**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**
**NO. 20-0896**
**(Circuit Court Civil Action No. 20-AA-25)**

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

**Petitioner,**



**v.**

**COURTNEY RHODENIZER,**

**Respondent.**

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# BRIEF OF THE DIVISION OF MOTOR VEHICLES

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**PATRICK MORRISEY**
**ATTORNEY GENERAL**

**Elaine L. Skorich #8097**
**Assistant Attorney General**
**DMV Legal Division**
**Post Office Box 17200**
**Charleston, West Virginia 25317**
**Telephone: (304)558-2522**
**Telefax: (304) 558-2525**
**Elaine.L.Skorich@wv.gov**

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## ASSIGNMENTS OF ERROR

1. **The circuit court erred in finding that Ms. Rhodenizer was actually and substantially prejudiced by the post-hearing delay of the Office of Administrative Hearings ("OAH") when she voluntarily accepted a second job and signed a new home lease many months *after* receiving the OAH final order.**

2. **Ms. Rhodenizer waived her right to an evidentiary hearing, and the circuit court erred by granting an evidentiary hearing regarding the Respondent's alleged prejudice caused by post-hearing delay after she failed to schedule a hearing and after the matter had been fully briefed.**

## STATEMENT OF THE CASE

On April 18, 2013, Courtney Rhodenizer, the Respondent herein, was at her doctor's office and tested positive for narcotics. (App.[1] 307.) She engaged in an altercation and left the doctor's office. *Id.* She was "expecting to get pulled over to be returned to the doctor's office." *Id.* The Respondent had left without warning, prompting Seneca Mental Health Services ("Seneca") to call the police to return her to the facility for crisis management per their policy. (App. 214.)

On the same day, Deputy W. K. Nester of the Greenbrier County Sheriff's Department, the Investigating Officer herein, responded to a Be On the Look Out ("BOLO") call for a possibly impaired driver running off the road in Lewisburg, Greenbrier County, West Virginia. (App. 297.) By description and license plate number, the Investigating Officer located a vehicle which matched the account given in the BOLO. (App. 223, 298.)

The Investigating Officer independently observed the vehicle swerving, weaving, driving with the tires on the center line marker, and traveling left of center. (App. 223, 298.) The Investigating Officer initiated a traffic stop of the vehicle. (App. 223, 300.) The Investigating Officer identified the driver as Courtney Rhodenizer, the Respondent herein. (App. 223.)

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[1] References are to the enumerated Appendix filed contemporaneously with the instant brief.

The Respondent had slurred speech, had dilated eyes, and was unsteady while exiting her vehicle, yet appeared normal while walking and standing. (App. 224, 300.) The Investigating Officer administered three standardized field sobriety tests to the Respondent. (App. 224-225, 300.)

Prior to administering the Horizontal Gaze Nystagmus ("HGN") Test, the Investigating Officer performed a medical assessment of the Respondent 's eyes which indicated that she was a viable candidate for the test because she had equal pupils, equal tracking, and no resting nystagmus. (App. 224, 301.) Although the Investigating Officer failed to document the entire medical assessment on the DUI Information Sheet and did not have an independent recollection of the results of the assessment, he testified at the hearing below that he was trained to complete the assessment and would not have administered the test if the Respondent was not a viable candidate for the test. (App. 301-302.) During the HGN Test, the Respondent exhibited impairment because both of her eyes lacked smooth pursuit and exhibited distinct and sustained nystagmus at maximum deviation. (App. 224, 302.)

The Investigating Officer performed the Vertical Gaze Nystagmus Test which indicated nystagmus at maximum elevation in both eyes. (App. 224, 302.) Per the officer's training, Vertical Gaze Nystagmus can indicate consumption of a controlled substance. (App. 302.)

The Investigating Officer explained and demonstrated the Walk-and-Turn Test, and the Respondent exhibited impairment because she started too soon during the instruction phase of the test, and during the administration of the test, she took two steps, "messed up" and started again. (App. 224, 302-303.) The Investigating Officer documented the Respondent's first attempt as a failure. (App. 224.)

The Investigating Officer explained and demonstrated the One Leg Stand Test, which the

Respondent was able to satisfactorily perform. (App. 225, 303.)

The Investigating Officer administered a Preliminary Breath Test which did not register the presence of alcohol in her system. (App. 225, 303.) The Investigating Officer lawfully arrested the Respondent and transported her to the Greenbrier County Sheriff's Department for processing and the administration of the designated secondary chemical test. (App. 222, 226, 303.)

The Investigating Officer completed all steps of the *Breath Test Operational Checklist*, and administered the secondary chemical test in accordance with W. Va. Code R. § 64-10-1, *et seq.* (2005). (App. 226, 307.) The result of the test showed that the Respondent had a blood alcohol concentration of 0.00%. *Id.*

After being processed at the Sheriff's Department, the Respondent was returned to Seneca, a mental health facility. (App. 314-315, 318-319.) While the Respondent was at Seneca, the hospital took a blood sample for a toxicology report. (App. 321.) The Investigating Officer was unaware of the results of that test, and the DUI Information Sheet does not indicate that the officer took the Respondent for a blood test. (App. 227, 321.)

Pursuant to W. Va. Code § 17C-5A-1(a) 2008), the Investigating Officer submitted a copy of the DUI Information Sheet regarding Ms. Rhodenizer's arrest to the West Virginia Division of Motor Vehicles ("DMV.") (App. 230.) On June 6, 2013, the DMV sent the Respondent an *Order of Revocation* for DUI of controlled substances and/or drugs. (App. 181.) On July 1, 2013, the Respondent requested an administrative hearing from the OAH. (App. 177.) The OAH conducted an administrative hearing on June 27, 2014. (App. 286-323.) The Respondent testified at the hearing. (App. 308-314.)

On July 17, 2014, the Respondent emailed the OAH to address several points that were made

at the hearing. (App. 214.) Specifically, the Respondent stated that at "the time of my arrest I was prescribed certain medications, namely Adderall and Valium, which I did not abuse in any way. I had not been drinking alcohol nor taking any other drugs. I had only taken a half dose of my medication." *Id.* On January 23, 2020, the OAH entered its *Final Order* upholding the DMV's *Order of Revocation* for DUI of controlled substances and/or drugs. (App. 240-246.)

On February 20, 2020, Ms. Rhodenizer filed a *Petition for Judicial Review* with the Circuit Court of Kanawha County. (App. 145-156.) The Respondent requested a hearing on her motion for stay (App. 157-158) which the circuit court scheduled for March 6, 2020. (App. 96.) The DMV learned of this hearing when the Respondent's counsel notified the DMV that the hearing was cancelled. *Id.* She did not reschedule the matter for a hearing on her motion to stay her license revocation.

On April 17, 2020, the OAH filed the administrative record with the circuit court. (App. 171.) On June 16, 2020, the Respondent filed her brief with the circuit court. (App. 129-144.) In her brief, she alleged, *inter alia*, that she was actually and substantially prejudiced by the delay between her OAH hearing and the entry of the OAH *Final Order*. (App. 132, 140-142.) There was no evidence in the record to support her allegations of actual and substantial prejudice.

On July 16, 2020, the DMV filed its response brief with the circuit court. (App. 110-128.) The DMV alleged, *inter alia*, that because Ms. Rhodenizer failed to put on evidence of a detrimental change in her circumstances post-hearing (i.e., she failed to have a *Staffileno*[2] hearing), the circuit court could not find that she was actually and substantially prejudiced by the delay in the OAH

[2] The parties refer to a hearing to take evidence on whether a petitioner is actually and substantially prejudiced by post-hearing delay by the OAH as a *Staffileno* hearing. *See*, *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017).

entering its order. (App. 125-127.)

On July 27, 2020, the Respondent filed a *Motion for Evidentiary Hearing* with the circuit court. (App. 108-109.) On July 29, 2020, Ms. Rhodenizer filed her reply to the DMV's response brief. (App. 99-104.) She also filed an affidavit which outlined the facts to support her argument that she was actually and substantially prejudiced by the OAH delay. (App. 105-107.) On the same day, the DMV filed its objection to the Respondent's motion for an evidentiary hearing arguing that the Respondent violated the procedural rules and failed to meet her burden of proof. (App. 90-98.)

On July 30, 2020, the DMV filed a motion to strike the Respondent's reply brief. (App. 82-89.) On July 31, 2020, Ms. Rhodenizer filed a response to the DMV's objection to her affidavit and belated request for an evidentiary hearing. (App. 76-81.) The circuit court did not rule on the DMV's objection or motion to strike but scheduled a *Staffileno* hearing via email. (App. 75.) The parties stipulated to proceeding with an affidavit of OAH Director and Chief Hearing Examiner Teresa Maynard in lieu of her live testimony. (App. 74.) On August 25, 2020, the DMV filed Director Maynard's affidavit with the circuit court. (App. 63-73.)

On September 1, 2020, the circuit court heard Respondent's evidence regarding her alleged detrimental change in circumstances which she argued caused her to be actually and substantially prejudiced by the delay in the OAH issuing its final order. (App. 23-62.) At the *Staffileno* hearing, the DMV renewed its objection to holding an evidentiary hearing after the matter had been briefed. (App. 27.) The circuit court noted the DMV's objection. *Id.*

The testimonial and documentary record established the following time line of events relative to the issue of post-hearing delay in this case. On April 18, 2013, Ms. Rhodenizer was arrested for DUI. (App. 33, 223.) In December of 2013, she married her husband. (App. 49.) On June 27, 2014,

the OAH held the administrative hearing in this matter. (App. 286.) At that time, the Respondent was living in Blacksburg, Virginia next to a bus stop and working as a waitress and bartender for the Cellar restaurant in Blacksburg. (App. 28, 34, 43.) After the OAH hearing, she believed that a decision would be entered in three to six months. (App. 33.) At the time of her hearing, she drove a 2006 Cavalier. (App. 49, 50.)

In 2015, the Respondent had her son. (App. 50.) Also in that year, her Cavalier blew its engine, and she purchased a 2000 Subaru Outback. *Id.* In 2017, Ms. Rhodenizer moved to 111 Hickock Street, Christiansburg, Virginia (App. 28, 44, 48) and lived with a roommate for a year. (App. 48.) She moved her family to Christiansburg[3] because she believed there were better opportunities there; it was away from college students; and it was in a better neighborhood for her family and child. (App. 36, 46.) In Christiansburg, Ms. Rhodenizer resides 20 minutes from her job at the Cellar in Blacksburg. (App. 28-29.) Also in 2017, the Respondent began training to become manager for the Cellar restaurant. (App. 44.) In 2018, Ms. Rhodenizer became the manager for the Cellar (App. 45) and moved into her own apartment in Christiansburg where she pays $700 per month for rent. (App. 48.) In September of 2019, the Respondent leased a 2019 Subaru Forester. (App. 50.) She still owns the Subaru Outback, which needs repairs. *Id.*

On January 23, 2020, the OAH entered its *Final Order*. (App. 240-246.) On February 20, 2020, Ms. Rhodenizer filed a petition for judicial review with the Circuit Court of Kanawha County. (App. 145-170.) Six months ***after*** she received the Final Order, on July 17, 2020, Ms. Rhodenizer

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[3] Although the circuit court made a finding that Ms. Rhodenizer "relied upon the inaction of OAH in the following manner: [she] moved her family out of state. . .", at all times relevant, the Respondent lived in the Commonwealth of Virginia. She moved her residence from Blacksburg, Virginia to Christiansburg, Virginia. (App. 28-29.) Those cities are 20 minutes apart. *Id.*

became the manager at Palisades Restaurant in Eggleston, Virginia, which is 35-40 minutes away from her home in Christianburg, Virginia, and she continued to work at the Cellar. (App. 29, 45, 47.) Eggleston is in a rural area, and ride sharing to get to work there is an option but not feasible for the Respondent because of availability and cost. (App. 29-30, 47.) Public transportation from her home in Christianburg to Eggleston is not an option. (App. 30, 31.) Her job at Palisades requires the Respondent to drive to pick up liquor and food items (App. 31, 46) and to make bank deposits. (App. 46.) Ms. Rhodenizer considers her position at Palisades to be a promotion. (App. 45, 48.) Although the Respondent had completed eight months of a three month revocation and could drive to safety and treatment classes with her valid Virginia license, she speculated that she would lose her job if she were unable to drive during her revocation period. (App. 32.) Her husband would not be able to drive the 35-40 minutes to her work to pick up the items she needs for work because he is the primary caretaker of their five year old son. (App. 32-33.)

On August 8, 2020, seven months ***after*** receiving the *Final Order* of the OAH, Ms. Rhodenizer left her management position with the Cellar but continued to work for them training her replacement, acting as a substitute manager if the new manager needed a day off of work, and serving because "serving money is still good money." (App. 47.) On August 17, 2020, seven months ***after*** receiving the OAH *Final Order*, the Respondent extended the lease on her home for another year. (App. 49.) Her husband has not worked outside the home since they married but is the primary caretaker for their son. (App. 50-51.)

The Respondent thought that her case was closed after she did not hear anything from the OAH for six months. (App. 35.) She testified that she signed a home lease, albeit seven months after receiving the OAH order, and bound her family to making those payments or risking some type of

litigation if she falls behind. (App. 37.) Ms. Rhodenizer further testified that she purchased a new car and took on debt to pay for it but would not have done so if she had an expectation that a license revocation would be entered. (App. 37.)

The Respondent testified that she would not be able to renew her Virginia driver's license in Virginia in December of 2020 if the revocation were upheld (App. 37-38) and that her license would be revoked for five years even though the DMV revoked her license for 90 days. (App. 38, 40, 181.) There is no evidence in the record that Virginia will revoke Ms. Rhodenizer's license for five years, and the record clearly shows that the West Virginia DMV only revoked her license for 90 days, which she had served already. (App. 40, 181.)[4]

On September 22, 2020, the circuit court entered a diary order which held that the matter "shall remain open for [the DMV's] Counsel to file a supplemental response and for both parties to file proposed orders in the matter." (App. 21-22.) On the same day, the DMV filed a supplemental response brief based upon the evidence taken at the hearing on September 1, 2020. (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.)

## SUMMARY OF ARGUMENT

The DMV agrees that the OAH's pattern of delay in issuing final orders was unacceptable and egregious. Such delay resulted in not only the elimination of the OAH but also the administrative license revocation process. W. Va. Code § 17C-5C-1a (2020) *et seq*. However, in *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017), this Court provided a remedy to a driver if she could prove

[4] Presumably, because the circuit court rescinded the DMV's order of revocation, Ms. Rhodenizer was able to renew her license in Virginia in December of 2020.

that she was actually and substantially prejudiced by the OAH's delay because she experienced a detrimental change in her circumstances. In the instant case, the circuit court erroneously determined that Ms. Rhodenizer suffered actual and substantial prejudice because "she 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. 6.)

Ms. Rhodenizer was arrested for DUI, asked for an administrative hearing, and was given a hearing. Prior to and after the administrative hearing, she enjoyed the automatic stay of her license revocation but did not move along her appeal by asking the OAH for an order or by filing a *mandamus* action to compel the OAH to enter an order. Five and half years after the administrative hearing, the OAH entered its final order affirming the DMV's *Order of Revocation,* and the Respondent filed an administrative appeal in the Circuit Court of Kanawha County. Six months *after* she filed her appeal in the circuit court, she changed jobs and alleged that she could not get to that job and keep that job because she could not drive. Although West Virginia revoked her driver's license for 90 days, Ms. Rhodenizer, a resident of Virginia, continued to drive because she held a valid Virginia driver's license. To reinstate her license in West Virginia, she can continue to drive validly in Virginia while taking safety and treatment classes there, and she must pay reinstatement fees in West Virginia. Because she has completed the revocation time for reinstatement in West Virginia and continues to drive legally in Virginia, she has failed to prove that any delay by the OAH in entering its final order caused her to be actually and substantially prejudiced.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to R. App. Pro. 19 (2010) is appropriate on the basis that this case involves a narrow issue of law, and the Court would benefit from being able to question the parties

regarding this fact heavy case.

## ARGUMENT

### A. Standard of Review

"On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. Syllabus point 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)." Syllabus point 1, *Frazier v. S.P.*, 242 W. Va. 657, 838 S.E.2d 741 (2020). "Further, '[i]n cases where the circuit court has [reversed] 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, *id.*" 242 W. Va. 657, 838 S.E.2d 741, 746.

"An interpretation of the West Virginia Rules of Civil Procedure presents a question of law subject to a de novo review. Syllabus point 4, *Keesecker v. Bird*, 200 W. Va. 667, 490 S.E.2d 754 (1997)." Syllabus Point 3, *Cattrell Companies, Inc. v. Carlton, Inc.*, 217 W. Va. 1, 614 S.E.2d 1 (2005).

### B. The circuit court erred in finding that Ms. Rhodenizer was actually and substantially prejudiced by the post-hearing delay of the OAH when she voluntarily accepted a second job and signed a new home lease many months *after* receiving the OAH final order.

The circuit court found as fact that Ms. Rhodenizer "relied upon the inaction of OAH in the following manner: [Ms. Rhodenizer] moved her family out of state; [Ms. Rhodenizer] purchased a new vehicle for commute; and [Ms. Rhodenizer] accepted a promotion at her place of employment." (App. 5.) The court concluded that Ms. Rhodenizer "has established that she suffered actual and

substantial prejudice due to the delay in receiving a Final Order. Specifically, [she] 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. Had this matter been timely resolved after the June 2014 administrative license revocation hearing, [Ms. Rhodenizer] would have been well past the fallout of a revocation, and not be subject to such [*sic*] the actual and substantial prejudice that such a delay imposes on and individual, their family, and their livelihood. [Ms. Rhodenizer] made family and livelihood decisions over three (3) years ago in reliance on OAH having timely fulfilled its statutory obligation to issue an order resolving this matter." (App. 6-7.)

Six months ***after*** she received the OAH order, Ms. Rhodenizer voluntarily took a second job 35-40 minutes away from her home while continuing to work in management at her first job. (App. 29, 45, 47.) She speculated that she would lose her new job if she were unable to drive during her revocation period. (App. 32.) Seven months ***after*** receiving the OAH order, Ms. Rhodenizer left her management position with the Cellar but continued to work for them training her replacement, acting as a substitute manager if the new manager needed a day off of work, and serving because "serving money is still good money." (App. 47.) Also, seven months ***after*** receiving the OAH order, the Respondent extended the lease on her home. (App. 49.)

This Court has set forth the balancing test which a circuit court must make when considering allegations of prejudice due to OAH post-hearing delay.

> 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, the 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.

Syl. Pt. 2, *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017).

The first step in the *Staffileno* test was for the circuit court to make a finding as to whether Ms. Rhodenizer had been actually and substantially prejudiced because the OAH delayed issuance of its final order. If the circuit court found that she failed to prove actual and substantial prejudice as a result of the delay, then that court's review would be complete, and there would be no need to balance the reasons for the delay against a non-existent prejudice. Here, the circuit court went too far in its inquiry. Pursuant to this Court's holding in *Straub v. Reed*, 239 W. Va. 844, 806 S.E.2d 768 (2017), the requirement in this matter is that Ms. Rhodenizer suffer "some type of detrimental **change in ...circumstances ...related to the delay in OAH issuing its final order.**" 239 W. Va. 844, 851, 806 S.E.2d 768, 775 (emphasis added). *See also Reed v. Boley*, 240 W. Va. 512, 517, 813 S.E.2d 754, 759 (2018) (finding that "Mr. Boley has not actually alleged 'some type of detrimental change in his circumstances, related to the delay in OAH issuing its final order.' ")

In the instant matter, there has been no detrimental change in the Respondent's circumstances due to the delay in the OAH entering its *Final Order*. Ms. Rhodenizer received the order in January of 2020 and chose to take the manager position at the Palisades restaurant in Eggleston six months ***after*** the OAH issued its order. She knew that there was a pending appeal and was represented by counsel in July of 2020, yet she still took a job in a rural area knowing that she had limited transportation options to and from that job.

Further, the Respondent testified that she continued to be employed at the Cellar training her replacement, acting as a substitute manager if the new manager needs a day off of work, and serving because "serving money is still good money." (App. 47.) Her position at the Cellar restaurant changed after the OAH order was entered and was not due to the delay in the OAH issuing its *Final*

*Order* as required by *Straub*. Further, there was no evidence before the circuit court that Ms. Rhodenizer would lose that job if she was required to serve a license revocation for DUI.

Notably, the Respondent did not testify that she contacted the OAH to ask about the status of the final order in this case. "At no time did Ms. Rhodenizer file a mandamus action against the OAH, requesting that a final order be entered in his case." (App. 71 at ¶ 32.)

In *Staffileno,* in reliance upon his having obtained a commercial driver's license and being employed as a school bus driver, Mr. Staffileno retired from his Tax Department desk job. 239 W. Va. 538, 543, 803 S.E.2d 508, 513. There, "the circuit court determined that Mr. Staffileno would not have retired when he did, and changed his employment to that of a school bus driver, if OAH had issued a timely decision." *Id.* Moreover, unlike in *Staffileno*, Ms. Rhodenizer cannot demonstrate that she was prejudiced by the OAH's delay because she served more than the 90-day revocation period required by the DMV's *Order of Revocation.* To reinstate her license in West Virginia, she is only required to take the DUI Safety and Treatment Classes and to pay the reinstatement fees. Because she has a valid license in Virginia, she can do that. Her ability to drive to and for work on a valid Virginia license makes her factual situation patently distinguishable from *Staffileno*.

This case is substantially similar to the facts in *Straub*. There, Mr. Straub testified that he was employed as a pharmaceutical sales representative; his employer issued notices of potential layoffs regularly during the time between his arrest and administrative hearing; he attempted to secure other employment; and once job recruiters learned that his driver's license could possibly be revoked, the recruiters would no longer continue the job search. 239 W. Va. 844, 806 S.E.2d 768, 771. As to the post-hearing delay, this Court determined that Mr. Straub "could identify no actual and substantial prejudice, e.g., some type of detrimental change in his circumstances related to the delay in the OAH

issuing the final order." 239 W. Va. 844, 806 S.E.2d 768, 775.

Like Mr. Straub, Ms. Rhodenizer could not identify a detrimental change in her circumstances **as a result of or related to the delay.** She knew about the OAH decision and chose to change jobs seven months ***after*** receiving the order. She knew the outcome of her case and chose to take a job in a rural location which is farther from her home. Therefore, her change in circumstances was not related to the OAH delay but was related to the knowing choices that she made.

Further, Ms. Rhodenizer's failure to seek mandamus relief and raising the delay issue for the first time on appeal to the circuit court warranted a finding that she did not suffer actual and substantial prejudice as a result of the delay. This Court has held that "a party who elects not to seek mandamus relief but who, instead, raises the delay issue for the first time on appeal to the circuit court, does so at his peril. The reviewing court is free to consider the aggrieved party's failure to pursue a ruling as a factor in determining whether he has suffered actual and substantial prejudice as a result of the delay." 239 W. Va.538, 545, 803 S.E.2d 508, 515. Here, the circuit court ignored the Respondent's failure to move her appeal along at the OAH.

Ms. Rhodenizer failed to demonstrate that she suffered "some type of detrimental change in ...circumstances ...related to the delay in OAH issuing its final order." 239 W. Va. 834, 851, 806 S.E.2d 768, 775. There has been no detrimental change in the Respondent's circumstances due to the delay in the OAH issuing a decision. She voluntarily changed her circumstances ***after*** the OAH issued its order. In addition, she did not seek relief in *mandamus*. Accordingly, Ms. Rhodenizer failed to prove that she suffered actual and substantial prejudice ***as a result of the delay*** and the circuit court erred in so holding.

**C. Ms. Rhodenizer waived her right to an evidentiary hearing, and the circuit court erred by granting an evidentiary hearing regarding the Respondent's alleged prejudice caused by post-hearing delay after she failed to schedule a hearing and after the matter had been fully briefed.**

When Ms. Rhodenizer filed her *Petition for Judicial Review* (App. 145-170), she alleged that she was actually and substantially prejudiced by the delay in the OAH issuing its *Final Order*. In her petition, she correctly stated that in procedural irregularity cases such as this, she has the burden of proof:

> 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, **the 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.

Syl. Pt. 2, *Reed v. Staffileno, supra,* (emphasis added.) *See also, Straub v. Reed, supra,* (holding that "we decline to grant Mr. Straub relief because he can identify no actual and substantial prejudice, e.g., some type of detrimental change in his circumstances, related to the delay in OAH issuing its final order."); *Reed v. Boley, supra,* (holding that "Mr. Boley has not specifically identified some type of detrimental change in his circumstances that was related to the delay in OAH issuing its final order itself, like the circumstances before us in *Staffileno*, and thus, we conclude that the circuit court's finding of prejudice was erroneous.")

Pursuant to *Staffileno*, *Straub,* and *Boley,* the petitioner must demonstrate that she has suffered actual and substantial prejudice as a result of the delay. The burden of proof was on Ms. Rhodenizer, the petitioner below, and as she pointed out in her *Brief,*

According to Black's Law Dictionary, "[t]he burden of proof includes both the

> burden of persuasion and the burden of production. – Also termed evidentiary burden, evidential burden; onus probandi. BURDEN OF PROOF, *Black's Law Dictionary* (10th ed. 2014). "Prove" is defined as "[t]o establish or make certain; to establish the truth of (a fact or hypothesis) by satisfactory evidence." PROVE, *Id.* (emphasis added).

(App. 138.)

The Petitioner proffered one set of averments in her petition (App. 147-148) and proffered a different set of averments in her brief. (App. 141-142.) " 'A proffer is not evidence, *ipso/facto.*' *U.S. v. Reed,* 114 F.3d 1067, 1070 (10th Cir.1997); *See also, Crawley v. Ford,* 43 Va.App. 308, 597 S.E.2d 264 (2004); *Jones v. U.S.,* 829 A.2d 464 (D.C.2003); *Parker v. US.,* 751 A.2d 943 (D.C.2000)." *State ex rel. Miller v. Karl,* 231 W. Va. 65, 70, 743 S.E.2d 876, 881 (2013). Moreover, a " 'proffer is not evidence unless the parties stipulate that a proffer will suffice.' *Ford v. State,* 73 Md.App. 391, 404, 534 A.2d 992, 998 (1988)." 231 W. Va. 65, 70, 743 S.E.2d 876, 881.

The Respondent filed her brief with the circuit court (App. 129-144), alleging, *inter alia,* that she was actually and substantially prejudiced by the delay between her OAH hearing and the entry of the OAH *Final Order.* (App. 132, 140-142.) There was no evidence in the record to support her allegations of actual and substantial prejudice. The DMV filed its response brief with the circuit court (App. 110-128) in which it alleged, *inter alia,* that because Ms. Rhodenizer failed to put on evidence of a detrimental change in her circumstances post-hearing (i.e., she failed to have a *Staffileno* hearing), the circuit court could not find that she was actually and substantially prejudiced by the delay in the OAH entering its order. (App. 125-127.)

Notably, the Respondent made a clerical error[5] and proffered facts from another brief. (App.

[5] The facts in her brief were significantly different from those which the Respondent alleged in her *Petition for Judicial Review.* (App. 147-148.)

141-142.) She alleged that those facts met her burden of proof regarding actual and substantial prejudice. The Respondent's then counsel signed the brief submitted to the circuit court which, pursuant to W. Va. R. Civ. Pro. 11(b)(3) (1998)[6], represented to the court that "the allegations and other factual contentions have evidentiary support."

After the DMV alerted the Respondent that she failed to prove that she was actually and substantially prejudiced by the OAH post-hearing delay because she failed to put on evidence, she filed a *Motion for Evidentiary Hearing* with the circuit court (App. 108-109) then filed her reply to the DMV's response brief. (App. 99-104.) In addition, Ms. Rhodenzier filed an affidavit which outlined her alleged detrimental change in circumstances which caused her actual and substantial prejudice. (App. 105-107.) The facts contained in the Respondent's affidavit differed completely from those alleged in her brief. The DMV objected to the Respondent's motion for an evidentiary hearing. (App. 90-98.)

The DMV also filed a motion to strike the Respondent's reply brief (App. 82-89), and Ms. Rhodenizer filed a response to the DMV's objection to her affidavit and belated request for an evidentiary hearing. (App. 76-81.)

Ms. Rhodenizer complied with W. Va. R. Pro. Admin. App. 6(c) (2008) by requesting an evidentiary hearing in her petition; however, she did not file a notice of hearing for her request for a stay hearing. "Pursuant to Rule 6(d)(1) of the West Virginia Rules of Civil Procedure, a notice of hearing **shall** be mailed nine days prior to the scheduled hearing, unless a different period is fixed by the court." *Truman v. Auxier*, 220 W. Va. 358, 360–61, 647 S.E.2d 794, 796–97 (2007) (per curiam) (emphasis added). Ms. Rhodenizer filed her request for an evidentiary hearing on February

[6] Pursuant to W. Va. R. Civ. Pro. 81(a)(1) (1998), the Rules of Civil Procedure are applicable to review of decisions of administrative agencies.

20, 2020 when she filed her petition, but she did not file a notice of hearing until ***after*** she received the DMV's brief and realized that she had failed to meet her burden of proof. Ms. Rhodenizer had four months between the filing of her petition and the filing of her brief to schedule an evidentiary hearing yet failed to do so. Instead, she waived her right to an evidentiary hearing when she filed her brief and attested that the allegations and other factual contentions had evidentiary support.

"The essential elements of the doctrine of waiver are: (1) the existence of a right, advantage, or benefit at the time of the waiver; (2) actual or constructive knowledge of the existence of the right, advantage, or benefit; and (3) intentional relinquishment of such right, advantage, or benefit." *Bruce McDonald Holding Co. v. Addington, Inc.*, 241 W. Va. 451, 825 S.E.2d 779, 781 (2019). In her *Petition for Judicial Review*, Ms. Rhodenizer acknowledged her burden of putting on evidence of actual and substantial harm at a *Staffileno* hearing. After the matter was initially scheduled for hearing but not noticed (App. 96), the Respondent failed to reschedule an evidentiary hearing. Instead, she waited four months then voluntarily prepared and submitted a brief in which she attested that the factual contents were true. (App. 129-144.)

In this instant matter, the circuit court entered a briefing schedule on May 27, 2020, which stated that, "[u]nless otherwise requested by counsel or the parties, the Court will consider this action submitted on July 31, 2020 for a decision on briefs." (App. 325.) On June 4, 2020, the circuit court entered an amended briefing schedule which again provided "[u]nless otherwise requested by counsel or the parties, the Court will consider this action submitted on July 31, 2020 for a decision on briefs." (App. 327.) The Respondent submitted her brief on June 16, 2020 without asking for an evidentiary hearing. (App. 129-144.) The DMV submitted its response brief on July 16, 2020. (App. 110-128.) Accordingly, Ms. Rhodenizer waived the right to an evidentiary hearing after both parties

briefed the matter. *See Corp. of Harpers Ferry v. Taylor*, 227 W. Va. 501, 711 S.E.2d 571 (2011) (holding that the city waived its right to request an evidentiary hearing on the landowner's request for attorney fees because the scheduling order specifically noted that the issues would be decided on the records and pleadings, and the city filed its response without challenging the amount of attorney fees requested.)

Even if this Court does not find that the Respondent waived her right to a *Staffileno* hearing by filing a brief in which she attested that the factual representations were true, the circuit erred by accepting the Respondent's deficient and belated request for an evidentiary hearing and by not ruling on the DMV's *Motion to Strike.*

"An application to the court for an order **shall** be by motion which, unless made during a hearing or trial, **shall** be made in writing, **shall** state with particularity the grounds therefor, and **shall** set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion." W. Va. R. Civ. Pro. 7(b) (1998) (emphasis added).

In her motion for evidentiary hearing (App. 108-109), the Respondent did not allege that her counsel misstated the facts upon which she relied to support her contention that she was actually and substantially prejudiced. Instead, she asked to present her "testimony as evidence of irreparable harm and substantial prejudice on the matter of delay." (App. 108.) Moreover, in her motion, the Respondent did not explain what she wanted the circuit court to do with the evidence from an evidentiary hearing after the matter had been briefed by both parties. There was no request to amend the scheduling order, to file supplemental briefs or to ignore the averments which the Respondent had already made in her brief; therefore, any new evidence would have been moot and irrelevant.

In her *Motion for Evidentiary Hearing*, the Respondent also failed to state good cause why

the circuit court should ignore the West Virginia Rules of Civil Procedure and the court's briefing schedule. The Respondent's counsel was aware of the requirement to put on evidence of actual and substantial prejudice, and once counsel reviewed the file and began writing the *Petitioner's Brief*, he knew or should have known that no evidence had been taken in this matter because there was no transcript from which to cite. He should have requested an evidentiary hearing prior to writing and submitting a brief under attestation that the facts presented were correct. Indeed, the factual representations in her brief were completely inaccurate.

The circuit court erred by not requiring the Respondent to state good cause as to why she failed to meet her burden of proof by putting on evidence of actual and substantial prejudice prior to the submission of briefs and why the Respondent ignored the rules of civil procedure in filing her deficient *Motion for Evidentiary Hearing*. Further, before the DMV could schedule its July 29, 2020 *Objection to Petitioner's Motion for Evidentiary Hearing* or its July 30, 2020 *Motion to Strike Petitioner's Reply to Response Brief of the Division of Motor Vehicles* for hearing, the circuit court scheduled a *Staffileno* hearing via email on August 4, 2020 without addressing the Respondent's procedural errors as alleged in the DMV's motion thus nullifying the DMV's objections. (App. 75.) At the *Staffileno* hearing, the DMV again objected to Ms. Rhodenizer putting on evidence after the matter had been briefed by the parties. (App. 27.) The circuit court noted the DMV's objection. *Id.*

This Court has held that "[o]n appeal of a case involving an action covered by the Rules of Civil Procedure, this Court will disregard and regard as harmless any error, defect or irregularity in the proceedings in the trial court which does not affect the substantial rights of the parties." Syllabus point 2, *Boggs v. Settle*, 150 W. Va. 330, 145 S.E.2d 446 (1965). In *Boggs*, this Court determined that "the provisions of R.C.P. 59(b) which require that a motion for a new trial shall be served not

later than ten days after the entry of the judgment are mandatory and jurisdictional; and, by reason of R.C.P. 6(b), the parties have no legal authority to extend the period prescribed for service of the motion." *Id.* at 334, 145 S.E.2d at 449.

As in *Boggs*, the Respondent herein had a mandatory duty regarding the prosecution of her case. She was required to put on evidence that she "has suffered actual and substantial prejudice as a result of the delay." Syl. Pt. 2, *Reed v. Staffileno*. The circuit court clearly erred in failing to recognize that she did not meet this burden.

## CONCLUSION

For the reasons outlined above, the circuit court's final order must be reversed. The Respondent failed to show actual and substantial prejudice at the *Staffileno* hearing, and the circuit court erred in providing her with a *Staffileno* hearing.

Respectfully submitted,

EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

Elaine L. Skorich

Elaine L. Skorich, WVSB # 8097
Assistant Attorney General
DMV - Legal Division
P.O. Box 17200
Charleston, WV 25317-0010
Telephone: (304) 558-2522
**Elaine.L.Skorich@wv.gov**

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**
**NO. 20-0896**
**(Circuit Court Civil Action No. 20-AA-25)**

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

**Petitioner,**

**v.**

**COURTNEY RHODENIZER,**

**Respondent.**

## CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 16th day of February, 2021, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, to wit:

David Pence, Esquire
ZERBE & PENCE PLLC
P. O. Box 3667
Charleston, WV 25336

Elaine L. Skorich
Elaine L. Skorich