

Written notice of the hearing was sent to the Petitioners, (South Carolina Department of Public Safety and South Carolina Department of Motor Vehicles), and to the Respondent. It was held on October 19, 2011 at the Florence City/County Complex, Florence, South Carolina. After reviewing the entire record and considering all the evidence, I find that the suspension of Respondent's driver's license or driving privilege is sustained.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion by the parties, I make the following findings of fact by a preponderance of the evidence:

1. Notice of the date, time, place, and subject matter of the hearing was timely given to the parties.
2. On July 3, 2010 while on routine patrol in Darlington County, Trooper Brigham witnessed a black in color Chevrolet pickup truck traveling on U.S. 15 within the city limits of Hartsville. Trooper Brigham witnessed the truck following too close to a vehicle in front of it. Both vehicles were in the same lane of travel. Trooper Brigham initiated a traffic stop on the truck.
3. The driver of the truck was Edward Eli Saleeby, III, the Respondent.
4. Trooper Brigham noticed a very strong odor of alcohol coming from within the truck. The Respondent was asked to exit the truck. There were two (2) passengers left inside the truck. Trooper Brigham noticed an odor of alcohol on the Respondent outside his truck. The Respondent appeared disoriented, and his eyes were dilated. The Respondent stated that he had taken Loricets because he had chipped a tooth.
5. The Respondent contends that he had taken a small dose of Hydrocodone prescribed to him by a medical doctor.
6. The Respondent stated that he has Ataxia which is a coordination disorder.
7. Field sobriety tests were offered to the Respondent. The first (1st) test was the "HGN" test. The Respondent had no nystagmus; however his pupils were dilated.

8. The second (2nd) test was the “walk and turn” test. The Respondent started the test before instructions were finished; did not touch heel-to-toe; lost his balance while walking; and took an incorrect number of steps.
9. The third (3rd) test was the “one (1)-leg stand” test. The Respondent swayed while balancing; used his arms for balance; and put his foot down.
10. Trooper Brigham arrested the Respondent for Driving under the Influence.
11. During an inventory of the Respondent’s vehicle, Trooper Brigham found a prescription of Xanax in the center console.
12. The Respondent was transported to the Hartsville Police Department for the offering of the breath test.
13. When the Respondent entered the DataMaster Test room, the Respondent was advised that he was being video-recorded. The Respondent was allowed to use the rest room at the DataMaster Test site. Trooper Brigham advised the Respondent that he believed the Respondent to be under the influence of narcotics.
14. The Respondent stated that he wanted to give a blood sample and not a breath sample.
15. Trooper Brigham read and gave the Respondent a copy of the appropriate Implied Consent Advisement (Driving under the Influence Advisement for breath testing) in writing.
16. The Respondent’s mouth was checked for foreign material.
17. The Respondent was observed for twenty (20) minutes.
18. The DataMaster Test machine was operating properly.
19. The Respondent submitted to a breath test for alcohol concentration, and test result indicated an alcohol concentration of zero one-hundredths of one percent (0.00%).
20. Trooper Brigham is a certified DataMaster Test Operator.
21. Trooper Brigham read and gave the Respondent a copy of the appropriate Implied Consent Advisement (Driving under the Influence Advisement for urine testing) in writing. The Respondent signed the Implied Consent Advisement.
22. Trooper Brigham advised the Respondent that he would be transported to Carolina Pines for a urine test.

23. During transport to Trooper Brigham's vehicle, the Respondent verbally refused the urine test. The Respondent's refusal to urine testing was not video-taped.
24. The Respondent contends that he did not refuse urine testing; however, during cross examination, the Respondent testified that he did not "recall" refusing to submit to urine testing.
25. The Respondent was charged with a violation of S.C. Code Ann. § 56-5-2950 (Supp. 2010) for refusing to submit to a urine test.
26. On July 3, 2010, the Respondent was issued a Notice of Suspension by Trooper Brigham which suspended the Respondent's driver's license or driving privilege.
27. The Respondent signed the Notice of Suspension.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude as a matter of law the following:

General

1. In S. C. Code Ann. §1-23-600 (Supp.2009), the General Assembly provided for the creation of the South Carolina Division of Motor Vehicle Hearings. Effective January 1, 2006, the DMVH was authorized to employ Hearing Officers to preside over contested case hearings involving suspensions, cancellations, or revocations of drivers' licenses. The name of the DMVH was changed to the Office of Motor Vehicle Hearings (OMVH) effective October 1, 2008.
2. All hearings presided over by Hearing Officers of the OMVH must be conducted in accordance with the Administrative Procedures Act (APA) and the rules of procedure of the OMVH. A filing of a request for a hearing stays the suspension until a final decision is issued. S. C. Code Ann. §56-5-2951(G).
3. Appeals from final decisions of the Hearing Officers will be to the SCALC in accordance with S. C. Code Ann. § 1-23-600 (Supp. 2009).
4. Petitioner is an administrative agency of the State of South Carolina which is charged with administering its motor vehicle laws and delivering accurate and secure credentials and transaction documents to the citizens of this state. S. C. Code Ann. §56-1-5 (2006)

5. Basic administrative law principles establish that an agency bears the burden of proof in an enforcement action. *See Peabody Coal Co. v. Ralston*, 578 N.E.2d 751 (Ind. Ct. App. 1991); Randy R. Lowell and Stephen P. Bates, South Carolina Administrative Practice and Procedure, 200-201 (2004). Since Petitioner asserts the affirmative of an issue, i.e. the enforcement of a driver's license suspension, and since it will be subject to an adverse ruling if no evidence is introduced, Petitioner bears the burden of proof in this enforcement action. *See Alex Sanders and John S. Nichols*, Trial Handbook for South Carolina Lawyers, Second Edition, 2001, § 9:3, p. 366.

Unlawful to drive while under the influence

6. Pursuant to S. C. Code Ann. § 56-5-2930 (Supp. 2009), it is unlawful for a person to drive a motor vehicle within this State while:

- a. under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired;
- b. under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired; or
- c. under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired.

Implied consent to submit to testing

7. S.C. Code Ann. § 56-5-2950(A)(Supp. 2009) provides:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of the law enforcement officer who arrested [the] person....

Furthermore, the breath test must be administered by a person trained and certified by Petitioner pursuant to State Law Enforcement Division (SLED) policies. S.C. Code Ann. § 56-5-2950(A) (Supp. 2009).

8. S.C. Code Ann. § 56-5-2950(B) (Supp. 2009) further provides:

No tests may be administered or samples obtained unless upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:

- (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court;
- (2) his privilege to drive must be suspended for at least one month if he takes the tests or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
- (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;
- (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
- (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

9. Upon motion by any party, the OMVH Hearing Officer may review the application of the policies, procedures, and regulations promulgated by SLED. If the Hearing Officer finds that the failure to follow any of the policies, procedures, regulations or other provisions of S.C. Code Ann. § 56-5-2950 materially affected the accuracy or reliability of the test results or the fairness of the testing procedure, the test results shall be excluded from evidence. The hearing officer must rule specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure, See S.C. Code Ann. § 56-5-2950(J)(Supp.2009).

10. If a person drives a motor vehicle and has an alcohol concentration of fifteen one-hundredths of one percent or more, Petitioner must suspend the person's driver's license, permit or nonresident operating privilege or deny the issuance of a license or permit to that individual. The arresting officer issues a notice of suspension which is effective beginning on the date of the alleged violation. See S.C. Code Ann. § 56-5-2951(A) (Supp. 2009)

11. A person may request an administrative hearing within thirty (30) days of the issuance of the notice of suspension. S.C. Code Ann. § 56-5-2951(B) (Supp.2009). Section 56-5-2951(F) requires that the scope of the hearing be limited to whether the person:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950;
- (3) refused to submit to a test pursuant to Section 56-5-2950; or
- (4) consented to taking a test pursuant to Section 56-5-2950, and the:
 - (a) reported alcohol concentration at the time of testing was fifteen one-hundredths of one percent or more;
 - (b) individual who administered the test or took samples was qualified pursuant to Section 56-5-2950;
 - (c) tests administered and samples obtained were conducted pursuant to Section 56-5-2950; and
 - (d) the machine was working properly.

Nothing in this section prohibits the introduction of evidence at the administrative hearing on the issue of the accuracy of the breath test result.

12. Counsel for the Respondent argued that the suspension of Respondent's driver's license or driving privilege should be rescinded based on the Respondent not verbally refusing to submit to urine testing. I disagree.

The videotape of the DataMaster Test room shows Trooper Brigham advising the Respondent that a urine test is being requested. Trooper Brigham turns off the videotape. Trooper Brigham testified that the Respondent verbally refused to submit to urine testing as he and the Respondent were in transit to his vehicle for transport of the Respondent to Carolina Pines. The Respondent testified that he did not refuse urine testing; however, under cross-examination, the Respondent testified that he did not "recall" refusing the urine test. The conflicting testimonies lead one to believe that Trooper Brigham's testimony concerning the Respondent's refusal to urine testing is true, steadfast, and without doubt; whereas, the Respondent first testified that he did not refuse urine testing but under cross-examination testified that he did not "recall" refusing the urine test. I conclude the Respondent did verbally refuse to submit to the urine test offered to him by Trooper Brigham.

13. Counsel for the Respondent argued that the suspension of Respondent's driver's license or driving privilege should be rescinded based on Trooper Brigham not providing affirmative assistance to the Respondent as required by Section 56-5-2950 (D) and (E) in reference to the Respondent's request for a blood test. I disagree.

When the Respondent first entered the DataMaster Test room, he requested a blood test. Trooper Brigham followed statutory procedure and first offered the Respondent a breath test although he believed the Respondent to be under the influence of drugs. The Respondent had a breath alcohol analysis test reading of zero one-hundredths of one percent (0.00%). Based on Trooper Brigham finding Xanax in the Respondent's vehicle after the Respondent admitted to taking Loriceps, Trooper Brigham offered the Respondent the opportunity to submit to urine testing. The Respondent verbally refused the urine test.

Section 56-5-2950 (D) and (E) provide that the person tested or giving samples for testing may have a qualified person of his own choosing conduct *additional tests* at his expense. The officer must provide affirmative assistance to the person requiring *additional tests*. Because the Respondent refused the urine test, there was no initial test and therefore no duty to provide affirmative assistance for *additional tests*. The Respondent verbally refused to submit to urine testing for drugs and did not give a urine sample for drug testing; therefore, affirmative assistance is not an issue in this case.

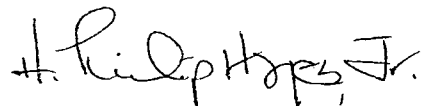
14. I conclude as a matter of law that the Petitioners have met the burden of proof pursuant to Section 56-5-2950 (Supp.2009). The Respondent was lawfully arrested for Driving under the Influence; the Respondent was read and given a copy of the appropriate Implied Consent Advisement (Driving under the Influence Advisement) in writing; and the Respondent refused the urine test by verbally stating to Trooper Brigham that he would not submit to the urine testing. Accordingly, the relief requested by the Respondent is denied.

ORDER

Based upon the above findings of fact and conclusions of law, it is hereby:

ORDERED that the suspension of Respondent's driver's license or driving privilege is sustained.

AND IT IS SO ORDERED.



H. Philip Hayes, Jr.
OMVH Hearing Officer

October 24, 2011
Florence, South Carolina