

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State ex rel Joe Miller, Commissioner,
West Virginia Division of Motor Vehicles,
Petitioner**

vs.) **No. 12-0380** (Wyoming County 11-C-85)

**The Honorable Warren R. McGraw, Judge of the
Circuit Court of Wyoming County,
Respondent**

and

**Roy H. Keith,
Party in interest**

**FILED
May 30, 2012**

released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Joe Miller, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter “DMV”), through Darrell V. McGraw, Jr., Attorney General, and Elaine L. Skorich, Assistant Attorney General, petitions this Court to invoke its original jurisdiction pursuant to Rule 16 of the Revised Rules of Appellate Procedure. The petitioner seeks a writ of prohibition against the respondent, Warren R. McGraw, Judge of the Circuit Court of Wyoming County, challenging the circuit court’s denial of the DMV’s motion to dismiss the administrative appeal filed by Roy H. Keith, the party in interest. Having thoroughly reviewed the petition,¹ the record and the applicable law, this Court concludes that the petitioner is entitled to the relief requested and grants the writ of prohibition. As this case presents no new or substantial question of law, its proper disposition is by memorandum decision as contemplated by Rule 21 of the Revised Rules of Appellate Procedure.

This case arises from a July 18, 2009, arrest of the party in interest, Roy H. Keith, for driving under the influence of alcohol. The arresting officer submitted the appropriate report of this arrest to the petitioner to initiate license revocation proceedings. On August 14, 2009, the petitioner sent an order of revocation to Mr. Keith, revoking his

¹The respondents were afforded an opportunity to respond to the petition. No response was received.

privileges to operate a motor vehicle effective September 18, 2009, for driving under the influence and for refusing to submit to a secondary chemical test. Mr. Keith timely requested an administrative hearing to contest this revocation. This hearing was initially scheduled for November 5, 2009, but was continued several times. The hearing was ultimately scheduled for and held on October 7, 2010. The record reflects that Mr. Keith personally signed for the registered mail containing the notice of hearing. As well as indicating the time and place of the hearing, this notice of hearing contained a statement that failure to appear at the hearing without a continuance would cause the suspension or revocation to be upheld.

Mr. Keith failed to appear at the October 7, 2010, hearing, and by order dated May 6, 2011, the DMV revoked his license effective June 21, 2011. Mr. Keith then filed a petition for appeal of this revocation in the Circuit Court of Wyoming County on June 17, 2011, pursuant to the Administrative Procedures Acts (hereinafter “APA”), W. Va. Code § 29A-5-1 *et seq.* (2008). Specifically, Mr. Keith requested judicial review of a contested case, pursuant to W. Va. Code § 29A-5-4 (2008). In response to this appeal, the petitioner filed a motion to dismiss for lack of jurisdiction and venue, alleging that judicial review under the APA was not appropriate because this was not a contested case subject to review within the meaning of the statute. The petitioner argued that Mr. Keith's failure to appear at the administrative hearing automatically reinstated the previously ordered revocation, pursuant to W. Va. C.S.R. 91-1-3.7.1. Furthermore, because this automatic registration was a ministerial act of the Commissioner, not a contested act, there was no judicial review under W. Va. Code 29A-5-4. The petitioner posited that if Mr. Keith wished to seek further judicial action on this revocation, he would have to file a request for an extraordinary writ in the Circuit Court of Kanawha County.

A hearing was held on the petitioner's motion to dismiss. By order entered February 1, 2012, the circuit court denied the motion to dismiss and set this case for a hearing on February 15, 2012. In addition to denying the relief requested by the petitioner, the circuit court order stated, *inter alia*, that the revocation was subject to judicial review pursuant to the APA. A hearing was scheduled upon the petition for appeal.

On March 23, 2012, the petitioner filed the instant petition for writ of prohibition seeking to prohibit the Circuit Court of Wyoming County from further proceedings in this matter and seeking dismissal of the underlying petition for appeal. By order entered March 29, 2012, all proceedings in the circuit court were stayed pending resolution of this petition. The respondents were directed to file any responses to the petition by April 13, 2012. As noted, neither the respondent nor the party in interest has filed a written response. This matter is therefore ripe for consideration by this Court.

The petitioner asserts that its only remedy is to seek the present writ of prohibition to correct the lower court's clear legal error. Pursuant to W. Va. Code § 53-1-1

(1923), a writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, which the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.

In determining whether to grant the requested writ of prohibition, we are guided by the following law:

“In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.”

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Furthermore, we have stated

“In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in

advance.”

Syl. pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

In the case before us, we agree with the contentions of the petitioner that the subject license revocation is not a “contested case” within the definition of the APA. Reinstatement of the original revocation was warranted by Mr. Keith’s failure to appear.² Further, we note that our statutory law defines a contested case as “a proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing....” W. Va. Code § 29A-1-2(b) (2008). In the instant case, because there was no administrative hearing, there was nothing to make this automatic revocation a contested case within the definition of W. Va. Code § 29A-1-2(b). Thus, because the automatic nature of the reinstatement of Mr. Keith’s suspension renders this case a non-contested case, there is nothing to review under the provisions of the APA.

It was clear legal error on the part of the circuit court to deny the petitioner’s motion to dismiss the appeal of Mr. Keith’s license revocation. To correct this clear legal error, we hereby grant the writ of prohibition. We find that the circuit court clearly exceeded its authority and legitimate powers by failing to dismiss the petition for appeal of the Commissioner’s revocation. The respondent is ordered to dismiss the petition for appeal filed by Mr. Keith.

Writ granted as moulded.

²Our law is settled on whether the failure to appear at the administrative license revocation hearing acts as a matter of law to reinstate the revocation or suspension. W. Va. C.S.R. § 91-1-3.7.1 (2005) states as follows:

3.7.1. The Division shall automatically reinstate the revocation or suspension and the assessment of costs outlined in Subsection 3.11 of this rule if the person fails to appear either in person or by counsel, at the hearing without obtaining a continuance pursuant to Subsection 3.8 of this rule.

ISSUED: May 30, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum