

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35560

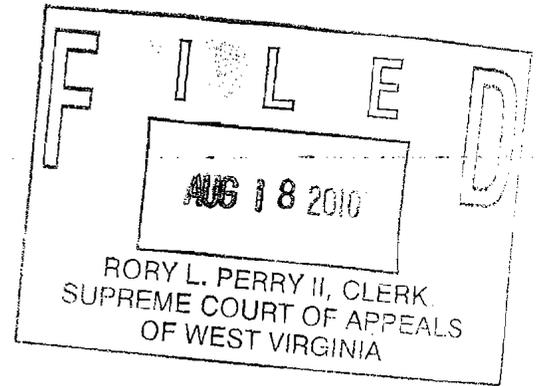
CRAIG A. HARE,

Petitioner below, Appellee,

v.

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

Respondent below, Appellant.



WEST VIRGINIA DEPARTMENT OF MOTOR VEHICLES' REPLY BRIEF

SCOTT E. JOHNSON (WVSB No. 6335)
ASSISTANT ATTORNEY GENERAL
Attorney General's Office
Building 1, Room W-435
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
(304) 558-2522

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTS	2
III. ARGUMENT	3
A. Due Process	3
1. Procedural due process	3
2. Substantive due process	6
i. Substantive due process	6
ii. Legislation substantive due process	7
iii. Due process/Equal Protection: Equality, not Identity	15
B. The circuit court granted multiple relief for an alleged single wrong and usurped the commissioner's authority.	17
IV. CONCLUSION	19

TABLE OF AUTHORITIES

STATUTE	Page
<i>Appalachian Power Co. v. PSC</i> , 170 W. Va. 757, 296 S.E.2d 887, (1982)	5, 9
<i>Appalachian Power Co. v. State Tax Dep't</i> 195 W. Va. 573, 466 S.E.2d 424 (1995)	7, 16
<i>Arrington v. Department of Human Resources</i> , 935 A.2d 432, (Md. 2007)	13
<i>Atlantic Richfield Co. v. United States Dep't of Energy</i> , 769 F.2d 771 (D.C. Cir. 1984)	9
<i>Barry v. Garcia</i> , 573 So.2d 932 (Fla. Dist. Ct. App. 1991)	13
<i>Baxstrom v. Herold</i> , 383 U.S. 107 (1966)	16
<i>Bolware v. State</i> , 995 So.2d 268 (Fla.2008)	8
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978)	1
<i>Brown v. Cooke</i> , 362 Fed. Appx. 897 (10 th Cir. 2010)	3
<i>C & P Tele. v. PSC</i> , 171 W. Va. 708, S.E.2d 798 (1983)	5
<i>Carroll v. Stump</i> , 217 W. Va. 748, 619 S.E.2d 261 (2005)	1
<i>Cathcart v. Crumlish</i> 189 A.2d 243 (Pa.1963)	10
<i>Cf. Boggs v. Settle</i> , 150 W. Va. 330, 145 S.E.2d 446, (1965)	2
<i>Church of Scientology v. United States</i> , 506 U.S. 9, (1992)	9, 10

<i>Cincinnati Bar Assn. v. Adjustment Serv. Corp.</i> , 732 N.E.2d 362 (Ohio 2000)	9
<i>Committee on Legal Ethics v. Pence</i> , 161 W. Va. 240, 240 S.E.2d 668 (1977)	16
<i>Cook v. Oberly</i> , 459 A.2d 535 (Del. Ch. Ct. 1983)	9
<i>County of Sacramento v. Lewis</i> , 523 U.S. 833 (1998)	3
<i>Cudaby Packing Co. v. Holland</i> , 315 U.S. 357 (1942)	10
<i>Customer Co. v. City of Sacramento</i> 895 P.2d 900 (Cal. 1995)	4
<i>Dailey</i> , 195 W. Va. 330, 469 S.E.2d 601	5
<i>Daniels v. Williams</i> 474 U.S. 327 (1986)	3
<i>David v. Commissioner</i> , 219 W. Va. 493, 637 S.E.2d 591 (2006)	4, 17, 18
<i>Dile v. Dile</i> , 426 A.2d 137 (Pa. Super. Ct. 1981)	3
<i>EEOC v. Bay Shipbuilding Corp.</i> , No. 80-C-591, 1981 WL 129 (E.D. Wis. Feb. 12, 1981)	12
<i>EEOC v. Schwan's Home Serv.</i> , 692 F.Supp.2d 1070 (D. Minn. 2010)	12
<i>Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.</i> , 223 W. Va. 209, 672 S.E.2d 345 (2008)	8
<i>Fleet/Norstar Financial Group, Inc. v. SEC</i> , 769 F. Supp. 19, (D. Me. 1991)	10
<i>F.T.C. v. Owens-Corning Fiberglas Corp.</i> , 626 F.2d 966 (D.C. Cir. 1980)	11

<i>F. T.C. v. Sherry</i> , 13 Fed. R. Serv.2d 1382 (D.D.C. May 29, 1969)	13
<i>Gaines v. Municipal Court</i> , 161 Cal. Rptr. 704 (Ct. App. 1980)	4, 5
<i>Garcia v. San Antonio Metro. Transit Auth.</i> , 469 U.S. 528, (1985)	12
<i>Ging v. Ging</i> , 775 N.W.2d 479 (Neb. Ct. App. 2009)	2
<i>Gonzalez-Fuentes v. Molina</i> , 607 F.3d 864, 1 st Cir. 2010)	7
<i>Grantville Co. (Sibley Division) v. EEOC.</i> , 438 F.2d 32 (4th Cir. 1971)	12
<i>Hawkins v. Freeman</i> , 195 F.3d 732 (1999)	7
<i>Herring-Malbis I, LLC v. TEMCO, Inc.</i> , 37 So.3d 158 (Ala. Ct. Civ. App. 2009)	2
<i>Hubbard v. State Farm Indem. Co.</i> , 213 W. Va. 542, 584 S.E.2d 176 (2003)	5
<i>Interstate Commerce Comm'n v. Brimson</i> , 154 U.S. 447 (1894)	9
<i>Jensen v. Superior Court</i> , 72 Cal. Rptr.3d 594 (Ct. App. 2008)	4
<i>King v. Wyoming Div. of Criminal Investigation</i> , 89 P.3d 341 (Wyo. 2004)	8
<i>Kimbel v. Florida Bd. of Regents</i> , 528 U.S. 62 (2000)	16
<i>Kyriazis v. University of West Virginia</i> , 192 W. Va. 60, 450 S.E.2d 649 (1994)	15
<i>Lewis</i> , 523 U.S. at 846	6

<i>Maher v. Roe</i> , 432 U.S. 464 (1977)	16
<i>Manchin v. Browning</i> , 170 W. Va. 779, 296 S.E.2d 909 (1982)	1
<i>Minnesota v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	16
<i>Morgan</i> , 205 W. Va. 516 S.E.2d	16
<i>Morgantown</i> , 159 W. Va. 788, 226 S.E.2d 900 (1976)	2, 16
<i>Mourning v. Family Pub. Serv. Inc.</i> , 411 U.S. 356 (1973)	16
<i>N.A.A.C.P., Inc. v. City of Niagara Falls</i> , 65 F.3d 1002 (2d Cir. 1995)	13
<i>N.L.R.B. v. International Medication Systems, Ltd.</i> , 640 F.2d 1110 (9 th Cir. 1981)	10
<i>N.L.R.B. v. Midwest Heating And Air Conditioning, Inc.</i> , 528 F.Supp.2d 1172 (D. Kan. 2007)	13
<i>Novak v. Chicago & Calumet Dist. Transit co.</i> , 135 N.E.2d 1 (Ind.1956)	14
<i>People v. Jaudon</i> , 718 N.E.2d 647 (Ill. Ct. App. 1999)	3
<i>Platt v. State</i> , 341 N.E.2d 219 (Ind. Ct. App. 1976)	3
<i>Poulos v. New Hampshire</i> , 345 U.S. 395 (1953)	14
<i>Probst v. Com., Dept. of Transp., Bureau of Driver Licensing</i> , 849 A.2d 1135 (Pa. 2004)	16
<i>Reno v. Flores</i> , 507 U.S. 292 (1993)	7

<i>Robertson v Goldman</i> , 179 W. Va. 453, 369 S.E.2d 453 (1988)	16
<i>Rochin v. California</i> , 342 U.S. 165 (1952)	7
<i>Ryan v. Hofstra Univ.</i> , 324 N.Y.S.2d 964 (Sup. Ct. 1971)	15
<i>Schneider v. Currey</i> , 584 So.2d 86 (Fla. Dist Ct. App. 1991)	3
<i>SEC v. Arthur Young & Co.</i> , 584 F.2d 1018 (D.C. Cir. 1978)	9
<i>SEC v. Jerry T. O'Brien, Inc.</i> , 467 U.S. 735 (1984)	10
<i>Shea v. Office of Thrift Supervision</i> , 934 F.2d 41 (3d Cir. 1991)	9
<i>Sight v. Resolution Trust Corp.</i> , 852 F. Supp. 28 (D. Kan. 1994)	10
<i>Silverman v. Berkson</i> , 661 A.2d 1266 (N.J.1995)	10
<i>South Dakota v. Neville</i> , 459 U.S. 553 (1983)	9
<i>State v. Goff</i> , 203 W. Va. 516, 509 S.E.2d 557 (1998)	1, 17
<i>State v. Grimmer</i> 162 W. Va. 588, 251 S.E.2d 780 (1979)	15
<i>State v. Howell</i> , 575 N.W.2d 345 (2008)	8
<i>State v. Phillips</i> , 205 W. Va. 673, 520 S.E.2d 670 (1999)	11
<i>State v. Tucker</i> , 878 P.2d 855 (Kan. Ct. App. 1994)	8

<i>State ex rel. Appleby v. Recht</i> , 213 W. Va. 503, 583 S.E.2d 800 (2002) (per curiam)	8, 9
<i>State ex rel. Greenberg v. Florida State Bd. of Dentistry</i> , 297 So.2d 628 (Fla. Dist. Ct. App. 1974)	10
<i>State ex rel. McGraw v. Burton</i>	
212 W. Va 23, 569 S.E.2d 99 (2002)	5
<i>State ex rel. Deputy Sheriff's Ass'n v. County Comm'n</i> , 180 W. Va. 420, 376 S.E.2d 626 (1988)	7
<i>State ex rel. Roy Allen S. v. Stone</i> , 196 W. Va. 624, 474 S.E.2d 554 (1996)	3
<i>Swanner v. Anchorage Equal Rights Comm'n</i> , 513 U.S. 979 (1994)	8
<i>Tasker v. Mohn</i> , 165 W. Va. 55, 267 S.E.2d 183 (1980)	4
<i>Tederick v. State</i> , 723 A.2d 917 (Md. 1999)	8
<i>Thornbury Noble, Ltd. v. Thornbury Township</i> , 112 Fed. Appx. 185 (3d Cir. 2004)	7
<i>Threadgill v. Board of Professional Responsibility</i> , 299 S.W.3d 792 (Tenn. 2009)	2
<i>United States v. Bell</i> , 564 F.2d 953 (Temp. Emer. Ct. App.1977)	11
<i>United States v. Sturm, Ruger & Co.</i> , 84 F.3d 1 (1 st Cir. 1996)	9
<i>Virginia v. Harris</i> , 130 S. Ct. 10 (2009)	8
<i>Wagner ex rel. Wagner-Garay v. Fort Wayne Community Sch.</i> , 255 F. Supp.2d 915 (N.D. Ind. 2003)	15
<i>Walker v. City of Birmingham</i> , 388 U.S. 307 (1967)	15

Williamson v. Lee Optical Co.,
348 U.S. 483 (1955) 7

Zaleski v. West Virginia Mutual Ins. Co.
224 W. Va. 544 S.E.2d 123 (2009) 17

MISCELLANEOUS

73 C.J.S. Public *Administrative Law* § 158 5, 13

MARTIN A. SCHWARTZ, SECTION 1983: LITIGATION, CLAIMS AND DEFENSES. 6

STATE

W. Va. Code § 17C-5-1 6

W. Va. Code § 17C-5A-1(a) 15

W. V. Code § 17C-5A-2 5

W. Va. Code § 29A-5-1(b) 5, 6

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35560

CRAIG A. HARE,

Petitioner below, Appellee,

v.

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

Respondent below, Appellant.

REPLY BRIEF

I.

INTRODUCTION

“This Court has repeatedly recognized that legislative procedures for the administrative revocation of a driver’s license are meant to protect the public from persons who drive under the influence of alcohol.” *Carroll v. Stump*, 217 W. Va. 748, 755, 619 S.E.2d 261, 268 (2005). In attempting to legitimately discharge this obligation, the circuit court put the breaks on the DMV, not only prohibiting the DMV from holding the hearing on Mr. Hare’s license revocation because of the arresting officer’s non-appearance (a non-appearance in contravention of a DMV subpoena and over which the DMV had no control), but then adding insult to injury (or perhaps, injury to injury) by awarding attorney’s fees and costs against the DMV. This Court has recognized that public officers are entitled to due process, *Manchin v. Browning*, 170 W. Va. 779, 791, 296 S.E.2d 909, 921 (1982), and “[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort[.]” *State v. Goff*, 203 W. Va. 516, 522, 509 S.E.2d 557, 563 (1998) (per curiam) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). This is precisely what occurred here and the circuit

court should be reversed.

II.

FACTS

The DMV wishes to point out that, even though titled, “Respondent’s Response to Petitioner’s Initial Brief,” the Response continuously cites the *Petition for Appeal*. See, e.g., Resp’t Resp. Pet’r Initial Br. at 8-9, 9 n.4, 12. The Petition for Appeal is not the operative document before this Court, it is the Appellant’s Initial Brief.

Additionally, the DMV objects to the assertions made on pages 11, 12 and 14 of the Response concerning the alleged reasons for the 2010 amendments, the allegations that the Commissioner lobbied for the 2008 Amendments and that there are funding of federal grants and the grants results based on the “undersigned’s experience.” There is no legal substantiation of these assertions and *ipse dixit* statements and assertions by counsel are not evidence and cannot be considered on appeal. “The law is clear that statements of fact made in or attached to pleadings, briefs, and oral arguments are not evidence and may not be considered by an appellate court unless they are properly made part of the record. Thus, the bare allegations made in the briefs are not sufficient for this Court to consider.” *Threadgill v. Board of Professional Responsibility*, 299 S.W.3d 792, 812 (Tenn. 2009) (citations omitted). See *In re Morgantown*, 159 W. Va. 788, 790 n.1, 226 S.E.2d 900, 902 n.1 (1976) (letter attached to appeals brief disregarded); *Cf. Boggs v. Settle*, 150 W. Va. 330, 338, 145 S.E.2d 446, 451 (1965) (“We are of the opinion that such unsworn oral statements, even if included in a transcript of the proceedings, cannot form the basis of a finding of fact to which the usual attributes of a finding of fact can be attached upon a review by an appellate court.”). See also *Herring-Malbis I, LLC v. TEMCO, Inc.*, 37 So.3d 158, 163 (Ala. Ct. Civ. App. 2009) (“statements in [a] brief are not evidence that may be considered on appeal”); *Ging v. Ging*, 775 N.W.2d 479, 484 (Neb. Ct. App. 2009) (“statements of counsel in a brief are not evidence”);

Schneider v. Currey, 584 So.2d 86, 87 (Fla. Dist Ct. App. 1991) (“unproven utterances documented only by an attorney are not facts that a trial court or this court can acknowledge.”); *Dile v. Dile*, 426 A.2d 137, 141 n.5 (Pa. Super. Ct. 1981) (“The Superior Court is bound to consider only those facts which are in the record; and may not consider those interjected by briefs of counsel.”).

III.

ARGUMENT

A. Due Process

This case is premised upon due process. Due process contains two components, substantive and procedural. *State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 631 n.12, 474 S.E.2d 554, 561 n.12 (1996). The core concept of either is the “protection against arbitrary action.” *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). The Appellee’s justification for the circuit court’s action relies on substantive due process. Resp’t Resp. Pet’r Initial Br. at 8 & n.3. Thus, any procedural due process claim is waived. See *Brown v. Cooke*, 362 Fed. Appx. 897, 899 & n.1 (10th Cir. 2010); *People v. Jaudon*, 718 N.E.2d 647, 656 (Ill. Ct. App. 1999); *Platt v. State*, 341 N.E.2d 219, 221 (Ind. Ct. App. 1976).

In any event, there is no due process violation here, whether procedural or substantive.

1. Procedural due process.

There is no due process claim, procedural or substantive, based upon a state actor’s simple negligence that causes unintended loss or injury to life, liberty, or property. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). “Where a government officials act causing injury to life, liberty, or property is merely negligent, ‘no procedure for compensation is constitutionally required.’” *Id.* (citation omitted) (emphasis deleted). The state actor must act with intent or recklessness in depriving a person of procedural due process for a constitutional violation to occur. Thus, where a state actor acts as if an emergency exists and knows it does not, or acts in reckless disregard of the actual circumstances, the constitution is

violated. *See, e.g., Customer Co. v. City of Sacramento*, 895 P.2d 900, 923 (Cal. 1995) (citation omitted) (“Procedural due process requires government officials to provide a hearing before depriving individuals of property if ‘the officials know no emergency exists, or . . . act with reckless disregard of the actual circumstances.’”). *David* fits well within this Constitutional paradigm and demonstrates why the Appellee cannot prevail here.

In *David*, the Commissioner acted to grant a continuance that was not an emergency as set forth in the C.S.R. and did so well aware of the true circumstances. Here, the Hearing Examiner was ignorant of the true circumstances, and was no more responsible for the Deputy’s absence than was the Appellee. Given that the Hearing Examiner here did not act with intent or recklessness, there could be no constitutional violation and the circuit court erred when it found such a violation.

Further, an agency must follow its own rules in order to satisfy the notice requirement of due process. *Tasker v. Mohn*, 165 W. Va. 55, 65, 267 S.E.2d 183, 189 (1980). While the Appellee and the circuit court referenced the C.S.R.’s good cause provisions for continuances and postponements related to drivers and officers, each misses the actually controlling provision at issue here. West Virginia Code of State Rules § 91-1-3.8.3 provides, “[t]he Commissioner may postpone or continue a hearing on his or her own motion . . . for good cause” “When a witness was served with a subpoena but fails to appear as commanded, there is usually good cause for a continuance.” *Jensen v. Superior Court*, 72 Cal. Rptr.3d 594, 596 (Ct. App. 2008). Indeed, “[t]o penalize and dismiss the case of a litigant who has no advance knowledge of a witness’ default is unreasonable and unwarranted.” *Gaines v. Municipal Court*, 161 Cal. Rptr. 704, 706 (Ct. App. 1980). And this advance knowledge is a crucial aspect differentiating this case from *David*.

In *David*, the DMV had such advance knowledge that the officer was delayed and the alleged reason for the delay, *David v. Commissioner*, 219 W. Va. 493, 495, 637 S.E.2d 591, 593 (2006), knowledge

which the DMV hearing examiner did not have in this case. 4/15/09 Tr. at 3. The fact that the Hearing Examiner did **not** know why the Deputy did not appear fully supports his conduct as the Deputy had five days after the hearing date to request an emergency continuance. W. Va. C.S.R. § 91-1-3.8.4. And, in *David*, the Commissioner agreed to grant the request for a continuance, creating a concerted action between the Trooper and DMV. Here there was no such complicity or concerted action which distinguishes this case from *David*, where there was. Parties are entitled, absent a showing of identity of interest, to be treated separately. *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 548, 584 S.E.2d 176; 182 (2003).

Under the circumstances in this case, “[i]f a police officer disregards a subpoena issued on behalf of either the prosecution or the defense, he defaults as a witness and not as an agent” *Gaines*, 161 Cal. Rptr. at 707.

Additionally, as a matter of separation of powers, *Appalachian Power Co. v. PSC*, 170 W. Va. 757, 761 n.8, 296 S.E.2d 887, 891 n.8 (1982); *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 33 & n. 13, 569 S.E.2d 99, 109 & n. 13 (2002); *In re Dailey*, 195 W. Va. 330, 335 & n. 8, 469 S.E. 2d 601, 605, *C & P Tele. v. PSC*, 171 W. Va. 708, 720, n.5 301 S.E.2d 798, 809 n. 5 (1983), the law provides that an administrative subpoena is not truly enforceable until *after* it is backed up by the force of a judicial decree. *Id* at 761 n.8, 296 S.E.2d at 891 n.8 ; 73 C.J.S. *Public Administrative Law* § 158 (“Administrative agencies are without authority to enforce their own subpoenas and, therefore, must apply to the courts for enforcement.”). *See* W. Va. Code § 29A-5-1(b) (“In case of disobedience or neglect of any subpoena . . . the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by such agency or any member of the body which comprises such agency, shall compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements

of a subpoena . . . issued from such circuit court . . .”).¹ Absent such an order, members of the official constabulary are under no compulsion to attend the hearing. Therefore, the notice requirement of due process includes an obligation to follow the subpoena procedures laid out in West Virginia Code § 17C-5A-2 and West Virginia Code § 29A-5-1(b).² The circuit court erred and should be reversed.

2. *Substantive due process.*

“Substantive due process affords individuals different types of protections against governmental action.” MARTIN A. SCHWARTZ, SECTION 1983: LITIGATION, CLAIMS AND DEFENSES § 3.05. While substantive due process limits both legislative and executive action, the “criteria to identify what is fatally arbitrary differ[s] depending on whether it is legislation or a specific act of a governmental officer that is at issue.” *Lewis*, 523 U.S. at 846. Here, the Appellee asserts a substantive due process executive action argument, but attempts to support it with a substantive due process legislation authority. In any event, no matter which argument is raised, they are both wrong. MARTIN A. SCHWARTZ, SECTION 1983: LITIGATION, CLAIMS AND DEFENSES § 3.05 (“[L]ittle governmental action is held unconstitutional under these formulations.”).

i. Executive action substantive due process.

If the Appellee is arguing that the DMV disregarded or ignored the law, this is a claim of executive action. In dealing with abusive executive action, “only the most egregious official conduct can be said to be ‘arbitrary in the constitutional sense[.]’” *Lewis*, 523 U.S. at 846 (citation omitted), that is an abuse of power “which shocks the conscience.” *Id.* “If it does not meet that test, the claim fails

¹The West Virginia Code grants DMV subpoena power. W. Va. Code § 17C-5-1. When such a power is granted, it is controlled by West Virginia Code § 29A-5-1(b) (“When such power exists, the provisions of this section shall apply.”).

²The Appellee claims that judicial enforcement actions will have to be filed in Kanawha County for all such actions. Resp’t Resp. Pet’r Initial Br. at 10. The Appellee is legally incorrect as such enforcement actions must be filed in “the circuit court of the county in which the hearing is being held[.]” W. Va. Code § 29A-5-1(b).

on that account, with no need to inquire into the nature of the asserted liberty interest.” *Hawkins v. Freeman*, 195 F.3d 732, 738 (4th Cir. 1999) (en banc). Conscience shocking conduct is a high threshold. “[C]onscience shocking actions would violate the ‘decencies of civilized conduct,’ and would be so ‘brutal’ and ‘offensive’ that [they] [would] not comport with traditional ideas of fair play and decency.” *Thornbury Noble, Ltd. v. Thornbury Township*, 112 Fed. Appx. 185, 188 (3d Cir. 2004). “A hallmark of successful challenges is an extreme lack of proportionality, as the test is primarily concerned with ‘violations of personal rights . . . so severe . . . So disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.” *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 881 (1st Cir. 2010) (quoting *Moran v. Clarke*, 296 F.3d 638, 647 (8th Cir. 2002) (en banc) (ellipses in original)). For example, the forced pumping of a suspect’s stomach is conduct that shocks the conscience. *Rochin v. California*, 342 U.S. 165 (1952). Here, the continuance of a hearing (even if erroneous) is not conduct that is malicious, brutal, sadistic, a inhuman, in other words it is not conduct that shocks the conscience.

ii. Legislation substantive due process.

Where a legislative act is challenged as violative of substantive due process, a different test is employed. The first step is to determine the nature of the interest at issue, *Reno v. Flores*, 507 U.S. 292, 302 (1993), because the nature of the right at issue controls the measure of protection that substantive due process will employ. Where a case does not involve fundamental rights, a rational basis test applies. *State ex rel. Deputy Sheriff’s Ass’n v. County Comm’n*, 180 W. Va. 420, 424, 376 S.E.2d 626, 630 (1988). The rational basis test is “highly deferential[.]” *Appalachian Power Co. v. State Tax Dep’t* 195 W. Va. 573, 594, 466 S.E.2d 424, 445 (1995), “[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.” *Williamson v. Lee*

Optical Co., 348 U.S. 483, 487-88 (1955).

“There is ‘no substantive constitutional right to drive an automobile [.]’” *Appleby*, 213 W. Va. at 518, 585 S.E.2d at 815 (quoting *Jones v. Penny*, 387 F. Supp. 383, 392 (M.D.N.C.1974) (three-judge panel)); in fact, there is no such “right” at all, *Tederick v. State*, 723 A.2d 917 (Md. 1999) (“[T]here is no right to drive an automobile on the roads and highways of the State of Maryland.”); *Bolware v. State*, 995 So.2d 268, 274 (Fla.2008) (“Historically, Florida courts have viewed a license to drive on our state roads as a privilege, not a right.”); nor is there any “right” to a driver’s license. *E.g.*, *King v. Wyoming Div. of Criminal Investigation*, 89 P.3d 341, 352 (Wyo. 2004) (“a driver’s license . . . is a ‘privilege’ and not a ‘right.’”); *State v. Howell*, 575 N.W.2d 861, 868 (Neb. 1998) (“A driver’s license is a privilege, not a right.”), so rational basis applies here. “A law will be upheld under the rational basis test as long as it bears a rational relationship to a legitimate state interest.” *Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 223 W. Va. 209, 218, 672 S.E.2d 345, 354 (2008).

Here, not only is there a legitimate state interest, there is a compelling state interest—an interest that is “paramount” and “of the highest order.” *Swanner v. Anchorage Equal Rights Comm’n*, 513 U.S. 979, 982 (1994) (Thomas, J., dissenting from denial of certiorari)—the protection of the users of West Virginia’s public roadways from the deadly threat of impaired drivers. “There is no question that drunk driving is . . . serious and potentially deadly” *Virginia v. Harris*, 130 S. Ct. 10, 11 (2009) (Roberts, C.J., dissenting from denial of certiorari). “[O]perating an automobile while under the influence is reckless conduct that places the citizens of this State at great risk of serious physical harm or death.” *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 516, 583 S.E.2d 800, 813 (2002) (per curiam) (quoting *State ex rel. State v. Gustke*, 205 W. Va. 72, 81, 516 S.E.2d 283, 292 (1999)). Indeed, a “motor vehicle in the hands of a drunken driver is an instrument of death.” *State v. Tucker*, 878 P.2d 855, 861 (Kan. Ct. App. 1994). Hence, both this Court and the United States Supreme Court have recognized the states’

“compelling interest in ensuring the safety of the public roadways,” *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 517, 583 S.E.2d 800, 814 (2002) (per curiam) (citing *Mackey v. Montrym*, 443 U.S. 1, 17 & 18 (1979)); *South Dakota v. Neville*, 459 U.S. 553, 559 (1983) (same), one “at least as great as any individual’s interest in his license.” *Cook v. Oberly*, 459 A.2d 535, 539 (Del. Ch. Ct. 1983) (citing *Mackey v. Montrym*, 443 U.S. 1, 17-18 (1979)). And, here, there is a rational basis to conclude that the law in effect was not arbitrary or irrational.³

Because broad contempt powers cannot be vested in an administrative agency consistent with the separation of powers, *Appalachian Power Co. v. PSC*, 170 W. Va. 757, 761, 296 S.E.2d 887, 891 (1982); and due process *Interstate Commerce Comm’n v. Brimson*, 154 U.S. 447, 485 (1894), *overruled on other grounds by Bloom v. Illinois*, 391 U.S. 194 (1968), it is “well-established . . . that agencies do not have power to enforce their own subpoenas[.]” *Atlantic Richfield Co. v. United States Dep’t of Energy*, 769 F.2d 771, 793 (D.C. Cir. 1984); *see also Cincinnati Bar Assn. v. Adjustment Serv. Corp.*, 732 N.E.2d 362, 366 (Ohio 2000). In other words, an administrative subpoena is not self-enforcing or self-executing, *Church of Scientology v. United States*, 506 U.S. 9, 17 n.10 (1992) (citation omitted); *see also Shea v. Office of Thrift Supervision*, 934 F.2d 41, 45 (3d Cir. 1991) (“Our analysis begins with the general proposition that administrative subpoenas are not self-enforcing.”); *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 3 (1st Cir. 1996) (“An administrative subpoena is not self-executing”); “[e]nforcement of administrative subpoenas has long been committed, not to administrative tribunals themselves, but instead to the courts,” *SEC v.*

³The Appellee argues that this rule renders the emergency continuance rule meaningless. Resp’t Resp. Pet’r Initial Br. at 8. However, “it is presumed that a public official will perform his duties as required by law.” *State ex rel. Smith v. Boles*, 150 W. Va. 1, 4, 146 S.E.2d 585, 587 (1965). *Cf. F.C.C. v. Schreiber*, 381 U.S. 279, 296 (1965) (noting “the presumption to which administrative agencies are entitled—that they will act properly and according to law.”). Consequently, it is to be presumed that officers will abide by the continuance requirements. The fact that some don’t is not evidence that all won’t. Moreover, an administrative subpoena is mandatory and a necessary precondition for the application of judicial compulsion of attendance. *NLRB v. Midwest Heating and Air Conditioning*, 528 F. Supp.2d 1172, 1181 (D. Kan. 2007); *Greene v. Commonwealth*, 672 S.E.2d 832, 833 n.* (Va. 2009) A circuit court could take into consideration the officer’s disregard of the hearing examiner’s denial of continuance in an enforcement proceedings.

Arthur Young & Co., 584 F.2d 1018, 1032-33 (D.C. Cir. 1978), and “obedience can be obtained only by court order.” *Church of Scientology*, 506 U.S. at 17 n.10 (citation omitted). As this Court has said, “[t]he traditional method of enforcing administrative agency subpoenas is for the agency to be empowered to apply to the courts if there is a refusal to respond to the subpoena.” *Appalachian Power Co.*, 170 W. Va. at 761 n.8, 296 S.E.2d at 891 n.8. In short, “[s]ubpoenas which are not self-enforcing, . . . threaten no sanction for failure to comply[.]” *Fleet/Norstar Financial Grp., Inc. v. SEC*, 769 F. Supp. 19, 20 (D. Me. 1991), until they are enforced by the judiciary, that is, an administrative subpoena is “only binding upon court order.” *Sight v. Resolution Trust Corp.*, 852 F. Supp. 28, 29 (D. Kan. 1994). See also *N.L.R.B. v. International Medication Systems, Ltd.*, 640 F.2d 1110, 1115-16 (9th Cir. 1981) (“[Brimson] makes clear that challenges to agency subpoenas must be resolved by the judiciary before compliance can be compelled.”); *Silverman v. Berkson*, 661 A.2d 1266, 1273 (N.J.1995) (“No question of contempt may arise until all issues are determined adversely to a party and that party has refused to obey a final order of the court.”); *Cathcart v. Crumlish*, 189 A.2d 243, 245 (Pa.1963) (“Disobedience is not punishable by imprisonment or fine unless it continues after a court has ordered compliance.”). See also *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 741 (1984) (“Subpoenas issued by the Commission are not self-enforcing, and the recipients thereof are not subject to penalty for refusal to obey. But the Commission is authorized to bring suit in federal court to compel compliance with its process.”); *Cudaby Packing Co. v. Holland*, 315 U.S. 357, 363 (1942) (“there can be no penalty incurred for contempt before there is a judicial order of enforcement.”); *Church of Scientology v. United States*, 506 U.S. 9, 17 n.10 (1992); *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 662 N.Y.S.2d 450, 453 (App. Div. 1997) (“a person who is served with a non-judicial subpoena cannot be held in contempt for failure to comply unless and until a court has issued an order compelling compliance, which order has been disobeyed”); *State ex rel. Greenberg v. Florida State Bd. of Dentistry*, 297 So.2d 628, 632 (Fla. Dist. Ct. App. 1974) (“a citizen may not be held in

contempt, and thereupon punished, upon failing or refusing to obey any subpoena, process or order of respondent or any other administrative agency until after he or she shall have first been afforded an opportunity for a hearing before a court of competent jurisdiction And until after that court shall have ordered obedience to such subpoena, process or order of such administrative agency, And such court order shall have been disobeyed.”); Donald R. C. Pomgrace, Comment, *Requirement of Notice of Third-Party Subpoenas Issued in SEC Investigations: A New Limitation on the Administrative Subpoena Power*, 33 Am. U. L. Rev. 701, 745 n.10 (1984) (“Generally, contempt for noncompliance with an administrative subpoena does not lie until a federal district court has ordered compliance.”).

Indeed, the administratively subpoenaed party has a *right* to a judicial determination of agency subpoena enforcement. “The system of judicial enforcement is designed to provide a meaningful day in court for one resisting an administrative subpoena.” *F.T.C. v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 982 (D.C. Cir. 1980) (quoting *Wearly v. FTC*, 616 F.2d 662,665 (3d Cir. 1980)). “Courts play a critical role in this administrative process judicial involvement ensures administrative due process.” *Silverman*, 661 A.2d at 1273. “Bifurcation of the power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them, is an inherent protection against abuse of subpoena power.” *United States v. Bell*, 564 F.2d 953, 959 (Temp. Emer. Ct. App.1977). As *Brimson*, 154 U.S. at 485, observed (in dicta), an administrative “body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment.” The Constitution and the law compels DMV to continue a hearing if a subpoenaed officer does not appear in order to secure attendance of the officer.⁴

The Appellee asks this Court to disregard this law by “parading the horribles,” Resp’t Resp.

⁴While the Deputy herein may not have wished to challenge the subpoena, this Court writes not only for the parties before “in a larger context.” *State v. Phillips*, 205 W. Va. 673, 684, 520 S.E.2d 670, 681 (1999).

Pet'r Initial Br. at 9-10, of an infinite limbo of continued hearings. This ominous argumentation is not justification for the Appellee's position because it is based on naked speculation, embarrassingly unadorned by legal analysis or authority.

First, “[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency.” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) (quoting *New York v. United States*, 326 U.S. 572, 583 (1946) (Frankfurter, J.)).

Second, “administrative subpoena enforcement actions are summary proceedings and involve limited judicial review[.]” *EEOC v. Schwan's Home Serv.*, 692 F. Supp.2d 1070, 1078 (D. Minn. 2010); *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 310 (7th Cir. 1981) (“subpoena enforcement is meant to be a summary proceeding.”), “because of the administrative agency’s need to pursue its responsibilities without delay.” *EEOC v. Bay Shipbuilding Corp.*, No. 80-C-591, 1981 WL 129, at * 6 (E.D. Wis. Feb. 12, 1981). Thus, “delays are clearly to be avoided if possible[.]” *Graniteville Co. (Sibley Division) v. EEOC*, 438 F.2d 32, 36 (4th Cir. 1971), *overruled on other grounds by EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984). Hence, “[t]he issues involved may be decided upon the pleadings, allegations and admissions” and without the need for a hearing, *id.*, W. Va. R. Civ. P. 78 (“To expedite its business the court may make provisions by rule or order for the submissions and determination of motions without oral hearing upon brief written statements of reasons in support and opposition”), and by initiation through a Motion or Petition to Show Cause. 2 Am. Jur.2d *Administrative Law* § 126 (footnotes omitted) (“An enforcement action may be commenced by way of motion or order to show cause, and a formal complaint is not required.”). In sum, “[a] judicial proceeding to enforce an administrative subpoena may be of a summary nature not requiring the issuance of process, hearing, findings of fact, and the elaborate

process of a civil suit.” 73A C.J.S. *Public Administrative Law and Procedure* § 250.⁵ The circuit courts of this state should be able to expeditiously handle proceedings.

Third, the circuit court can compel the officer to pay the Appellee’s fees if the officer fails to appear at the second administrative hearing in response to a judicial order, *N.L.R.B. v. Midwest Heating And Air Conditioning, Inc.*, 528 F. Supp.2d 1172, 1181 (D. Kan. 2007); or invoke the “nuclear” option—issuing a capias or bench warrant and incarcerating the officer until he testifies. *Arrington v. Department of Human Resources*, 935 A.2d 432, 447 n.12 (Md. 2007) (citations omitted) (“If a party or witness is duly summoned to appear in court and fails to do so, the court may issue a body attachment or, if necessary, a bench warrant, authorizing the person to be seized and brought before the court. The sole purpose of such an order is to assure the presence of the person in court so that the hearing or trial may proceed.”); *Barry v. Garcia*, 573 So.2d 932, 938 (Fla. Dist. Ct. App. 1991) (“Ultimately disobeying a subpoena lawfully issued can result in a contempt order by an appropriate judicial forum, which upon noncompliance, may result in the one subpoenaed being subject to incarceration.”).

And, fourth, to purloin and paraphrase the Rt. Hon. Sir Winston Churchill, “this rule may be the worst possible rule, except for all the others.” *N.A.A.C.P., Inc. v. City of Niagara Falls*, 65 F.3d 1002,

⁵ See generally *F.T.C. v. Sherry*, 13 Fed. R. Serv.2d 1382, 1382 (D.D.C. May 29, 1969) (footnotes omitted):

A plenary proceeding in accordance with the . . . Rules of Civil Procedure is not required to enforce an administrative subpoena; such proceedings are summary in nature. Because of the limited number of issues which may be raised in subpoena-enforcement proceedings, the fact that those issues can usually be resolved upon the pleadings, allegations and admissions, and the need for expeditious resolution of those issues so that the administrative proceedings may continue without needless delay, it is well established that such enforcement proceedings are summary in nature. The proper procedure in such cases is that they be initiated by a petition filed by the agency, brought on by an order to show cause, and decided upon pleadings, affidavits, and other written submissions. Other modes of ascertaining facts may be invoked by the court if necessary, but they are not to be used unnecessarily and are not available as of right to establish unessential facts or for purposes of delay.

1019 n.20 (2d Cir. 1995⁶). “Admittedly such procedure occasionally results in seemingly needless delay and expense to the litigants. However, such procedure is an inherent consequence of our democratic way of life.” *Novak v. Chicago & Calumet Dist. Transit Co.*, 135 N.E.2d 1, 5 (Ind.1956). While “[d]elay is unfortunate . . . the expense and annoyance of litigation is a price citizens must pay for life in an orderly society” *Poulos v. New Hampshire*, 345 U.S. 395, 409 (1953). And, any delays in the process do not simply affect drivers; Resp’t Resp. Pet’r Initial Br. at 9, they affect the agency and its employees as well.

As President Jimmy Carter once said, “I know it is possible for an irrational, ill-planned inhuman system to grind down, discourage and virtually incapacitate the most dedicated and competent public servant.” *Washington Post*, May 12, 1976, §C, at 6. Academic authors have also noted the drawbacks of the system to administrative agencies. *See, e.g.*, Steven Reed Armstrong, Note, *The Argument for Agency Self-Enforcement of Discovery Orders*, 83 Columbia L. Rev. 215, 219 (1983) (“delay created by the absence of self-enforcement has a debilitating effect upon those involved in agency decision-making”); *id.* at 218 (“the present procedure for enforcing administrative subpoenas is often used by respondents as a weapon to impede or prevent administrative regulation”); *id.* at 219 (“The longer the delay, the greater the subversion of the agency’s duties to carry out its legislative mandate”); *id.* (“Financial loss is another consequence of delay. This loss . . . results from waste of tax moneys through prolonged administrative proceedings . . .”). The agency and its employees can commiserate with the Appellee since they share many of the same pressures and anxieties attendant to the sequential process.

The law and the courts must be solicitous of the constitutional rights of *all* persons. Even “[w]here a ‘right’ can be identified, its force and priority must be measured with the conflicting rights

⁶Winston Churchill is an honorary citizen of the United States, presidential Proclamation 3525 (Apr. 9, 1962), <http://www.presidency.ucsb.edu/ws/index.php?pid=24064>, as well as West Virginia. John Plumpton, *Churchill Honored with U.S. Citizenship*, *Finest Hour* 60 (Summer 1988)

of others. These questions of social balance weave through our whole constitutional texture.” *Ryan v. Hofstra Univ.*, 324 N.Y.S.2d 964, 977 (Sup. Ct. 1971). See, e.g., *State v. Berrill*, 196 W. Va. 578, 584, 474 S.E.2d 508, 514 (1996) (“First Amendment rights may not be exercised in a manner destructive of other’s rights.”); *State v. Grimmer*, 162 W. Va. 588, 596, 251 S.E.2d 780, 786 (1979) (criminal defendant’s right to compulsory process does not outweigh co-defendant’s right against self-incrimination). The Appellee’s argument is ironic in that she is claiming a right to due process, but she would (1) short-circuit the administrative process to her advantage by denying the subpoenaed party the right to a day in court (a judicial one, and not a quasi-administrative one), (2) deny the judiciary of this State its role in ensuring administrative due process, (3) preclude the DMV from affording that requirement of due process; and, (4) deny the DMV its statutory duty to determine if the Appellee should retain her license.

The system imposed may, at times, cause inconvenience and even hardships, but these are “a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.” *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967).⁷ The circuit court erred and should be reversed.

iii. Due process/Equal Protection: Equality, not Identity.

The issue in this case also becomes muddled because due process normally does not cover the fair treatment of one person vis-a-vis a second person—for that is the province of equal protection. “[E]qual protection means the State cannot treat similarly situated people differently unless circumstances justify the disparate treatment.” *Kyriazis v. University of West Virginia*, 192 W. Va. 60, 67, 450 S.E.2d 649, 656 (1994).⁸ See also *Wagner ex rel. Wagner-Garay v. Fort Wayne Community Sch.*, 255 F.

⁷And, of course, during these proceedings, the driver is still permitted to drive. W. Va. Code § 17C-5A-1(a).

⁸And to muddy the issue up further, while the 14th Amendment contains an explicit equal protection (continued...)

Supp.2d 915, 929 n.15 (N.D. Ind. 2003) (“When a plaintiff complains about differential treatment by the government, she is complaining about equal protection, not due process.”). In any event, if equal protection is not offended here (and it is not) then there is no substantive due process violation either.

See, e.g., *Minnesota v. Clover-Leaf Creamery Co.*, 449 U.S. 456, 470 n.12 (1981).

Equality does not mean identity. *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966). Distinctions drawn under equal protection need only be rational when such distinctions are not based upon a suspect classification. *Appalachian Power Co. v. State Tax Dep’t.*, 195 W. Va. 573, 594, 466 S.E.2d 424, 445 (1995).⁹ Rational basis Equal Protection does not require razor sharp precision, *Kimbel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000), and must tolerate some inequality in practice. *Morgan v. City of Wheeling*, 205 W. Va. 34, 45, 516 S.E.2d 48, 59 (1999).¹⁰ Here there is a legitimate distinction between drivers and officers are treated, although the end purpose of the treatment as to each remains identical.

The DMV, its rules, and the examiner’s conduct in this case treats drivers and subpoenaed police officers equally—DMV compels both to attend the hearing, albeit in different ways. The DMV compels the attendance of drivers at hearings under penalty of forfeiture. The DMV compels the

⁸(...continued)

clause, the West Virginia constitution does not contain the term “equal protection,” but this Court has read equal protection principles into the state constitution’s due process clause. Syl. Pt. 3, *Robertson v. Goldman*, 179 W. Va. 453, 369 S.E.2d 888 (1988).

⁹Financial status is not a suspect classification. See, e.g., *Maher v. Roe*, 432 U.S. 464, 471 (1977) (“[T]his court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.”). See also *Probst v. Com., Dept. of Transp., Bureau of Driver Licensing*, 849 A.2d 1135, 1144 (Pa. 2004). The lack of resources to obtain counsel in an administrative license revocation does not require the state to step in to provide such counsel. *Committee on Legal Ethics v. Pence*, 161 W. Va. 240, 249, 240 S.E.2d 668, 673 (1977) (per curiam) (“The respondent has cited no case in support of his constitutional argument, and almost all of the many decisions we have examined hold that due process does not require a state administrative agency to furnish counsel at government expense.”).

¹⁰Nor may a court use rational basis to invalidate a legislative action because the legislature could have crafted a system better suited to achieve the legislative aim. *Morgan*, 205 W. Va. at 49, 516 S.E.2d at 59; *Mourning v. Family Pub. Serv. Inc.*, 411 U.S. 356, 377 (1973) (“It is not a function of the Courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner.”)

attendance of arresting officers under the threat of attachment in contempt, because that is the only way that the law allows DMV to secure the attendance of officers. Indeed, such a system is identical to that contained in the Rules of Civil Procedure. See F. R. Civ. P. 45, David D. Siegel, *Practice Commentary* at C45-1 (“The incentive of the summoned defendant is to appear in the action so as to avoid default judgment. The incentive of the subpoenaed witness is to obey the subpoena so as to avoid punishment for contempt, the sanction that backs a subpoena.”).

DMV is legally entitled to hold a second hearing and the prevention of that hearing is an invasion of the DMV’s duty and rights. *State v. Goff*, 203 W. Va. 516, 522, 509 S.E.2d 557, 563 (1998) (per curiam) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)) (“[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort[.]”).¹¹

The circuit court’s prohibition disregards the constitutional rights of the subpoenaed officer and the constitutional limits that are institutionally imposed on DMV. The circuit court should be reversed.

B. The circuit court granted multiple relief for an alleged single wrong and usurped the commissioner’s authority.

If the DMV did engage in wrongful conduct, the circuit court erred by allowing multiple relief for a single wrong.

In *David*, this Court specifically noted that “[t]he DMV, of course, has the option of dismissing the license revocation proceedings instead of payment of the appellant’s fees and expenses.” *David*, 219 W. Va. at 499 n.6, 637 S.E.2d at 597 n.6. *David* never permitted *both* to stop a second hearing *and*

¹¹Whether the DMV actually enforces the administrative subpoena before holding a second revocation hearing is not an issue here. Since the DMV could do so, the driver would have to attend a second hearing no matter what so the driver suffers no less as a result of hearing to attend the second hearing. In other words, until the officer does not appear at a second hearing, the driver has suffered no legal injury. See, e.g., *Zaleski v. West Virginia Mutual Ins. Co.*, 224 W. Va. 544, 992, 687 S.E.2d 123, 131 (2009) (per curiam)(abstract review of hearing procedures before a hearing occurs is premature, the claim is not ripe and does not present a case or controversy). Whether DMV enforced the subpoena before the second hearing would affect the right of the driver to relief.

award of fees and costs for the first hearing—it only authorized one or the other at the DMV’s option. As this Court explained, “the circuit court’s denial of the requested writ of prohibition in the instant case must be reversed; 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.” *David*, 219 W. Va. at 498-99, 637 S.E.2d at 596-97 (emphasis added). In short, *David* recognized that David could be made whole in one of two ways: (1) pay the attorneys fees and witness costs and have another hearing, or (2) just don’t have another hearing. These are mutually exclusive reliefs, though—either one places the driver back into the position they driver would be in but for the DMV’s acts. Taken *together*, though, they give the driver a “double dip”—not having to go to another hearing and not having to pay for the first hearing.

Additionally, the circuit court usurped the Commissioner’s authority. “[C]ourts may not usurp the functions of an administrative agency.” 2 Am. Jur.2d *Administrative Law* § 652. “[W]hile a superior court can will direct a lower court to rule on a matter, it cannot and will not tell the lower court how to rule.” 72A C.J.S. *Prohibition* § 71 (citing *State ex rel. Preissler v. Dougherty*, 166 W. Va. 240, 273 S.E.2d 574 (1980)). The circuit court basically decided the case and ordered the DMV to reinstate the license. But, the West Virginia traffic laws vest the authority to revoke or reinstate licenses with the DMV. See *Stalaker v. Roberts*, 168 W. Va. 593, 599, 287 S.E.2d 166, 169 (1981). The circuit court should have at least allowed for a decision by DMV based on the record before it. “It was said by able men in an early period of our country’s history that the courts were usurpatory of power, and inclined to dominate over other branches of government. The courts should not justify this charge.” *State ex rel. Printing-Litho, Inc. v. Wilson*, 147 W. Va. 415, 420, 21, 128 S.E.2d 449, 452 (1962). The circuit court should be reversed.

IV.

CONCLUSION

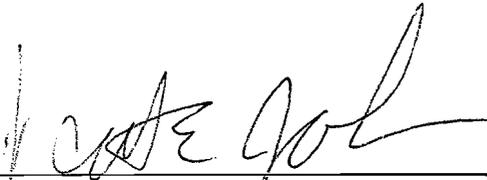
For the above-reasons, the circuit court should be reversed.

Respectfully submitted,

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

By counsel,

**DARRELL V. McGRAW, JR.
ATTORNEY GENERAL**



**SCOTT E. JOHNSON (WVSB No. 6335)
ASSISTANT ATTORNEY GENERAL**

Office of the Attorney General
Building 1, Room W-435
State Capitol Complex
Charleston, WV 25305
(304) 558-2522

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35560

CRAIG A. HARE,

Petitioner below, Appellee,

v.

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

Respondent below, Appellant.

CERTIFICATE OF SERVICE

I, Scott E. Johnson, Assistant Attorney General for the State of West Virginia, do hereby certify that a true copy of the foregoing *Reply Brief* was served upon counsel for the Appellant by depositing said copy in the United States Mail, with first class postage prepaid, on this 18th day of August, 2010, addressed as follows:

Carter Zerbe, Esquire
Post Office Box 3667
Charleston, West Virginia 25335-3667



SCOTT E. JOHNSON