

NO. 11-0681

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

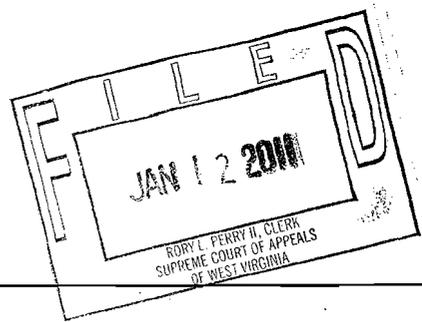
JOHN MOREDOCK,

Respondent/Petitioner Below,

v.

JOE E. MILLER, COMMISSIONER OF THE
DIVISION OF MOTOR VEHICLES,

Petitioner/Respondent Below.



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2010 DEC -8 5 PM 4:56
CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PETITION FOR APPEAL

JOE E. MILER, COMMISSIONER,
DIVISION OF MOTOR VEHICLES,

By counsel,

Janet James
Senior Assistant Attorney General
West Virginia State Bar No. 4904
DMV - Attorney General's Office
Post Office Box 17200
Charleston, West Virginia 25317
(304) 926-3874

NO.

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CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DESIGNATION OF RECORD

To: The Honorable Cathy Gatson, Clerk
Circuit Court of Kanawha County, West Virginia

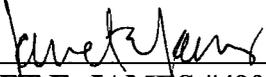
Pursuant to Rule 8(a) of the Rules of the West Virginia Supreme Court of Appeals, the West Virginia Division of Motor Vehicles designates the entire record as the record of this case upon appeal to the Supreme Court of Appeals of West Virginia, *John Moredock v. Joe E. Miller, Commissioner, West Virginia Division of Motor Vehicles*, Civil Action No. 09-AA-174.

Respectfully submitted,

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

By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



JANET E. JAMES #4904
ASSISTANT ATTORNEY GENERAL
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304) 926-3874

SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKETING STATEMENT

JOHN MOREDOCK,

Petitioner Below/Respondent,

v.

JOE E. MILLER,
COMMISSIONER, WEST VIRGINIA
DIVISION OF MOTOR VEHICLES,

Respondent Below/petitioner.

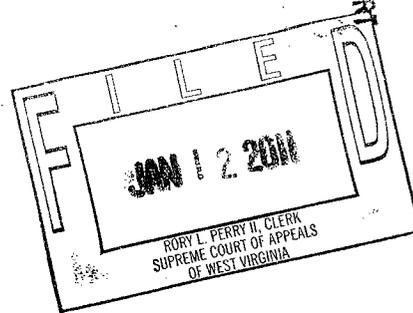
Circuit: Thirteenth Judicial Circuit

County: Kanawha

Judge: Carrie Webster

Circuit Number: 09-Misc-174

Type of Action
 Civil



FILED
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CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

A. Timeliness of Appeal

1. Date of entry of judgment or order appealed from: August 9, 2010
2. Filing date of any post-judgment motion filed by any party pursuant to R. Civ. P. 50(b), 52(b), or 59: n/a
3. Date of entry of order deciding post-judgment motion: n/a
4. Date of filing of petition for appeal: December 8, 2010
5. Date of entry of order extending appeal period: n/a
6. Time extended to: n/a

B. Finality of Order or Judgment

1. Is the order or judgment appealed from a final decision on the merits as to all issues and parties? Yes

2. If no, was the order or judgment entered pursuant to R. Civ. P. 54(b)? _____

3. Has the defendant been convicted? Yes No

4. Has a sentence been imposed? Yes No

5. Is the defendant incarcerated? Yes No

C. Has this case previously been appealed? Yes No

If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

D. Are there any related cases currently pending in the Supreme Court of Appeals or Circuit Court? Yes No

If yes, cite the case and the manner in which it is related on a separate sheet.

E. State the nature of the suit, the relief sought, and the outcome below.

This is an administrative appeal from a driver's license revocation. The Petitioner/ DMV Commissioner found that Respondent had driven while intoxicated, and revoked Respondent's license.

Respondent appealed the Petitioner's order to the circuit court. The circuit court reversed the Petitioner's Final Order on the basis that the delays between Respondent's request for a hearing, the holding of the hearing, and the issuance of the Final Order violated Respondent's due process rights.

Petitioner assigns error as to the grounds upon which the circuit court reversed the Petitioner's order, and seeks reversal of the circuit court's order and reinstatement of the Commissioner's Final Order and the license revocation.

F. Issues to be raised on appeal.

Whether the circuit court erred in reversing the final order on the basis that the delays between the request for hearing, the hearing, and the issuance of a final order deprived the respondent of due process, especially in light of the fact that the respondent failed to show that he was prejudiced?

G. Do you wish to make an oral presentation of the petition? Yes No

H. Has the entire or only portions of the record been designated? Entire Portion

I. If the appeal is granted, do you desire reproduction of the record or that the case be heard on the original record? Reproduced Original **XX**

J. List each adverse party to the appeal. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.

1. Adverse party: John Moredock
Attorney: Carter Zerbe, Esquire
Address: Post Office Box 3667
Jane Lew, West Virginia 25336
Telephone: (304) 345-2728

K. Petitioner(s) name: Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles

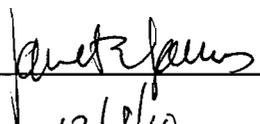
Address Post Office Box 17200
Charleston, West Virginia 25317
Telephone (304) 558-2723

L. Attorney or pro se litigant filing Docketing Statement.

Will you be handling the appeal? (In criminal cases, counsel below will handle the appeal unless relieved by the court). Yes No

Name Janet E. James
Attorney Pro Se
Firm DMV - West Virginia Attorney General's Office
Address Post Office Box 17200
Charleston, West Virginia 25317
Telephone (304) 926-3874

If this is a joint statement by multiple petitioners, add the names and addresses of the other petitioners and counsel joining in this Docketing Statement on an additional sheet, accompanied by a certification that all petitioners concur in this filing.

Signature 
Date 12/8/10

ATTACH:

1. ADDITIONAL PAGES, IF ANY, CONTAINING EXTENDED ANSWERS TO QUESTIONS ON THIS FORM.
2. A COPY OF THE ORDER OR JUDGMENT FROM WHICH THE APPEAL IS TAKEN.
3. A CERTIFICATE OF SERVICE.

A True Copy

Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

JOHN MOREDOCK,

2010 AUG -9 PM 12:54

Petitioner,

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

v.

Civil Action No. 09-AA-174

Judge Carrie L. Webster

JOE MILLER, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES

RECEIVED

AUG 12 2010

Respondent.

Attorney General Office
Tax Division

FINAL ORDER

Mr. Moredock and his counsel, Carter Zerbe, Esq., come before this Court appealing the revocation of Mr. Moredock's driver's license. The Commissioner of the West Virginia Division of Motor Vehicles is represented by Janet James, Esq. The central issue of the petition of appeal concerns a delay between the administrative hearing and final order. This Court finds that the delay constitutes a due process violation and orders the Commissioner's Final Order reversed.

Facts and Procedural History

On September 29, 2007, Mr. Moredock was arrested for driving under the influence of alcohol. A Statement of the Arresting Officer, Officer Duncan of the Charleston Police Department, was subsequently submitted to the West Virginia Division of Motor Vehicles (hereinafter "DMV"). Mr. Moredock properly and timely requested an administrative hearing with the DMV concerning revocation of his driving privileges.

A hearing was schedule for February 20, 2008. However, this hearing was continued by the DMV based upon the request for a continuance by the hearing examiner assigned to the matter. The hearing was then re-scheduled and conducted on May 6,

2008, approximately eight months following Mr. Moredock's arrest. Over seventeen months following the scheduled hearing, on October 13, 2009, a Final Order was received by Mr. Moredock revoking his driver's license. The Petitioner timely filed the present Petition for Judicial Review.

Standard of Review

On appeal of an administrative order, the Court is bound by the statutory standards in West Virginia Code § 29A-5-4 (Administrative Procedures Act, "APA") and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless clearly wrong. Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

Review is limited to the record made before the administrative agency, and the circuit court is authorized to accept additional evidence only where there is an allegation of procedural irregularity. *West Virginia Code* § 29A-5-4(f) [1964]. The scope of judicial review of a contested case generally is delineated by the APA:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudice because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code § 29A-5-4(g)

Applicable Law

The West Virginia Constitution does not allow property deprivation without due process. *West Virginia Constitution*, Art. III, § 10. The same Constitution requires that "justice be administered without delay." *West Virginia Constitution*, Art. III, § 17. These two provisions have been interpreted as requiring administrative agencies "to dispose

promptly of matters properly submitted.” Syl. Pt. 7, *Allen v. W.Va. Human Rights Comm’n*, 174 W.Va. 139 (1984).

“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.” Syl. Pt. 1., *David v. Commissioner of West Virginia Div. of Motor Vehicles*, 219 W.Va. 493, 637 S.E.2d 591 W.Va., (2006) (citing Syl. Pt. 1, *Abshire v. Cline*, 193 W.Va. 180 (1995)).

“The mere delay in the disposition or decision of a case does not vitiate the order or judgment. If a decision is unduly delayed, a proceeding in mandamus may be instituted to compel a decision but not how to decide.” Syl. Pt. 2, *Kanawha Valley Transp. Co. v. Public Service Comm’n*, 159 W.Va. 88 (1975). Nevertheless, delays that prejudice a litigant violate due process. *Miller v. Cline*, 193 W.Va. 210, 214 (1995).

According to *Leonard*, delays can be presumptively prejudicial. Syl. Pt. 1, *State ex. rel. Leonard v. Hey*, 269 S.E.2d 394 (W.Va. 1980). However, “the presumption is rebuttable by the government.” *Id.*

To date, the West Virginia Supreme Court of Appeals has not “set definite temporal boundaries for determining when a particular delay caused by a state actor’s misconduct rises to constitutional dimensions; the flexibility required by due process doctrines and the range of variables that can affect fairness in this context preclude our imposing specific time limits.” *Hutchison v. City of Huntington*, 198 W.Va. 139, 155-156 (1996).

Factors to consider when determining whether an administrative delay violates due process include the “length of the delay, the reason for the delay, the harm caused by

the delay, and what other alternatives to relief were available...Clearly the most important of the factors is the reason for the delay.” *Id.* at 156.

Analysis

Drunk drivers present a danger to themselves and others. However, this danger “cannot excuse the need for scrupulous adherence to our constitutional principles.” *State ex rel. v. Maxwell*, 189 W.Va. 362, 369 (1993).

Mr. Moredock has a property interest in his license. Therefore, due process must be afforded before his license may be revoked. One element of due process is timely resolution of appeals. The length of the delay in this case is extraordinary, over 17 months between the hearing and final order and over two years between the request for hearing and final order.

The record does not reflect that Mr. Moredock ever sought a continuance or took any other action which would operate to delay the underlying matter. Not resolving Mr. Moredock’s case in a timely manner is exacerbated by the DMV’s failure to provide a reasonable justification for the delay. Furthermore, although Mr. Moredock may have sought a writ of mandamus to compel action on the part of the DMV, he was not required to do so. Mr. Moredock is not foreclosed from raising the issue of delay in this matter as the Court has found no law to suggest that a litigant must move, at their own expense, for mandamus to protect his or her due process rights.

The excessive delay, over 17 months between the hearing and final order and over two years between the request for hearing and final order in issuing the order, violated the Petitioner’s due process rights.

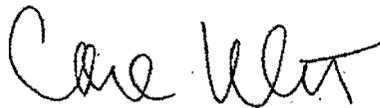
Decision

Accordingly, the Court **ORDERS** the Commissioner's decision **REVERSED**, this matter is hereby **DISMISSED** and **STRICKEN** from the open docket of this Court. The Court **FURTHER DIRECTS** that a certified copy of the **FINAL ORDER** be sent to the following addresses:

Carter Zerbe, Esq.
Post Office Box 3667
Charleston, WV 25336

Janet James, Esq.
Office of the Attorney General
State Capital Complex, Bldg. 1
Room W-435
1900 Kanawha Blvd., East
Charleston, WV 25305

Entered this 9 day of August, 2010.



HONORABLE CARRIE L. WEBSTER

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 11
DAY OF August 2010
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA *act*

NO.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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v.

JOE E. MILLER, COMMISSIONER OF THE
DIVISION OF MOTOR VEHICLES,

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2010 DEC - 8 PM 4: 59
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

FILED

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PETITION FOR APPEAL

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Now comes Petitioner, Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division"), and petitions this Honorable Court, pursuant to W. Va. Code §29A-6-1, to review and reverse the *Final Order* entered on August 9, 2010, by the Honorable Carrie L. Webster, Judge of the Circuit Court of Kanawha County (hereinafter, "Order"), in an administrative appeal styled *John Moredock v. Joe E. Miller, Commissioner, West Virginia Division of Motor Vehicles*, Civil Action No. 09-AA-174. Through its Order, the Circuit Court reversed an

administrative driver's license revocation order entered by Joe E. Miller, Commissioner of the Division, by which the Respondent's privilege to drive was revoked on November 20, 2009.

A. THE ADMINISTRATIVE APPEAL

In the underlying administrative appeal, Respondent sought relief from the administrative order which took effect on November 20, 2009, (hereinafter, "Final Order"), wherein Commissioner Miller revoked Respondent's privilege to drive in West Virginia for a period of six months, for driving under the influence of alcohol (hereinafter, "DUI"). The Circuit Court reversed the Final Order on the basis that the delays between Respondent's request for a hearing, the holding of the hearing, and the issuance of the Final Order violated Respondent's due process rights.

B. THE ADMINISTRATIVE PROCEEDINGS

Respondent was arrested for driving under the influence of alcohol on September 29, 2007. Officer J. S. Duncan of the Charleston Police Department apprised the Division of Respondent's arrest by submitting a DUI Information Sheet, an Implied Consent Statement, a West Virginia Uniform Traffic Crash Report and an Intoximeter printout ticket. DMV File Exhibit 1. After reviewing the documents in Record Exhibit 1, the Division issued an initial order, dated October 10, 2007, revoking Respondent's privilege to drive in West Virginia for two years, and accompanied by successful completion of the safety and treatment program and payment of the pertinent costs and fees, for DUI causing injury.

Respondent timely requested an administrative hearing. The hearing was scheduled for February 20, 2008, but was continued by the DMV because the hearing examiner was in training. The hearing was rescheduled for May 6, 2008. On May 6, 2008, the hearing was held. The Final Order of the Commissioner was issued effective November 20, 2009, affirming the revocation for

DUI but finding an insufficient basis to find that the injury was caused by the Respondent, and revising the revocation period accordingly.

Respondent filed a *Petition for Judicial Review* on or about October 21, 2009. On November 10, 2009, the circuit court entered an *Order Granting Stay*, by which the revocation of Respondent's privilege to drive was stayed for 150 days. On April 8, 2010, the Court unilaterally entered another stay of Respondent's revocation for 150 days. On August 9, 2010, the Court entered the Order reversing the Final Order, from which the Division seeks appeal.

II.

STATEMENT OF THE FACTS

Respondent crashed his vehicle head-on into another car at 2:43 a.m. on September 29, 2007, on Cantley Drive, Kanawha County, West Virginia. Transcript of Administrative Hearing held on May 6, 2008, at the DMV Regional Office in Kanawha County, Charleston, West Virginia at 13 (hereinafter, "Tr. at 13"). Officer J. S. Duncan of the Charleston Police Department responded to the scene of a two-vehicle crash.

Officer Duncan made contact with Respondent, and noted the odor of alcohol on Respondent's person. DUI Information Sheet (DMV File Exhibit 1); Tr. At 14. Officer Duncan detected that Respondent had glassy eyes, slurred speech, and was unsteady walking to the roadside and standing. Respondent admitted drinking a couple of beers. DMV File Exhibit 1; Tr. At 14. Officer Duncan performed a horizontal gaze nystagmus test, the walk-and-turn test and the one-leg stand test on the Respondent, all of which Respondent failed. Record Exhibit 1; Tr. at 15-20. Respondent also failed a preliminary breath test. Record Exhibit 1; Tr. at 20. Respondent was placed under arrest at 3:18 a.m. on September 29, 2007. Record Exhibit 1; Tr. At 23. Officer

Duncan transported Respondent back to the police department station, and read Respondent the Implied Consent Statement at 3:51 a.m. Record Exhibit 1; Tr. at 23.

The breath test is the designated secondary chemical test of the Charleston Police Department. Tr. at 2. Officer Duncan was certified as a test administrator of the EC/IR Intoximeter II on March 3, 2005. Tr. at 2; Record Exhibit 1. Officer Duncan observed the Respondent for 20 minutes prior to collection of the breath specimen to ensure that Respondent did not ingest any food, drink or other matter into his mouth. The Intoximeter printer was online and there were no errors indicated in the display. The instrument was turned on and the display read, "Press Enter to Start". Officer Duncan entered data as prompted by the machine. The Intoximeter displayed the instruction "Please Blow," and Officer Duncan placed an individual disposable mouthpiece into the breath tube. Respondent blew into the mouthpiece. A gas reference standard was run on the Intoximeter and the results indicated that the instrument was working properly. The results of the reference standard were .083 and .082. When the display read, "Test Complete," Officer Duncan waited for the printout. The printout ticket reflects that Respondent had a blood alcohol content of .172. Record Exhibit 1; Tr. At 23-25.

III.

ASSIGNMENT OF ERROR

- A. **THE CIRCUIT COURT ERRED IN REVERSING THE FINAL ORDER ON THE BASIS THAT THE DELAYS BETWEEN THE REQUEST FOR HEARING, THE HEARING, AND THE ISSUANCE OF A FINAL ORDER DEPRIVED THE RESPONDENT OF DUE PROCESS, ESPECIALLY IN LIGHT OF THE FACT THAT THE RESPONDENT FAILED TO SHOW THAT HE WAS PREJUDICED.**

IV.

POINTS AND AUTHORITIES

A. “In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law de novo.” Syl. Pt. 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

B. “Similarly, in Syllabus Point 2 of *Kanawha Valley Transportation Co. v. Public Service Comm'n*, 159 W. Va. 88, 219 S.E.2d 332 (1975), this Court stated, ‘The mere delay in the disposition or decision of a case does not vitiate the order or judgment. If a decision is unduly delayed, a proceeding in mandamus may be instituted to compel a decision but not how to decide.’” *Johnson v. State Dept. of Motor Vehicles*, 173 W. Va. 565, 570, 318 S.E.2d 616, 620 (1984) (per curiam).

C. “[T]he mere passage of time in rendering an administrative determination will not, standing alone, justify its annulment. Instead, a party must demonstrate actual and substantial prejudice as a result of the delay.” *Board of Ed. v. Donaldson*, 839 N.Y.S.2d 558, 561 (N.Y.A.D. 3 Dept. 2007) (citations omitted).

D. In *In re Petition of Donley*, 217 W. Va. 449, 618 S.E.2d 458 (2005) Mr. Donley was not entitled to relief because no prejudice flowed from the delay.

E. West Virginia has not set definite temporal boundaries for issuance of a Final Order in a DUI appeal; nor should it. *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

V.

STANDARD OF REVIEW

“In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*.” Syl. Pt. 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). Similarly, “where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A. L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). Since there is only a legal question presented, and not a factual one, the sole standard of review to be followed by this Court is *de novo*. In addition, “[t]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syllabus Point 2, *Webb v. West Virginia Bd. of Medicine*, 212 W.Va. 149, 569 S.E.2d 225 (2002).

VI.

ARGUMENT

**THE DELAYS BETWEEN THE REQUEST FOR HEARING ,
THE HEARING AND ISSUANCE OF THE FINAL ORDER IS
NOT A BASIS FOR REVERSING THE ORDER, ESPECIALLY
IN LIGHT OF PETITIONER’S FAILURE TO SHOW THAT
HE WAS PREJUDICED THEREBY.**

The circuit court improperly reversed the Final Order of the Commissioner based upon the delays between the request for hearing, the hearing itself, and issuance of the Final Order. The

circuit court made no finding that the Respondent had been prejudiced thereby. The court noted that the delay between the hearing and the Final Order was 17 months, and that the delay between the request for hearing and the Final Order was approximately two years. The delay from the request for hearing in October 2007 until the hearing was held on May 2008, with only one continuance, is neither unusual nor improper given the immense caseload of DMV Hearing Examiners. Likewise, the 17 month delay between the hearing and issuance of the Final Order does not form a basis for dismissing the license revocation.

Delay does not form a basis for overturning an administrative order but may support an order compelling agency action. In *Johnson v. State Dept. of Motor Vehicles*, 173 W. Va. 565, 570, 318 S.E.2d 616, 620 (1984) (per curiam), this Court noted: "Similarly, in Syllabus Point 2 of *Kanawha Valley Transportation Co. v. Public Service Comm'n*, 159 W. Va. 88, 219 S.E.2d 332 (1975), this Court stated, 'The mere delay in the disposition or decision of a case does not vitiate the order or judgment. If a decision is unduly delayed, a proceeding in mandamus may be instituted to compel a decision but not how to decide.'" See also *Special Care of New Jersey, Inc. v. Board of Review*, 742 A.2d 1023, 1026 (N.J. Super. A.D. 2000) ("the remedy Special Care seeks is not justified by the Board's delay, particularly where the record reveals no effort by Special Care to compel the Board to act."); *DeMilo and Co., Inc. v. Department of Transp.*, 658 A.2d 170, 175 (Conn. Super. 1993) ("The short answer to the plaintiff's argument is that § 4-180 provides its own remedy in the case of an administrative agency that fails to render a timely decision. That remedy is an application to this court for an order to compel the issuance of a decision. The plaintiff did not avail itself of that remedy in this case, and the court concludes that the remedy was waived."). *Accord* 2 Am. Jur.2d *Administrative Law* § 572 (footnote omitted) ("The preferred remedy for administrative delay is an

order compelling agency action, not a reversal of the eventual agency decision.”); 73A C.J.S. *Public Administrative Law and Procedure* § 456 (). Cf. *F.T.C. v. Anderson*, 631 F.2d 741, 750 (D.C. Cir. 1979) (under the federal Administrative Procedures Act, a “citizen may be entitled to a court ruling that an agency exercise its discretion even though the court cannot say which way the discretion is to be exercised.”). The Respondent never sought such relief, and the circuit court exceeded its jurisdiction by dismissing the revocation.

Moreover, the Respondent did not aver prejudice as a result of the delay, nor did the circuit court find that the Respondent had been prejudiced, thereby further undermining the legitimacy of the Order. “[T]he mere passage of time in rendering an administrative determination will not, standing alone, justify its annulment. Instead, a party must demonstrate actual and substantial prejudice as a result of the delay.” *Board of Ed. v. Donaldson*, 839 N.Y.S.2d 558, 561 (N.Y.A.D. 3 Dept. 2007) (citations omitted). In *In re Petition of Donley*, 217 W. Va. 449, 618 S.E.2d 458 (2005) the delay was the result of a Magistrate’s failure to send in an abstract of judgment to the Division of Motor Vehicles for more than three years. Although this Court found that the delay was unreasonable in this case, it further held that Mr. Donley was not entitled to relief because no prejudice flowed from the delay.

In this case, the delay between the hearing and issuance of the Final Order was approximately seventeen months. Compare *Kanawha Valley Transp. Co.*, 159 W. Va. at 94-95, 219 S.E.2d at 338 (16 to 24 months not prejudicial), [*accord Britt v. Britt*, 606 S.E.2d 910, 913 (N.C. App. 2005) (16 months)]; *Hartman v. Hartman*, 624 N.Y.S.2d 470, 472 (N.Y.A.D. 3 Dept. 1995) (“There was a 19-month delay between the hearing and the order of custody which petitioner claims was prejudicial to his interests. Although we believe the delay was unduly long, such delay in and of itself is

insufficient to require a new hearing.”); *City-Wide Asphalt Co., Inc. v. City of Independence*, 546 S.W.2d 493, 498-99 (Mo. App. 1976) (16 month between bench trial and order not prejudicial)] with Syl. Pt. 1, *State ex rel. Leonard v. Hey*, 269 S.E.2d 394 (W. Va. 1980) (“A delay of eleven years between the commission of a crime and the arrest or indictment of a defendant, his location and identification having been known throughout the period, is presumptively prejudicial to the defendant and violates his right to due process of law, U.S. Const. Amend. XIV, and W. Va. Const. art. 3, § 10. The presumption is rebuttable by the government.”).

The circuit court incorrectly found that the failure of the Respondent to compel issuance of the Final Order was not dispositive of the matter. The *Johnson* Court noted that in an earlier decision the Court had held that “any error associated with a delay in a final child custody hearing was waived by the parent’s failure to object to the continuances granted.” *Johnson*, 173 W. Va. at 570, 318 S. E.2d at 620 (citing *State v. Scritchfield*, 167 W. Va. 683, 694-95, 280 S.E.2d 315, 322 (1981)).

Indeed, issuance of a writ of mandamus would have been a better resolution than outright dismissal of the license revocation. In *Allen v. State, Human Rights Com'n*, 174 W.Va. 139, 324 S.E.2d 99 (1984), this Court granted a writ of mandamus in part because of the delays in the West Virginia Human Rights Commission’s investigations, holding of hearings and rendering of decisions.

In *Patterson*, 317 S.E.2d at 808, this Court concluded that a thirty-three month delay between initial hearing and the filing of the mandamus action to compel a decision was unreasonable and justified the issuance of a writ of mandamus commanding rendition of a decision. See also *State ex rel. Cackowska v. Knapp*, 147 W.Va. 699, 700-01, 130 S.E.2d 204, 205 (1963) (seventeen month delay in rendering a decision warranted issuance of writ of mandamus compelling decision).

This Court has also consistently held that administrative delay may be subject to a writ of mandamus compelling action.

174 W.Va. 156, 324 S.E.2d 116. Caselaw is clear that short of dismissal of the petition in this case, the circuit court's remedy was to compel action on the part of the Petitioner via a writ of mandamus.

Moreover, Respondent has benefitted from the delay because the revocation of his driving privilege was stayed pending issuance of the Final Order. W. Va. Code § 17C-5A-2(s) ("During the pendency of any hearing, the revocation of the person's license to operate a motor vehicle in this state shall be stayed").

Thus, the delay in issuance of an administrative Final Order where Respondent did nothing to compel issuance of the Final Order, where the revocation has been stayed during the pendency of the litigation, and where the Petitioner has failed to show prejudice, does not vitiate the Final Order.

West Virginia has not set definite temporal boundaries for issuance of a Final Order in a DUI appeal; nor should it, as the Court noted in *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996). The circuit court erred in finding that the time between the hearing and issuance of the final order constituted a deprivation of due process to the Respondent; and it exceeded its authority in reversing the Final Order when no prejudice was shown.

VII.

RELIEF REQUESTED

WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, the Petitioner hereby respectfully requests that this appeal be granted so that this Court may review the Order entered by the Circuit Court of Kanawha County on August 9, 2010, reversing the

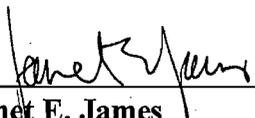
Final Order of the Commissioner. Upon appellate review, said Order should be reversed and vacated.

Respectfully submitted,

**JOE E. MILLER, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

By counsel,

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



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NO.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN MOREDOCK,

Respondent/Petitioner Below,

v.

JOE E. MILLER, COMMISSIONER OF THE
DIVISION OF MOTOR VEHICLES,

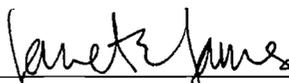
Petitioner/Respondent Below.

FILED
2010 DEC -8 PM 4:56
CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that the foregoing *Designation of Record, Docketing Statement and Petition for Appeal* were served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 8th day of December, 2010, addressed as follows:

Carter Zerbe, Esquire
Post Office Box 3667
Charleston, WV 25336



JANET E. JAMES