THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable H. W. Funderburk, Jr., Administrative Law Judge

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Case No. 2015-002535

Melissa Spalt . . . . . Respondent,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety . . . . . Appellants.

Of Whom the South Carolina Department of Motor Vehicles is Appellant.

FINAL BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

This matter comes before the Court of Appeals pursuant to the appeal of the South Carolina Department of Motor Vehicles (hereinafter, "SCDMV" or "DMV"), who seeks review of the December 1, 2015 Final Order and Order of Remand from the Administrative Law Court (hereinafter, "ALC") which remanded for a hearing before the Office of Motor Vehicles Hearings (hereinafter, "OMVH") Respondent Spalt's challenge to an implied consent suspension. The Appellant, SCDMV seeks to have the ALC's Final Order and Order of Remand overturned and the OMVH Order of Dismissal issued August 12, 2015 reinstated in full.

Respondent Spalt was arrested on April 5, 2015 for an offense arising out of an act alleged to have been committed while she was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs (R. pp. 127-128). Upon refusal to submit to a breath sample, Respondent was found to be in violation of S.C. Code §56-5-2950, and the arresting officer issued a Notice of Suspension form pursuant to S.C. Code §56-5-2951. *Id.* Respondent timely requested a contested case hearing on April 10, 2015. *Id.*

On April 14, 2015, the OMVH e-mailed a Notice of Hearing to all parties for a

hearing scheduled for June 23, 2015 (R. pp. 122-126). This Notice of Hearing was sent again to Respondent Spalt's Counsel only on June 12, 2015 (R. p. 121). On Thursday, June 18, 2015, Respondent requested a continuance of the hearing scheduled for Tuesday, June 23, 2015 due to a conflicting Court appearance her Counsel had in the Magistrate's Court (R. pp. 112-115).[1] The conflicting Magistrate's Court appearance had been noticed to Respondent's Counsel on May 19, 2015 (R. p. 115). On June 24, 2015, the OMVH e-mailed an Order of Continuance and Notice of Hearing to all parties (R. pp. 110-111). This Order rescheduled the hearing for August 11, 2015. *Id.*

On Friday, August 7, 2015 at 12:30 p.m., Respondent requested a continuance of the hearing scheduled for Tuesday, August 11, 2015 due to a conflicting Court appearance her Counsel had in the Magistrate's Court (R. pp. 104-109).[2] The conflicting Magistrate's Court appearance had been noticed to Respondent's Counsel on July 15, 2015 (R. p. 109).[3] On Sunday, August 9, 2015, the Hearing Officer denied the request for continuance of the August 11, 2015 hearing (R. p. 103). On Monday, August 10, 2015 at 8:02 a.m., the OMVH e-mailed Respondent's Counsel the denial of the request for continuance issued by the Hearing Officer the day before (R. p. 102).[4] Respondent's Counsel responded the same day at 1:28 p.m. and asked the Hearing Officer to reconsider

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[1] The DMV, a party to this case, was not copied on this request and was not aware the request had been made until the June 24, 2015 Order of Continuance and Notice of Hearing was issued by the OMVH.

[2] The DMV, a party to this case, was not copied on this request and was not aware the request had been made until the August 12, 2015 Order of Dismissal was issued by the OMVH.

[3] Although Respondent stated DMV "alleges this conflict became apparent immediately upon the July 15, 2015 this is just not true," an August 10, 2015 e-mail from Respondent's Counsel's office to the OMVH clearly stated Respondent's Counsel "were notified of a scheduled Jury Trial on July 15th." R. pp. 10 and 102.

[4] DMV, a party to this case, was not copied on this e-mail from the OMVH and, it appears, Trooper R. D. Grubbs, the arresting officer, was also not copied on this e-mail from the OMVH.

the request for continuance.[5] *Id.* On Monday, August 10, 2015 at 4:41 p.m., Respondent's Counsel filed a second Motion for Continuance (R. pp. 90-100).[6] On Monday, August 10, 2015 at 5:02 p.m., Trooper R. D. Grubbs did e-mail Frances Inabinet of the OMVH and Respondent's Counsel's paralegal stating "No objections" to Respondent's request for a continuance (R. p. 90).[7]

On August 12, 2015, the Hearing Officer issued an Order of Dismissal ruling that Respondent "did not follow the requirement of Rule 601 or the procedure for requesting a continuance at the OMVH pursuant to Rule 10 (B)," that Respondent's request for a continuance had been denied, the "parties were notified of the denial on the morning of Monday, August 10, 2015," and that Respondent nor her Counsel appeared at the hearing (R. pp. 56-57). This decision was served on all the parties via e-mail on August 13, 2015 (R. pp. 58-59). On August 17, 2015, Respondent filed a Motion for Reconsideration of the Order of Dismissal (R. pp. 62-81). Respondent's Motion for Reconsideration was primarily based on two (2) points: 1) that Appellant's second Motion for Continuance e-mailed at 4:41 p.m. on Monday, August 10, 2015 had not been ruled on; and 2) that "attorneys with court conflicts must serve the continuance upon all parties... As required by the rules all parties of record were notified of the request for a continuance." (R. pp. 63-65).[8] On September 11, 2015, Respondent filed her Notice of Appeal with the ALC

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[5] This request for reconsideration was not copied to DMV or Trooper R. D. Grubbs, and, in fact, was sent directly to the Hearing Officer as well as the Hearing Officer's Scheduling Assistant. All prior e-mails from Respondent's Counsel had been sent only to the Hearing Officer's Scheduling Assistant. Further, the DMV, only became aware of this request for reconsideration when the Record on Appeal was filed in the ALC by the OMVH on or about October 7, 2015.

[6] The DMV, a party to this case, was not copied on this request and was not aware the request had been made until the August 12, 2015 Order of Dismissal was issued by the OMVH.

[7] The DMV, a party to this case, was not copied on this e-mail and was still unaware of the requested continuance of the August 11, 2015 hearing.

[8] Despite being listed by the Appellant in the caption to this Motion as a Petitioner, the DMV was not copied on this Motion and was not even aware the Motion had been made until the September 11, 2015

(R. pp. 40-55).[9] On September 16, 2015, the Hearing Officer issued an Order Dismissing Respondent's Motion for Reconsideration (R. p. 60). This Order was served on the parties on the same date (R. p. 61).

The ALC appeal was assigned to the Honorable H. W. Funderburk, Jr. on September 16, 2015 (R. p. 39). The Record on Appeal was filed on or about October 2, 2015 (R. pp. 38 and 133). On October 29, 2015, Memorandum on Appeal was filed by Respondent Spalt (R. pp. 30-35). On November 16, 2015, DMV filed its Brief in the ALC (R. pp. 15-29). On November 23, 2015, Respondent Spalt filed her Reply Brief (R. pp. 9-14). On December 1, 2015, the ALC issued Final Order and Order of Remand (R. pp. 2-7). On December 2, 2015, prior to receiving the ALC's Final Order and Order of Remand, Appellant mailed the ALC a letter supplementing its Brief with two (2) additional cases (R. p. 8). Also, on December 2, 2015, the OMVH scheduled a hearing for this case pursuant to the ALC's December 1, 2015 Order of Remand (R. p. 134).

On December 10, 2015, DMV filed a Notice of Appeal to this Court. This Notice of Appeal was served on Respondent's Counsel, the Clerk for the ALC, and Yolanda Williams of the OMVH on December 8, 2015.

As of the filing of this Brief, Respondent Spalt has still not served DMV with copies of the following:

1) request for continuance on June 18, 2015;

Notice of Appeal was received by DMV on September 15, 2015. Further, DMV did not receive any copy of the Motion for Reconsideration until the ALC Record on Appeal was served on DMV by the OMVH on October 7, 2015.

[9] DMV assumes Respondent's ALC appeal focused on the OMVH's Order of Dismissal dated August 12, 2015 and issued on August 13, 2015. DMV bases this assumption on Respondent's statement in her Notice of Appeal that she "gives notice of her Appeal from the Final Order and Decision of the [OMVH] issued on August 12, 2015..." DMV notes that no Final Order was attached to Respondent's ALC Notice of Appeal as required by Rule 33, SCALCR, but that the only order issued in this case on August 12, 2015, as far as DMV is aware, is the Order of Dismissal dated August 12, 2015 and issued on August 13, 2015.

2) request for continuance on August 7, 2015;

3) request for reconsideration of request for continuance on August 10, 2015 at 1:28 p.m.;

4) request for continuance dated August 10, 2015 and e-mailed to OMVH at 4:41 p.m.; and

5) Motion for Reconsideration dated August 17, 2015.[10]

Failure of Respondent Spalt to serve these documents on DMV has continued despite DMV pointing out this failure to serve in DMV's ALC Brief. Further, it is clear that Respondent is and was aware that DMV is a party to this action as DMV was served with Respondent's ALC Notice of Appeal (R. p. 43) and Respondent listed DMV as a Petitioner in Respondent's Motion for Reconsideration (R. p. 63).

STANDARD OF REVIEW

The scope of judicial review in cases such as this is limited by the Administrative Procedures Act, S.C. Code §1-23-380(A)(6).

> (A) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review....
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> (6) The court shall not substitute its judgment for that 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:
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> (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;

[10] The Certificate of Service by Mail reflects that the Motion for Reconsideration was only mailed to the Hearing Officer, Trooper R. D. Grubbs, and Trooper McWhorter (R. p. 66).

(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.

In *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981), our Supreme Court set out the standard of evidentiary review under the South Carolina Administrative Procedure Act:

> [Section 1-23-380(g)(5)] specifically states: "The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact." In addition, the statute states the decision under appeal must be "clearly erroneous" in view of the substantial evidence on the whole record.
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> We, therefore, caution the Bench and Bar as to the limitations upon the application of the "substantial evidence" rules in reviewing the decision of administrative agencies. As stated in *Dickinson-Tidewater, Inc. v. Supervisor of Assess.*, 273 Md. 245, 329 A.2d 18, 25, the substantial evidence test "need not and must not be either judicial fact-finding or substitution of judicial judgment for agency judgment"; and a judgment upon which reasonable men might differ will not be set aside.

The Court further noted that:

> The substantial evidence rule... means that we will not overturn a finding of fact by an administrative agency "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." (Citation omitted.)

See also *Schudel v. South Carolina Alcoholic Beverage Control Commission*, 276 S.C. 138, 276 S.E.2d 308 (1981); *Fast Stops, Inc. v. Ingram,* 276 S.C. 593, 281 S.E.2d 18 (1981).

An appeal from action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 211, 394 S.E.2d 842 (1990); *Lark v. Bi Lo, Inc.*, *supra*. In *Lark*, our Supreme Court quoted

Consolo v. Federal Maritime Commission, 383 U.S. 611, 16 L.Ed.2d 131, 86 S.Ct. 1118 (1966), to define substantial evidence:

> We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."... "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury..." This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark, 276 S.C. at 136, 276 S.E.2d at 311. *See*, *also*, *Dorman v. DHEC*, 565 S.E.2d 119, 350 S.C. 159 (Ct. App. 2002); *Hamm v. South Carolina Public Service Commission and Wild Dunes Utilities, Inc.*, 311 S.C. 295, 422 S.E.2d 118 (1992).

A court cannot weigh the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion. *Dorman v. DHEC*, *supra*; *Hamm v. American Telephone & Telegraph Co.*, *supra*; *Chemical Leaman Tank Lines v. South Carolina Public Service Commission*, 258 S.C. 518, 189 S.E.2d 296 (1972). The limited substantial evidence standard of review is intended only to assure that the agency's action is properly supported and that, therefore, no abuse of delegated authority occurred. *See Fowler v. Lewis*, 260 S.C. 54, 194 S.E.2d 191 (1973).

On review of the acts or orders of administrative agencies, the courts will presume, among other things, that the agency action is regular and correct, and that the orders and decisions of the agency are valid and reasonable. 73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983). Therefore, the burden is on the Petitioner to show convincingly that the order of the agency is without evidentiary support or is arbitrary or capricious as a matter of law. *Hamm v. South Carolina Public*

Service Commission, 294 S.C. 320, 364 S.E.2d 455 (1988).

ARGUMENT

1) THE DECEMBER 1, 2015 FINAL ORDER AND ORDER OF REMAND ISSUED BY THE ADMINISTRATIVE LAW COURT IS IMMEDIATELY APPEALABLE TO THIS COURT.

S.C. Code §14-3-330 sets forth those cases that may be considered by the appellate courts of South Carolina. One of the types of cases that may be considered by the appellate courts of this state are those where "An order affecting a substantial right made in an action when such order...(b) grants or refuses a new trial..." The order appealed in this case is just such an order. The Final Order and Order of Remand issued by the ALC on December 1, 2015 explicitly remands this case back to the OMVH "for a hearing on the merits." This case was already scheduled for a hearing once before and Respondent, nor her Counsel appeared at the hearing. Therefore, the ALC's Order of Remand has, essentially, granted Respondent a new "trial" via the new hearing. As held in the recently decided case *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146, to prevent Appellant DMV "from appealing the order immediately would encourage piecemeal litigation and limit [DMV's] appellate remedies." See also, *Knight v. Johnson*, 244 S.C. 70, 135 S.E.2d 372 (1964) (An order of the trial court granting or refusing a new trial, when based solely on an error of law, is subject to review by the Supreme Court); and *Daughty v. Northwestern R. Co. of South Carolina*, 92 S.C. 361, 75 S.E. 553 (1912) (This statute does not undertake to make an order granting a new trial appealable, when it is based upon questions of fact; but it can review orders granting new trials when based upon error of law.). For these reasons, the

ALC's Final Order and Order of Remand issued on December 1, 2015 is immediately appealable.

2) THE HEARING OFFICER PROPERLY DISMISSED RESPONDENT'S CHALLENGE TO HER IMPLIED CONSENT SUSPENSION.

Rule 601, SCACR states:

(a) Order of Priority as Between Tribunals. In the event an attorney of record is called to appear simultaneously in actions pending in two or more tribunals of this State, the following list shall establish the priority of his obligations to those tribunals:

(1) The Supreme Court.
(2) The Court of Appeals.
(3) The Commission on Judicial Conduct, the Commission on Lawyer Conduct, and the Committee on Character and Fitness.
(4) The Circuit Court - General Sessions.
(5) The Family Court - merits hearings involving child abuse, child neglect and termination of parental rights upon approval of the Chief Judge for Administrative Purposes for the Family Court and notice to the Chief Judge for Administrative Purposes for the Circuit Court five days prior to the term of the Circuit Court.
(6) The Circuit Court - Common Pleas, Jury Term.
(7) The Family Court – all cases not referenced in (5) above.
(8) The Circuit Court - Common Pleas, Non-Jury Term.
(9) The Administrative Law Court.
(10) Alternative Dispute Resolution Conferences conducted pursuant to the SC Court-Annexed ADR Rules.
(11) The Probate Court.
(12) **Magistrates and Municipal Courts**.
(13) **Other Administrative Bodies or Officials**.

When a party or his counsel is in the process of a hearing or trial before a tribunal, he may not be required to appear in another tribunal having greater priority unless the tribunal with less priority grants a recess or continuance for that purpose.

(b) Conflict With Federal Courts. When times set for appearances before state and federal courts are in conflict, appearance shall have such priority as is appropriate. Courts and counsel shall have the obligation to adjust schedules to accord with the spirit of comity between the state and federal courts.

> (c) Attorney to Give Notice. **An attorney who cannot make a scheduled appearance because of the priority established by paragraph (a) of this rule shall notify the affected tribunals as soon as the conflict becomes apparent.**

Emphasis added. In this case, the conflicting Magistrate's Court appearance had been noticed to Respondent's Counsel on July 15, 2015 (R. pp. 102 and 109). Despite the July 15, 2015 notice, Respondent's Counsel did not notify the OMVH or Hearing Officer of the anticipated conflict until Friday, August 7, 2015 at 12:30 p.m., three (3) weeks and one (1) day after the conflict was apparent to Respondent's Counsel. Rule 601(c), SCACR requires attorneys to notify affected tribunals as soon as a conflict becomes apparent. Respondent's Counsel did not do so. For these reasons, the Hearing Officer's finding that "counsel did not follow the requirement of Rule 601" was appropriate and demonstrates no abuse of discretion.

In South Carolina, the grant or denial of a continuance is within the sound discretion of the Hearing Officer and is reviewable on appeal only when an abuse of discretion appears from the record. *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) ("The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record."); *Newman v. Old West, Inc., et al.*, 286 S.C. 394, 334 S.E.2d 275 (1985) (The trial judge's decision to grant or deny a continuance is a matter within his sound discretion.); and *State v. Lytchfield*, 230 S.C. 405, 95 S.E.2d 857 (1957) ("The granting or refusal of a motion for continuance is within the discretion of the trial judge and his disposition of such a motion will not be reversed on appeal unless it is shown that there was an abuse of discretion to the prejudice of appellant. A multitude of cases to this effect will be found in 7 S.C.Dig., Criminal Law, k586 et seq., p. 504 et seq. and

supplement. Review of them shows that reversals of refusal of continuance are about as rare as the proverbial hens' teeth."). Thus, with no evidence of an abuse of discretion, the Hearing Officer's ruling must stand.

Furthermore, Rule 10, OMVH Rules states:

> A. Content and Filing. All motions shall be written, contain the caption of the case and the title of the motion, the docket number and the name, address, telephone number and e-mail address of the person or representative filing the motion. The motion shall state with specificity the grounds for relief and the relief sought. All motions pertaining to the hearing shall be filed not later than ten days before the hearing date. Any party may file a written response to the motion within ten days unless the time is extended or shortened by the hearing officer.
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> B. Motions for Continuance. A motion for continuance shall be in writing, state with specificity the reasons therefor, and be signed by the requesting party or representative. **All motions must be filed at least two business days prior to the scheduled hearing. Motions filed less than two business days prior to the scheduled hearing will be granted only for good cause shown. Motions not served upon all parties will not be granted except in an emergency.** Attorneys with court conflicts must include documentation of the call to court with the motion and the documentation must include the case name, the court, the county, the docket number, the presiding judge's name and telephone number, and the date the attorney received notice of the conflicting court appearance. **Attorneys must notify the Office as soon as possible when a court conflict occurs.** Law enforcement officers with court conflicts must include documentation of the call to court with the motion and the documentation must include the case name, the court, the county, the docket number, the presiding judge's name and telephone number, and the date the officer received notice of the conflicting court appearance. Law enforcement officers with training conflicts must submit documentation that sets out the date, place, and time of training, and the date the officer received notice of the conflicting training. Officers must notify the Office as soon as possible when a conflict occurs.

Emphasis added. Respondent's request for continuance on June 18, 2015; request for continuance on August 7, 2015; request for reconsideration of request for continuance on August 10, 2015 at 1:28 p.m.; and request for continuance dated August 10, 2015 and e-

mailed to OMVH at 4:41 p.m. did not comply with Rule 10(A), OMVH Rules. Each of these requests was sent simply as a letter or e-mail to the OMVH, the Hearing Officer, or both. Specifically, none of these requests were written as a motion, none contained the caption of the case, some did not contain the e-mail address of the person or representative filing the motion, and none were signed by an attorney. Rather each of these were signed by "Tori Ford" for Attorney Michael Laubshire or were sent via e-mail from "Victoria Ford, Paralegal." Therefore, Respondent's Counsel's attempts to file a "motion for continuance" were, in actuality, not motions. These attempts were merely letters requesting a continuance. While a letter may comply with the requirements of Rule 601, SCACR, it does not comply with the requirements of Rule 10, OMVH Rules.

The failure to comply with the requirements of Rule 10, OMVH Rules is further demonstrated by the explicit requirements of section (B) of Rule 10, OMVH Rules. Specifically, the requirement that "All motions must be filed at least two business days prior to the scheduled hearing." Assuming for argument's sake that Respondent's Counsel's August 7, 2015 letter is considered a motion, it still did not comply with the requirement that it be filed at least two (2) business dates prior to the scheduled hearing. This hearing was scheduled for August 11, 2015 at 9:00 a.m. In August 2015, the 8th and 9th of August were Saturday and Sunday, respectively, and not business days. Therefore, any motions for the August 11, 2015 hearing had to be filed with the OMVH by no later than 9:00 a.m. on Friday, August 7, 2015. Respondent's Counsel's August 7, 2015 letter was not sent to the OMVH until 12:30 p.m. on August 7, 2015, clearly past the two business day deadline. The Rule 10(B), OMVH Rules goes on to discuss how motions submitted less than two business days prior to the scheduled hearing will be evaluated:

"Motions filed less than two business days prior to the scheduled hearing will be granted only for good cause shown." Emphasis added. Obviously, the Hearing Officer did not find good cause to grant the requested continuance. In fact, the Hearing Officer took pains to point out in the Order of Dismissal Respondent's Counsel's failure to request the continuance for three (3) weeks and one (1) day after knowing there was a court conflict. Moreover, Rule 10(B), OMVH Rules specifically states, "Attorneys must notify the Office **as soon as possible** when a court conflict occurs." Clearly, based on the over three (3) week delay, Respondent's Counsel did not comply with this requirement of Rule 10, OMVH Rules.

In addition to the reasons specifically stated by the Hearing Officer in his Order of Dismissal, Respondent's Counsel's requests also failed to comply with other requirements of Rule 10(B), OMVH Rules. Specifically, Rule 10(B), OMVH Rules requires:

> Attorneys with court conflicts must include documentation of the call to court with the motion and the documentation must include the case name, the court, the county, the docket number, the presiding judge's name and telephone number, and the date the attorney received notice of the conflicting court appearance.

Respondent's Counsel's June 18, 2015 request did not include the docket number, the presiding judge's name and telephone number, or the date the attorney received notice of the conflicting court appearance.[11] Additionally and significantly, Rule 10(B), OMVH Rules also states "Motions not served upon **all parties** will not be granted except in an emergency." In this case, Respondent's Counsel failed to serve DMV with:

[11] It did contain the date the notice was sent to Appellant's Counsel from the Solicitor's Office and later the date of receipt was confirmed by Respondent's Counsel to the OMVH (R. p. 102).

1) the request for continuance on June 18, 2015;[12] [13]

2) the request for continuance on August 7, 2015;[14]

3) the request for reconsideration of request for continuance on August 10, 2015 at 1:28 p.m.;[15]

4) the request for continuance dated August 10, 2015 and e-mailed to OMVH at 4:41 p.m.; and[16]

5) the Motion for Reconsideration dated August 17, 2015.[17] [18]

Respondent's Counsel also failed to serve Trooper Grubbs with the request for reconsideration of request for continuance on August 10, 2015 at 1:28 p.m.[19] There are no statements or indications in any of these letters, e-mails, motions, or attached documents that any of these requests were made due to an emergency. Moreover, nothing in Respondent's Notice of Appeal or briefs in the ALC indicated that any of these letters, e-mails, and/or motions were made due to an emergency. The ALC Final Order and Order of Remand blithely dismisses Respondent's Counsel's failure to comply with the requirements of Rule 10, OMVH Rules as merely "not satisfy[ing] all of the technicalities" of the rule (R. p. 5). Service of a motion on other parties to a case is not a mere "technicality." By failing to serve all the parties, Respondent removed the parties'

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[12] R. pp. 112-115.

[13] Footnote 1 of the ALC's Final Order and Order of Remand states "The Record is unclear as to how this request was made and processed." The ALC Record on Appeal, however, contains a copies of the letters and e-mails regarding this request and how the request was made. See R. pp. 112-115.

[14] R. pp. 104-109.

[15] R. p. 102.

[16] R. pp. 90-100.

[17] R. p. 62-81.

[18] Respondent's ALC Reply Brief stated "Any and all requests for continuances were emailed to all parties of record listed on the original notice of hearing." This statement is incorrect, as shown by the listing above, and as shown in the R. pp. 122-126 and 110-111.

[19] In fact, because this request for reconsideration was not copied to DMV or Trooper R. D. Grubbs of the South Carolina Highway Patrol, and was sent directly to the Hearing Officer as well as the Hearing Officer's Scheduling Assistant, DMV believes this e-mail was an improper ex parte communication with the Hearing Officer.

ability to respond to or challenge in anyway the motions made to the OMVH. Moreover, by failing to serve all the parties, Respondent potentially placed the parties in the unenviable position of showing up to a hearing that may have been continued without the party's knowledge.[20] These collateral consequences of failure to serve motions on other parties to a case are not mere "technicalities," but, rather, can have a very real effect on the parties and the case. The various rules regarding service of motions and other pleadings are in place specifically to avoid situations such as those suggested above. As a result, if for no other reason than Respondent's Counsel's failure to serve copies of these requests on the DMV and Trooper Grubbs, the ALC Final Order and Order of Remand should be overturned and the OMVH Order of Dismissal issued August 12, 2015 reinstated in full.

Case law also supports overturning the ALC decision in this case. A review of the case *Brockman v. South Carolina Dept. of Motor Vehicles and Mauldin Police Dept.*, 2014 WL 2895374, 13-ALJ-21-0049-AP (SCALC 2014) reveals that the ALC has considered this exact issue in the past. In the *Brockman* case, the ALC specifically rejected a claim of abuse of discretion for a request of continuance under Rule 601, SCACR because the request for continuance was filed with less than two business days notice and Appellant was aware of the conflict well before he filed the Motion for Continuance. Thus, the *Brockman* case provides solid guidance to this Court in determining the proper outcome of this appeal and demonstrates that the ALC Final Order and Order of Remand issued December 1, 2015 is a departure from the precedent of the ALC. The ALC Final Order and Order of Remand finds that the *Brockman* case is

[20] For example, a law enforcement officer showing up for a 9:00 a.m. hearing after working a 7:00 p.m.-7:00 a.m. shift or an attorney for the DMV driving 3 hours from Columbia to a hearing in Horry, only to discover the hearing has been rescheduled and no notice was provided to them about the rescheduling.

not similar to this case because *Brockman* "was represented by substitute counsel and... a full hearing was held" (R. p. 5). What this finding by the ALC fails to acknowledge is that Respondent and/or her Counsel or substitute counsel could have appeared at the hearing. If they had done so, the OMVH would have held a full hearing as was done in the *Brockman* case. Therefore, despite the ALC's finding, there are not substantive differences in this case and the *Brockman* case.

Also instructive on this matter is the case of *Chadwick Dale Martin v. S.C. Dept. of Motor Vehicles*, 2007 WL 4184375 (2007). *Martin* found an appeal such as the one initiated by the Respondent in this case in the ALC is more like a Motion to Reopen and analyzed the case under the *Mictronics, Inc. v. S.C. Dept. of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001) four part test. In *Mictronics, Inc.*, the Court put forth the following four part test: "(1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party." *Mictronics, Inc.*, 548 at 226. In *Martin*, as we have in this case, there has been no information put forth for the Court to make a "tenable judgment on whether a meritorious defense exists" and, thus, the ALC found there was no abuse of discretion in the OMVH's dismissal pursuant to Rule 601, SCACR.

Further, "Nothing in Rule 601, SCACR mandates that one tribunal always be given priority over the other." *Joseph W. Hiller, Sr., v. S.C. Dept. of Labor, Licensing and Regulation*, 1999 WL 51899 (1999).

Another case which provides guidance on this matter is *S.C. Dept. of Revenue v. Edwin Alewine*, 1997 WL 816208 (1997). The *Alewine* case focused on:

1) the late notice to the ALC of a conflicting General Sessions court appearance (less than 24 hours);
2) the requirement of Rule 601, SCACR that "an attorney must give notice of a scheduling conflict as soon as it becomes apparent;"
3) that Counsel requesting the continuance did not state the date when he was noticed of the Circuit Court trial (notice of the ALC hearing was issued 45 days prior to the hearing);
4) there was no "explanation as to why the request was not made earlier;"
5) the number of prior requests for continuances and the reasons for those requests;
6) that Counsel stated he "did not have anyone in his firm that would be able to attend the hearing for him 'because of the short notice;'" and
7) the amount of delay the previous continuances had created in the case (six months in *Alewine* and at least two months in this case, see R. p. 87 & 75).[21]

Emphasis in the original. This case shares many similarities to the *Alewine* case. The original request for a continuance was sent with less than two (2) business days notice, Respondent's Counsel waiting for three (3) weeks and one (1) day after receiving notice of the conflicting court appearance before advising the OMVH of the conflict, the original request did not state the date on which Respondent's Counsel received the notice of appearance for the conflicting court appearance, no explanation was provided (to the OMVH or the ALC during the appeal) as to why the request was not made earlier, Respondent's Counsel had previously asked for a continuance in this case for another

[21] If the requested continuance had been granted by the OMVH, this hearing likely would have been scheduled 2-3 months from the date of the request putting the total delay time at four (4) to five (5) months.

court appearance, and the previous continuance had already caused a two month delay in this case. The *Alewine* case also noted "counsel has shown a predilection for making multiple requests for continuances in other cases adjudicated before this tribunal." While it is not specifically listed as one of the reasons for dismissal in the Order of Dismissal issued by the OMVH, Appellant suspects, based on the e-mail communications between Respondent's Counsel and the OMVH, that Respondent's Counsel's "predilection for making multiple requests for continuances in other cases" before the OMVH contributed to the OMVH's decision in this matter. (R. pp. 83-97, 101-107).

Additionally, the ALC's reasoning that "court schedules change, and a conflict may only become apparent when it becomes clear that neither of the cases will be rescheduled"[22] places the courts, particularly those with lower priority under Rule 601, SCACR, in an untenable position. Following the ALC's logic, an attorney could wait until literally one (1) minute prior to a scheduled hearing or trial to inform a court that he/she had an appearance in a court with a higher priority for the same date and time.[23] The attorney would merely have to state that he/she believed one of the court schedules would change. Such a holding would essentially eviscerate Rule 601, SCARC.

The ALC Order continued by asserting that the purpose of Rule 601, SCACR "is to prevent an individual from being deprived of counsel in situations similar to the one before the Court in which an attorney is forced to abandon responsibility to one client in order to serve another" (R. p. 5). While the ALC may believe this to be the primary

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[22] *Id.*

[23] For example, if an attorney had oral arguments scheduled for the same day and time before the South Carolina Supreme Court and the South Carolina Court of Appeals, he/she could wait until only minutes before the argument was scheduled to begin at the Court of Appeals to inform the Court of Appeals of the conflict and could simply state that he/she believed the oral argument in the Supreme Court would be rescheduled.

purpose of Rule 601, SCACR, by waiting until nearly the last minute to advise the OMVH of the conflict that existed in this case, Respondent's Counsel, not the OMVH Hearing Officer, is the one that deprived Respondent of his presence at the hearing. Appellant DMV asserts that the primary purpose of Rule 601, SCACR is to improve juridical economy and efficiency by allowing the prompt rescheduling of trials and hearings and reassignment of court time to other matters when there are conflicts with a court with a higher priority under Rule 601, SCACR. If this assertion is correct, then following the ALC's logic of allowing last minute notification to courts of conflicts, would defeat the primary purpose of Rule 601, SCACR.

3) THE HEARING OFFICER DID NOT ERROR BY DISMISSING THE CASE WITHOUT HOLDING A HEARING.

In the ALC the Respondent contended that the OMVH Hearing Officer erred in issuing an Order of Dismissal when the Hearing Officer never initiated the scheduled hearing and, by never initiating the scheduled hearing, did not require Appellant to present evidence. Respondent further asserted that the OMVH Hearing Officer bore the burden of proof in enforcement actions pursuant to Rule 15, OMVH Rules and that in this case, the Hearing Officer failed to carry his burden of proof against Appellant.

First, the burden of proof in implied consent actions is on the Appellant, i.e. DMV or the law enforcement officer, not the OMVH Hearing Officer. Despite this error in Respondent's argument, the cases *John McGeary v. S.C. Dept. of Motor Vehicles and S.C. Dept. of Public Safety*, 2011 WL 7119316 (2011), *S.C. Dept. of Motor Vehicles v. Willie Pitts*, 06-ALJ-21-0592 and *S.C. Dept. of Motor Vehicles v. Alana Marie Erwin*, 06-ALJ-21-0591 dealt with this exact argument. In *McGeary*, the ALC held that because Appellant McGeary failed to appear at the administrative hearing, without the proper

consent of the OMVH Hearing Officer, the Hearing Officer clearly had the authority, under Rule 13, OMVH Rules, to dismiss the case adverse to Appellant. Further, in the *McGeary* case, the Administrative Law Court noted that "unlike its treatment of the DMV, the General Assembly has not carved out an exception to OMVH Rule 13 for motorists." The ALC went on to state "nothing in the rules suggest that OMVH Rule 15(B) was intended to limit a hearing officer's authority under OMVH Rule 13 to dismiss a case adverse to a defaulting party" and concluded *McGeary* ruling:

> [I]n light of the fact that the State is not required to present a prima facie case for suspension in situations where the motorist does not request an administrative hearing, the court sees no reason why the State should be required to do so in cases where the motorist does not appear at the hearing. In both situations, it is clear that the motorist is not going to present a defense.

This case is no different and Respondent, even in her ALC Reply Brief, has failed to provide any argument or grounds for why her case should be treated any differently than *McGeary*. Additionally, to require the OMVH to hold contested case hearings when individuals who requested the hearing do not appear for the hearing would be an unjustifiable waste of time and resources, both for the OMVH, law enforcement officers, the governmental agencies involved in the case, and witnesses involved in the case. For all of these reasons Appellant's arguments with regard to Rules 14 and 15, OMVH Rules must fail.

CONCLUSION

For the reasons set forth above, the order of the ALC is immediately appealable, should be overturned and the OMVH Order of Dismissal issued August 12, 2015 reinstated in full.

Respectfully submitted,

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February 24, 2016
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable H. W. Funderburk, Jr., Administrative Law Judge

Case No. 2015-002535

Melissa Spalt . . . . . Respondent,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety . . . . . Appellants.

Of Whom the South Carolina Department of Motor Vehicles is Appellant.

CERTIFICATE OF COUNSEL

The Undersigned Counsel certifies that the attached Final Brief is in compliance with SCACR 211(b).

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February 24, 2016
Blythewood, SC

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Appellant's Final Brief complies with South Carolina Supreme Court Order 2007-08-13-02 Amended by Order 2014-04-15-02, filed April 15, 2104.

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February 24, 2016
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CERTIFICATE OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, February 25, 2016, I served one (1) copy of Appellant's Final Brief by depositing with the United States Postal Service, correct postage prepaid, to Counsel for the Respondent at the address indicated below:

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