STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department of Motor Vehicles, Appellant, vs. Michelle Dover, Respondent.	Docket No. 15-ALJ-21-0542-AP ORDER

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SC Court of Appeals

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed November 25, 2015 by the South Carolina Department of Motor Vehicles (Department or DMV). The Department requests review of a contested case decision issued by a hearing officer with the Office of Motor Vehicle Hearings (OMVH). The hearing officer found in favor of Michelle Dover, after she contested the Department's decision to suspend her license pursuant to South Carolina Code Section 56-1-1030.

The Record on Appeal in this matter was filed on January 21, 2016. The Department timely filed its Brief of Appellant on February 19, 2016. Pursuant to ALC Rule 37(A), Respondent's brief was due by March 21, 2016. Respondent has not filed a brief. On April 7, 2016, the Department filed a Motion to Resolve Appeal Adversely to Respondent, pursuant to ALC Rule 38. This rule allows the Court to resolve an appeal against a party who fails to meet the time limits imposed by the rules of procedure. However, application of this rule is within the discretion of the Court. In this case, which turns upon a matter of law, the Court finds that it would be inappropriate to resolve the appeal on procedural grounds, and thus denies Appellant's motion. See Mictronics, Inc. v. S.C. Dept. of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (noting South Carolina courts favor deciding cases on the merits).

BACKGROUND

Respondent has two prior convictions that qualify as "major" violations under Section 56-1-1020, which defines habitual offender. Respondent does not contest these two prior convictions, but instead contests the third "major" violation which the Department has attributed to her. On May 3, 2015, Respondent was issued a ticket in Virginia. On July 21, 2015, she was

FILED
May 4, 2016
SC ADMIN. LAW COURT

convicted of speeding in excess of eighty miles-per-hour. Under Virginia law, speeding over eighty miles-per-hour is *per se* "reckless driving." See Va. Code Ann. § 46.2-862 (West 2015).

The conviction was reported to the South Carolina DMV by Virginia on August 10, 2015, pursuant to a reciprocal agreement between the states. The information provided by Virginia includes, among other things, the reason for conviction as "RECKLS DRV-SPEEDING EXCESS OF 80MPH-MISD" and an ACD code[1] of "M84." The Department applied the conviction to Respondent's driving record as a conviction for reckless driving. Reckless driving qualifies as a major violation under Section 56-1-1020. Because Respondent then had three total major violations on her record, the Department issued a Notice of Suspension declaring Respondent a Habitual Offender. The suspension was to run from September 18, 2015 until September 18, 2020.

After receiving the Notice of Suspension, Respondent filed for a contested case with the OMVH on September 4, 2015, pursuant to South Carolina Code Section 56-1-1030. A hearing was held before an OMVH hearing officer on November 4, 2015. After reviewing the evidence presented by the parties, the hearing officer concluded that the Department's Notice of Suspension must be rescinded. Specifically, the hearing officer concluded that the Department had incorrectly categorized Respondent's conviction pursuant to South Carolina law, and that the Respondent therefore did not have three qualifying major offenses under the habitual offender statute.

ISSUE ON APPEAL

Whether the hearing officer erred in concluding that Respondent's Virginia conviction does not qualify as reckless driving, pursuant to South Carolina law.

STANDARD OF REVIEW

Pursuant to Section 56-1-1030, the OMVH has exclusive jurisdiction over contested cases arising from habitual offender revocations or suspensions executed by the Department. See S.C. Code Ann. § 56-1-1030(B) (Supp. 2015). The ALC hears appeals from the OMVH, under the Administrative Procedures Act (APA).[2] See S.C. Code Ann. § 1-23-660(D) & § 1-23-600(E)

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[1] ACD stands for the Administrators Code Dictionary, published by the American Association of Motor Vehicle Administrators. The manual defines "M84" as "Reckless driving," under the "Reckless, Careless, or Negligent Driving" heading. See AAMVA Code Dictionary (ACD) Manual, Release 5.1.0, Appendix A at A-6 (effective Sept. 1, 2013), available at http://www.aamva.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=4390&libID=4367. Some of the ACD codes, including M84, are also listed in federal regulations regarding the National Driver Register Problem Driver Pointer System. See 23 C.F.R. Pt. 1327, App. A (2015).

[2] The Court notes that for the purposes of the APA, the OMVH functions as an "agency." See S.C. Dept. of Motor Vehicles v. Brown, 406 S.C. 626, 636, 753 S.E.2d 524, 529 (2014) (Beatty, J., dissenting) (quoting S.C. Dept. of Motor Vehicles v. McCarson, 391 S.C. 136, 144, 705 S.E.2d 425, 429 (2011)).

(Supp. 2015). Consequently, the Court's review is limited to the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2015). Additionally, the Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2015). Substantial rights of the appellant are prejudiced when the agency's decision, including the agency's findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Id.

DISCUSSION

Appellant begins by arguing that it did not make a discretionary decision to suspend Respondent's license, but rather acted according to the statutory mandate contained in Section 56-1-1030. See S.C. Code Ann. § 56-1-1030(A) (Supp. 2015). The Court agrees. Insofar as a driver in this state has three qualifying major violations under Section 56-1-1020, and is thus a habitual offender, the Department must suspend or revoke that person's license. Id. However, the question presented by this case is not whether such action is mandatory, but whether the respondent in this case had three qualifying major violations. See S.C. Code Ann. § 56-1-1020 (2008). That Respondent had two qualifying South Carolina convictions is undisputed. What is disputed is whether the Virginia conviction utilized by the Department to suspend Respondent's license may properly be considered a qualifying conviction.

The Virginia conviction was added to Respondent's South Carolina driving record pursuant to a reciprocal agreement between the states authorized by South Carolina law, which provides:

> The Department of Motor Vehicles may enter into a reciprocal agreement with the proper agency of any other state for the purpose of reporting convictions in one state by a person holding a driver's license in the other state. Such convictions in another state of a violation therein which, if committed in this State, would be a violation of the traffic laws of this State, may[3] be recorded against a driver the same as if the conviction had been made in the courts of this State. When a resident of this State has been convicted of a motor vehicle violation in another state for which there is no corresponding offense in this State, excluding the offenses listed

[3] The Court interprets this "may" to mean "must," inasmuch as the principle of equal protection requires. See S.C. Att'y Gen. Op. dated May 29, 1978, 1978 WL 207615 at *1; S.C. Att'y Gen. Op. No. 3835, dated Aug. 6, 1974, 1974 WL 21339 at *1–3.

> in Section 56-1-650(A), the conviction must not be recorded on the person's driving record in this State.
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S.C. Code Ann. § 56-1-790 (2008).[4] In accordance with the reciprocal agreement, Virginia provided the Department with a summary of Respondent's conviction, which is contained in the record. Relying on the ACD code provided in the summary, and not the Virginia statute cited in the summary, the Department added reckless driving to Respondent's record. Because reckless driving constitutes a major violation under Section 56-1-1020, the Department proceeded to suspend Respondent's license.

Thus, the question is whether the Department properly relied on the code when attributing a reckless driving conviction to Respondent. As stated by Section 56-1-790, an out-of-state conviction is applied if the offense committed out-of-state "would be a violation of the traffic laws of this State" if it were "committed in this State." By relying solely on a code that is not part of state law, the Department failed to determine whether the offense committed by Respondent would be an offense under South Carolina law.

At the hearing in this case, the hearing officer determined that the burden of proof was on the Department to show that Respondent has three qualifying major convictions. As *prima facie* proof of their position the Department presented Respondent's two South Carolina convictions and the summary of her Virginia conviction that was provided by that state. However, Respondent rebutted the Department's position by correctly pointing out that the offense she was convicted of concerned speeding. As the summary shows, Respondent was convicted under Virginia Code Section 46.2-862, entitled "Exceeding speed limit:"

> A person shall be guilty of reckless driving who drives a motor vehicle on the highways in the Commonwealth (i) at a speed of twenty miles per hour or more in excess of the applicable maximum speed limit or (ii) in excess of eighty miles per hour regardless of the applicable maximum speed limit.

Va. Code Ann. § 46.2-862 (West 2015). As the Department argues in its brief, Virginia has determined that exceeding eighty miles-per-hour constitutes reckless driving *per se*. However, South Carolina law specifically requires that an out-of-state offense must be recorded as if it were a conviction under South Carolina law. Therefore, the question is whether, on a charge of

[4] The Court reverses the hearing officer's decision insofar as it relied on South Carolina Code Sections 56-1-650 and 56-1-320 instead of Section 56-1-790 for the procedure by which the Department applies out-of-state convictions. The Court notes that reliance on these statutes did not prevent the hearing officer from reaching the correct result.

exceeding eighty miles-per-hour, Respondent would be charged with reckless driving under South Carolina law. Contrary to the Department's arguments, the outcome of this case is controlled by the South Carolina statutes and the intent of the South Carolina legislature, not the policies advanced by the Virginia legislature. The question is not whether Virginia considers Respondent's offense a major violation, but whether it is defined as such in South Carolina law. In South Carolina, reckless driving is defined as: "Any person who drives any vehicle in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving." S.C. Code Ann. § 56-5-2920 (2008); compare Va. Code Ann. § 46.2-852 (West 2015) ("Irrespective of the maximum speeds permitted by law, any person who drives a vehicle on any highway recklessly or at a speed or in a manner so as to endanger the life, limb, or property of any person shall be guilty of reckless driving."). Upon comparison, it is clear that the Virginia statute that Respondent was charged under is more analogous to South Carolina's speeding laws, which require:

> (A) A person shall not drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. Speed must be so controlled to avoid colliding with a person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of a person to use care.

S.C. Code Ann. § 56-5-1520 (2008). Subsection (G) provides stepped penalties depending on how much the driver is exceeding the speed limit. If, as Respondent testified, she was only going ten miles over the limit, under South Carolina law she would likely have been charged with Subsection (G)(2), which provides for a fine.[5] Even at the highest level of speeding (more than twenty-five miles per hour) speeding, without more, does not rise to the level of the major violations defined in Section 56-1-1020(a). South Carolina requires that an offense be applied as it would have been convicted under South Carolina law. A review of the applicable statutes shows that Respondent would have been convicted of speeding, not reckless driving. Therefore, the Court concludes that

[5] The Department argues that the Court should take into consideration that Respondent could have been, but was not, charged under VA Code Section 46.2-874. The Department claims that this statute covers "speeding more than twenty miles over the speed limit." However, a review of the Virginia Code shows that this statute merely sets the speed limit at twenty-five miles-per-hour for "highways in business or residence districts." Va. Code § 46.2-874 (West 2015). Possibly, the Department meant to refer to Section 46.2-874.1, which allows towns with a population between 14,000 and 15,000 to prohibit speeding in excess of twenty miles-per-hour by passage of an ordinance. Id. at § 46.2-874.1 (West 2015). There is no indication that Respondent was in such a town with such an ordinance at the time of the violation.

the hearing officer did not err in determining that the Department incorrectly suspended Respondent's license.

Appellant argues that public policy prevents this Court from following the law as set forth in Section 56-1-790. The Court disagrees. The result reached by the hearing officer and this Court in this case does not require the Department to ignore any out-of-state convictions or to delve into the specific facts of every out-of-state conviction. Nothing in this opinion prevents the Department from relying on the ACD Codes in making an initial decision under the habitual offender statute. Instead, the Department must simply compare the statutes involved in a given case when the driver in question successfully challenges the Department's classification in a contested case.

The Department argues that, instead of making a statutory comparison as required by South Carolina law, it should be allowed to rely solely on the ACD codes without reference to statutes. Administrative codes, such as those used by motor vehicle agencies, are for convenience and are not meant to supersede or replace statutory law. The South Carolina Court of Appeals has held that statutes, not administrative codes, determine a criminal's sentence. See State v. Bennett, 375 S.C. 165, 173–4, 650 S.E.2d 490, 495 (Ct. App. 2007) ("While the codes were developed and are used to provide an administrative shortcut, they were never intended to replace statutory law . . . . Because the South Carolina Code of Laws is the controlling authority for classifications, definitions and penalties for criminal offenses, a statute listed on a sentencing sheet, and not a CDR code, will dictate a criminal's sentence.").

The Department further argues that the Court engages in speculation to assume that Respondent would be charged with speeding under South Carolina law. To the contrary, the Court concludes that the Department engages in speculation in assuming that Respondent was driving recklessly when the statute under which she was convicted merely calls for going in excess of eighty miles-per-hour. Because Virginia has defined reckless driving as speeding, does not mean that Respondent was driving recklessly, as defined by South Carolina law. To assume as much without evidence or legal substantiation deprives Respondent of the due process she is owed before she loses her driver's license.

ORDER

IT IS THEREFORE ORDERED that Appellant's Motion to Resolve Appeal Adversely to Respondent is **DENIED**.

IT IS FURTHER ORDERED that the decision of the OMVH is **AFFIRMED** as **MODIFIED**.

IT IS SO ORDERED.

Deborah Brooks Durden, Judge
S.C. Administrative Law Court

May 4, 2016
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

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SC ADMIN. LAW COURT