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MAR 24 2014
SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department of Motor Vehicles, Appellant, v. Russo Dumpster, Inc., Respondent.	Docket No. 13-ALJ-21-0193-AP **ORDER**

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SC Court of Appeals

STATEMENT OF THE CASE

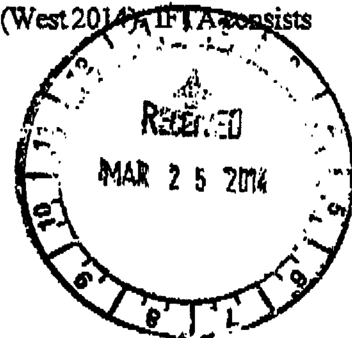
In this matter, the South Carolina Department of Motor Vehicles ("Appellant" or "the Department") appeals the Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings ("OMVH") dated March 14, 2013. In the decision, the OMVH Hearing Officer found the Department improperly (1) determined Russo Dumpster, Inc. ("Respondent") owed $49,667.05 in taxes under the International Fuel Tax Agreement ("IFTA") [1] and (2) suspended Respondent's IFTA license after Respondent failed to remit the assessed taxes. The South Carolina Administrative Law Court ("the Court") has jurisdiction to hear this matter pursuant to section 1-23-660(D) of the South Carolina Code (Supp. 2013). Upon careful review of the matter, the Hearing Officer's decision is affirmed.[2]

BACKGROUND

A. South Carolina's Participation in IFTA

The United States Code defines IFTA as "the interstate agreement on collecting and distributing fuel use taxes paid by motor carriers." 49 U.S.C.A. § 31701(3) (West 2014). The Ninth Circuit Court of Appeals described IFTA as "a multi-jurisdictional agreement that is intended to encourage cooperation in the administration and collection of motor fuel use tax." May Trucking Co. v. Oregon Dep't of Transp., 388 F.3d 1261, 1262 (9th Cir. 2004) (internal quotation marks omitted). IFTA is not a federal law, but the federal government mandates that all states engaging in fuel tax collections adhere to IFTA provisions. 49 U.S.C.A. § 31705(a) (West 2014). IFTA consists

[1] IFTA, available at http://www.iftach.org (last visited March 11, 2014).
[2] Respondent did not submit a brief.



The fuel records must specify the fuel type purchased and whether the fuel was purchased in bulk. Id. at P550.200, P550.300. Specifically, the fuel records must contain: the date of each receipt of fuel; the name and address of the person from whom the fuel was purchased or received; the number of gallons received; the type of fuel; and the vehicle or equipment into which the fuel was placed. IFTA, Procedures V, P550.400.

Tax paid retail purchases must be evidenced by receipts or invoices that identify the vehicle or unit number or other licensee identifier. Id. at P560.100, P560.200. A sufficient invoice includes: date of purchase; seller's name and address; number of gallons purchased; fuel type; price per gallon or total amount of sale; unit numbers; and the purchaser's name. Id. at P560.300.

Tax paid bulk fuel constitutes fuel delivered into a storage tank owned, leased or controlled by the licensee. Id. at P570.100. Invoices for bulk fuel purchases must show whether the licensee paid fuel tax at the time the bulk fuel was purchased from the vendor. Id. at P570.400. Only fuel that is withdrawn and placed into the fuel tank of a qualifying motor vehicle is considered. Id. Records of withdrawl must include: date of withdrawal; number of gallons; fuel type; unit number; and purchase and inventory records to substantiate that tax was or was not paid on all bulk fuel purchases. Id.

C. IFTA Audits and Non-Compliance

To ensure compliance, IFTA requires the Department to conduct audits of its licensees on behalf of all member jurisdictions where the licensees operate. IFTA, Articles XIII, 1310; see S.C. Code Ann. § 56-11-40 (2006) (providing the Department has the authority to "examine the books and records" of an IFTA licensee at any reasonable time). If a licensee fails to maintain adequate records to support an audit, the licensee can be cited for non-compliance, which is cause for revocation of their IFTA license. IFTA, Procedures V, P530. Furthermore, non-compliance can result in an assessment of taxes. Id. at P530. The failure to remit assessed taxes is also a ground for IFTA license suspension, cancellation, or revocation. S.C. Code Ann. § 56-3-1330 (2006); see also S.C. Code Ann. §§ 56-11-280, -550 (2006) (governing the collection of funds under IFTA); IFTA, Articles IV, R420. Specifically, when the licensee's records are inadequate to substantiate its fuel tax returns during an audit, the base jurisdiction "shall have the authority to estimate the fuel use upon (but is not limited to) factors such as the following: .005 Prior experience of the licensee; .010 Licensees with similar operations; .015 Industry averages; .020 Records available from fuel

distributors; and .025 Other pertinent information the auditor may obtain or examine." IFTA, Audit V, A550.100. Furthermore, "[u]nless the auditor finds substantial evidence to the contrary by reviewing the above, in the absence of adequate records, a standard of [4 MPG] will be used." IFTA, Audit V, A550.100. Additionally, "[w]hen tax paid fuel documentation is unavailable, all claims for tax paid fuel will be disallowed." Id. at A550.200. Essentially, if the licensee does not have adequate records to substantiate its tax return, IFTA provides a mechanism and default standards by which the Department assesses taxes for the unsubstantiated fuel used.

D. Procedural History

Respondent Russo Dumpster, Inc., is a "motor carrier"[5] that has been in the business of transporting waste material from construction sites in Rock Hill, Charlotte, and the surrounding area to appropriate disposal facilities since 2008. Respondent has been an IFTA licensee since 2008. South Carolina is Respondent's base jurisdiction. At the request of the Department, on January 1, 2011, Respondent signed an "Agreement to Prepare/Maintain Records" (form MC-7) acknowledging it understood and agreed to comply with IFTA's recordkeeping requirements. This was the first time Respondent was presented with this form. On April 19, 2011, the Department notified Respondent that it would be conducting an IFTA audit for the period of January 1, 2008, through December 31, 2009. The notice informed Respondent it would be reviewing distance records, fuel records, retail and bulk purchase records. The notice included a summary of the specific information these records needed to contain for the Department to perform the audit. The notice also requested Respondent fill out a Pre-audit Questionnaire (form MC-6) within ten days, and it informed Respondent it should be prepared for the audit in thirty days.

On May 2, 2011, Respondent filled out the Pre-audit Questionnaire for the Department. Respondent indicated it kept distance and fuel records. On November 7, 2011, the Department contacted Respondent for a Telephone Contact Questionnaire (form MC-22), during which the Department restated to Respondent the specific records it would be reviewing, restated it would be reviewing the records for January 1, 2008 through December 31, 2009, and confirmed the audit would start on November 14, 2011. On November 9, 2011, the Department sent Respondent a letter confirming the audit and restating the audit would cover the period of January 1, 2008 through

[5] "Motor carrier" is defined as "every person who operates or causes to be operated on any highways in this State road tractors, truck tractors, trucks having more than two axles, or passenger vehicles designed to seat more than twenty occupants." S.C. Code Ann. § 56-11-10 (2006).

December 31, 2009.

On November 14, 2012, the audit commenced, and the Department's auditor filled out an Internal Control Questionnaire (MC-23), in which he noted Respondent's fuel accounting system had weaknesses. He found Respondent did not keep an adequate accounting system to ensure all vehicles' fuel and distance related transactions were identified and recorded. He noted the accounting system was not designed with sufficient detail to permit identification of the vehicle or unit number, trip origin and destination, routes traveled, odometer readings, total distance and jurisdictional distance, and the date or time period of trips. The auditor further noted bulk fuel inventories did not include the amounts purchased and dispensed for the tax periods audited. However, the auditor also noted Respondent began keeping adequate records in 2011 when it hired someone to keep proper records.

The Department completed the audit on April 10, 2012, and issued an Audit Report ("the Report"). In the Report's summary, the auditor stated Respondent failed to provide distance source documents to verify the reported distance traveled and only provided a few tax paid retail receipts. The auditor stated Respondent received credit for the acceptable fuel receipts it presented. The auditor noted Respondent installed a bulk fuel tank in the first quarter of 2008 and provided bulk fuel purchase receipts, but failed to provide records of bulk withdrawl. Accordingly, the auditor determined Respondent's bulk fuel use could not be verified.

As a result of the audit, the Report concluded Respondent accumulated a total of 861,605 IFTA miles over the audit period, which included 126,805 miles in South Carolina and 734,800 miles in North Carolina. Because Respondent's records were inadequate to verify the number of gallons used for the reported distance, the Department determined 136,335 total gallons of fuel were needed to support the reported mileage. This calculation was partly based on the default IFTA standard of 4.0 MPG and an adjusted MPG of 5.2 MPG and 6.50 MPG for some of the audited quarters in an effort to reduce Respondent's tax burden.[6] Of the 136,335 total gallons, Respondent reported paying fuel taxes on 88,604 gallons, but only had sufficient records to substantiate that it paid fuel taxes on 5,650 gallons, with the result that 82,954 gallons were disallowed. Accordingly, the Department assessed the fuel taxes and interest for the remaining 130,685 gallons of unsubstantiated fuel, which resulted in a $49,667.05 assessment. Specifically, Respondent owed

[6] The Department indicated Respondent would have owed approximately $30,000 more in fuel taxes had it not

$4,247.52 to South Carolina and $45,419.53 to North Carolina. The Department conducted an exit conference with Respondent on April 17, 2012, during which it explained the results of the Report.

On April 24, 2012, the Department mailed an audit billing statement to Respondent. The statement showed Respondent had been assessed $49,667.05 in fuel taxes and required Respondent remit that amount to the Department by May 24, 2012. The statement further indicated that if payment was not received by May 24, 2012, interest would continue to accrue monthly until payment was received. On May 25, 2012, the Department mailed a letter advising Respondent the assessed amount of $49,667.05 was still outstanding. The letter further stated that if Respondent failed to remit the assessed amount by June 9, 2012, its IFTA license would be suspended pursuant to section 56-3-1330 of the South Carolina Code (Supp. 2011). On June 4, 2012, Respondent requested a hearing to contest the Department's assessment, which stayed the suspension and allowed Respondent to keep operating until a ruling was issued.

On September 4, 2012, a hearing was conducted before an OMVH Hearing Officer. Both the Department and Respondent were present. At the hearing, the Department admitted the January 6, 2011 MC-7 form was the only signed document it had showing it had informed Respondent of IFTA's recordkeeping requirements. However, the Department asserted Respondent submits an IFTA application every year, which includes a certification that Respondent agrees to comply with IFTA provisions, including recordkeeping requirements. Therefore, the Department argued Respondent has been on notice of IFTA's recordkeeping requirements since it first applied for an IFTA license. The Department did not submit any of Respondent's signed IFTA applications. Respondent contended it never intended to be in non-compliance and could not be held accountable for improper recordkeeping when the Department failed to put it on notice of IFTA recordkeeping requirements until January 6, 2011. Respondent further asserted it had recovered several records since the audit, which it believed would have changed the outcome of the audit. The Department indicated it would be willing to review the supplemental records to determine if it was possible to reduce the assessment. The Hearing Officer held the record open to allow Respondent to submit the supplemental records to the Department for review.

On September 13, 2012, Respondent submitted the supplemental records to the Department and the Hearing Officer. Upon review of the supplemental records, the Department determined the

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adjusted the MPG in an effort to reduce the burden on Respondent.

supplemental records, like the previously provided records, did not meet IFTA recordkeeping requirements and could not support an adjustment in the assessment. On March 14, 2013, the Hearing Officer issued a Final Order and Decision finding the assessment was improper and rescinding the suspension of Respondent's IFTA license. Specifically, the Hearing Officer determined the assessment was improper because the Department failed to put Respondent on notice of IFTA's recordkeeping requirements until January 6, 2011; therefore, Respondent could not be held accountable for inadequate IFTA recordkeeping before that date. On March 21, 2013, the Department filed a motion for reconsideration, which the Hearing Officer denied on April 22, 2013. The Department then filed this appeal on May 2, 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. 2012). Therefore, the OMVH is an "agency" under the Administrative Procedures Act ("APA"). See S.C. Code Ann. § 1-23-310(2) (Supp. 2012). 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). Section 1-23-380(5) of the South Carolina Code (Supp. 2013) provides the standard used by appellate bodies, including this Court, to review agency decisions. 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.

§ 1-23-380(5).

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 W. 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 (1981). 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.

ISSUES ON APPEAL

> Did the Hearing Officer err in finding Respondent had no responsibility to adhere to IFTA recordkeeping requirements prior to Respondent's written acknowledgement of IFTA's recordkeeping requirements on January 6, 2011? Stated alternatively, did the Hearing Officer err in finding the Department had a duty to inform Respondent of IFTA's recordkeeping requirements before Respondent could be held liable for non-compliance with recordkeeping requirements? Further, even if the Department had a duty to put Respondent on notice of IFTA's recordkeeping requirements, did the Hearing Officer err in refusing to accept the Department's prima facie proof that Respondent's IFTA application put it on notice of IFTA's recordkeeping requirements?[7]
>
> Did the Hearing Officer err in finding the Department bore the burden of proof in this matter as an enforcement action?

DISCUSSION

Respondent's Duty to Know and Comply with IFTA Recordkeeping Requirements and the Department's Duty to Inform Respondent of IFTA's Recordkeeping Requirements

[7] The Department's first, third, and fourth stated issues are combined for the purposes of this Court's review because the resolution of these issues is intertwined.

Under section 56-11-20 of the South Carolina Code, the Department is charged with administering and enforcing applicable IFTA provisions. Accordingly, potential IFTA licensees or renewing licensees with a base jurisdiction in South Carolina submit an IFTA application to the Department every year. Id.; IFTA, Articles II, R315. The application is required to contain a certification (the "certification provision") evidencing, in part, the following: "Applicant agrees to comply with . . . recordkeeping . . . requirements as specified in [IFTA]." IFTA, Procedures I, P100, P160. The certification further provides: "Failure to comply with these provisions shall be grounds for revocation of license in all member jurisdictions." Id.

However, IFTA also provides:

> Each jurisdiction shall provide licensees and prospective licensees with all information required to enable them to comply with all the terms of [IFTA]. When credentials are issued to a new licensee, information shall be provided to the licensee which completely describes the requirements of [IFTA]. This should include, but not be limited to:
>
> .100 Instructions for display of license or cab card and decals;
> .200 Licencing requirements and cancellation provisions;
> .300 Tax reporting and recordkeeping requirements;
> .400 Audit information;
> .500 Explanation of base jurisdiction determination
>
> As [IFTA governing documents] are revised, it is the responsibility of each base jurisdiction to notify its licensees of the current requirements.

IFTA, Articles III, R360. This provision (the "notice provision") requires the Department to provide licensees with "all information required to enable them to comply with all the terms of [IFTA]." Id. Specifically, the Department shall provide new licensees and renewing licensees with IFTA's recordkeeping requirements. To comply with this requirement, the Department requires all IFTA licensees to sign form MC-7, which explains IFTA's recordkeeping requirements. According to the Department, this form went into effect in November 2009, although IFTA recordkeeping requirements have been in effect since July 1, 1998, and South Carolina has included IFTA in its

statutory scheme since 1996. IFTA, available at http://www.iftach.org/ (last visited March 11, 2014) (effective since July 1, 1998); 1996 S.C. Acts 459. The Department did not present this form for Respondent to sign until January 6, 2011, at which time Respondent signed it. Testimony in the record reveals that sometime shortly after signing form MC-7 in 2011, Respondent began keeping adequate IFTA records.

The Department argues Respondent, as an IFTA licensee, had a duty to know IFTA's provisions, including its recordkeeping provisions, and exercise reasonable care to protect its interests under it. Specifically, the Department points to the section of IFTA governing yearly applications, which requires potential or renewing licensees to certify they agree to comply with IFTA provisions, including recordkeeping provisions. Based on the certification provision, the Department contends Respondent was on notice that it had to comply with the IFTA's recordkeeping requirements regardless of whether the Department also had a duty to inform Respondent of IFTA's recordkeeping requirements. Accordingly, the Department asserts substantial evidence does not support the Hearing Officer's finding that Respondent was not liable for the assessed fuel taxes because Respondent did not have notice of IFTA's recordkeeping requirements until January 6, 2011. This Court disagrees.

In fact, this Court holds the Department had a duty to inform Respondent of the IFTA recordkeeping requirements, and the Department did not fulfill this duty until it presented the MC-7 form to Respondent on January 6, 2011. To arrive at this conclusion, this Court began its inquiry with an examination of the competing provisions of IFTA: the certification provision and the notice provision. The certification provision requires IFTA licensees to certify in their yearly application that they agree to comply with IFTA's provisions. Although the Department did not present evidence in the form of Respondent's IFTA application, there is no contention that Respondent was not an IFTA licensee, and therefore, presumably, the Department collected a signed application from Respondent before issuing Respondent's IFTA license. See S.C. Nat. Bank v. Florence Sporting Goods, Inc., 241 S.C. 110, 115-16, 127 S.E.2d 199, 202 (1962) ("In the absence of any proof to the contrary, public officers are presumed to have properly discharged the duties of their offices and to have faithfully performed the duties with which they are charged."). Therefore, Respondent agreed to comply with IFTA's provisions, including recordkeeping provisions.

However, a promise to comply does not preclude a separate duty on the Department to provide the information necessary for Respondent to comply. The notice provision states the Department shall provide an initial IFTA licensee with the information necessary to comply with IFTA, including IFTA's recordkeeping requirements. The word "shall" in the notification provision establishes a duty on the part of the Department to inform initial licensees of IFTA's recordkeeping requirements. Accordingly, although the notification and certification provisions conflict to the extent they fail to clarify whether Respondent's duty to know the law is independent of the Department's duty to inform Respondent of the law, this Court finds the provisions are not irreconcilable. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000) ("Statutes in apparent conflict should, if reasonably possible, be construed to allow both to stand and to give effect to each."). This court finds Respondent's duty to comply with IFTA's requirements is predicated on the Department's duty to inform it of what those requirements are, including IFTA's recordkeeping requirements. Together, the two provisions ensure parties are aware of IFTA's requirements to better realize the cooperative spirit and purpose of IFTA, which is "to promote and encourage the fullest and most efficient possible . . . administration of motor fuels use taxation laws." IFTA, Articles I, R130.

Here, the notification provision has been part of IFTA since at least July 1998, but the Department admits it did not start utilizing the MC-7 form to document its compliance with this provision until November 2009. Whether it had a form prior to the MC-7 to demonstrate compliance is unknown. Regardless, although the Department started utilizing the MC-7 in 2009, it did not present it to Respondent, an IFTA licensee since 2008, until 2011. The Department provided no excuse for its delay. Moreover, Respondent started complying with IFTA's recordkeeping requirements in 2011 after the Department presented it with the MC-7, and thus put it on notice of IFTA's recordkeeping requirements. Further, the Department admits Respondent made a good faith effort to comply with IFTA's requirements. Therefore, while it is undisputed Respondent kept inadequate records during the audit period, which properly resulted in an assessment of taxes under IFTA, this Court cannot uphold the assessment or suspension in light of the Department's failure to comply with its duties under IFTA.

Accordingly, this Court finds substantial evidence in the Record supports the reasoning and determination reached by the Hearing Officer, and the Court finds the OMVH Hearing Officer

properly concluded the Department wrongly assessed taxes and suspended Respondent's IFTA license.

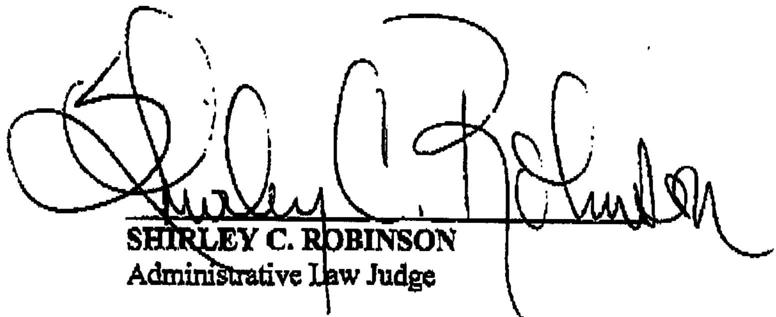
Burden of Proof

In the conclusions of law section of his order, the OMVH Hearing Officer stated "[b]asic administrative law principles establish that an agency bears the burden of proof in an enforcement action." The Department argues the Hearing Officer erred in finding the Department had the burden of proof in this matter. This court agrees. IFTA clearly states: "The assessment made by a base jurisdiction pursuant to this procedure shall be presumed to be correct and, in any case where the validity of the assessment is questioned, the burden shall be on the licensee to establish by a fair preponderance of evidence that the assessment is erroneous or excessive." IFTA, Articles XII, R1210.300. This provision is repeated in the IFTA Audit Manual, which states, "The findings of the base jurisdiction's audit as to the amount of fuel taxes due from any licensee shall be presumed to be correct." A730. Accordingly, the Department's assessment is presumed correct, and Respondent had the burden of proof to show the assessment was incorrect at the contested case hearing. See Leventis v. S. C. Dep't of Health & Envtl. Control, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding the burden of proof is generally on the complaining party in an adjudicatory administrative proceeding).

ORDER

IT IS HEREBY ORDERED that the OMVH Final Order and Decision refusing to impose the assessment against Respondent and rescinding the suspension of Respondents' IFTA license is **AFFIRMED**.

AND IT IS SO ORDERED.



SHIRLEY C. ROBINSON
Administrative Law Judge

March 24, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE
[illegible]
this 24 day of March 2014
By: [illegible]

FILED
APR 30 2014
SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

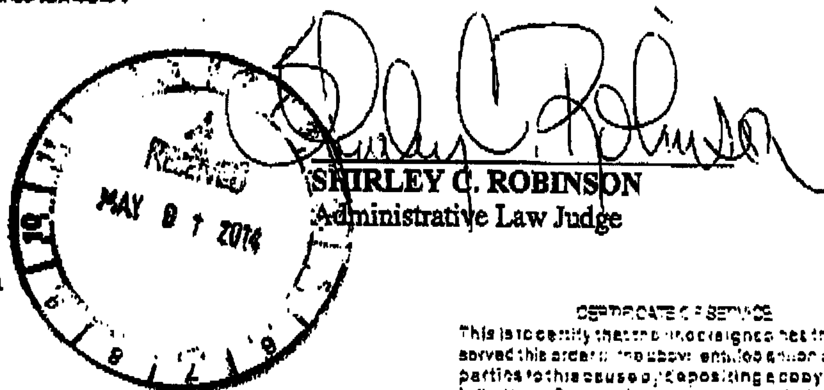
South Carolina Department of Motor Vehicles, Appellant, v. Russo Dumpster, Inc., Respondent.	)	Docket No. 13-ALJ-21-0193-AP **ORDER DENYING MOTION FOR RECONSIDERATION**

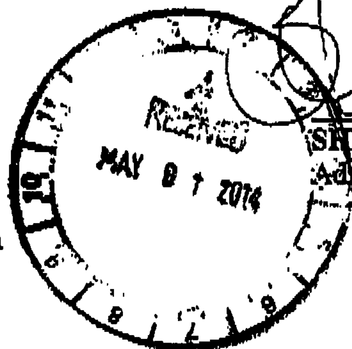
This matter is before the South Carolina Administrative Law Court ("ALC" or "the Court") pursuant to an appeal by the South Carolina Department of Motor Vehicles ("Appellant") of a Final Order and Decision issued by the Office of Motor Vehicle Hearings ("OMVH") Hearing Officer dated March 14, 2013. On March 24, 2014, the Court issued an Order affirming the OMVH Hearing Officer's Final Order and Decision.

Subsequently, on April 4, 2014, the Appellant filed a motion requesting the Court to reconsider its decision accompanied by a Motion to Present Additional Evidence. Having considered the facts of this appeal and the Appellant's Motion for Reconsideration, the Court finds that its Order affirming the OMVH Hearing Officer must stand, and it is not necessary to consider additional evidence.

THEREFORE, IT IS HEREBY ORDERED that Appellant's Motion for Reconsideration and Appellant's Motion to Present Additional Evidence are **DENIED.**

AND IT IS SO ORDERED.





SHIRLEY C. ROBINSON
Administrative Law Judge

April 30, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).
This 30 day of April 2014
By: [signature]
Judicial Clerk