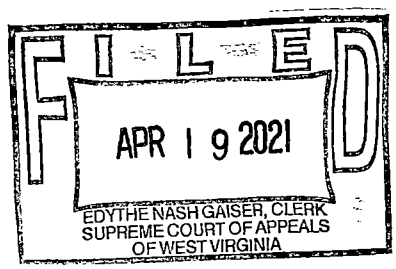
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0896
(Circuit Court Civil Action No. 20-AA-25)



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

Petitioner,

v.

COURTNEY RHODENIZER,

Respondent.

REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES **Page**

STATUTES **Page**

RULES **Page**

MISCELLANEOUS **Page**

Now comes Petitioner Everett J. Frazier, Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), by and through his undersigned counsel, and pursuant to R. App. Pro. 10(g) (2010) submits the *Reply Brief of the Division of Motor Vehicles*.

ARGUMENT

A. The Respondent's alleged prejudice

In her response brief, Ms. Rhodenizer alleges that "the Petitioner ignores the fact that during the five and one-half year (5½) year delay, Petitioner [*sic*] 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 vehicle." (Resp. Br. at P. 9.)

At the *Staffileno*[1] hearing below, Ms. Rhodenizer testified on direct-examination that if the *Final Order* of the Office of Administrative Hearings ("OAH") had been entered in 2015 or 2016, she "would have definitely done things differently. I would have stayed in Blacksburg. I would have – I had a house there. I was next to the bus route." (App. at P. 39.) However, on cross-examination, she testified that her move from Blacksburg to Christiansburg was not related to her job but was a better option for her family. "It was more affordable to live in Christiansburg. It was away from the college students. It was a better neighborhood for my family, for my child." (App. at PP. 45-46.) Significantly, there is no evidence in the record that the Respondent would not have chosen to have a child while waiting on the OAH final order.

Also in her brief, Ms. Rhodenizer alleged that during the time that she was waiting on the OAH order, "her husband stopped working to care for their young child and they are completely dependent upon her wage." (Resp. Br. at P. 10.) This is a mischaracterization of her testimony. On

---

[1] 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).

direct-examination, she testified that "I'm a sole provider for my family. . . I don't even know if I would be able to keep my house because my husband doesn't work." (App. at P. 39.) On cross-examination Ms. Rhodenizer testified,

> Q. You said you got married in December of 2013 to your husband, and he does not work. Did he work at the time you got married?
> A. No, he did not.
> Q. So has he worked since you got married?
> A. He has not, no.

(App. at P. 50.) Accordingly, Ms. Rhodenizer was married at the time of her administrative hearing in 2014, and her husband has not worked from the time of their marriage in 2013 throughout the time of the *Staffileno* hearing on September 1, 2020. There is no evidence in the record of a detrimental change[2] in the Respondent's circumstances regarding her husband's employment status.

Further, the Respondent testified at the *Staffileno* hearing that,

> I am no longer a manager at the Cellar. I just help train. I have passed – the girl who is managing the Cellar now, she and I still work closely together. I'm just still picking up serving shifts there to kind of supplement my income. Serving money is still good money. And I'm helping her train her new employees. And if she needs a day off as a manager, I step in and I help her run the floor. I still help her write schedules because she is still new at it. So I'm not exactly a full manager there, but I'm still helping out. I'm still on the payroll and still a large part of that restaurant because I was there for a very long time. . . My last day as manager there was August 8th.

(App. at PP. 46-27.)

Ms. Rhodenizer waited until after she received the OAH *Final Order* before she voluntarily

---

[2] 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**." *Straub v. Reed*, 239 W. Va. 844, 851, 806 S.E.2d 768, 775 (2017) (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.' ")

and knowingly left the manager position at the Cellar in Blacksburg and took the manager position at the Palisades in Eggleston. The OAH delay in entering its Final Order is wholly unrelated to her decision to quit her management job at the Cellar, which is 20 minutes from her home, to take the job at the Palisades which is 35-40 minutes from her home.

In her brief, the Respondent complains that she lives 20 minutes from the Cellar and that ride sharing in that area is unreliable and very expensive. (Resp. Br. at P. 9.) Uber or Lyft may be sparse and inconvenient from her home in Christiansburg to her job in Blacksburg and when she may need to go out in Blacksburg for work errands, but ride sharing is an available option. Moreover, Ms. Rhodenizer's driver's license in Virginia was valid from the time that the final order was entered in January of 2020 until it was set to expire in December of 2020. (App. at P. 38.) She was able to drive validly to and from work and for work purposes, and she was able to drive to and from the alcohol safety and treatment classes required to reinstate her driving privileges in West Virginia.

Unlike the licensee in *Staffileno, supra*, who required a commercial driver's license for his job as a school bus driver and could not use substitute transportation to complete his work related duties, the Respondent could have driven her own vehicle until she reinstated her driving privileges in West Virginia; could have asked other employees at the Cellar to run work related errands; or could have called an Uber. Indeed, it was possible for her to remain employed: it was just inconvenient. Inconvenience is not a detrimental change in circumstances.

Finally, on page 4 of her brief, the Respondent continues to rely on her inaccurate speculation that her license revocation in West Virginia would be retroactively enhanced because of a previous DUI which she received in Virginia. While Ms. Rhodenizer testified that she has "been told" that her license revocation for the instant matter would be "five years because I had a previous DUI" in

Virginia (App. at P. 40), the evidence in the record shows that the West Virginia DMV revoked her driving privileges for 90 days. (App. at P. 181.) Ms. Rhodenizer's counsel hypothesized to the Court at the *Staffileno* hearing that "the penalty for two DUIs within ten years, it's a ten-year revocation reduced to five. So she's looking at five years because the DMV filed it under a first offense, inadvertently when it goes through, it can easily be picked up and then she's enhanced to as second offense which in my experience is what happens." (App. at P. 42.)

Presumably, the Respondent's counsel was referring to a change in the DMV's practice which occurred after this Court's opinion in *Reed v. Haynes*, 238 W. Va. 363, 795 S.E.2d 518 (2016). In that matter, the DMV did not enhance Ms. Haynes' 2012 revocation in West Virginia based upon her 2006 DUI offense in Ohio. This Court opined that,

> West Virginia is a member of the Driver License Compact, W. Va. Code §§ 17B–1A–1 to -2 [1972]. "Under the Driver License Compact, each state is required to treat a conviction in a sister state in the same manner as it would an in-state conviction." 7A Am.Jur.2d *Automobiles and Highway Traffic* § 154 (1997). This premise was stressed in *Shell* [*v. Bechtold*] wherein the Court stated, "As a member of the interstate Driver License Compact and by virtue of Article IV, Code, 17B–1A–1, the DMV is required to treat out-of-state convictions in the same manner as it would in-state convictions." 175 W. Va. at 795, 338 S.E.2d at 395–96. Despite our clear body of law on this issue, the DMV has not attempted to use Ms. Haynes' 2006 Ohio DUI to enhance her penalty for the 2012 DUI. In the future, we urge the DMV to give substantial thought and deliberation to using out-of-state DUI convictions to enhance the penalty for committing a DUI in this State.

238 W. Va. 363, 368, 795 S.E.2d 518, 523.

Because Ms. Rhodenizer's DUI offense occurred in 2013 prior to this Court's 2016 instruction in *Haynes*, the DMV did not retroactively enhance Ms. Rhodenizer's revocation or any other driver's revocation which occurred prior to the entry of the decision in *Haynes*. Moreover, at the hearing below, the DMV's counsel proffered to the circuit court that Ms. Rhodenizer had

completed the entire 90 days of revocation required to reinstate her driving privileges but needed to complete the West Virginia Alcohol Safety and Treatment Program, which she could complete while driving on her valid Virginia license. (App. at P. 41.) Ms. Rhodenizer chose not to drive validly to the safety and treatment classes and to reinstate her license prior to its expiration in December of 2020.

In sum, 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. Once she knew the outcome of her case, she chose to take a job in a rural location which is farther from her home. She could have remained employed by validly driving on her Virginia license to and from work, for work related errands, and to and from safety and treatment classes. Therefore, her change in circumstances was not related to the OAH delay but was related to the knowing choices that she made and her failure to complete the requirements for reinstatement prior to the expiration of her license in December of 2020.

B. The circuit court's procedural error

In her brief, the Respondent alleges that 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." (Resp. Br. 12.) The Respondent's position defies logic.

Per the circuit court's briefing schedule, the parties were required to write briefs on the issues raised in the *Petition for Judicial Review.* Ms. Rhodenizer raised the issue of actual and substantial prejudice caused by the delay in the OAH entering its *Final Order*. The issue of prejudice was not

in the record below but is a procedural irregularity. *See*, W. Va. Code § 29A-5-4(f) (1998). Ms. Rhodenizer was the petitioner below and had the burden of proving her alleged actual and substantial prejudice. A proffer of counsel is not evidence. *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). Ms. Rhodenizer failed in her burden to schedule a hearing to present the required evidence of prejudice.

Moreover, on page 18 of its brief to this Court, the DMV alleged that Ms. Rhodenizer 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 DMV further argued that 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). The Respondent failed to address the elements of waiver; therefore, this Court should assume that she agrees with the DMV's view of the issue. R. App. Pro. 10(d) (2010).

Finally, Ms. Rhodenizer blames the circuit court for not scheduling the evidentiary hearing which she was required to notice. "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." (Resp. Br. at P. 13.) The Respondent did not carry her burden of showing actual and substantial prejudice.

CONCLUSION

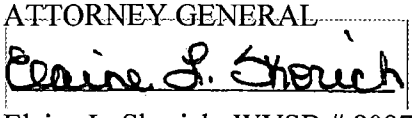
For the reasons outlined above as well as in the *Brief of the Division of Motor Vehicles*, the DMV respectfully requests that this Court reverse the circuit court order.

Respectfully submitted,

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

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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

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 **REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 19th day of April, 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