

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.**

**DISTRICT COURT
SIXTH DIVISION**

Irwin Jacobowitz :
 :
v. :
 :
State of Rhode Island :
(RITT Appeals Panel) :

A.A. No. 19 - 010

ORDER

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings and Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED, that the Findings and Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Appeals Panel is AFFIRMED.

Entered as an Order of this Court on this 29th day of August, 2019.

By Order:

_____/s/_____
Stephen C. Waluk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.

DISTRICT COURT
SIXTH DIVISION

Irwin Jacobowitz	:	
	:	
v.	:	A.A. No. 2019-010
	:	(T17-016)
State of Rhode Island	:	(16-101-501014)
(RITT Appeals Panel)	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Mr. Irwin Jacobowitz urges that an Appeals Panel of the Rhode Island Traffic Tribunal (RITT) erred when it dismissed his appeal from a conviction for a civil traffic violation, “Obedience to traffic control devices,” because he failed to appear before it on November 17, 2017 to prosecute his appeal.

Jurisdiction for the instant appeal is vested in the District Court by G.L. 1956 § 31-41.1-9; the applicable standard of review is found in § 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to G.L. 1956 § 8-8-8.1. And, for the reasons I will explain in this opinion, I have concluded that the decision of the Appeals Panel should be **AFFIRMED**; I so

recommend.

I

Facts and Travel of the Case

A

The Citation and Initial Proceedings

We may glean from the electronic record in this case and the memoranda filed by the parties that on December 8, 2016 Mr. Jacobowitz was cited by a member of the Barrington Police Department for a violation of G.L. 1956 § 31-12-4, “Obedience to traffic control devices.” *See* Summons No. 16-101-501014, in electronic record (*ER*) at 49.¹ He entered a plea of not guilty at his RITT arraignment on January 9, 2017 and, after several delays, a trial was conducted by Tribunal Magistrate Alan Goulart on April 24, 2017, at which Mr. Jacobowitz was found guilty of the charge. He filed an appeal.

B

First Review by the Appeals Panel

After a delay requested by Mr. Jacobowitz, the case was scheduled to be heard by the Appeals Panel on November 15, 2017. That day’s panel was composed of Judge Parker (Chair), Judge Almeida, and

¹ There are actually two electronic records in this case. A 50-page record, which covers the initial proceedings in the Tribunal, and 38-page record, which covers the post-remand material. The reference here is to the 50-page record.

Magistrate Kruse-Weller. One week later, the Chairman entered an Order in the case, declaring that the appeal would be dismissed because Appellant failed to submit a transcript of his trial. The second paragraph of the Order states:

Our rules require that an appellant submit a “transcript necessary for the determination of the appeal.” Traffic Trib. R. P. 21(e). An appellant must submit a transcript within forty-five days “after the filing of the notice of appeal unless the time is extended by an Order.” *Id.* In the instant matter, Appellant did not provide the members of this Panel with a transcript of the proceeding that was before the Trial Magistrate. *Id.* Pursuant to Rule 21(g) of the Traffic Tribunal Rules of Procedure, this appeal has not been perfected by submitting the requested transcript. Therefore, this Panel will issue an “order [] of dismissal of appeal for failure to comply with these rules ... upon the court’s own motion.” Traffic Trib. R. P. 21(e).

Order, November 15, 2017, at 1. The Order then noted that, according to our Supreme Court, the “dismissal of [an] appeal for failure to submit a transcript ‘is a drastic remedy which should only be employed in extreme situations.’ ” *Order*, at 1 (*quoting Medeiros v. Hilton Homes, Inc.*, 122 R.I. 406, 410, 408 A.2d 598, 600 (1979)).

Nevertheless, the Appeals Panel concluded that it had “no choice but to dispose of this appeal on a procedural deficiency rather

than on the merits.” *Order*, at 1-2 (*citing Gosset v. Reid*, 764 A.2d 138, 140 (R.I. 2001)). And so, Mr. Jacobowitz’s appeal was denied and the charges sustained pursuant to Rule 21(g).

C

First Appeal to the District Court

Appellant filed a second-level appeal to the District Court on December 8, 2017. A briefing schedule was set and memoranda were received from both parties. However, this Court did not address the substance of the transcript issue, owing to an inconsistency between the Panel’s written Order (which stated the case was dismissed because Appellant failed to submit a transcript) and the oral record of the Appeals Panel’s proceedings (in which the Chair of the Appeals Panel indicated that Mr. Jacobowitz’s appeal was being dismissed because of his failure to appear). *See State v. Jacobowitz*, A.A. No. 2017-144, slip op. at 7-9 (Dist.Ct. 12/12/18). Having identified this discrepancy, we remanded the case in order to give the Panel an opportunity to clarify its ruling. *Id.* at 9.

D
Before the Appeals Panel on Remand

And the Appeals Panel did so. In its Amended Order, dated January 15, 2019,² the Panel made it clear that the case was dismissed for non-prosecution. The Amended Order stated:

It is well-settled that “[s]imply stating an issue for appellate review, without a meaningful discussion thereof or legal briefing of the issues, does not assist the court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue.” *Wilkinson v. State Crime Lab. Comm’n*, 788 A.2d 1129, 1132 n.1 (R.I. 2002) (citations omitted). Therefore, “[c]laims of error that are unsupported by either argument or citation of authority are entitled to no consideration on review.” *James J. O’Rourke, Inc. v. Industrial National Bank*, 478 A.2d 195, 198 n.4 (R.I. 1984) (citing *Mercurio v. Fascitelli*, 116 R.I. 237, 243-244, 354 A.2d 736, 740 (1976)).

Here, the Appellant failed to appear at the time scheduled for his appeal hearing despite receiving a continuance and notice of the hearing date. As such, there has been no meaningful discussion or argument of the claims of error raised by Appellant beyond the issues stated in Appellant’s Notice of Appeal. *See Appellant’s Notice of Appeal*, at 2. In failing to appear, the Appellant waived those claims. *See Wilkinson*, 788 A.2d at 1132 n.1; *James J. O’Rourke, Inc.*, 478 A.2d at 198 n.4. Accordingly, Appellant’s appeal is hereby denied, and the charge against Appellant is sustained.

Amended Order, January 15, 2019.

E

² The Amended Order was date-stamped two days later, on Jan. 17, 2019.

Second Appeal to the District Court

Mr. Jacobowitz filed a second appeal to this Court on February 25, 2019.³ In his Notice of Appeal, Mr. Jacobowitz raised three issues: *first*, that he did not receive this Court's December 12, 2018 Order of remand, which foreclosed him from requesting a hearing or submitting a brief; *second*, that the Panel's *original* order failed to state that it could not render a decision without discussion; *third*, that the testimony and evidence of record was insufficient to prove the charge against him. *See Notice of Appeal*, in the electronic record attached to this case. A briefing schedule was set; memoranda have been received by both parties.

F

Position of the Parties

1

Initial Memorandum Submitted by Appellant Jacobowitz

Mr. Jacobowitz styled his initial Memorandum as — “Appellant's/Defendant's Memorandum in Support of Vacating Judgment.” He enumerated a series of issues for discussion: (1) the unavailability of a videotape of the incident (*Appellant's Memorandum*,

³ His appeal was thus filed *after* the expiration of the thirty-day appeal period, even when that period is calculated from the date on which the Amended Order was entered, which was January 17, 2019. *See* n.2, *ante* at 5. We shall discuss this circumstance further, *post*.

at 4-5); (2) whether the officer who issued the citation to Mr. Jacobowitz acted maliciously (*Id.* at 5); (3) the exact location of the officer at the moment Appellant’s traffic infraction was allegedly committed (*Id.* at 5-6); (4) that the trial judge failed to ask the witness (the citing officer) to describe the traffic control device in question (*Id.* at 6-7); (5) that the officer’s identification of the operator was insufficient to satisfy the Town’s burden of proof (*Id.* at 7-8).

Appellant also addressed the issue of his failure to appear before the Appeals Panel in November of 2017, reminding us that in his December notice of appeal he stated that — “I did not appear for my appeal hearing due to the exacerbation of my hip which led me to go to the hospital for medical care.” *Id.* at 9 (*citing Notice of Appeal*). Then, at some length, he expressed his curiosity (and suspicions) regarding the discrepancy between the Panel’s order of dismissal (based on his failure to file a transcript of the trial) and the Appeals Panel transcript and Panel’s Judgment Card (both predicated on his failure to appear). *Appellant’s Memorandum*, at 9-10 (*citing Findings and Recommendations*, December 12, 2018, at 8). He asserts that our remand gave the Panel the opportunity to “revive” its decision. *Appellant’s*

Memorandum, at 10-11.

Finally, he argued that the Rules of the Traffic Tribunal do not require that appellants participate in oral arguments. *Id.* at 11-12.

2

Memorandum Submitted by the Appellee/State

The State's Memorandum makes three arguments: *first*, that the Appellant's appeal was untimely and ought to be dismissed (*State's Memorandum*, at 4); *second*, that the decision of the Appeals Panel — *i.e.*, to dismiss his appeal based on his failure to appear before the Panel — was proper and ought to be affirmed (*State's Memorandum*, at 5); *and third*, that Mr. Jacobowitz's various and sundry allegations of error on the part of the trial magistrate are unfounded and the guilty finding in case should be affirmed.

3

Reply Memorandum Submitted by Mr. Jacobowitz

On May 21, 2019, Mr. Jacobowitz filed with this Court a Reply Brief, in which, to our reading, he trod over much the same ground which he covered in his first memorandum. He reiterated his assertion that he failed to appear at the Appeals Panel due to valid medical reasons. *Reply Memorandum*, at 4. He noted that neither the Appeals

Panel nor this Court commented upon this assertion, even though he included it in his Notice of Appeal. *Id.* at 5. And, based on our failure to direct the Appeals Panel to address this issue upon remand, he accuses this Court of “creating” a second basis for the dismissal of his case by the Panel. *Id.* at 5-6. He charges us with “pulling at straws” and “jumping through hoops” in order “to assist the State.” *Id.* at 6-7. And, he alleges that we wanted the dismissal to be predicated on his failure to appear, because the other reason — failure to file a transcript — was “not good enough.” *Id.* at 7.

Under a second heading, Mr. Jacobowitz urges that this Court’s remand order violated the narrow scope of review which obtains in administrative review cases and that the case should be dismissed in its entirety due to the discrepancy between the reasons for dismissal given in the Panel’s Order, on its Judgment Card, and in the audio recording of its brief proceeding of November 15, 2017. *Reply Memorandum*, at 7-8.

Finally, in his Reply Memorandum Mr. Jacobowitz raises an entirely new matter: that although he was convicted of a violation of G.L. 1956 § 31-12-4, “Obedience to Traffic Control Device,” the original citation issued by an officer of the Barrington Police Department cited

G.L. 1956 § 31-13-4. *Id.* at 9-10. Therefore, he urges that the incorrect charge was sustained, and the Panel had no jurisdiction. *Id.* at 10.⁴

II Standard of Review

The standard of review which must be employed in this case is enumerated in G.L. 1956 § 31-41.1.-9(d), which states as follows:

(d) *Standard of review.* The judge of the district court shall not substitute his or her judgment for that of the Appeals Panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the Appeals Panel, or may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the Appeals Panel's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the Appeals Panel;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

⁴ Mr. Jacobowitz has also favored us with additional writings, an Addendum to his Reply Brief (filed on June 3, 2019) and an Additional Rely Brief, filed on August 1, 2019. They shall not be considered. On March 7, 2019, this Court issued a Briefing Schedule of April 8, 2019 for the Appellant's Brief, which, in fact, we allowed to be filed late. We also permitted (and considered) his Reply Brief, as is custom, even though some of the material therein went beyond the purpose of a reply memorandum, which is to focus on arguments raised in the Appellee's Brief. But this Court cannot countenance additional filings *ad infinitum*. If we did so, this case could never be resolved.

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This provision is a mirror-image of the standard of review found in G.L. 1956 § 42-35-15(g) — a provision of our Administrative Procedures Act (APA). Accordingly, we are able to rely on cases interpreting the APA standard as guideposts in this process. Under the APA standard, the District Court “... may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are ‘clearly erroneous.’” *Guarino v. Dep’t. of Soc. Welfare*, 122 R.I. 583, 584, 410 A.2d 425 (1980)(citing G.L. 1956 § 42-35-15(g)(5)). *See also Link v. State*, 633 A.2d 1345, 1348 (R.I. 1993).

And our Supreme Court has reminded us that reviewing courts lack “the authority to assess witness credibility or to substitute its judgment for that of the hearing judge concerning the weight of the evidence on questions of fact.” *Link*, 633 A.2d at 1348 (citing *Liberty Mutual Ins. Co. v. Janes*, 586 A.2d 536, 537 (R.I. 1991)). This Court’s review “... is confined to a reading of the record to determine whether the judge’s decision is supported by legally competent evidence or is affected by an error of law.” *Link*, 633 A.2d at 1348 (citing *Env’tl. Sci.*

Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)).

III **Analysis**

In light of the myriad issues which have been raised and discussed by the parties (which we rehearsed *ante*), it is important that we define the sole issue which we shall consider in this opinion: namely, whether the Appeal's Panel's decision, as reflected in its Amended Order, dismissing Mr. Jacobowitz's appeal because he failed to appear for his appeal hearing on November 15, 2017, met the standard of legality set forth in § 31-41.1-9(d) (set forth *ante*, at 10-11). But, as we have suggested, other issues have been raised by the parties. However, with one exception, they are not subject to this Court's review at this juncture.

A **Matters Which Shall Not Be Addressed**

To begin with, all of Mr. Jacobowitz's assertions of error on the part of the trial magistrate are not properly before us, because the Appeals Panel has not ruled upon them. Our authority under § 31-41.1-9 is solely to review decisions of the Appeals Panel. As we know, the Appeals Panel did not reach those *substantive* issues because it

dismissed Mr. Jacobowitz's appeal on *procedural* grounds. And so, our role at this time is to determine whether that procedural ruling is lawful — if it is, we affirm; if not, we must remand this matter for consideration of Appellant's substantive assignments of error.

It would also be inappropriate for this Court to revisit our December 12, 2018 decision to remand the case to the Appeals Panel; it stands as the law of the case. It is certainly subject to review, but not by this Court at this time.

Conversely, this Court does possess the authority to entertain the State's request that we dismiss Mr. Jacobowitz's appeal because it was not filed within 30-day period enumerated in § 31-41.1-9. However, I will not address the lateness issue at this time; for, if my recommendation that this Court affirm the Panel's dismissal (of Mr. Jacobowitz's appeal) is adopted, such a discussion will be rendered unnecessary.

B

The Appeals Panel's Dismissal Grounded on Failure to Appear

Having explained the reasons why other issues may not be entertained at this time, we may now turn to the dispositive issue of this

appeal — *viz.*, whether Mr. Jacobowitz has shown, pursuant to the standard set forth in § 31-41.1-9(d), that the Panel’s decision to dismiss his appeal (because he failed to appear before it on November 15, 2017)⁵ should be set aside. More precisely, we must ask whether that decision is contrary to law, clearly erroneous in light of the evidence of record, made upon unlawful procedure, or characterized by an abuse of discretion.

It appears that, based on the circumstances known to the Panel at that time, it did act appropriately. The case was called, there was no response — that is the extent of the circumstances known to the Panel when it acted.

Of course, Mr. Jacobowitz, in his notice of appeal to this Court, asserted that he had a valid reason for missing his appeal date. But that statement is not part of the RITT record. Neither was it submitted under oath. Moreover, it has not been evaluated by the Panel. In sum, Mr.

⁵ We must acknowledge that the Appeals Panel fully complied with this Court’s December 12, 2018 Order of Remand. The Amended Order which the Chair of the Appeals Panel entered on January 17, 2019 unambiguously stated the reason for dismissal as being Mr. Jacobowitz’s failure to appear before the panel on November 15, 2017.

And, contrary to Mr. Jacobowitz’s *ad hominem* attack, we recommended the entry of the Order of Remand enter because it was legally necessary. During the first appeal, this Court was faced with two inconsistent orders of dismissal — one based on his failure-to-appear, another based on his (alleged) failure-to-file a transcript. It is not this Court’s role to guess which reason the Panel truly meant to adopt; it is not our function to reconstruct legally ambiguous decisions.

Jacobowitz has not (yet) *created a record* on this issue — as he might have done by filing and arguing a motion to vacate. As a result, this Court has no basis upon which to overturn the Appeals Panel’s entry of a default judgment. *See Hamlet Lopez v. State of Rhode Island*, A.A. No. 2018-171, slip op. at 7-8 (Dist.Ct.4/29/2019).

Put simply, this Court cannot consider the issue in the first instance. Of course, the Panel still has jurisdiction to do so. It is perhaps worth mentioning that Rule 20 of the Traffic Tribunal Rules of Procedure⁶ might well provide a satisfactory vehicle pursuant to which Mr. Jacobowitz

⁶ **Rule 20. Relief from Judgment or Order.** — The court may, upon motion or on its own initiative, relieve a party or a party's legal representative from a judgment or order for the following reasons:

- (a) Mistake, inadvertence, surprise, or excusable neglect;
- (b) Newly discovered evidence;
- (c) Fraud, misrepresentation, or misconduct of an adverse party;
- (d) The judgment or order is void;
- (e) The judgment or order has been satisfied, released, or discharged, or the judgment or order is no longer equitable that the judgment or order should have prospective application; or
- (f) Any other reason justifying relief from the operation of the judgment, or order, including that relief is warranted in the interests of justice.

The motion shall be made within a reasonable time, and for reasons (a), (b), and (c) not more than one (1) year after the judgment or order was entered. The filing of a motion under this rule does not, in the absence of further action by the court, affect the finality of a judgment or order or suspend its operation.

might seek to vacate the Panel's Amended Order by proffering a meritorious justification for his absence.⁷

IV Conclusion

Upon careful review of the record and the positions of the parties, I conclude that the Amended Order issued by the Appeals Panel in this case was neither contrary to law nor predicated on an improper procedure; nor did it constitute an abuse of discretion. Accordingly, I recommend that this Court AFFIRM the decision rendered by the Appeals Panel.

/s/
Joseph P. Ippolito
MAGISTRATE
AUGUST 29, 2019

⁷ At such a hearing, he could be sworn-in and make his representations (as to the reasons for his absence) under oath. He could also provide supporting documentation supporting his assertions.

Mr. Jacobowitz should also understand that such a motion is still timely only because the remand we ordered resulted in the entry of the Amended Order. Had we not done so, the time for filing a motion under Rule 20 would have expired in November, 2018.

