STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Bradley Sanders, Appellant, vs. South Carolina Department of Motor Vehicles and Columbia Police Department, Respondents.	Docket No. 15-ALJ-21-0124-AP **AMENDED FINAL ORDER**

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SC Court of Appeals

STATEMENT OF THE CASE

This is an appeal by Bradley Sanders (Appellant) from a Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings (OMVH). A hearing was held at the OMVH on March 5, 2013. On February 13, 2015, the OMVH issued a Final Order and Decision sustaining the decision of the South Carolina Department of Motor Vehicles (Department or DMV) revoking Appellant's driver's license and driving privileges. The Administrative Law Court (ALC or court) has jurisdiction to review this matter pursuant to South Carolina Code Section 1-23-660. Upon review of this matter, the OMVH's Final Order and Decision is affirmed.

BACKGROUND

On November 21, 2012, Officer S. B. Desrochers of the Columbia Police Department was dispatched to the scene of a single-car collision. Officer Desrochers found the Appellant standing nearby, bleeding from the head and smelling strongly of alcohol. The Appellant, according to the officer, also spoke with slurred speech and seemed both mentally and physically "off-balance." The Appellant was transported to Lexington Medical Center, where Officer Desrochers was informed by Angela Albright, who held herself out as a registered nurse that the Appellant was physically unable to submit to a breath test. Officer Desrochers arrested the Appellant, read the Appellant his *Miranda* rights, and advised him of his Implied Consent Rights, both in writing and verbally. The Appellant refused to submit to a blood test and was given a Notice of Suspension of his driver's license.

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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. 2014). Appeals from the OMVH, which is an "agency" by statutory definition, are brought before the ALC. *See* S.C. Code Ann. §§ 1-23-310(2) and 1-23-660(D) (2005 & Supp. 2014). The standard used to review appeals of agency decisions is provided by S.C. Code Ann. § 1-23-380(5). *See* S.C. Code Ann. § 1-23-600(E) (Supp. 2014).

> (5) 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 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.

Under this statute, the court's review is essentially "limited to determining whether the findings [of the OMVH] were supported by substantial evidence or were controlled by an error of law." *Hill v. S.C. Dept. of Health & Environmental Control,* 389 S.C. 1, 9, 698 S.E.2d 612, 617 (2010) (citation omitted).

ISSUES ON APPEAL

1. Did the OMVH hearing officer err in admitting evidence showing that the arresting officer lawfully sought a blood sample?
2. Did the OMVH hearing officer err in ruling that the arresting officer established a prima facie case that the individual who signed the SLED Urine/Blood Collection Report was a licensed medical professional?

DISCUSSION[1]

Under South Carolina law, a motorist arrested for driving under the influence is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol or drugs, or both. S.C. Code Ann. § 56-5-2950 (Supp. 2014). If a motorist refuses to submit to such a test, the motorist's license must be immediately suspended. S.C. Code Ann. § 56-5-2951(A) (Supp. 2014). If such a suspension is issued, the motorist may request an administrative hearing to review, in relevant part, whether the arrestee refused to submit to a test pursuant to Section 56-5-2950. *See* S.C. Ann § 56-5-2951(F)(3) (Supp. 2014).

In such a hearing, the Department and the arresting officer have the burden of proof. S.C. Code Ann § 56-5-2951(F) (Supp. 2014). The burden is met by a preponderance of the evidence. S.C. Ann. § 1-23-600(A)(5) (Supp. 2014); OMVH Rule 15(B). The South Carolina Rules of Evidence apply to proceedings before the OMVH. S.C. Code Ann. § 1-23-330(1) (2005); OMVH Rule 14. The question before a hearing officer is not whether the state proved guilt, but whether the motorist violated the implied consent law. *See S.C. Dept. of Motor Vehicles v. Nelson*, 364 S.C. 514, 525–26, 613 S.E.2d 544, 549 (Ct. App. 2005) (citation omitted).

The implied consent statute requires that the arresting officer first offer the subject a breath test, unless the subject is unable to provide a breath test "for any other reason considered acceptable by the license medical personnel...." If this occurs, then the officer "may request a blood sample be taken" from the subject. Specifically, the statute provides:

> At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken.

S.C. Code Ann. § 56-5-2950 (Supp. 2014).

The Appellant argues that in determining whether the Appellant violated the implied consent law, the OMVH hearing officer improperly admitted hearsay evidence. Specifically, the Appellant contends that the hearing officer improperly relied upon hearsay statements of Angela

[1] The court appreciates counsel for Appellant's cite to this court's previous opinion which is contrary to the Appellant's position in this matter.

Albright and a SLED Urine/Blood Collection Report,[2] signed by Albright, because they were offered for the truth of the matter asserted.

Rule 801(c), SCRE defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." It is well settled that a statement introduced not for the truth of the matter asserted should not be excluded as hearsay. *Hatfield v. Van Epps*, 358 S.C. 185, 192, 594 S.E.2d 526, 530 (Ct. App. 2004) (citation omitted). *See also Sams v. McCaskill*, 282 S.C. 481, 485, 319 S.E.2d 344, 347 (Ct. App. 1984). Furthermore, an appellate court will not reverse an evidence ruling absent an abuse of discretion amounting to an error of law. *R & G Const., Inc. v. Lowcountry Regl. Transp. Auth.*, 343 S.C. 424, 439 S.E.2d 113, 121 (Ct. App. 2000).

In this case, the arresting officer's testimony concerned how he arrived at the conclusion that the Appellant was unable to take a breath test. He testified that the nurse signed the SLED Urine/Blood Collection Report, and also indicated on that form that she was a registered nurse when she listed her title on that report. Under the facts of this case, the officer's testimony on this point was not hearsay, because it was not offered to prove that the Appellant was, in fact, medically unable to provide a breath test at the time, but rather, to show that the officer had reasonable grounds to request that the Appellant submit to a blood test.

In short, the circumstances of this case are very similar to those in *Cann v. S.C. Dep't of Motor Vehicles and S.C. Dep't of Public Safety*, 12-ALJ-21-0465-AP, in which this court previously held that the arresting officer's testimony was not offered to prove that the Appellant was actually unable to take a breath test, but was offered to show the officer's action, in offering the Appellant an opportunity to submit to a blood test, was warranted.

Likewise, under the facts of this case, the arresting officer relied on information he received from a person he reasonably believed was qualified to opine that the Appellant was unable to take a breath test under the provisions of Section 56-5-2950(A). The officer then, as required under the statute, offered the Appellant the opportunity to submit to a blood test, to which he refused. *See* Rule 801, SCRE; *see also* S.C. Code Ann. § 56-5-2950(A) (Supp. 2014). This court agrees with

[2] The court notes that this report, which was admitted at the hearing and relied upon by the hearing officer in his decision, was not originally contained in the Record on Appeal, though it had been present at the hearing. This court issued an Order to Supplement the Record, on December 11, 2015, and the Department supplemented the record with the report (the SLED Report was dated November 21, 2012) on December 18, 2015. The court finds that there is no prejudice to the Appellant, since substantial evidence on the whole record supports the hearing officer's decision. *See Sweat v. Crawford*, 292 S.C. 324, 327, 356 S.E.2d 147, 149 (Ct. App. 1987).

the hearing officer's conclusion that the evidence was not offered for the truth of the matter asserted, but rather to show that a blood test was warranted under the statute. Thus, the hearing officer did not err in admitting Albright's statement into evidence.

The Appellant further argues that the hearing officer erred in ruling that the Officer established a prima facie case that Albright was a licensed medical professional. The Appellant cites to a criminal case in which a purported "trained, qualified medical personnel" actually collected a blood-alcohol sample from the defendant. *See State v. Frey,* 362 S.C. 511, 516, 608 S.E.2d 874, 877 (Ct. App. 2005).[3] In *Frey*, the defendant argued that the court erred in admitting the blood-alcohol test results, and argued that there was no proof that the person who collected his blood sample was a licensed "medical personnel trained to obtain the samples in a licensed medical facility," as required by the statute.

The Appellant's case is easily distinguishable. *Frey* involved a criminal proceeding in which the state sought to introduce a blood sample that the statute mandates must only be collected by licensed physicians or licensed registered nurses or "other medical personnel trained to obtain samples in a licensed medical facility." In this case, the Appellant was appearing before the OMVH hearing officer because he refused to submit to a blood test. In this case, the officer complied with the requirements of the implied consent statute, and reasonably relied on the statement of a hospital nurse that the Appellant was unable to take a breath test. The Appellant also cites to a case where no attempt to consult licensed medical personnel appeared in the record. *See generally Peake v. S.C. Dept. of Motor Vehicles*, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007).

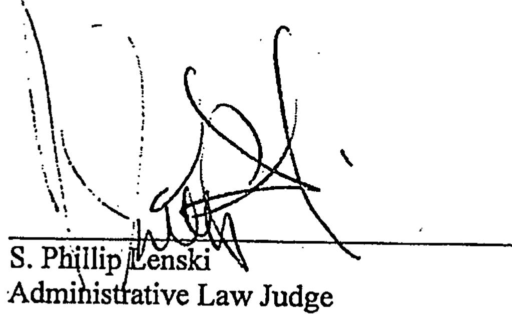
In this case, evidence was presented to establish Albright's status as licensed medical personnel. Officer Desrochers testified that he saw Albright in the hospital wearing a nametag and hospital scrubs that reasonably indicated she was a registered nurse. The Appellant offered no rebuttal of this prima facie evidence. The court notes that the standard of proof in an OMVH hearing is a preponderance of the evidence, unlike in a criminal case. *See* S.C. Ann. § 1-23-600(A)(5) (Supp. 2014); OMVH Rule 15(B). Additionally, in this instance, no blood sample was collected. Therefore, the court finds that the hearing officer did not err in ruling that Officer Desrochers established a prima facie case the Albright was a registered nurse.

[3] The court cites to the opinion substituted and refiled January 25, 2005, not the earlier opinion contained in the record.

ORDER

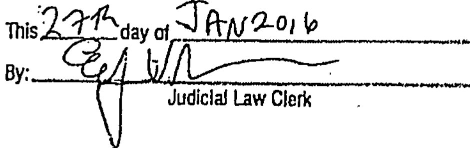
IT IS HEREBY ORDERED, for the foregoing reasons, that the hearing officer's Final Order and Decision is **AFFIRMED** and the Department's suspension of Appellant's driver's license is upheld.

AND IT IS SO ORDERED.



S. Phillip Lenski
Administrative Law Judge

January 27, 2016
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 27th day of JAN 2016

By: ______________________
Judicial Law Clerk