

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Jennifer K. Salter,

Appellant,

vs.

South Carolina Department of Motor
Vehicles, and Conway Police Department,

Respondents.

Docket No. 13-ALJ-21-0428-AP

ORDER

This is an appeal by Jennifer K. Salter (Appellant) from a Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings (OMVH) following an administrative hearing held pursuant to S.C. Code Ann. § 56-5-2951 (Supp. 2013) upholding the decision of the South Carolina Department of Motor Vehicles (DMV) suspending Appellant's driver's license. The Administrative Law Court (ALC or Court) has jurisdiction to review this matter pursuant to S.C. Code Ann. § 1-23-600 (Supp. 2013). Upon review of this matter, the OMVH's Final Order and Decision is affirmed.

BACKGROUND

On April 11, 2013, Officer Kendall Dixon of the Conway Police Department arrested and charged the Appellant with driving under the influence of alcohol, drugs, or a combination of alcohol and drugs. Officer Dixon then transported Appellant to the Horry County Detention Center. Once in the Breath Analysis/DataMaster Room, Appellant was advised that she was being audio and video recorded and her Implied Consent Rights were read to her, but she was not given a written copy at that time. During the twenty-minute waiting period, Officer Dixon observed another individual being advised and given a written copy of the Implied Consent Rights. Officer Dixon then provided Appellant with her written Implied Consent Rights, seventeen minutes after beginning the test procedure. Appellant refused to submit to a breath analysis testing. Officer Dixon issued a written Notice of Suspension of Appellant's driver's license and Appellant was charged with a violation of S.C. Code Ann. § 56-5-2950 for refusing to submit to a chemical test of her breath. Appellant timely requested a hearing before the OMVH. Appellant's hearing was held on July 16, 2013, before

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Hearing Officer H. Philip Hayes, Jr. Officer Dixon initially testified that he provided Appellant with her Implied Consent Rights, and they were read to her. The Breath Analysis Room video was reviewed, and upon cross examination, Officer Dixon admitted that he had not provided Appellant with her Implied Consent Rights in writing prior to reading them. He also admitted that he failed to comply with written SLED procedures and South Carolina Code 56-5-2950 (2009). On July 31, 2013, the OMVH issued the decision sustaining Appellant's suspension. Appellant filed an appeal with the ALC on August 26, 2013.

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660 (Supp. 2013). Therefore, the OMVH is an "agency" under the Administrative Procedures Act (APA). See S.C. Code Ann. § 1-23-310(2) (2005). As such, the APA's standard of review governs appeals from decisions of the OMVH. See S.C. Code Ann. § 1-23-380 (Supp. 2013); see also Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). The standard used by appellate bodies, including the ALC, to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2013). This section provides:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision [of the agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2013).

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 641, 321 S.E.2d 63, 68 (Ct. App. 1984). A decision will not be set aside

simply because reasonable minds may differ on the judgment. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307. The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996); Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing Kearse v. State Health and Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). The party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. at 226, 467 S.E.2d at 917.

ISSUE ON APPEAL

Did the hearing officer err in finding that Appellant was properly advised of her Implied Consent Rights and in sustaining the suspension of Appellant's driving privileges?

DISCUSSION

Appellant argues that the Final Order and Decision of the Hearing Officer should be reversed and the driver's license suspension should be rescinded because the evidence showed Officer Dixon failed to follow SLED procedures. Officer Dixon admitted that he failed to comply with S.C. Code Ann. § 56-5-2950(B) when he did not provide Appellant with her Implied Consent Rights in writing prior to beginning the testing procedure.

The Department concedes that the officer failed to give Appellant a written copy of the Implied Consent Rights prior to the commencement of the testing procedure. The Department contends, however, that the Hearing Officer correctly found the Appellant was properly advised of her rights in that they were read to Appellant and she was given a written copy later. Because there was no showing of prejudice to the Appellant as a result of the officer's failure to provide the written copy of the Implied Consent Rights prior to beginning the testing procedure, such failure does not require the recession of the suspension. Taylor v. S.C. Dept. of Motor Vehicles, 382 S.C. 567, 677

S.E.2d 588 (2009). (“Given that it is undisputed [Appellant] was advised of the implied consent warning, the Court of Appeals properly found he suffered no prejudice from the officer’s lack of written notice.”)

In order for Appellant to prevail because the written copy of the implied consent warning was given to her belatedly, there must be a showing of prejudice. The South Carolina Supreme Court has held that “the criterion in § 56-5-2951(f) are simply factors which the DMV may consider in determining whether to uphold a suspension...[A]n examination of the four factors with an eye toward prejudice is the proper inquiry.” Id. The Appellant made no showing that the failure of the officer to provide the written copy of the Implied Consent Rights prior to beginning the testing procedure materially affected the fairness of the testing procedure.

ORDER

For the foregoing reasons,

IT IS HEREBY ORDERED that the OMVH’s Final Order and Decision is **AFFIRMED** and the Department’s suspension of Appellant’s driver’s license is upheld.

AND IT IS SO ORDERED.

Deborah Brooks Durden
Administrative Law Judge

April 9, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

April 9, 2014
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