FILED
May 26, 2022
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Everett Frazier, Commissioner,
West Virginia Division of Motor
Vehicles,
Respondent Below, Petitioner

vs.) No. 19-1022 (Kanawha County 19-AA-84)

Justin Hensley,
Petitioner Below, Respondent

MEMORANDUM DECISION

Petitioner Everett Frazier, Commissioner, West Virginia Division of Motor Vehicles, by counsel Patrick Morrisey and Janet E. James, appeals the Circuit Court of Kanawha County's October 8, 2019, order reversing the August 1, 2019, final order of the Office Administrative Hearings ("OAH"), which affirmed the order of revocation issued by the West Virginia Division of Motor Vehicles ("DMV") on April 15, 2014. Respondent Justin Hensley, by counsel David Pence, filed a response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Respondent was arrested for driving under the influence ("DUI") of alcohol on March 23, 2014, and he was issued an order of revocation on April 15, 2014.[1] Respondent sought a hearing before the OAH, which was held on July 9, 2015. More than four years later, on August 1, 2019, the OAH entered its final order affirming the order of revocation, which respondent appealed to the circuit court.

The circuit court held an evidentiary hearing on September 20, 2019. Respondent testified that at the time of his hearing before the OAH, he held a job that he was able to perform from his

[1] The circumstances surrounding respondent's arrest are not at issue in this appeal.

home. In approximately May of 2018, however, respondent took a position with a different organization that required him to "travel across the whole state to provide a STEM curriculum to counties and schools that want it."

Respondent further testified that "[i]t's common knowledge around the office" that his employment with this new employer would be terminated if he did not have a valid license, and before he was hired, he was informed that he was required to have a valid license. Respondent submitted his Team Member Guide—in essence, an employee handbook—which prohibits an employee "from driving on behalf of [employer] if your driver's license is suspended or if your driving privileges have been revoked for any period of time for any reason." The Team Member Guide also specifies that "Team Members in roles that may require driving on behalf of [employer] will be asked to verify they hold a valid license and as part of this policy, are required to report any suspension of driving privileges, regardless of the nature of the suspension." In addition, respondent testified that he could not have a restricted driver's license or interlock system in his car, explaining that, "I drive on behalf of [employer] during work hours and when I'm at these school districts. So when I take administrators or board of education or even state department of education, I'm representing my company." He also said that "that could easily get back to my employer, and that would therefore terminate my employment." Respondent's employer expects respondent to travel with members of the education field, and respondent is his employer's sole employee in West Virginia. Respondent quantified that he drives with either an administrator from the state or with his boss throughout West Virginia "roughly 25 to 30 times a year."

Respondent had not informed his employer of his pending DUI issue because "[i]t's common knowledge that my—I will be terminated from my position." Respondent also explained that he took this new position requiring a driver's license despite the looming possibility of a revocation because

> [a]t the time of my last hearing, I didn't—I thought whenever it was concluded that it was over with. I never received anything, you know, two months ago, I suppose. And, obviously, if it would have been prior to this, I could have completed it before even taking this position, and it wouldn't be an issue.[2]

Respondent also acknowledged that his former position ended in May of 2018 because the position itself was terminated: "It was a part-time position . . . . They terminate year by year. It just varies."

Melissa Carte, a hearing examiner for the OAH, but not the hearing examiner for respondent's hearing, reviewed respondent's case file. Ms. Carte noted that William Bands, the hearing examiner for respondent's case, heard respondent's case in July of 2015 and submitted a proposed order on October 2, 2018. According to Ms. Carte, during the three-plus years a final order in respondent's case was pending, Mr. Bands's wife became ill and died, and he held over 250 hearings. But Ms. Carte recognized that this case did not involve novel concepts or difficult evidentiary issues, and she therefore believed that respondent's hearing "should have been a quick

[2] In addition, respondent's criminal case was dismissed, and the matter was expunged from his record.

one." She also acknowledged that it would not be reasonable to intentionally let a case linger for four years.

Following Mr. Bands's submission of his proposed order to the chief hearing examiner, it did not appear to Ms. Carte that the chief hearing examiner made any alterations to it. Ms. Carte surmised that the reason it then took another ten months for the order to be issued by the OAH was because the OAH has twelve hearing examiners who

> are submitting final orders every day, and the process is they are pulled by a paralegal who reviews them to make sure—you know, checks the accuracy and the correct application of the law. So it goes through that process first. And if there are any questions, then they would talk to the hearing examiner before it actually makes it to the chief hearing examiner.

Ms. Carte also testified that the OAH had issued over 15,000 orders since 2012.

Ms. Carte testified that neither respondent nor respondent's counsel contacted the OAH to inquire about the order or request that it be expedited.[3] The DMV filed a motion to expedite, but Ms. Carte said that the DMV files a motion to expedite in every case, so "there wasn't much we could do if you file one in every case."

Ms. Carte acknowledged that the OAH has "had an issue with backlog." She attributed the backlog to staffing issues and conflicting orders from the Legislature and this Court regarding the prioritization of case resolution. Ms. Carte testified to steps taken by the OAH to eliminate the backlog, which included the hiring of temporary and contract employees and the creation of a new order template that is "easier to follow . . . [and] to understand." Ms. Carte also identified an anticipated turnaround time of sixty days between a hearing and the issuance of a final order for future cases, but she testified that during the pendency of respondent's case, the OAH had no policy addressing the timeframe for issuing a final order, no penalty for issuing an order years after a hearing, and no electronic reminder system alerting hearing examiners to the age of pending cases. Ms. Carte further acknowledged that the OAH operated with a budget surplus in 2015, 2016, 2017, and 2018, so the delay in this case was not caused by a lack of funding.

John Bonham II, assistant general counsel for the DMV, testified that the DMV "has initiated and spearheaded . . . legislation . . . to allow people to go directly on to interlock without having suffered an immediate revocation. That has alleviated overall the number of cases that have been filed and go to hearing." The DMV has also,

> informally and formally, been requesting and cajoling and persuading and trying to influence the OAH to push . . . out more orders. We saw the delay problem coming on early on as an issue, and to no avail. We were unable to do that. So we started filing motions in every case. Motions for hearings, trying to do anything we could to speed up the case.

[3] Before the OAH, respondent was represented by counsel different from counsel who represented him before the circuit court and this Court.

The circuit court reversed the OAH's final order on October 8, 2019, finding that the OAH's delay in issuing the final order violated respondent's constitutional right to due process of law. The court recounted that respondent's employment requires that he drive his supervisor, school administrators, and other professionals on a regular basis, and his Team Member Guide specified that he needed to maintain a valid driver's license and prohibited him from driving during work hours if his license was revoked for any reason. The court also highlighted respondent's testimony that he was confident his employment would be terminated if his license were revoked.

The court found that if the OAH had timely ruled after the revocation hearing, respondent would have suffered no detriment to his employment, as his employment at the time of the hearing did not require the use of a valid driver's license. The court also found that, other than documenting its work volume, the OAH produced no meaningful justification for the delay. The DMV's sole act to expedite the handling of this case was filing a motion more than three years after the hearing was held requesting that a decision be rendered. But because the DMV filed similar motions in all cases pending before the OAH, "the net impact of that action did not result in decisions being expedited." Consequently, the court found that "the prejudice suffered as a result of the post-hearing delay outweighs the reasons offered by [the DMV] for the delay." This appeal followed.

In our review 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.

Syl. Pt. 1, in part, *Frazier v. Derechin*, -- W. Va. --, 866 S.E.2d 101 (2021) (citation omitted). Additionally, when "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*." *Id.* at --, 866 S.E.2d at 103, Syl. Pt. 2, in part.

The DMV raises three assignments of error on appeal. First, it asserts that the circuit court erred in finding, under *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017), that respondent was actually and substantially prejudiced by the delay in the entry of the OAH's final order. The DMV asserts that *Staffileno* is distinguishable because, here, respondent failed to show that his change in circumstances was a result of or related to the delay. Rather, according to the DMV, respondent's initial employment came to a natural conclusion. The DMV also characterizes the delay as only presumptively prejudicial—not actually and substantially prejudicial—because the Team Member Guide does not, in fact, state that respondent's employment *will* be terminated for a failure to timely report an arrest. It states that such failure "will result in possible discipline," up to and including termination. *See Miller v. Moredock*, 229 W. Va. 66, 71, 726 S.E.2d 34, 39 (2011) (specifying that a party claiming to have been prejudiced by OAH delay in entering a final order "must prove actual prejudice from the delay" and "preclud[ing] the use of presumptive prejudice"). The DMV further argues that because respondent rested his opinion of what his employer would do on "common knowledge," this too undermines the court's finding of actual and substantial prejudice.

The DMV also points to respondent's failure to request that the final order be expedited or to seek mandamus relief, factors which it contends warrant a finding that respondent did not suffer actual and substantial prejudice as a result of the delay. This is so, the DMV argues, because

> 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.

Staffileno, 239 W. Va. at 545, 803 S.E.2d at 515 (citation omitted).

In addition, the DMV submits that there was good cause for the delay, noting that it showed its good faith efforts to resolve the delay by communicating with the OAH and spearheading the passage of legislation allowing drivers to participate in the interlock system in lieu of a hearing before the OAH.

In *Staffileno*, the driver was issued an order of revocation, and he requested an administrative hearing to contest that revocation. 239 W. Va. at 541, 803 S.E.2d at 511. A hearing was held, but a final order was not entered until more than three years later. *Id.* In the thirty-nine-month period between his hearing and the issuance of the final order, the driver retired from his desk job, applied for and obtained a commercial driver's license ("CDL"), became a temporary/substitute school bus driver first, and then became a permanent full-time school bus driver for which a valid CDL was necessary. *Id.* at 543, 803 S.E.2d at 513. In reversing the order of revocation, the circuit court found that the driver "made a career change that is now adversely affected by the potential revocation of his [d]river's [l]icense," and this Court agreed that "as a result of [the driver's] change in employment, he will suffer substantial and *actual* prejudice by the imposition of the untimely decision by OAH." *Id.* at 543-44, 803 S.E.2d at 513-14.

Contrary to the position taken by the DMV, the respondent's circumstances and the driver's circumstances in *Staffileno* are practically identical in all material respects. Like the situation in *Staffileno*, respondent's employment with one employer ended in the time between his hearing before the OAH and the issuance of its final order, he began employment with a different employer, and his new position now requires possession of a valid driver's license and regular travel throughout the state. Respondent's Team Member Guide specifies that he is prohibited "from driving on behalf of [employer] if your driver's license is suspended or if your driving privileges have been revoked for any period of time for any reason." If respondent is unable to drive, he can no longer perform an essential function of his position. So, just as we found in *Staffileno*, the circuit court did not abuse its discretion in finding that, due to respondent's change in employment, he will suffer substantial and actual prejudice by the imposition of the OAH's untimely final order.

We further find no error in the circuit court's decision to accord no weight to respondent's failure to seek mandamus relief. A driver who fails to file a petition for a writ of mandamus does "not waive the argument that he was prejudiced by the delay in his circuit court appeal of the revocation order." *Id.* at 545, 803 S.E.2d at 515 (citation omitted). Though such extraordinary relief is available, "a party whose driver's license has been revoked should not have to resort to such relief to obtain a final decision by the Commissioner within a reasonable period of time

following the administrative hearing." *Id.* (citation omitted). And, thus, "a circuit court has discretion to consider the impact of a party's failure to seek a writ of mandamus to compel issuance of a revocation order after a hearing," and that discretion "means that a court may give substantial or no weight to such evidence." *Id.*

In balancing the reasons for the delay, the circuit court heard that the OAH had a backlog of cases and staffing shortages but that the DMV had taken steps to reduce the backlog by communicating with the OAH and initiating the legislation described above. The court ultimately concluded that these asserted reasons did not justify a delay of more than four years. Notably, as was also the case in *Derechin*, the circuit court did not hear reasons specific to respondent's case to justify the delay. *See* -- W. Va. at --, 866 S.E.2d at 109 ("What the circuit court did not hear was that there were some circumstances specific to Mr. Derechin's case that could have caused it to languish for almost four years without a decision."). In fact, Ms. Carte acknowledged that respondent's case was not particularly difficult and that his hearing should have "been a quick one." Thus, the conclusion reached in *Derechin* is equally applicable here: "The circuit court would have been hard-pressed to excuse such an extensive delay by DMV's proffer that there was simply a huge backlog of cases stymied further by staffing issues, and we have not been presented with any justification to disturb the circuit court's findings in this regard." *Id.* Accordingly, we find no error here in the circuit court's conclusion that the prejudice suffered as a result of the delay outweighs the reasons for the delay offered by the DMV.

The DMV's two remaining assignments of error can be addressed in tandem. In its second, it claims that it, in fact, was prejudiced by the OAH's delay. In support, the DMV cites to the dissenting opinion in *Staffileno*: "Neither a licensee *nor the DMV Commissioner* should be required to wait such a long period of time to obtain a decision in an administrative appeal." 239 W. Va. at 546, 803 S.E.2d at 516 (Loughry, J., dissenting) (emphasis added). The DMV also points out that it bears the obligation to remove drunk drivers from the roadways, so allowing respondent to avoid revocation for DUI when he has not been prejudiced "would eviscerate the purpose of the administrative license revocation process." *See* Syl. Pt. 3, *In re Petition of McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005) ("The purpose of this State's administrative driver's license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible."). The DMV further claims to be prejudiced by the OAH's delay "by raiding its coffers each time it must defend the OAH's delay." Therefore, it argues in its third assignment of error, *Staffileno* should be overturned or modified to require that a reviewing court consider the DMV's efforts at resolving delay by the OAH and to require the imposition of a remedy other than recission of the license revocation. The DMV highlights that "[i]n neither the civil nor the criminal context has a party been made to answer for the actions of the tribunal," and it outlines the efforts taken to address the delay.

We addressed similar arguments in *Derechin*, noting that the DMV had asserted that "its prejudice is not adequately considered" and that it "makes no secret that it wants *Staffileno* overturned." -- W. Va. at --, 866 S.E.2d at 109. The arguments were unavailing there, and they fare no better here because, as in *Derechin*, "DMV has a mistaken perspective" in claiming that it is wrongly punished for OAH delay. *Id.* at --, 866 S.E.2d at 110. Instead, "[w]e do not permit the reversal of revocations for OAH's post-hearing delays to *punish* the DMV for OAH's delay, but to *protect* the due process rights of drivers." *Id.* "[A] driver's license is a property interest and such

interest is entitled to protection under the Due Process Clause of the West Virginia Constitution." *Id.* And, again taking language from *Derechin* that could only be more on point if the delay in *Derechin* had been longer to match the length of delay here,

> [t]hough prejudice is not presumed by the length of delay alone, when OAH takes nearly *four years* to issue a decision, the odds of actual prejudice certainly increase the longer these drivers are left in limbo and must put their life decisions and career moves on hold. That delay may not be placed squarely on the shoulders of DMV, but it certainly is not placed on the shoulders of the driver.

Id. We acknowledged in *Derechin* and we acknowledge here that the DMV's purpose of protecting innocent individuals by removing intoxicated drivers from public roadways is commendable, but the DMV "is not the party with a property interest at stake protected by the Due Process Clause." *Id.* As a result, the DMV has still failed to convince this Court to overturn *Staffileno*. *See id.*

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice William R. Wooton

DISSENTING:

Justice Tim Armstead

I dissent to the majority's resolution of this case. I would have set this case for oral argument to thoroughly address the error alleged in this appeal. Having reviewed the parties' briefs and the issues raised therein, I believe a formal opinion of this Court was warranted—not a memorandum decision. Accordingly, I respectfully dissent.

NOT PARTICIPATING:

Justice C. Haley Bunn