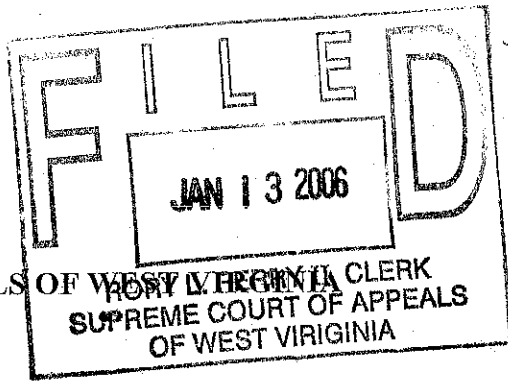


NO. 32886



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HAROLD PETRY, II,

Appellant,

v.

F. DOUGLAS STUMP, COMMISSIONER;
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,

Appellee.

RESPONSE BRIEF

Respectfully submitted,

WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

By Counsel

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WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,

Appellee.

RESPONSE BRIEF

Comes now the Appellee, Joseph Cicchirillo, successor to F. Douglas Stump as Commissioner of the West Virginia Division of Motor Vehicles, by counsel, Janet E. James, Assistant Attorney General, and submits this response in opposition to the *Amended Petition for Appeal and Writ of Error* filed in the above-styled matter on behalf of the Appellant. This is an appeal, pursuant to the Administrative Procedures Act, from the Order of the Honorable Tod J. Kaufman, Judge of the Circuit Court of Kanawha County, entered on February 10, 2005.

KIND OF PROCEEDING AND THE NATURE OF THE RULING BELOW

Appellant's privilege to drive was revoked by the Appellee by an Order of Revocation dated November 24, 1998. Appellant timely requested an Administrative Hearing, which was held on February 16, 1999. Before the Final Order was entered, the Appellee received an Abstract of Judgment from the Cabell County Magistrate Court showing that Appellant had pled guilty to the

DUI charge. An Order of Revocation was entered April 23, 2003, revoking Appellant's license for six months. After a corrected Abstract of Judgment was received by the Appellee, the Order of Revocation was stayed, and an administrative hearing was scheduled for March 7, 2005.

Appellant filed a *Writ of Prohibition, Mandamus and Application for Stay and Rule to Show Cause* in the Circuit Court of Kanawha County (Case No. 05-MISC-50) on February 4, 2005. By Order, entered February 10, 2005, Judge Kaufman denied Appellant's writ and dismissed the case.

Appellant then filed a *Petition for Writ of Prohibition and Mandamus* in this Court on March 10, 2005. By Order dated April 28, 2005, this Court refused the Appellant's *Petition for Writ of Prohibition and Mandamus*.

Appellant then filed a *Petition for Appeal and Writ of Error* in this Court on May 10, 2005, and, upon leave of the Court, an *Amended Petition for Appeal and Writ of Error* on July 21, 2005. The Petition was granted on November 17, 2005.

STATEMENT OF FACTS

Appellant was arrested on November 20, 1998, by Officer Timothy P. Goheen of the Huntington Police Department, for driving while under the influence of alcohol (hereinafter "DUI"). Appellant was notified on November 24, 1998, that his privilege to drive was revoked for six months. He timely requested a hearing, which was held on February 16, 1999.

Before a decision was rendered, the Appellee received an *Abstract of Judgment: Citation* from the Clerk of the Cabell County Magistrate Court in Case Number 98-M-8481 that Appellant had been convicted of DUI first offense. Consequently, the Appellee revoked Appellant's license for six months by Order of Revocation dated April 23, 2003.

On October 19, 2004, counsel for the Appellant transmitted *Guilty or No Contest Plea* and *Criminal Case History* forms to Appellee showing that Appellant plead guilty to the lesser offense of reckless driving in Case Number 98-M-8481. On November 1, 2004, Appellee informed counsel for the Appellant that the Order of Revocation was stayed pending hearing, based upon receipt of the corrected abstract of judgment.

On January 4, 2005, Appellee set an administrative hearing on Appellant's license revocation for March 7, 2005, and notified Appellant. The hearing was rescheduled on the basis that the hearing examiner who heard the case in 1999, Larry Mullett, lost the tape of the hearing. Mr. Mullett's employment was subsequently terminated by the Appellee.

ISSUE PRESENTED

WHETHER THE DELAY IN RESOLUTION OF APPELLANT'S APPEAL OF HIS LICENSE REVOCATION SHOULD PREVENT THE APPELLEE FROM MAKING A DETERMINATION REGARDING THE REVOCATION OF APPELLANT'S LICENSE.

STANDARD OF REVIEW

This Court must apply a "clearly wrong" standard to its review of the facts of this case, and a "*de novo*" standard to its review of the law applied. "Where the issue on 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)." Syl. pt. 5, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998).

This Court has determined that it may not substitute its judgment for that of the administrative body, but must look at the record as a whole to determine whether the agency's decision is supportable. "This Court, in conjunction with appeals under the Administrative

Procedures Act, has indicated that a reviewing court must evaluate the record of the agency's proceedings to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is to be conducted pursuant to the administrative body's findings of fact regardless of whether the court would have reached a different conclusion on the same set of facts." *Donahue v. Cline*, 190 W. Va. 98, 102, 437 S.E.2d 262, 266 (1993) (per curiam) citing *Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Rights Commission*, 187 W. Va. 312, 418 S.E.2d 758 (1992) (per curiam).

ARGUMENT

THE COMMISSIONER IS OBLIGATED TO PROVIDE APPELLANT WITH A HEARING AND TO MAKE A DETERMINATION REGARDING THE REVOCATION OF HIS LICENSE.

The relief sought by Appellant in this matter cannot be granted. He has filed a petition for appeal, and there is no final order from which to appeal. He is seeking to prohibit the Appellee from holding an administrative hearing: clearly, he seeks extraordinary relief. However, he approached this Court with a *Petition for Writ of Prohibition and Mandamus* in March, 2005, which was refused by this Court in April, 2005. He then filed the present *Amended Petition for Appeal and Writ of Error*, seeking the same relief of prohibiting the Appellee from holding a hearing.

The Appellee must be permitted to proceed with resolution of Appellant's appeal of his license revocation. Appellee held a hearing in 1999; however, before the final order was issued in that case, the Cabell County Magistrate Clerk transmitted an abstract of judgment indicating that Appellant had plead guilty to DUI; thus, the revocation was based on the conviction and resolution of the administrative hearing was concluded. Subsequently, Appellant was able to have the charge reduced to reckless driving, thus, Appellee had to rescind the revocation based upon conviction.

Now, Appellee is attempting to proceed with an administrative hearing (the record from the 1999 hearing was lost) in order to resume the process of resolving Appellant's appeal.

The delays in this case do not require that the Commissioner abandon his statutory duty to provide Appellant with a hearing on his driver's license revocation. The Commissioner is obligated to enforce the driving laws of this State. Pursuant to West Virginia Code §17A-2-9, the Commissioner is "vested with and is charged with the duty of observing, administering and enforcing the provisions of this chapter and of all laws the enforcement of which is now or hereafter vested in the department[.]"¹ *Coll v. Cline*, 202 W.Va. 599, 608, 505 S.E.2d 662, 671 (1998). His enforcement responsibilities include West Virginia Code §17C-5-2, "which prohibits driving under the influence of alcohol, controlled substances or drugs, by mandating that the Commissioner revoke the driver's license of individuals violating that section of the Code." *Id.*

To remove jurisdiction from the Appellee because of the delay would frustrate the goal of administrative review of a license revocation. In his concurrence in *Anderson & Anderson Contractors, Inc. v. Latimer*, 162 W. Va. 803, 257 S.E.2d 878 (1979) Justice Miller noted his "considerable reservation" over the majority's treatment of the issue of an agency's losing jurisdiction because of a delay in the proceedings. He pointed out that the law relied upon by the majority to support this proposition in *Eastern Associated Coal Corp. v. Doe*, 159 W. Va. 200, 220 S.E.2d 672 (1975), was dictum. Justice Miller noted: "To utilize *Eastern*, as does the majority, for the further proposition that an administrative agency will lose jurisdiction to hear a proceeding because it does not move with alacrity, is contrary not only to our case law, but to the general

¹Under the Executive Reorganization Act of 1989, the Department of Motor Vehicles was transferred to the Department of Transportation thereby becoming the Division of Motor Vehicles. W. Va. Code § 5F-2-1(g)(4).

thinking in this field.” *Anderson*, 162 W. Va. at 814, 257 S.E.2d at 884. Justice Miller further noted: “Moreover, the harshness of termination of agency jurisdiction, which vitiates all further inquiry both administrative and judicial, can hardly ever be justified where, as here, the agency is charged with administering statutory and regulatory violations which relate to the health, safety and welfare of employees and the public in general.” *Anderson*, 162 W. Va. at 815, 257 S.E.2d at 885. The parallels to the present case are obvious, and dictate that the Division is not deprived of jurisdiction under the facts of the present case.

The burden of proving whether there has been actual prejudice as a result of delay is the Appellant’s. In this case, he has failed to prove prejudice. Appellant asserts that he will suffer a hardship because “he has to put his life on hold again and he may lose his job.” Amended Petition at 10. There is no record of testimony which supports these allegations, and the allegations may be exaggerated.

In *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996) this Court found that there was not a delay which deprived the Plaintiff therein of any rights. “This case does not come close to exceeding the limits of fairness and reasonableness.” 198 W. Va. 155, 479 S.E.2d 665. In rejecting the Plaintiff’s contention in *Hutchison*, this Court enunciated the principles that 1) the Court will not set bright lines discerning when the delay becomes unconstitutional (“This Court cannot set definite temporal boundaries for determining when a particular delay caused by a state actor’s misconduct rises to constitutional dimension; 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.”) 198 W. Va. 155-56, 479 S.E.2d 665-66; and 2) that averments of delay cannot serve to determine the underlying merits of a case (“Although we have held that due process requires

governmental agencies to comply with their own regulations, we have also refused to confer substantive entitlements on claimants simply because an agency failed to comply strictly with a particular time deadline.”) 198 W. Va. 157, 479 S.E.2d 667 (citations omitted).

Likewise, in the recent case of *In re Petition of Donley*, 618 S.E.2d 458 (W.Va. 2005), this Court denied relief to the Appellant on the basis of delay. The Court noted that the statute authorizing a magistrate court clerk to forward an abstract of a DUI conviction to the Commissioner contains no time limit within which this task must be accomplished, and concluded that “ Although we have found that the delay was unreasonable in this case, Mr. Donley is still not entitled to relief because no prejudice flowed from the delay.” 618 S.E.2d 461.

The claim that a driver should be excused from the application of the law due to the hardship flowing from loss of a driver’s license has been rejected by this Court, as reflected in the following:

Quite simply, Appellant is not entitled to more consideration under the applicable laws than an individual who does not utilize his vehicle during the work day other than for the purposes of commuting to and from work. Appellant has been treated in the same manner, as required by statute, as all others in this state who have been found to have operated a motor vehicle under the influence of alcohol. The DUI statutes at issue make no exceptions with regard to the issue of license revocation.

McDonald v. Cline, 193 W. Va. 189, 192, 455 S.E.2d 558, 561 (1995). Thus, the difficulties flowing from the revocation of Appellant’s privilege to drive do not comprise grounds upon which to reverse an Order of Revocation.

Appellant had the obligation, when he became dissatisfied with the length of time between the administrative hearing and the issuance of the Final Order, to file an action in mandamus.

Kanawha Valley Transportation Co. v. Public Service Comm'n, 159 W. Va. 88, 219 S.E.2d 332 (1975), held:

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.

189 W. Va. 368-369, 432 S.E.2d 38- 39. In the present case, the revocation on conviction further delayed issuance of the Final Order through no fault of the Appellee.

In *Allen v. State Human Rights Com'n*, 174 W. Va. 139, 324 S.E.2d 99 (1984), this Court did not dismiss the cases, but rather ordered that the cases be noticed for hearing: "we order the Human Rights Commission to immediately issue and serve written notice of hearing on the complaints of petitioners Allen, Francisco, Lucas, and Moore, to begin within ninety days from the issuance of a writ of mandamus in this proceeding." 174 W. Va. 160, 324 S.E.2d 120. That is precisely what the Appellee seeks to do here: convene an administrative hearing.

The appropriate remedy for Appellant was to file a petition for a writ of mandamus to compel the Division to issue a Final Order. Having contributed to the delay by his own lack of action, he is foreclosed from complaining about it at this late date. Appellant took no action to compel issuance of the Final Order. In *State ex rel. Cackowska v. Knapp*, 147 W. Va. 699, 130 S.E.2d 204 (1963), a circuit judge failed to render a decision concerning the final disposition of an estate. After 17 months had passed, the relator filed a petition, which was granted. In *State ex rel. Patterson v. Aldredge*, 173 W. Va. 446, 317 S.E.2d 805 (1984), the petitioner brought an original proceeding in mandamus seeking to compel the respondent, Chief Judge Naaman J. Aldredge of the Circuit Court of Logan County, to render a final decision in a civil action instituted by the petitioner in 1980. This

Court found that the delay of 33 months between the initial hearing and the filing of the action in mandamus was cause for a writ to issue. The Appellant cannot properly be granted relief in prohibition here, because this is not an action for extraordinary relief, and because he is not entitled to relief in the absence of having sought to compel issuance of the Final Order prior to the Appellee's re-setting the hearing.

Appellant cites many cases which either do not support his position or are distinguishable. He cites *Dolin v. Roberts*, 173 W.Va. 443, 317 S.E.2d 802 (1984) for the proposition that delay in license revocation was a deprivation of procedural due process. In that case, however, this Court found that even though there had been a 20-week delay between arrest and suspension, there was no deprivation of due process. In *State ex rel. Cline v. Maxwell*, 189 W. Va. 362, 432 S.E.2d 32 (1993), this Court held that although a six-month delay is unreasonable, it is not sufficient to justify the dismissal of the licensees' revocation proceedings. *Maxwell*, 189 W. Va. at 367-368, 432 S.E.2d at 37-38.

Relief cannot be granted to the Appellant in this matter because this Court denied his *Petition for Writ of Prohibition and Mandamus* on April 28, 2005. Here, he seeks the same relief of asking this Court to prohibit the Appellee from holding a hearing. This is not proper under the guise of the granting of a petition for appeal. There has been no final order from which to appeal. Further, the Appellee has acted diligently in holding the original hearing, revoking on conviction, and finally re-setting the hearing when the revocation on conviction required rescission. Moreover, Appellant has failed to show prejudice. Finally, the Court must consider the Appellee's duty and responsibility to enforce the driving laws of this state for the protection of the public. The Commissioner should be permitted to proceed with the administrative hearing in this matter.

CONCLUSION

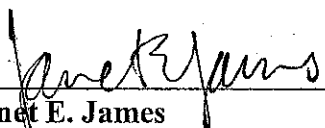
WHEREFORE, Appellee prays that the relief requested by Appellant be denied.

Respectfully submitted,

**JOSEPH CICCHIRILLO,
COMMISSIONER,
WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,**

By Counsel,

**DARRELL V. McGRAW, JR.
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CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing *Response Brief* was served upon opposing counsel by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 13th day of January, 2006 addressed as follows:

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Charleston, West Virginia 25336



JANET E. JAMES