 2009 Respondent filed a *Petition for Writ of Prohibition, Mandamus and Application for Stay* in the Circuit Court of Kanawha County (09-MISC-322). By Order entered October 16, 2009 The Honorable Judge Louis H. Bloom granted the Respondent's *Petition for Writ of Prohibition, Mandamus and Application for Stay* and awarded attorney fees in an Order dated December 23, 2009.

III. STATEMENT OF FACTS

Respondent was arrested for first offense DUI on December 21, 2008 in Preston County, West Virginia by Deputy C.A. Martin of the Preston County Sheriff's Department (Hereinafter "Dep. Martin"). Following the arrest, a Statement of Arresting Officer was forwarded to the DMV by Dep. Martin. Consequently, an initial order of revocation dated January 22, 2009 was mailed to the Respondent. Through Counsel, the Respondent timely submitted a hearing request form to challenge the suspension of his driving privileges. The attendance of the arresting officer was requested.

As a result the DMV scheduled an administrative hearing for April 15, 2009 at the DMV's regional office in Morgantown, West Virginia. Dep. Martin was issued a subpoena on February 18, 2009. The return receipt card was signed on February 19, 2009.

On April 15, 2009 the Respondent, a witness, his counsel, and the hearing examiner appeared at the designated hearing location. Dep. Martin, however, failed to appear. At no time prior to the hearing or after the hearing did Dep. Martin contact the DMV to request a continuance or offer an explanation for his absence.

Based on the failure of the arresting officer, or any witness for the State, to appear at the hearing, counsel for the Respondent moved for dismissal of the revocation.¹ No testimony was

¹Counsel for the Commissioner claims that "petitioner" failed to object to the rescheduling of the hearing. This assertion is a misrepresentation. Hare moved for dismissal (Tr. 31). The hearing examiner, noting the emergency continuance requirement (*Id.*), which would have allowed the officer five days post hearing in which to request an emergency continuance, took the dismissal motion under advisement. The issue of rescheduling the hearing was never addressed. Thus, Petitioner's rescheduling was not an issue at the hearing. This court should not countenance Petitioner's attempt at misdirection. Indeed, in referencing the emergency continuance provision, the hearing examiner created the impression that the matter would be dismissed if the officer did not comply with that requirement.

elicited at the hearing, and the Statement of Arresting Officer was never properly identified or properly moved into evidence.

Absent any motion or action from the State or the arresting officer, the Commissioner scheduled a second administrative hearing for July 22, 2009. A continuance request for that hearing was granted on July 14, 2009 at the request of the Respondent. The hearing was then rescheduled for September 24, 2009.

On or about September 4, 2009 counsel for Respondent filed a *Writ of Prohibition and Application of Stay* in the Circuit Court of Kanawha County. A telephonic hearing in front of Judge Louis H. Bloom took place on September 23, 2009. An Order was entered on October 16, 2009 dismissing the revocation and providing Respondent with a full and valid license. On October 27, 2009 counsel for the Respondent filed a *Motion for Attorney Fees*. An *Order Granting Motion for Attorney Fees* was entered on December 23, 2009.

IV. ISSUES PRESENTED

I. WHETHER THE COMMISSIONER EXCEEDED HIS JURISDICTION IN SCHEDULING A SECOND HEARING WHERE A PROPERLY CONDUCTED HEARING HAD ALREADY TAKEN PLACE WHERE THE ARRESTING OFFICER, UNDER SUBPOENA, FAILED TO APPEAR WITHOUT EVER REQUESTING A CONTINUANCE IN THE MATTER IN VIOLATION RESPONDENT'S DUE PROCESS RIGHTS.

II. WHETHER THE COMMISSIONER'S ACTIONS OF EXCEEDING HIS JURISDICTION BY DELAYING THE RESOLUTION OF THE LICENSE REVOCATION PROCEEDING IN VIOLATION OF RESPONDENT'S DUE PROCESS RIGHTS WARRANTED AN AWARD OF ATTORNEY FEES.

V. POINTS AND AUTHORITIES

- A. A driver's license is a property interest and as such, is entitled to protection under the Due Process Clause of the West Virginia Constitution.

Syl. pt. 1, *Abshire v. Cline*, 193 W. Va. 180, 455 S.E.2d 549 (1995)

- B. “Any hearing shall be held within one hundred eighty days after the date upon which the commissioner received the timely written request for a hearing unless there is a postponement or continuance. The commissioner may postpone or continue any hearing on the commissioner’s own motion or upon application for each person for good cause shown. **The commissioner shall adopt and implement by a procedural rule written policies governing the postponement or continuance of any hearing** on the commissioner’s own motion or for the benefit of any law-enforcement officer or any person requesting the hearing and **the policies shall be enforced and applied to all parties equally.**”

W. Va. Code §17C-5A-2(c) (2008)

- C. According to Rule 3.8.1 of the Legislative Rules pertaining to continuances at the DMV, “the commissioner may grant the person requesting a hearing a continuance of the scheduled hearing. The person shall make the request for continuance in writing, and it must be received by the Commissioner at least five (5) days prior to the scheduled hearing date. The Commissioner shall grant the request for good cause shown.” The above provisions apply to any continuances requested by the arresting officer.

W. Va. C.S.R. Sec. 91-1-3.8.1, 2 (2005)

- D. According to Rule 3.8.4 of the Legislative Rules pertaining to emergency continuances “the Commissioner may grant an emergency continuance on less than five days notice to the person requesting the hearing and also the arresting officer in a DUI hearing for unexpected emergencies of the person, attorney, arresting officer, or subpoenaed witness . . .any emergency continuance request may be made by telephone but also must be submitted in writing. The written request must be received by the Division no later than five (5) days after the date the hearing was scheduled or the provisions of Subsection 3.7 will be applied as if the party requesting the continuance failed to appear.”

W. Va. C.S.R. Sec. 91-1-3.8.4 (2005)

- E. According to the procedural rules promulgated by the Commissioner, if the driver fails to appear at a hearing; either in person or by counsel, without first obtaining a continuance, then the DMV shall automatically reinstate the initial order of revocation. Failure of the arresting officer to appear at a DUI hearing does not relieve the licensee from his obligation to appear. Provided, that where the arresting officer fails to appear and the licensee appears, the revocation may not be based solely on the arresting officer’s affidavit or other documentary evidence submitted by the arresting officer.

W. Va. C.S.R. Sec. 91-1-3.7 (2005)

- F. “[T]o withstand constitutional [sic] scrutiny under the substantive due process standard, it must appear that the means chosen by the Legislature to achieve a proper legislative purpose bear a rational relationship to that purpose and are not arbitrary and discriminatory .”

McDonald v. Cline, 193 W. Va. 189, 191, 455 S.E.2d 558, 560 (1995) citing *State ex rel. Harris v. Calendine*, 160 W. Va. 172 (1977)

- G. “[P]rinciples of fairness suggest that the same promptness concerns that are imposed upon a defendant who requests a hearing in connection with an administrative revocation of his operator’s license should be similarly imposed upon the West Virginia Department of Motor Vehicles (“DMV”). To permit the DMV to grant itself an extension of the 180-day deadline for revocation hearings that is mandated by West Virginia Code §17C-5A-2(b) (2004) without providing for any limits on the length of such extensions encourages the establishment of a lopsided system - a system that proves inherently unjust for the defendant whose revocation proceedings are protracted, not because of his requests, but because of the lengthy administrative delays.”

In re Donley, 217 W. Va. 449, 453, 618 S.E.2d 458, 462 (2005), concurring opinion by Chief Justice Albright.

- H. “[w]here 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 and thereby denied due process of the law to a licensee, a party who has incurred substantial expenses as a result of the improper delay and denial may recover the party’s expenses so incurred from the Department in order to place the party in the position in which he or she would have been absent the improper delay and denial by the Department.”

Syl. pt. 2, *David v. Comm’r of the West Virginia Division of Motor Vehicles*, 219 W. Va. 493, 637 S.E.2d 591 (2006).

VI. ARGUMENT

A. The Commissioner Exceeded His Legal Authority and Violated Hare's Due Process Rights in Scheduling a Second Hearing.

The Commissioner's attempt to conduct a second hearing to provide the State yet another bite at the apple after the arresting officer failed to appear is clearly erroneous as a matter of law and fundamentally unfair. The Petitioner is correct in noting that administrative license revocation hearings fall within the purview of the Administrative Procedures Act, (*W. Va. Code* §29A-5-1 *et. seq*) and *W. Va. Code* §17C-5A *et. seq*. Those provisions of law require the DMV to conduct all hearings in an impartial manner and require the Commissioner to adopt and implement, by procedural rule, written policies governing the postponement or continuance of hearings. See *W. Va. Code* §17C-5A-2(c) and *W. Va. Code* §29A-5-1(d).

Perhaps most important, the policies with respect to postponements and continuances “. . . shall be enforced and applied to all parties equally.” *Id.* Without exception, if the driver fails to appear at the hearing or properly obtain a continuance, the initial order of revocation is upheld². *W. Va. C.S.R. Sec.91-1-3.7.1* Conversely, if the arresting officer fails to appear, and the licensee appears, as is the case herein, the Division can not revoke or suspend the Petitioner's driver's license based solely upon the arresting officer's affidavit or other documentary evidence. *CSR §91-1-3.7*

Therefore, in applying the rules equally to all parties, where the driver appears in the absence of the arresting officer, the Commissioner is required to reinstate a full and valid license

²The notice of hearing issued in this matter specifically states “[f]ailure to appear at your hearing without a continuance will cause the suspension or revocation to be upheld and automatic assessment of the hearing costs.” (Exhibit A)

to the driver. Such was the logic traditionally applied by the Commissioner in the past. The Commissioner's deviation from well-settled law is contrary to the Commissioner's own rules and regulations and violates Petitioner's right to a fair hearing³.

With regard to continuances, the law allows each party the opportunity to request a continuance in writing, based on good cause, at least five days prior to the hearing, or a party can file an emergency continuance request in writing, which must be received no later than five days following the hearing date. W. Va. C.S.R. Sec. 91-1-3.8. At no time did the arresting officer request a continuance in this matter or offer an explanation for his absence.

From a fairness standpoint, rescheduling a hearing based exclusively on the arresting officer's absence renders the emergency continuance provision for arresting officers meaningless. An officer would never have to file an emergency continuance if the hearing is already going to be rescheduled based on his failure to appear. The driver is afforded no such luxury, as he must file an emergency continuance if he cannot appear at the last minute or else suffer an automatic revocation. This double standard clearly favors the State to the detriment of the driver contrary to the intent of W. Va. Code §17C-5A-2, the Administrative Procedures Act and due process.

The Petitioner would have this court believe that the Commissioner is somehow doing the driver a service in rescheduling a second hearing when the arresting officer fails to appear. He repeatedly makes the Orwellian assertion that DMV's insistence on compelling the officer's

³ “[T]o withstand constitutional [sic] scrutiny under the substantive due process standard, it must appear that the means chosen by the Legislature to achieve a proper legislative purpose bear a rational relationship to that purpose and are not arbitrary and discriminatory.” *McDonald v. Cline*, 193 W. Va. 189, 191, 455 S.E.2d 558, 560 (1995) citing *State ex rel. Harris v. Calendine*, 160 W. Va. 172 (1977)

attendance is for the driver's benefit.⁴ Petitioner's argument borders on the bizarre. It's like arguing that black is white or up is down. As noted above Legislative Rules, Division of Motor Vehicles, Administrative Due Process Series §91-1-3.7.2 states:

“The failure of the arresting officer to appear at a DUI hearing does not relieve the licensee from the obligation to appear at the hearing or from the provisions of Subsection 3.71 of this rule. Provided that, where the arresting officer fails to appear at the hearing, but the licensee appears, the revocation or suspension of license may *not* be based solely on the arresting officer's affidavit of other documentary evidence submitted by the arresting officer. (Emphasis supplied).

Why then, would the driver want to compel that attendance of an adverse party when under the Commissioner's own rules, the driver's license cannot be revoked in that party's absence?

Moreover, such “service” comes at a high price. For one, the driver would be forced to undergo the expense of appearing with counsel at a second hearing. He would also have to take additional time off work. He would have to adjust his personal and professional life around a potential license revocation at some time in the future. Also, and perhaps most importantly, he would have to deal with the stress and uncertainty of a pending license revocation proceeding.

And the delay does not stop there. If the arresting officer failed to appear at the second

⁴ “Because the Respondent asked for the attendance of the investigating officer, the Division rescheduled the hearing.” (Petitioner's Br., at 3). “Presumably, Respondent desired to cross-examine [the arresting officer].” *Id.*, at 7. “The statute and rules are designed to give the driver every opportunity to challenge the evidence against him. . .by requiring that the Commissioner secure the attendance of the investigating officer.” *Id.*, at 8. The Commissioner's rescheduling of the hearing was at the request of, and for the benefit of, “the driver.” *Id.*, at 10. “In the present case, the hearing was rescheduled because of, and for the benefit of the driver, who requested the investigating officer's attendance.” *Id.*, at 11. “Respondent illogically complains that he wants to cross-examine the officer, but then thwarts any attempts by the Commissioner to secure the officer's attendance.” *Id.*, at 13.

hearing, a third hearing would then be scheduled again. Additional delay as well as judicial waste would occur each time an arresting officer fails to appear pursuant to a subpoena in a license revocation proceeding. The Petitioner asks this Court to authorize a filing of an enforcement proceeding in Circuit Court. That means each time an officer fails to appear at an administrative hearing in this state, a civil action will be filed in Kanawha County.

Following the proceeding, another administrative hearing would take place. This process would likely take at least one year, assuming the officer appears at the second administrative hearing. If the officer again fails to appear, the cycle would continue, and another action would be filed in Circuit Court. That means a driver facing a license revocation proceeding faces the real possibility of becoming a pawn in the legal system, stuck in limbo for several years, through no fault of his own.

The driver is therefore exposed to an infinite amount of delay in resolving the matter. How being exposed to such delay benefits the driver is a complete mystery.

The Petitioner's interpretation, then, is a recipe for multiple hearings and delays in contravention of the frequently expressed legislative and judicial intention for a speedy resolution of license revocation issues. It is not only Hare's rights that are at stake here. It must be kept in mind to protect the public as well as the driver, the whole system is designed to facilitate a speedy resolution of license revocation issues. The officer is required to submit the charges (Statement of Arresting Officer) to the DMV within forty-eight hours of the arrest. The driver must request a hearing within ten days to avoid an initial revocation, and in any case, within thirty days to secure a hearing on the revocation. Originally hearings were required to be held within twenty days until the legislature recognized that DMV's limited staffing could not

accommodate such an expeditious schedule.

Nevertheless, the thrust of West Virginia's implied consent law is to solve license revocation issues as quickly as possible. Also, as pointed out above, underlying the West Virginia implied consent law is the complementary policy of providing the driver with a speedy resolution of the issue of his driving privileges as the ability to drive is extremely important in this modern age. It is especially so in a state in which there is little public transportation. One's livelihood as well as the ability to support one's family are often dependent on the ability to drive. To quote the United States Supreme Court, unreasonable delay, "evinces an entire lack of that acute appreciation of justice which should characterize a tribunal charged with [such a] delicate and important duty. . ." *Smith v. Ill. Bell Tel. Co.*, 270 U. S. 587, 591, 46 S. Ct. 408, 409, 70 L. Ed. 747 (1926).

Thus, it strains belief that the legislature would countenance a system that promotes further delays in DUI license revocation cases. In fact, the WV Legislature in the 2010 session removed the language relied upon by the Petitioner in support of his appeal from *W. Va. Code* §17C-5A-2(d). The Petitioner leans heavily upon the 2008 language that the "investigating officer . . . shall not attend the hearing . . . unless requested to do so by the party whose license is at issue . . ." and "The Division of Motor Vehicles is solely responsible for causing the attendance of the investigating officers . . ." *Petition for Appeal* P. 6. That language no longer exists in *W. Va. Code* §17C-5A-2. It is reasonable to conclude that the legislature removed that language because the Commissioner's interpretation of that provision was not what it had intended.

It is true that this provision of the 2008 amendments to the DUI law is undoubtedly the

strangest piece of legislation that the undersigned has ever encountered. In what other area of law, criminal, civil, administrative, is one party *required* to request the presence of an adverse party? Requiring the driver to request the presence of the adverse party and giving the Commissioner subpoena power to compel that party's attendance was the result of intense lobbying by the Commissioner, which itself belies the Commissioner's argument that it was put in there for the driver's benefit. Nevertheless, it was never intended to create dual standards for the driver and officer. The purpose of the statute was to relieve the officer of the burden of attending the hearing if it did not prove to be necessary. It was clearly *not* the purpose to deprive the driver of rights afforded to the adverse party.⁵

The *Petition for Appeal* also places great emphasis on the fact that the Administrative Procedures Act (APA) gives the Commissioner the discretion to enforce subpoenas. While the APA does give the Commissioner that authority, it does not authorize him to exercise that discretion in contravention of the driver's due process rights.

Also, contrary to Petitioner's contention, no provision of state law or applicable rule governing administrative hearings allows the Commissioner to conduct a second hearing with respect to Petitioner's driving privileges where a properly conducted hearing has already taken place. In this case, the hearing examiner, the driver, and counsel for the driver timely appeared at the designated hearing location. No witness for the State appeared, and no continuance was ever requested.

Therefore, the Petitioner wrongly states that the "Division continued the hearing in order to meet its statutory obligation to cause the attendance of Dep. Martin at the hearing" (Pet. Brief

⁵If it had been, it would certainly be unconstitutional.

P. 7) No continuance was ever requested for the April 15, 2009 hearing, and no continuance was ever granted for that hearing⁶.

While the law certainly grants the Commissioner the power to continue or postpone a hearing on a showing of good cause, he has no authority to “reschedule” a previously held hearing as he attempted to do in this instance. See *W. Va. Code* §17C-5A-2(c).

In resolving this issue, the “split of authority” amongst the Circuit Court judges in Kanawha County regarding this issue is not exactly accurate. The only circuit court judge in Kanawha County to rule in favor of the DMV on this issue is a substitute judge, Judge Egnor, who was sitting in for the Honorable Paul Zakaib, Jr. during his absence. Upon return, Judge Zakaib ruled against the DMV on this issue (09-MISC-440). Also, Judge Jennifer Bailey issued a ruling in favor of the driver. (10-MISC-63) In a similar action, The Honorable James C. Stucky recently precluded the DMV from conducting a second hearing with directions for the DMV to rule on the evidence presented. (10-MISC-304). Thus, *every* Kanawha County Judge, except a retired, temporary judge, who has ruled on this issue, has rejected the Commissioner’s position.

Finally, the emptiness of Petitioner’s argument is reflected in his attempt to paint a picture of shady backroom deals where officers are enticed by defense attorneys to not appear at the administrative hearing. This Court in *Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005) ruled that it was unethical for attorney’s or officers to enter into agreements which would prevent the Commissioner from carrying out his legislative responsibilities or prevent a law enforcement officer from presenting evidence of the arrest at the hearing. *Id.* at 743, 256 In

⁶ In a case of circular logic, the Petitioner later concedes this point in its brief and then argues that the continuance rules do not apply to this type of situation. See P. 11 of Petition for Appeal.

other words, without any empirical evidence in this case, or any other case for that matter, Petitioner is, in effect, saying that unless he has the power to force the officer to appear, DUI defense attorneys will engage in unethical practices.

Contrary to Petitioner's assertion, dismissing a revocation where the officer fails to appear, despite being subpoenaed, will not have any effect on this Court's holding in *Stump v. Johnson*⁷, 217 W. Va. 733, 619 S.E.2d 246. In reality, officer's suffer suspension, without pay, for failure to appear at administrative license revocation hearings. Several failures to appear will result in termination.

Typically, law enforcement departments receive sums of money in the form of overtime grants from the federal government to patrol for impaired drivers. A condition of those federal grants is proof that the officer attended the license revocation proceeding. Failure of an officer to appear will eventually result in the loss of federal money. It has been the undersigned's experience that officers throughout the State suffer greater consequences for missing administrative hearings than any other type of proceeding. Needless to say, officers do not intentionally miss an administrative hearing.

Also, as pointed out above, this Court expressly forbade such deal making in the *Johnson* decision. Any attorney engaging in such practice would be subject to discipline. Therefore, neither party has an incentive to engage in any deal-making as the Petitioner proclaims.

While it is true that the Petitioner is required to enforce the laws pertaining to drunk driving in this State, such enforcement must comport with the laws of this State and comply with

⁷There is absolutely no evidence of such an agreement here. That is because there was none.

fundamental fairness and due process.

The Circuit Court correctly relied upon *David v. Commissioner*, 219 W. Va. 493, 637 S.E.2d 591 (2006) in concluding that the Petitioner failed to apply the rules equally to each party in this case. In an effort to distinguish the *David* decision, the Petitioner points out that no continuance was ever requested in this matter. That only further highlights the one-sided nature of the Commissioner's actions! In *David*, the officer at least attempted to continue the hearing. In this case, no such action was taken. Despite the officer taking no action to postpone or continue the hearing, the Petitioner nonetheless "rescheduled" the hearing.

The Commissioner's one sided application of the rules thus favors the State to the detriment of the Petitioner. The West Virginia Supreme Court has strictly forbidden such partial, non-neutral application of the rules.

"Especially because the important property interest of a driver's license is at stake, the DMV must conduct license suspension hearings in a fashion that assures the due process right of licensees to a tribunal where both sides are able to fully and fairly present their evidence before a neutral hearing examiner who does not act to favor or advance the cause of either side."

Id.

Therefore, the Commissioner acted in violation of his own rules and regulations in scheduling a second administrative hearing *sua sponte* without either good cause or a continuance request from the arresting officer when a properly scheduled hearing had already taken place and no party for the State appeared.

B. ATTORNEY FEES WERE PROPERLY AWARDED IN THIS CASE.

The lower court appropriately relied upon the opinion in *David v. Commissioner*, 219

W. Va. 493, 637 S.E.2d 591 (2006) in awarding attorney fees in this case upon a finding that the Petitioner violated Respondent's due process rights in delaying the resolution of the drivers license revocation proceeding in this matter. In fact, the due process violation in this instance is even more egregious than that in *David*.

In both cases, the arresting officer was under subpoena and failed to appear at the administrative hearing. Also, both driver's undertook great expense to retain counsel and procure witnesses to appear on his behalf at the scheduled hearing.

However, in the *David* case, the arresting officer at least requested an emergency continuance after the hearing within five days following the date of the hearing as required by W. Va. Sec. 91 C.S.R. 3.8. This Court determined in *David* that the grounds alleged by the arresting officer for the emergency continuance did not warrant an emergency continuance, and in granting that request for an emergency continuance, the Commissioner violated Petitioner's due process rights. Specifically, this Court held:

“[w]here 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 and thereby denial of due process of the law to a licensee, a party who has incurred substantial expenses as a result of the improper delay and denial may recover the party's expenses so incurred from the Department in order to place the party in the position in which he or she would have been absent the improper delay and denial by the Department.”

Syl pt. 2, *David*, 219 W. Va. 494, 637 S.E.2d 592.

In this case, the arresting officer never contacted the DMV prior to the hearing to explain his absence. Likewise, the arresting officer never requested an emergency continuance in the matter. In fact, no effort was made by the arresting officer to explain his absence to the DMV or

request a continuance in the matter. It was upon the Petitioner's own initiative to reschedule the hearing absent any request or motion to do so by either party in willful violation of the law.

Such a one-sided application of the rules in favor of the arresting officer to the detriment of the driver is arbitrary, capricious and violates Petitioner's right to due process of law. There exists no provision of law which authorizes the DMV to reschedule a hearing where a properly conducted hearing has occurred. The lower court agreed, concluding that "Respondent denied due process of the law to Petitioner." *Order Granting Attorney Fees* P. 6

The Petitioner also overstates the applicability of Justice Maynard's dissent in the *David* case. Justice Maynard expressed concern that every excuse or circumstance alleged by litigants would be scrutinized and lead to costly litigation⁸. This is not an instance where the validity of a continuance is being disputed. This is a case where the Petitioner unilaterally "rescheduled" a hearing on his own volition after the hearing was properly conducted in an effort to allow the arresting officer a second opportunity to present evidence. Therefore, the "routine dismissal" of cases referred to by the Petitioner to avoid paying attorney fees is grossly overstated.

Moreover, Petitioner's claim that the DMV is "diligently attempting to enforce the laws which it is entrusted to enforce" does not authorize the Petitioner to trample upon the due process rights of citizens or operate beyond his scope of jurisdiction. *Petition for Appeal p.16* After all, a driver's license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution. *Abshire v. Cline*, 103 W. Va. 180, 455 S.E.2d 549 (1995)

⁸Justice Maynard's concern that every continuance by the Commissioner would be scrutinized has proved uncorroborated.

In justifying an award of attorney fees again a government agent, this Court explained in *Trozzi v. Board of Review of West Virginia Bureau of Employment Programs*, 214 W. Va. 604, 591 S.E.2d 162 (2003):

“Citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed non-discretionary duties. When, however, resort to such action is necessary to cure willful disregard of law, the government ought to bear the reasonable expense incurred by the citizen in maintaining the action. No individual citizen ought to bear the legal expense incurred in requiring the government to do its job.”

In this case, the Petitioner knowingly disregarded a clear legal duty in violation of the due process rights of Respondent.

VII. CONCLUSION

For the foregoing reasons Respondent respectfully requests this court to affirm the decision of the Circuit Court of Kanawha County.

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By Counsel



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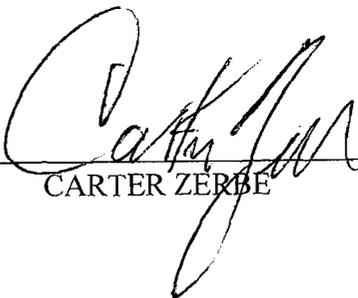
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CERTIFICATE OF SERVICE

I, Carter Zerbe, counsel for Respondent, do hereby certify that I have served a true and exact copy of the foregoing RESPONDENT'S RESPONSE TO PETITIONER'S "INITIAL BRIEF" by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to:

Scott Johnson, Asst. Attorney General
State Capital
Bldg. 2 Room W435
Charleston, WV 25305

on this the 3rd day of August 2010



CARTER ZERBE