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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0896**

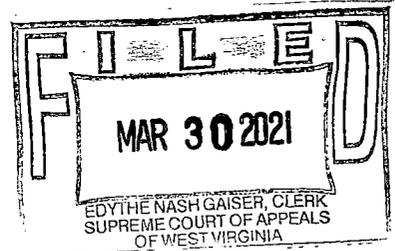
**EVERETT FRAZIER, COMMISSIONER
OF THE WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Respondent,

vs.

COURTNEY RHODENIZER,

RESPONDENT.



**Honorable Tera L. Salango, Judge
Circuit Court of Kanawha County
Civil Action No. 20-AA-25**

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

INTRODUCTION

This case involves a motorist charged administratively with driving under the influence of medications or drugs on April 18, 2013, approximately eight years ago. (App. 223)¹ No criminal charges were filed against Ms. Rhodenizer and the results of her blood test were never offered into evidence at the hearing. (App. 321) The OAH did not render a decision until over five and one-half (5 ½) years after the thirty minute evidentiary hearing conducted on June 27, 2014. (App. 240-246) The only meaningful explanation offered for the excessive delay in this case is that the OAH was busy handling other cases during that time. (App. 070) During the five and one-half (5 ½) year delay, Respondent changed jobs, moved to an area farther from work without adequate access to alternate transportation, started a family and entered a lease agreement for a new vehicle. Ms. Rhodenizer appeared *pro se* at the June 27, 2014 administrative hearing.

FACTS

Upon receipt of the DUI Information Sheet from the arresting officer, the West Virginia Division of Motor Vehicles (“DMV”) issued an Order of Revocation dated June 6, 2013 (App. 129)

On July 1, 2013, Respondent timely and lawfully challenged the *Order of Revocation* by requesting a hearing with the Office of Administrative Hearings (“OAH”) pursuant to W.Va. Code §17C-5A-2 (2010). (App. 177) The OAH conducted an administrative license revocation hearing on June 27, 2014 before hearing examiner Amy C. Humen. (App. 286-323)

The hearing lasted approximately thirty minutes and did not include any novel concepts,

¹ Reference is to the *Appendix Record* by page number.

difficult evidentiary issues or expert testimony. (App. 286-323) Ms. Rhodenizer appeared *pro se* at the hearing and both she and Deputy William Kenneth Nester, Jr., with the Greenbrier County Sheriff's Department testified. *Id.* The results of the blood test for Ms. Rhodenizer were never admitted into evidence at the hearing. (App. 321)

A *Final Order* upholding the driver's license revocation was not issued by the OAH until January 23, 2020, over five and one half years (5 1/2) after the administrative hearing. (App. 240-246)

On February 20, 2020 Ms. Rhodenizer timely appealed the matter to the circuit court of Kanawha County by filing a *Petition for Judicial Review* challenging the delay of over five and one half years (5 1/2) from hearing to decision pursuant to the Court's holding in *Reed v. Staffileno*, 239 W.Va. 538, 803 S.E.2d 508 (2017). (App. 145-156) Importantly, in her "Relief Prayed For" section of the *Petition for Judicial Review*, the Respondent specifically requested "that the court schedule an evidentiary hearing" as required by Rule 6(c) of the W.Va. Rule of Admin. Appeals. (App. 155)

The administrative record was forwarded to the circuit court on April 17, 2020. (App. 171) The court entered its briefing schedule on May 27, 2020. (App. 325-326) An amended briefing schedule was entered by the court on June 4, 2020. (App. 327-328) The Petitioner filed her brief on June 16, 2020 alleging prejudice from the five and one half year (5 1/2) OAH delay in issuing the *Final Order* pursuant to *Staffileno*. (App. 129-144) On July 16, 2020 the DMV filed its response brief with the circuit court. (App. 110-128)

Thereafter on or about July 27, 2020, counsel for Ms. Rhodenizer again requested an administrative hearing by filing a *Motion for Evidentiary Hearing* with the circuit court. (App.

108-109) Pursuant to the court's previously entered amended scheduling order, Ms. Rhodenizer filed her reply to the DMV's response brief along with an affidavit in support of her claim. (App. 99-107)

On July 29, 2020 the DMV filed its *Objection to Petitioner's Motion for Evidentiary Hearing* wherein the Petitioner complains that Ms. Rhodenizer somehow violated Rule 6(d)(1) of the West Virginia Rules of Civil Procedure by failing to mail a notice of hearing for the evidentiary hearing nine days prior to the hearing. (App. 092) Importantly, the DMV admits that Ms. Rhodenizer complied with W.Va. R. Pro. Admin. App. 6(c) by requesting an evidentiary hearing in her *Petition for Judicial Review*. (App. 092)

On August 4, 2020 the court issued an email to all parties and noticed a hearing for September 1, 2020 at 1:30 p.m. via Skype with the subject title of "(Hearing on Delay - Staffileno)". (App. 075)

Thereafter, the parties agreed to stipulate to OAH Chief Hearing Examiner Teresa Maynard's testimony via affidavit in lieu of her live testimony. (App. 74) Director Maynard's affidavit was filed with the court on August 25, 2020. (App. 63-73)

At the September 1, 2020 hearing, the DMV objected to the court conducting the evidentiary hearing after the briefing schedule. (App. 27)

Ms. Rhodenizer testified that her life has drastically changed from the time of her administrative OAH hearing back in June 2014. At that time, she had no children and was working as a server at the Cellar in Blacksburg near her home. (App. 034) Her employment was flexible and having a valid driver's license was not a priority. (App. 034) In fact, she lived next to a bus stop in Blacksburg at the time. (App. 034) She worked in this capacity for several years

until later becoming a manager at the Cellar and moving into a new residence in Christiansburg in or about 2017. (App. 035, 045, 048) She moved to Christiansburg to explore better opportunities and it was a better place to start a family away from the college in Blacksburg. (App. 036, 046) As of 2018, Ms. Rhodenizer and her husband rented a home in Christiansburg and she is the primary income for her family. (App. 036, 048)

Ms. Rhodenizer explained that she changed jobs and moved because she believed the matter was resolved after several years had passed and she hadn't heard anything. (App. 035) She was told at the hearing that she could expect a decision from the OAH within three to six months. (App. 033)

Moreover, in 2019, Ms. Rhodenizer's 2000 Outback required significant repairs. (App. 050) Because she could not afford the repairs, she instead leased a 2019 Subaru Forrester which she is currently paying monthly installments. (App. 050)

Ms. Rhodenizer explained at the September 2020 hearing that she would not be able to renew her Virginia driver's license in December 2020 if the revocation were upheld due to the interstate compact. (App. 37-38) Ms. Rhodenizer explained that her understanding was that her driver's license in Virginia would be revoked for a period of five years, despite the West Virginia DMV currently showing that she was revoked only for ninety days. (App. 40)

Currently, she resides in Christiansburg, Virginia and is employed both as a server at the Cellar Restaurant in Blacksburg, Virginia and as a house manager at Palisades, a fine-dining restaurant in Eggleston, Virginia. (App. 028, 044) She started working with Palisades on July 17, 2020. (App. 045) Her current residence in Christiansburg is twenty minutes from Blacksburg and approximately thirty-five to forty minutes from Eggleston in normal traffic.

(App. 029) Ms. Rhodenizer described the public transportation in that area as “sparse and expensive.” (App. 029) This is especially true for Eggleston, which is in a rural area. (App. 029) Ride sharing in that area is unreliable and very expensive. (App.029-030) There is no bus route in that area. (App. 030)

Similar to her job managing the Cellar, Ms. Rhodenizer regularly traveled to the local market to secure items for the Eggleston restaurant, such as ingredients or wine. (App. 031) As house manager, she is also responsible for performing bank drops and securing things such as change for the restaurant and miscellaneous items needed. (App. 046) She could not perform her job duties absent the ability to drive during working hours. (App. 032)

Ms. Rhodenizer further explained that she is married with a five-year old son. (App. 032) It would not be possible for her husband to pick her up from work after driving thirty-five to forty minutes late at night. (App. 032) Likewise, her husband would not be able to assist her in traveling to the store during her shift. (App. 032)

In an effort to justify the approximate five and one-half year (5 1/2) delay it took the OAH to issue a decision for a hearing which lasted approximately thirty minutes, the Petitioner offered the Affidavit of Teresa Maynard, Deputy Commissioner of the OAH. Deputy Maynard explained that the goal of the OAH was to have orders issued within ninety days after the hearing. (App. 066)

According to Deputy Maynard, the reason this case took over five years to issue a decision was because the OAH was operating under a backlog of cases. (App. 070) No evidence was produced by Deputy Maynard suggesting that this case was overly complicated or that any unusual circumstance existed which would explain the delay, such as hearing examiner illness or

the file being lost. Instead, this matter just sat on the books for over five and one-half (5 1/2) years with no action taken by the OAH.

According to Deputy Maynard, the DMV filed motions for decisions in all pending aged cases which did not assist the OAH in issuing decisions due to the volume of motions filed. (App. 071) The only explanation offered by Deputy Maynard was that like all administrative agencies in West Virginia, it had other work that needed to be done from June 2014 until January 2020 when the *Final Order* was issued in this case. (App. 071) The Respondent took no action from the date of the hearing to present to contribute to the delay in issuing the *Final Order*.

Thereafter, on September 22, 2020, the circuit court entered an order allowing for the matter to remain open to allow the Petitioner an opportunity to file a supplemental response and for both parties to file proposed orders in the case. (App. 21-22) A supplemental brief was filed by the DMV. (App. 10-20) On October 15, 2020, the circuit court entered its *Order Granting Petition and Reversing Office of Administrative Hearings' Final Order*. (App. 2-9)

II. SUMMARY OF ARGUMENT

The circuit court correctly reversed the OAH *Final Order* revoking Respondent's drivers's license after weighing the actual and substantial prejudice suffered by Respondent with the justification offered by the Petitioner for approximately sixty-seven month delay in this case. During that time, the Respondent started a family, was promoted, moved residences significantly farther from her workplace and now works two jobs.

Much like the driver in *Reed v. Staffileno*, 239, W.Va. 538, 803 S.E.2d 508, Respondent's employment did not require a valid driver's license at the time of the administrative hearing. However, over five and one-half years (5 1/2) after the hearing in this case, Respondent was

promoted and moved residences to an area where ride sharing and public transportation is not feasible. The only meaningful justification offered by the Petitioner for delaying a decision in this case for over five and one-half years (5 1/2) from hearing to decision is that the OAH, like all administrative agencies, was busy with other cases.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not appropriate because the dispositive issues have been authoritatively decided and the decisional process would not be significantly aided by oral argument.

IV. ARGUMENT

A. STANDARD OF REVIEW

This Court's review of a circuit court's order in an administrative appeal is made pursuant to West Virginia Code §29A-6-1. The Court reviews questions of law presented *de novo* and findings of fact by the administrative officer are accorded deference "unless the reviewing court believed the findings to be clearly wrong." Syl. Pt. 1, *Reed v. Hall*, 235 W.Va. 322, 773 S.E.2d 666 (2015). "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. THE LOWER COURT PROPERLY WEIGHED THE OVER FIVE AND ONE-HALF YEAR DELAY FROM HEARING TO DECISION IN REVERSING THE OAH FINAL ORDER.

Inasmuch as the Petitioner provided no meaningful evidence to justify the five and one-half year (5 1/2) delay in this case, the Petitioner primarily complains that Respondent failed to establish actual prejudice as a result of the excessive delay. The lower court properly found that

Respondent suffered actual and substantial prejudice as a result of the delay and correctly determined that the Petitioner failed to produce any meaningful justification for the approximate five and one-half year (5 ½) delay in this case.

According to W.Va. Const. Art. III, §17, “justice shall be administered without . . .delay.” A drivers license is a property interest entitled to the protections under the Due Process clause of the West Virginia Constitution. *Abshire v. Cline*, 193 W. Va. 180, 455 S.E.2d 549 (1995). Due process of law extends to actions of administrative offices and tribunals *Smith v. Siders*, 155 W. Va. 193 183 S. E. 21d 433 (1971); *McJunkin Corp. v. West Virginia Human Rights Commission*, 179 W. Va. 417, 369 S. E. 2d 720 (1988) and is synonymous with fundamental fairness. *State ex rel. Peck v. Goshorn*, 162 W. Va. 420, 249 S. E. 2d 765 (1978).

With respect to the quasi-judicial functions of administrative agencies, due process requires them to timely adjudicate matters properly submitted to them. See *Allen v. State Human Rights Comm.*, 324 S. E. 2d 99, 116 (1984). In Syllabus Point 3 of *Dolin v. Roberts*, 173 W. Va. 443, 317 S. E. 2d 802 (1984), the West Virginia Supreme Court of Appeals noted that, “[u]nreasonable delay can result in denial of procedural due process in license suspension cases.”

In dealing with post-hearing delay and the resulting prejudice, the Court in *Reed v. Staffileno*, 239 W.Va. 538, 803 S.E.2d 508 (2017) established the following:

“On appeal to the circuit court from an order of the Office of Administrative Hearings affirming the revocation of a party’s license to operate a motor vehicle in this State, when the party asserts that his or her constitutional right to due process has been violated by a delay in the issuance of the order by the Office of Administrative Hearings, a party must demonstrate that he or she has suffered actual and substantial prejudice as a result of the delay. Once actual and substantial prejudice from the delay has been proven, the circuit court must then balance the resulting prejudice against the reasons for the delay.”

In this case, the lower court properly balanced the prejudice suffered by Respondent against the reasons for the delay as required by *Reed v. Staffileno, supra*. As the lower court pointed out:

“Petitioner has established that she suffered actual and substantial prejudice due to the delay in receiving a Final Order. Specifically, the Petitioner accepted a promotion, purchased a new vehicle, and moved her family, all of which were decisions she made in reliance on the case’s seeming resolution.” (App. 006-007)

Ultimately, the lower court found that:

“Respondent has failed to produce any meaningful justification for the delay. Petitioner’s file was not lost or destroyed. Petitioner’s case did not include any novel or complex evidentiary issues. Moreover, Petitioner did not take action to contribute to the almost six-year delay, and in this case, the prejudice suffered as a result of the post-hearing delay outweighs any reasons offered by the Respondent for the delay.” (App. 007)

The Petitioner complains that the prejudice suffered by Ms. Rhodenizer occurred exclusively after the issuance of the OAH *Final Order*. However, the Petitioner ignores the fact that during the five and one-half year (5 ½) delay, Petitioner was promoted by the Cellar to a management position, moved away from a location which was easily accessible to the Cellar without a driver’s license, started a family and leased a new automobile.

At the time of the 2014 hearing, Ms. Rhodenizer was bartending/serving at the Cellar while living in Blacksburg near the bus station and had no dependents. (App. 034, 039) In or around 2017, approximately three years after the OAH hearing, Ms. Rhodenizer accepted a position as manager at the Cellar Restaurant and moved into a new residence in Christiansburg. (App. 035, 045, 048) Her residence in Christiansburg is twenty minutes from the Cellar Restaurant in Blacksburg. (App. 029) As a restaurant manager, she was required to drive as needed to pick up supplies and run to the bank as needed. (App. 039) Ride sharing in that area is unreliable and very expensive.

(App.029-030) There is no bus route in that area. (App. 030) During that time, her husband stopped working to care for their young child and they are completely dependant upon her wage. (App. 039) According to Ms. Rhodenizer, losing her driving privileges would “literally devastate me.” (App. 039)

Moreover, in 2019, Ms. Rhodenizer’s 2000 Outback required significant repairs. (App. 050) Because she could not afford the repairs, she instead leased a 2019 Subaru Forrester which she is currently paying monthly installments with the expectation that she would have a valid driver’s license. (App. 050)

Thus, while the Petitioner focuses his complaint that the prejudice suffered by Ms. Rhodenizer by her accepting a job at Palisades Restaurant after the *Final Order* should not count toward the analysis, he ignores the prejudice suffered by Ms. Rhodenizer prior to the *Final Order* being issued as set forth above. Absent a valid driver’s license, Ms. Rhodenizer would not be able to continue managing the Cellar Restaurant, which was her job in January 2020. She would be unable to get to and from work, she would be unable to drive to pick up supplies during work hours, and she would be unable to financially support her family.

Respondent’s circumstances closely resemble those set forth in *Staffileno*. For example, both drivers did not require a valid driver’s license for several years after the OAH hearing. Both driver’s changed job duties which later required a valid driver’s license. The driver in *Staffileno* obtained a CDL during the delay and Respondent accepted a promotion to manager at the Cellar Restaurant, which required her to travel several miles to and from work and during work hours. Likewise, both drivers would be incapable of performing their job duties without a driver’s license.

Contrary to the arguments offered by Petitioner, this case is distinguishable from *Straub*

v. *Reed*, 239 W.Va. 844, 806 S.E.2d 768 (2017) and *Reed v. Boley*, 240 W.Va. 512, 813 S.E.2d 754 (2018). The driver in those cases suffered no actual detrimental change in circumstance or employment from the time of the hearing until the OAH issued its decision. Thus, the revocation was upheld in both cases as a result. However, the Petitioner herein established actual and substantial prejudice as a result of the unjustified delay.

Next, the Petitioner complains that the lower court erroneously ignored Ms. Rhodenizer's failure to seek mandamus action. The lower court was presented with evidence at the evidentiary hearing that neither the Petitioner nor the Respondent, a *pro se* litigant up to the issuance of the *Final Order*, sought mandamus action in this case. According to *Staffileno*, a lower court is certainly free to consider a party's failure to seek an extraordinary remedy in its analysis but is not required to afford it any significant weight unless it so chooses. 239 W.Va. 538, 545, 803 S.E.2d 508, 515. "Insofar as the issue of filing a mandamus petition was raised below by DMV, we must assume that through its silence, the circuit court rejected the argument. See *State v. Darrell L.*, No. 13-1208, 2014 WL 6634367, at *4 (W. Va. Nov. 24, 2014) (memorandum decision) ("The circuit court's order following the hearing is silent as to any statements made to the child, aside from that previously mentioned, and, as such, it is presumed that the circuit court properly performed its duty in ruling on these allegations below."); *Mumaw v. U.S. Silica Co.*, 204 W.Va. 6, 9, 511 S.E.2d 117, 120 (1998) ("The circuit court's order was silent on factor C. Therefore, this Court must presume for summary judgment purposes that the circuit court found in favor of Administrator Mumaw regarding factor C.")" *Staffileno*, 239 W.Va. 545, 239 S.E.2d 515.

In this case, any amount of prejudice suffered by Ms. Rhodenizer would outweigh the

reasons for the excessive delay in this case. The sole excuse offered by the Petitioner for the delay was an affidavit establishing that the OAH was busy fulfilling its statutory duties on other cases. In other words, the OAH was busy and didn't get around to this case until approximately five and one-half (5 ½) years elapsed.

C. THE LOWER COURT CONDUCTED AN EVIDENTIARY HEARING AS REQUIRED BY STAFFILENO.

The Petitioner concedes that Ms. Rhodenizer requested an evidentiary hearing in her *Petition for Judicial Review* as required by W.Va. R. Pro. Admin. App.6(c) (2008) to assert and preserve her right to put forth evidence that she was prejudiced by the OAH delay in issuing a Final Order as directed by the Court in *Staffileno*. The record in this case was submitted by the OAH on April 17, 2020 and a briefing schedule was issued by the court thereafter to address the many errors alleged by the Respondent in this case. The matter was fully briefed in July 2020.

Accordingly, on August 4, 2020 the lower court noticed an evidentiary hearing for September 1, 2020 at 1:30 p.m. via Skype with the subject title of "(Hearing on Delay - Staffileno). (App. 075)

Following the hearing, the circuit court entered an order allowing for the matter to remain open to allow the parties an opportunity to file a supplemental response file proposed orders in the case. (App. 21-22) A supplemental brief was thereafter filed by the DMV. (App. 10-20)

The Petitioner takes exception to the lower court conducting the evidentiary hearing after the briefs were submitted and asks this Court to somehow consider the delay an implied waiver of Ms. Rhodenizer's right to an evidentiary hearing. There is no rule or statute requiring the evidentiary hearing to be scheduled before the briefs are submitted in an administrative appeal.

The only requirement is that the Ms. Rhodenizer request an evidentiary hearing, which the Petitioner admits was done in this case.

The Petitioner asks this Court to punish the Respondent for the lower court scheduling the evidentiary hearing after the briefs were submitted in this case. At no time did the Respondent intentionally relinquish her right to a hearing. Just the opposite, she filed a *Motion for Evidentiary Hearing* in order to expedite the matter for a hearing on July 27, 2020.

The Petitioner cites Rule 6(d)(1) of the West Virginia Rules of Civil Procedure claiming that her right to nine days notice prior to a scheduled hearing was somehow violated. However, the notice of hearing was filed on August 4, 2020 for the September 1, 2020 evidentiary hearing. Therefore, the court and the Respondent complied with Rule 6(d)(1) of the West Virginia Rules of Civil Procedure.

Next, the Petitioner takes exception to the fact that Respondent's proffer of the expected testimony from Ms. Rhodenizer slightly differed from her actual testimony at the evidentiary hearing. Both parties were afforded the opportunity to examine Ms. Rhodenizer and develop a record at the September 1, 2020 hearing. Likewise, both parties were afforded an opportunity to file briefs on the issue after the September 1, 2020 issue. Therefore, neither party was prejudiced by the original briefs being submitted prior to the evidentiary hearing in this case.

The Petitioner seeks to punish the Respondent and gain an advantage based upon the lower court scheduling the delay hearing after the briefs were submitted. Respondent does not control the lower court's docket and cannot notice a hearing without permission from the lower court. The fact that the court's docket could not accommodate the delay hearing until after the briefs were submitted is not the fault of the Respondent.

The Petitioner claims that the lower court ignored the Rules of Civil Procedure and should have required the Respondent to produce good cause to show why the evidentiary hearing was not noticed prior to the briefs being filed in this case. Again, Respondent fulfilled his obligation by requesting a hearing in his *Petition for Judicial Review*. Although under no obligation to do so, he further filed an additional *Motion for Evidentiary Hearing* thereafter to ensure the matter was promptly scheduled. Neither the lower court nor the Respondent violated the Rules of Civil Procedure. The matter was scheduled for an evidentiary hearing when the court's docket would allow.

Filing the briefs prior to the evidentiary hearing and then allowing an opportunity to submit supplemental briefs after the hearing did not affect the substantial rights of the parties.

V. CONCLUSION

WHEREFORE, based upon the foregoing, the Respondent hereby respectfully requests that the order of the circuit court be affirmed.

Respectfully submitted,

COURTNEY RHODENIZER

By counsel,



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**IN THE SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA**

**EVERETT FRAZIER, COMMISSIONER
WEST VIRGINIA DIVISION OF MOTOR VEHICLES,**

Petitioner,

v.

No. 20-0896

COURTNEY RHODENIZER,

Respondent.

CERTIFICATE OF SERVICE

I, David Pence, counsel for Petitioner, do hereby certify that I have served a true and exact copy of the foregoing **RESPONDENT'S BRIEF** by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to:

Elaine Skorich, Asst. Attorney General
DMV - Office of the Attorney General
P. O. Box 17200
Charleston, WV 25317

on this the 30th day of March 2021.



David Pence