

35560

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**CRAIG A. HARE,**  
Petitioner,

v.

Civil Action No. 09-Misc-322  
Judge Louis H. Bloom

**JOE E. MILLER, Commissioner,**  
West Virginia Department of  
Motor Vehicles,  
Respondent.

FILED  
2009 OCT 16 PM 3:52  
KANAWHA COUNTY CIRCUIT COURT

**ORDER GRANTING PETITIONER'S  
PETITION FOR WRIT OF PROHIBITION**

On September 23, 2009, came the Petitioner, Craig A. Hare ("Petitioner"), by counsel, Lisa Hyre, telephonically, and came the Respondent, West Virginia Department of Motor Vehicles ("Respondent" or "DMV"), by counsel, Janet James, Assistant Attorney General, for a hearing on Petitioner's Petition for Writ of Prohibition. The investigating officer in the underlying matter, Deputy C.A. Martin, also appeared.

Upon review of the record, the Petition for Writ of Prohibition, the parties' arguments, and the applicable law, the Court finds and concludes as follows.

**FINDINGS OF FACT**

1. On or about December 21, 2008, the Petitioner was charged with driving under the influence in Preston County, West Virginia, by Deputy C.A. Martin of the Preston County Sheriff's Department.
2. On January 22, 2009, the Respondent issued an order of revocation against the Petitioner.
3. The Petitioner requested a hearing from the Respondent and the revocation order was stayed pending the resolution of the hearing on the matter.

RECORDED

OCT 31 2009

4. A hearing before the DMV was scheduled for April 15, 2009, at the Division of Motor Vehicles, Regional Office, 1525 Deckers Creek Blvd., Morgantown, West Virginia.

5. At Petitioner's request, a subpoena was issued by the Respondent and served on the investigating officer on February 18, 2009, to appear at the April 15, 2009 hearing.

6. The Petitioner retained an attorney to travel to and represent him at the DMV hearing scheduled for April 15, 2009 in Morgantown, West Virginia.

7. The Petitioner, his witness, and his attorney all traveled to and attended the April 15, 2009 hearing before the hearing examiner in Morgantown, West Virginia.

8. The investigating officer, Deputy C.A. Martin failed to appear at the hearing. Based on such failure, the Petitioner moved to dismiss the case.

9. The record shows that the hearing examiner allowed the investigating officer to request a continuance within five (5) days of the hearing, showing an emergency existed that prevented him from attending said hearing.

10. The investigating officer did not file a request for a continuance either before the hearing or within the five (5) days following the hearing. In fact, no person, attorney or witness requested a continuance of the revocation hearing in accordance with applicable rules and statutes.

11. The Court finds that each party was given notice and an opportunity to be heard at the April 15, 2009 hearing that was scheduled by the Respondent.

12. On June 4, 2009, the Respondent issued a letter scheduling a second hearing on the same matter for July 22, 2009.

13. On September 8, 2009, the Petitioner filed a Petition for Writ of Prohibition requesting this Court to prohibit the Respondent from holding a second hearing on the underlying matter.

### DISCUSSION

1. In West Virginia, a writ of prohibition “lies as a matter of right whenever the inferior court (a) has no jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters not if the aggrieved party has some other remedy adequate or inadequate.” *State ex rel. Valley Distributors, Inc. v. Oakley*, 153 W.Va. 94, 99, 168 S.E.2d 532, 535 (1969); W.Va. Code § 53-1-1 (2009).

2. The Due Process Clause of the West Virginia Constitution states “[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” W.Va. Const. Art. 3, § 10. The Supreme Court of Appeals of West Virginia has held that 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).

3. According to Rule 3.8.1 of the Administrative Due Process Legislative Rules pertaining to the Division of Motor Vehicles, “the Commissioner may grant the person requesting a hearing a continuance of the scheduled hearing.” The request for continuance must be made in writing and received by the Commissioner at least five days prior to the scheduled hearing date. Further, the Commissioner shall grant such request if good cause is shown, including such reasons as serious illness, medical appointments, court appearances, or religious holidays. W.Va. Code R. § 91-1-3.8.1 (2009). The above

language also applies to any continuance requested by the arresting officer. W.Va. Code R. § 91-1-3.8.2 (2009).

4. Furthermore, the “Commissioner may grant an emergency continuance on less than five days notice to the person requesting the hearing in a DUI hearing for unexpected emergencies of the person, attorney, arresting officers, or subpoenaed witness.” W.Va. Code St. R. § 91-1-3.8.4.

### CONCLUSIONS OF LAW

1. The Respondent and Commissioner had jurisdiction below, but exceeded that jurisdiction as set forth in the relevant procedural rules, by scheduling a second hearing in the underlying matter, when no person, including the investigating officer, requested a continuance from the Commissioner.

2. Therefore, the Respondent is hereby prohibited from holding a second hearing on the Petitioner’s driver’s license revocation. A hearing on this matter was already scheduled and held, with all parties properly notified of such hearing. Thus, to allow a second hearing would violate the Petitioner’s due process rights.

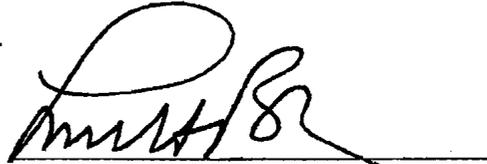
### DECISION

Accordingly, the Court does hereby **ORDER** that the Petitioner’s Petition for Writ of Prohibition is **GRANTED**. Also, if the Petitioner desires to request attorney fees for the cost to pursue the above petition, the Court further **ORDERS** the Petitioner to file a Motion and Affidavit seeking such, within ten (10) days of entry of this Order. If Petitioner does so chose to file a Motion for Attorney Fees, the Respondent will have ten

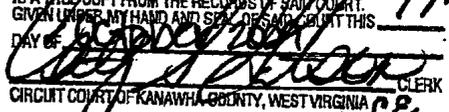
(10) days to file any response to such Motion. The objection of any party aggrieved by this Order is noted and preserved.

The Clerk is **DIRECTED** to send a certified copy of this Order to all counsel of record.

ENTERED this 14 day of October 2009.



Louis H. Bloom, Judge

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF 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 \_\_\_\_\_  
DAY OF \_\_\_\_\_ 2009  
 CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA *CE*

10/20/09  
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