

13-1225

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

CHRISTINA PAINTER,

Petitioner,

v.

Civil Action No. 12-AA-3  
Judge Joseph Reeder

STATE OF WEST VIRGINIA,  
WV DEPARTMENT OF MOTOR  
VEHICLES, JOE E. MILLER,  
COMMISSIONER,

Respondent.

**ORDER GRANTING PETITION FOR APPEAL**

This matter comes before the Court pursuant to the Petitioner's – Christina Painter (hereinafter "Ms. Painter" or "Petitioner") – *Petition for Administrative Appeal* (hereinafter "*Petition for Appeal*") filed on May 10, 2012, by counsel, David O. Moye, Esq. The *Petition for Appeal* was filed pursuant to West Virginia Code § 29A-5-4(a). This court entered an *Order Certifying a Legal Question to the West Virginia Supreme Court of Appeals* on November 29, 2012, seeking to have the Court determine whether an officer's refusal to provide a blood test should result in the exclusion of other test results administered by law enforcement. On May 16, 2013, the Supreme Court declined to consider the question.

The matter was returned to this Court and the Respondent filed a *Motion for Final Appealable Order* and a *Memorandum in Support of Motion for Final Appealable Order* on June 6, 2013. A hearing was held on July 10, 2013. Respondent submitted a brief following the hearing but Petitioner did not. After a thorough review of the record in this case, the Court **FINDS and ORDERS** as follows:

**I. BACKGROUND**

1. Around 12:07 a.m. on August 21, 2010, Ms. Painter was stopped for speeding in

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Nitro, West Virginia, by Officer J.J. Garbin of the Nitro Police Department. Around 12:13 a.m., Officer Garbin administered a preliminary breath test to Ms. Painter. The result of this preliminary breath test showed that Ms. Painter's blood alcohol content was .187.

2. At approximately 12:15 a.m. Ms. Painter was officially arrested for driving under the influence. While she was being transported back to the Nitro Police Station, Ms. Painter testified that she spoke to her daughter from the back of the police car and that the Officer could overhear her conversation, which included statements regarding the fact that she had recently undergone surgery and that she would need a blood test.
3. At 12:55 a.m. Ms. Painter was administered another breath test at the police station. The results of this breath test stated that her blood alcohol content was .164.
4. Ms. Painter was subsequently transported to Western Regional Jail; she arrived at 1:35 a.m.
5. Shortly after arriving at Western Regional Jail, Ms. Painter requested that she be administered a blood test. That request, however, was denied.
6. On December 6, 2011, the Office of Administrative Hearings held a hearing on the revocation of Ms. Painter's driver's license. During the hearing, the following exchange took place:

Eric L. Hayes: Do you remember if you asked for a blood test at any time?

Christina Painter: I explained that I had that surgery.

Mr. Hayes: Do you recall when that was?

Ms. Painter: Not exactly. I just – I asked to call my daughter from the squad car . . . . [The arresting officer] overheard my conversation with my daughter, and she said, "Well, Mom, you don't sound like you've been drinking," and I said, "It could be something to do with that surgery. I remember they warned me about that."

So [the arresting officer] was well aware that I had the surgery. And then I told my daughter *I'm going to have to get a blood test.*

Mr. Hayes: Did you tell the officer there himself?

Ms. Painter: No, not this officer.

Mr. Hayes: Did you ever tell them?

Ms. Painter: At Western Regional I told them. *I asked him if he heard my conversation, and he didn't offer me one.*

...  
David Pence: Christina, You [*sic*] discussed earlier that you had asked for a blood test and that you had actually specifically asked for a blood test at Western Regional. Can you talk about that for me, please?

Ms. Painter: Well, they already put me in a cell, and somebody was walking by, a guard or somebody. I don't know what is [*sic*] position or rank was, but I said, "Please have someone give me a blood test." I said, "That's the only way you're going to know," but I never heard anything from anybody. I don't even know if they reported my request.

Mr. Pence: How long had you been at the jail when that happened? Was that right when you arrived or after hours?

Mr. Painter: No, it wasn't right when I arrived. I was kind of scared. I didn't really want to say anything, you know, and then finally, you know, I had better say something here, and it was *shortly after I arrived.*

Hr'g Tr. 115-117, Dec. 6, 2011 (emphasis added). Ms. Painter's testimony that she requested a blood test shortly after arriving at the Western Regional Jail is uncontroverted.

7. In the *Final Order Findings of Fact and Conclusions of Law* (hereinafter "*Final Order*") signed April 27, 2012, the Chief Hearing Examiner noted that Ms. Painter requested a blood test from the Investigating Officer. Specifically, in the *Final Order*, the Chief Hearing Examiner remarked that Ms. Painter "stated that she asked for a blood test in addition to the secondary chemical test because she was worried that the secondary chemical test would show an inaccurate result due to her gastric bypass surgery." *Id.* at 6.
8. In the *Final Order*, the Chief Hearing Examiner found as follows:

*[E]ven though the Petitioner requested a blood test and was never given one, both the totality of the evidence and the fact that the secondary chemical test results were not borderline dictate that the Petitioner drove with a blood alcohol concentration of fifteen hundredths of one percent, or more, by weight. It is acknowledged that in accordance with West Virginia code § 17C-5-9 and Moczek v. Bechtold, 178 W. Va. 553, 363 S. E.2d 238, 1987 W.Va. Lexis 681 (1987), the Petitioner has the right to a blood test after having submitted to a designated secondary chemical test of her*

breath. *In sum, the evidence presented by the Respondent was not negated by the Investigating Officer's failure to afford the Petitioner a blood test.* Accordingly, the Order of Revocation is AFFIRMED.

*Id.* at 7 (emphasis added).

9. The Chief Hearing Examiner specifically made a finding that Ms. Painter requested a blood test in accordance with West Virginia Code § 17C-5-9 and that Ms. Painter was not afforded this statutory right. In spite of this finding, the Chief Hearing Examiner found that there was enough evidence to prove that Ms. Painter operated a motor vehicle with a blood alcohol concentration of at least fifteen hundredths of one percent.
10. On May 10, 2012, the Petitioner filed a *Petition for Administrative Appeal*. On May 30, 2012, the Petitioner filed a *Motion for Stay*. On July 12, 2012, the Court held a hearing on the *Motion for Stay*. On August 9, 2012, the Court entered an *Order Granting Motion for Stay of Execution*.
11. On November 29, 2012, this Court entered an *Order Certifying a Legal Question to the West Virginia Supreme Court of Appeals*. The Supreme Court received the request on December 3, 2012, and entered a Scheduling Order on December 10, 2012.
12. Petitioner filed a *Motion to Extend Stay* on April 1, 2013, pending a decision by the Supreme Court. Said *Motion* was granted the same day.
13. On May 20, 2013, the Supreme Court issued an *Order* refusing to docket the certified question, thus returning the case to the Circuit Court. A hearing was scheduled for July 10, 2013.
14. Respondent filed a *Motion for Final Appealable Order* and a *Memorandum in Support of Motion for Final Appealable Order* on June 6, 2013. Following the hearing on July 10, 2013, Respondent submitted a final brief in the matter.

## II. Standard of Review

A court's review of an administrative order is "upon the record made before the agency." W. Va. Code § 29A-5-4(f). The West Virginia Supreme Court of Appeals has

stated that "[s]ince a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations." *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 180, 539 S.E.2d 437, 440 (2000)(footnotes omitted). In other words, a reviewing court looks at the evidence presented to the administrative law judge and determines whether the administrative law judge made clearly erroneous factual findings. See *Kanawha Eagle Coal, LLC v. Tax Com'r of the State of West Virginia*, 216 W.Va. 616, 609 S.E.2d 877 (2004).

The West Virginia Supreme Court of Appeals has described a finding as clearly erroneous when:

[A]lthough there is evidence to support the finding, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and ***it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.***

Syllabus Point 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)(emphasis added).

Pursuant to W. Va. Code § 29A-5-4(g), a court shall reverse, vacate, or modify a DMV Hearing Examiner's order if the findings contained in that order violate an individual's constitutional or statutory rights. Specifically, W. Va. Code § 29A-5-4(g) states:

[A reviewing court] shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner . . . have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

(1) *In violation of constitutional or statutory provisions[.]*

*Id.* (emphasis added).

The relevant code section to this appeal is W. Va. Code § 17C-5-9, which states:

Any person lawfully arrested for driving a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs *shall have the right* to demand that a sample or specimen of his blood, breath or urine be taken within two hours from and after the time of arrest, and that a chemical test thereof be made. The analysis disclosed by such chemical test shall be made available to such arrested person forthwith upon demand.

*Id.* (emphasis added). This section “does not require that an alternative test be offered; it merely accords an additional right to individuals to have another test to supplement the designated secondary test if that designated secondary test is either a breath or urine test.” *Moczek v. Bechtold*, 178 W.Va. 553, 555, 363 S.E.2d 238, 240 (1987). However, if an individual requests such a test, they “*must be given the opportunity . . . to have a blood test that insofar as possible meets the evidentiary standards of 17C-5-6 [1981].*” Syl. Pt. 2, *In re Burks*, 206 W.Va. 429, 525 S.E.2d 310 (1999)(emphasis added).

The West Virginia Supreme Court of Appeals has not yet ruled on the appropriate remedy when an individual is denied their right to a blood test pursuant to W.Va. Code § 17C-5-9. *State ex rel. King v. MacQueen*, 182 W.Va. 162, 165, 386 S.E.2d 819, 822 (1986). However, the Supreme Court of Appeals has emphasized – at least in the criminal context – that the rights given by § 17C-5-9 are both an important statutory and constitutional right.

W.Va. Code 17C-5-9 . . . accords an individual arrested for driving under the influence of alcohol . . . a *right* to demand and receive a blood test within two hours of his arrest. Furthermore, this *statutory right* is hardly a new development. Historically, one charged with intoxication has enjoyed a *constitutional right* to summon a physician at his own expense to conduct a test for alcohol in his system. *To deny this right would be to deny due process of law because such a denial would bar the accused from obtaining evidence necessary to his defense. . . . The defendant's right to request and receive a blood test is an important procedural right that goes directly to a court's truth-finding function.*

*State v. York*, 175 W.Va. 740, 741, 338 S.E.2d 219, 221 (1985)(emphasis added)(citations omitted).

This proposition is not unique to West Virginia. As one treatise has stated “[s]ince a second test may reveal exculpatory evidence that the motorist was not drunk, some courts have held that a second test is required as a matter of due process when requested.” Edward L. Fiandach, 1 *Handling Drunk Driving Cases* § 9:8 (footnotes omitted). The West Virginia Supreme Court of Appeals has also found that “[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, *Abshire v. Cline*, 193 W.Va. 180, 455 S.E.2d 549 (1995).

However, the Supreme Court of Appeals has also stated that the exclusionary rule does not apply in civil or administrative contexts. Specifically the Court held that “the judicially-created exclusionary rule is not applicable in a civil, administrative driver’s license revocation or suspension proceeding.” Syl. Pt. 3, *Miller v. Toler*, 229 W.Va. 302, 729 S.E.2d 137 (2012). This holding appears based on the rationalization that the purpose behind the administrative sanctions for driving under the influence, which is the swift removal of unsafe drivers from the State’s roadways, would be thwarted if the exclusionary rule was applied in administrative license revocation and suspension proceedings. *Id.* at 306-07. Additionally, courts have found that applying the exclusionary rule in administrative proceedings offers little deterrence for police misconduct. *Id.* at 142-45.

### **III. Discussion**

To properly decide the issues presented, the Court must first analyze the Chief Hearing Examiner’s factual determinations. Next, the Court must analyze the Chief Hearing Examiner’s application of the law to the facts and its conclusions of law.

#### **A. Factual Findings**

There are two factual determinations made by the Chief Hearing Examiner that are pertinent to this *Petition for Appeal*: (1) the Petitioner requested a blood test pursuant to § 17C-5-9, and (2) that this request was denied. As stated *supra*, a

reviewing court is severely limited in its ability to overturn factual determinations made by a hearing examiner. *Cahill*, 208 W.Va. at 180, 539 S.E.2d at 440.

In light of the record made before the Chief Hearing Examiner, it is plausible – in fact, it is uncontroverted – that the Petitioner requested a blood test.<sup>1</sup> Furthermore, it is uncontroverted that the Petitioner's request was denied by the Investigating Officer. Even though this Court may have found differently had it presided over the hearing, the Court must affirm the Chief Hearing Examiner's findings of fact because the factual determinations made are plausible in light of the entire record. Consequently, the Court finds that the Chief Hearing Examiner's findings of fact were not clearly erroneous.

## **B. Respondent's Arguments**

The Respondent argues that the Chief Hearing Examiner made two clearly erroneous factual findings. First, the Respondent argues that “[a]lthough the [Chief Hearing Examiner] made a finding that Petitioner requested a blood test, this in not clearly established by the evidence.” *Response Brief*, Sept. 13, 2012 at 5 (dkt. no. 17). The Court disagrees; the Petitioner testified that she requested a blood test. Hr'g Tr. 115-117, Dec. 6, 2011. This testimony is uncontroverted. Consequently, the Chief Hearing Examiner's factual findings are plausible in light of the record.

Second, the Respondent argues that the record does not support the finding that the Petitioner made her request within two hours of arrest. *Response Brief*, Sept. 13, 2012 at 5 (dkt. no. 17). The Court disagrees. The Petitioner's uncontroverted testimony is that she made the request for a blood test shortly after she arrived at Western Regional Jail,<sup>2</sup> if not earlier. Hr'g Tr. 115-117, Dec. 6, 2011. Consequently, the Chief Hearing Examiner's findings of fact are plausible.

Next, the Respondent argues that the Chief Hearing Examiner's application of the facts to the law and the conclusions of law are not in error. The Respondent specifically argues that “[t]here is no basis in statute or case law for excluding the result

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<sup>1</sup> The record indicates that Ms. Painter requested a blood test twice. The first request was made to the Investigating Officer and the second request was made to someone at Western Regional Jail. The Chief Hearing Examiner, however, only made a specific finding as to the request made to the Investigating Officer. Consequently, the Court will limit its review specifically to this finding.

<sup>2</sup> In other words, the Petitioner requested a blood test around one hour and twenty minutes after her arrest.

of the breath test, which showed conclusively that Petitioner had committed the offense of 'aggravated' driving under the influence, or any of the other evidence of intoxication." *Response Brief*, Sept. 13, 2012 at 7. The Court disagrees; there is both statutory authority and case law directly on point. W. Va. Code § 29A-5-4(g) specifically directs a reviewing court to, *inter alia*, reverse and vacate an administrative agency's decision if that decision violates an individual's constitutional or statutory rights. Here, the Chief Hearing Examiner's decision did just that. Consequently, the Court must reverse and vacate its decision.

Furthermore, it is almost universally recognized that in the criminal context, when an individual is denied their constitutional and/or statutory right "to an independent sobriety test," the appropriate sanction is the "exclusion from evidence of the results of a police sobriety test." John P. Ludington, *Drunk driving: motorist's right to private sobriety test*, 45 A.L.R.4th 11, §§ 12[b] and 26[b];<sup>3</sup> see also Francis C. Amendola, *et. al.*, *Right to independent test and necessity of preserving sample*, 22A C.J.S. Criminal Law § 1042 (stating that "[t]he statutory right of defendants to a second alcohol concentration test will be strictly enforced, and as a sanction for the denial of such right, the state-administered test will be suppressed, and, although dismissal is not mandated, the inadmissibility of the test results due to the denial of the accused's right to an independent test may require dismissal of the charge").

The same holds true in the administrative context. For example, the North Dakota Century Code § 39-20-02 provides a right to an additional blood test similar to that in W. Va. Code § 17C-5-9. The Supreme Court of North Dakota has stated that in an administrative hearing, "[i]f an individual is denied this statutory right, results of tests administered at the direction of law enforcement may be suppressed or the charges may be dismissed." *Koenig v. North Dakota Dept. of Transp.*, 2012 ND 18, 810 N.W.2d 333, 336 (2012).<sup>4</sup>

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<sup>3</sup> As stated *supra*, W. Va. Code § 17C-5-9 is both an important statutory and constitutional right. *York*, 175 W.Va. at 741, 338 S.E.2d at 221.

<sup>4</sup> Specifically, the Supreme Court of North Dakota stated:

[¶] 6] Section 39-20-02, N.D.C.C., states an individual arrested for driving under the influence is entitled to have an individual of his or her choosing administer an independent blood or chemical test at the driver's expense. The statute further states, "The failure or inability to obtain an additional test by an individual does not preclude the admission of the test or tests

The reason for such a rule is clear; one has a constitutional right to due process in the revocation of his or her driver's license. Due process includes the right to present evidence on one's behalf. Clearly, this right is violated if an individual is denied the ability to obtain evidence that has the ability to prove their innocence.

The Respondent also argues that W. Va. Code § 17C-5-9 is not applicable in this case for several reasons. First, the Respondent argues that § 17C-5-9 is not applicable because the request was not made within the appropriate amount of time. *Response Brief*, Sept. 13, 2012 at 5. W. Va. Code § 17C-5-9 states that upon request, one must have the blood test "taken within two hours from and after the time of arrest . . . [.]". The Court generally agrees with the Respondent; one cannot request a blood test one hour and fifty-five minutes after they are arrested. There is an element of urgency in § 17C-5-9. But this was not the situation before the Chief Hearing Examiner or before this Court on appeal. As the Chief Hearing Examiner found, the Petitioner made a proper request – i.e., the request was made within the time frame set forth in § 17C-5-9.

Second, and related to the previous argument, the Respondent seems to suggest that such a request must be made immediately after arrest. *Id.* This argument, however, is not supported by a plain reading of § 17C-5-9, which only requires a blood sample to be obtained within two hours of arrest.

Third, the Respondent seemingly argues that a request for a blood test must be made to a law-enforcement officer; it is unclear, but the Respondent even goes so far as to suggest that it must be made to the arresting officer.<sup>5</sup> *Response Brief*, Sept. 13, 2012 at 5. The Court would agree with the assertion that a request cannot be made to

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taken at the direction of a law enforcement officer." N.D.C.C. § 39–20–02. The right to an independent test is generally viewed as the right of an arrestee to be free from police interference in obtaining the test through his or her own efforts and expense. *State v. Messner*, 481 N.W.2d 236, 240 (N.D.1992). ***If an individual is denied this statutory right, results of tests administered at the direction of law enforcement may be suppressed or the charges may be dismissed.*** *Lange*, 2010 ND 201, ¶ 6, 790 N.W.2d 28. Whether police have denied an accused a reasonable opportunity to obtain an independent test depends on the totality of the circumstances. *Luebke v. N.D. Dep't of Transp.*, 1998 ND 110, ¶ 12, 579 N.W.2d 189.

*Koenig v. North Dakota Dept. of Transp.*, 2012 ND 18, 810 N.W.2d 333, 336 (2012)(emphasis added).

<sup>5</sup> It is worth noting that if the Respondent's interpretation of § 17C-5-9 is correct it would further limit an individual's constitutional and statutory rights. Not only would someone in custody have to request a blood test, they would have to insure that it was made to the correct individual.

just anyone; the request must be lodged with someone who has apparent authority. In the case at bar, however, the Chief Hearing Examiner found that the Petitioner lodged a request with the Investigating Officer. The Court can find no error in this determination. Consequently, this argument is without merit.

### **C. Application of Law to Facts and Conclusions of Law**

As stated *supra*, the Chief Hearing Examiner found that Ms. Painter's statutory rights were violated. The Chief Hearing Examiner found that this statutory violation, however, was irrelevant because "both the totality of the evidence and the fact that the secondary chemical test results were not borderline" indicated that the Petitioner was driving under the influence.

Petitioner's statutory and constitutional rights appear to have been violated by the failure to administer the requested blood test. This violation prevented the individual from obtaining evidence necessary to her defense and it hinders the truth finding function; both of which are paramount constitutional and statutory rights. As the West Virginia Supreme Court of Appeals has stated previously, to deny an individual's right to a requested blood test in a criminal matter "would be to deny due process of law because such a denial would bar the accused from obtaining evidence necessary to his defense. . . . The defendant's right to request and receive a blood test is an important procedural right that goes directly to a court's truth-finding function." *York*, 175 W.Va. at 741, 338 S.E.2d at 221.

The same can be said in an administrative hearing. The Petitioner has a constitutional right to obtain evidence necessary to her defense. Also, a hearing examiner's sole purpose is to obtain the truth. The Chief Hearing Examiner's interpretation of the law effectively prevents both the ability to obtain evidence necessary for an individual's defense and the likelihood of obtaining the truth. Beyond this, the denial of the requested blood test fundamentally violates the Petitioner's procedural due process rights. The West Virginia Supreme Court of Appeals has stated that "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." *Sly*, Pt. 1, *Abshire*, 193 W. Va. 180, 455 S.E.2d 549 (1995). "In an effort to protect due process rights

involving suspensions or revocations of drivers' licenses, [the West Virginia Supreme Court of Appeals] adopted the following procedures . . . : . . . [the right to] present evidence on his own behalf . . . ." FN 5, *In re Petition of Donley*, 217 W. Va. 449, 618 S.E.2d 458 (2005)(quoting *Abshire*, 193 W. Va. at 183, 455 S.E.2d at 552). The denial of the requested blood test fundamentally restricted the Petitioner from presenting evidence on her behalf.

These ideas are supported by the jurisprudence.

If the motorist's request for a second test has been refused, the remedy may be suppression of the police administered test or dismissal of the alcohol-influenced operating offense. The basis for such severe sanction is that the state has denied the motorist the constitutional right to receive exculpatory evidence by refusing the request for a second test. Such a determination presumes that the evidence would have been exculpatory even though there is no showing that the second test would have revealed a lower result. In *McNutt v Superior Court of Arizona*, a motorist who was arrested and thereafter taken to a police station for driving while intoxicated, requested that he be allowed to telephone his attorney. The request was denied. The motorist then informed the officers of his desire to take an independent blood test after he submitted to the chemical test. However, no action was taken. Released to his ex-wife two to two-and-one-half hours after the initial stop, he immediately called his attorney who advised him that too much time had passed since the stop to obtain an independent blood test of any evidentiary value. Finding that the state's action resulted in the motorist's not being able to attempt to gather exculpatory evidence the court held that dismissal of the case with prejudice was the appropriate remedy.

Edward L. Fiandach, 1 *Handling Drunk Driving Cases* § 9:8 (footnotes omitted). This is just one of the many examples provided in this treatise.

Second, the Chief Hearing Examiner's interpretation of the law renders § 17C-5-9 dead letter; that is to say, it would be as though one had no right at all. Essentially, the Chief Hearing Examiner found that an individual's statutory right to a blood test may be denied if there is overwhelming evidence that one operated a motor vehicle while

intoxicated.<sup>6</sup> However, the legislature did not provide for such an exception; if one requests a blood test in accordance with the statute, they are entitled to that blood test.

As mentioned earlier, this Court is aware of the fact that the exclusionary rule generally does not apply in this type of administrative proceeding. However, the Court believes its hands are tied in this matter. Ms. Painter was denied her statutory right to a secondary blood test. By denying her right to a secondary test, Ms. Painter was also denied the opportunity to gather evidence to use in her defense and to possibly clear her of any wrongdoing. Based on the information in the record, it appears that a blood test may have been a more accurate measure, and possibly the only accurate measure, of Ms. Painter's blood-alcohol content due to her medical condition.

Rather than rely on the judicially-created exclusionary rule, this Court believes that W. Va. Code § 29A-5-4(g) provides the appropriate remedy. The statute specifically provides that a Circuit Court shall reverse, vacate, or modify an agency decision that violates a party's statutory or constitutional rights. Here, the Chief Hearing Examiner found that the petitioner's rights were violated. Moreover, the conclusion of the Chief Hearing Examiner that such a violation was essentially irrelevant constitutes an abuse of discretion. Therefore, this Court has no option but to vacate the agency's decision.

The Chief Hearing Examiner's interpretation of the law cannot stand because there is a statutory right to a blood test. This Court cannot simply read this right out of the Code. Quite the opposite; this Court is bound by the dictates of the West Virginia Legislature, which has seen fit to provide an individual a statutory right to a blood test. Just as this Court is bound by the dictates of the West Virginia Legislature, so too is a hearing examiner bound.

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<sup>6</sup> In the case at bar, there was the police officer's testimony that the Petitioner was drunk and the results of the secondary chemical test that were over the legal limit. The Chief Hearing Examiner's point is well taken; there was other evidence. This is true even without the secondary chemical tests. See *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984). Also, it is true that a hearing examiner can "rely solely upon the arresting officer's testimony to prove that [a] motorist was driving under the influence." *West Virginia Div. of Motor Vehicles v. Cline*, 188 W.Va. 273, 275, 423 S.E.2d 882, 884 (1992). But this analysis alone does not eviscerate ones constitutional and statutory rights. In fact, the violation of this right necessarily limited the Petitioner in the evidence that she could present in her defense. In other words, this line of reasoning is not persuasive when one has been denied their constitutional due process and statutory rights.

#### D. Conclusion

The Court **FINDS** that Petitioner's constitutional and statutory rights have been violated. To deny these rights prevents one from obtaining evidence necessary for their defense and hinders the truth finding function of a judicial proceeding. Also, such an interpretation eviscerates a statutory right granted by the West Virginia Legislature.

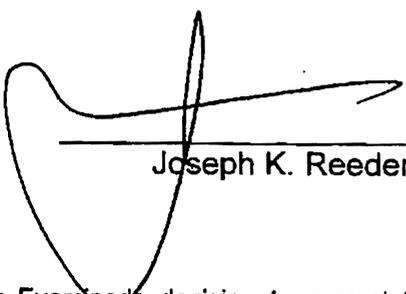
If an individual is given a constitutional and statutory right, and said right is violated, there must be some relief for this violation. In the case at bar, the appropriate relief can be found in W. Va. Code § 29A-5-4(g)(1). That code section provides that if an administrative agency's decision violates an individual's constitutional or statutory rights a reviewing court *shall* reverse, vacate, or modify the order. In the case at bar, the Court **REVERSES and VACATES** the Chief Hearing Examiner's decisions because its application of the law to the facts and its conclusions of law violate the Petitioner's constitutional and statutory rights.<sup>7</sup>

For the reasons listed *supra*, the Court **GRANTS** Petitioner's *Petition for Appeal* and **REVERSES and VACATES** the Chief Hearing Examiner's *Final Order*. The Circuit Clerk shall mail copies of this *Order* to all the parties on record including the following parties:

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ORDERED this 23 day of October, 2013.



\_\_\_\_\_  
Joseph K. Reeder, Chief Judge

<sup>7</sup> As there is no way to modify the Chief Hearing Examiner's decision to correct the violation of the Petitioner's constitutional and statutory rights, the Court finds that this is not an appropriate remedy.