via certified mail
Rec'd 12/07/16
Rejd. (16145)

South Carolina Department of Public Safety
S.C. Highway Patrol

EXHIBIT
tabbies
A

December 1, 2016

Raymon E. Lark, Jr., Esq.
Austin & Rogers, P.A.
508 Hampton Street, 3rd Floor
Columbia, South Carolina 29201

RE: Wayne's Automotive Center, Inc.

Dear Mr. Lark:

I am in receipt of your letter dated October 21, 2016 in which you have asked the South Carolina Department of Public Safety ("SCDPS") to reconsider a suspension which was previously imposed on Wayne's Automotive Center, Inc. ("Wayne's") for violations of Section 38-600 of the South Carolina Code of State Regulations.

After having carefully considered the grounds raised in your appeal, I concur with the findings and conclusions made by Captain C. B. Hughes and affirm his decision to suspend and remove Wayne's from the South Carolina Highway Patrol Rotation List ("Rotation List") for a period of one hundred twenty (120) days. The first part of the suspension shall begin on December 12, 2016, and run through December 31, 2016. Additionally, if Wayne's applies for and obtains approval for placement on the 2017 Rotation List, the suspension will extend until April 11, 2017. If Wayne's does not apply or receive approval for placement on the 2017 Rotation List, the suspension will extend into any subsequent calendar year in which Wayne's applies for and is approved to be on the Rotation List until all days of the suspension period are served.

Insofar as this suspension applies to all South Carolina locations operated by Wayne's, it will not receive any Rotation List calls in any county during this period. Per SCDPS policy, this disciplinary measure may be used to support subsequent disciplinary action and shall become a part of the permanent SCDPS file on Wayne's.

This is the final agency action for purposes of administrative review. Should you wish to pursue an appeal of this matter, you may seek judicial review in a court of competent jurisdiction.

Michael R. Oliver

Colonel Michael R. Oliver
South Carolina Highway Patrol

Rec'd 09/29/16
Reg# (16145)

South Carolina Department of Public Safety
S.C. Highway Patrol

EXHIBIT
tabbies
B

September 26, 2016

VIA CERTIFIED MAIL

Raymon E. Lark, Jr., Esq.
Austin & Rogers, P.A.
508 Hampton Street, 3rd Floor
Columbia, SC 29201

RE: Notice of Disciplinary Action Decision – Wayne's Automotive Center, Inc.

Dear Mr. Lark:

By letter dated April 25, 2016, the South Carolina Highway Patrol ("SCHP") notified Wayne's Automotive Center, Inc. ("Wayne's") of proposed disciplinary action arising out of a tow performed by Wayne's on February 9, 2016. A hearing on the matter was held at the South Carolina Department of Public Safety ("SCDPS" or "Department") on August 8, 2016. The Department's decision in this matter is set forth below.

FINDINGS OF FACT

1. On November 25, 2015, Pamela Belton signed the SCHP Wrecker Rotation Fee Schedule on behalf of Wayne's establishing the Troop Seven wrecker rotation fees for 2016 and containing other provisions governing Rotation List tows (set forth more fully in the Conclusions of Law herein). This document is attached hereto as Exhibit "1."

2. On February 9, 2016, Wayne's received a routine rotation call from SCHP requesting a Class "C" wrecker to tow a tractor-trailer belonging to J.H.O.C., Inc. d/b/a Premier Transportation ("Premier") that had overturned on I-20 near the South Carolina/Georgia border.

3. On February 10, 2016, Wayne's issued an invoice to Premier for the tow and clean-up totaling $69,017.19 ("First Invoice"). The First Invoice reflected that Wayne's utilized a heavy duty wrecker for 21 hours at a rate of $436.00 per hour, a rotator for 21 hours at a rate of $436.00 per hour, and a heavy duty tractor-trailer for 13 hours at the rate of $436.00 per hour. The First Invoice also contained numerous other labor and equipment charges reflecting various rates and hours expended. This document is attached hereto as Exhibit "2."

4. Robert Watson of Recovery Resolution Specialists, Inc. ("RRS"), subsequently contacted SCHP to express concerns about the amounts shown on the First Invoice and the difficulty he was having obtaining a release of the cargo.

5. SCHP Lieutenant N. W. King reviewed the First Invoice and contacted W. Jeffery Corbett, the owner of Wayne's, on February 17, 2016, to discuss the fees on the First Invoice and release of the cargo.

6. Mr. Corbett advised Lt. King during their conversation that some of the equipment and labor used to complete the tow and clean-up was furnished by two companies other than Wayne's, one of which was owned by his wife, Sherry Corbett.

7. Lt. King then advised Mr. Corbett that labor and equipment provided by a third party needed to be billed on a separate invoice. Mr. Corbett agreed to issue a revised invoice showing only those services performed by Wayne's and to separately invoice subcontracted labor and equipment provided by third parties. Lt. King also explained that Wayne's was obligated to release the cargo to its owner pursuant to S.C. Code § 56-5-5635,[1] and Mr. Corbett agreed to do so.

8. Despite Mr. Corbett's assurances to Lt. King, Wayne's did not issue a corrected invoice, provide separate invoices for third-party services, or release the cargo. Shortly thereafter, Mr. Watson submitted a written complaint with SCHP on February 19, 2016 ("Complaint"). The Complaint is attached hereto as Exhibit "3."

9. Lt. King called Mr. Corbett to discuss why Wayne's had not followed through on the foregoing matters discussed during the previous February 2016 conversation. Mr. Corbett informed Lt. King that Wayne's would not in fact be taking the referenced actions and that Wayne's would accept whatever consequences might result.

10. By check dated March 4, 2016, Premier paid a total of $48,633.19 to Wayne's, which apparently accepted this amount as payment in full for services provided. A copy of this check is attached hereto as Exhibit "4."

11. On April 25, 2016, a Notice of Proposed Disciplinary Action ("Notice") signed by SCHP Cpt. A. K. Grice was sent to Wayne's notifying it that SCHP had concluded an investigation arising out of the February 9, 2016 tow and determined that the violations identified therein had been substantiated by the Department. Among other things, the Notice provided that (1) the cargo in Premier's tractor-trailer was owned by Tractor Supply Company; (2) pursuant to the Fee Schedule executed by Wayne's in November 2015, Wayne's was permitted to charge $436.00 per hour for a Class "C" tow; (3) the First Invoice reflected that Wayne's utilized a heavy duty wrecker for 21 hours at a rate of $436.00 per hour to complete the tow; and (4) Wayne's billed for a rotator (21 hours) and a heavy duty tractor-trailer (13 hours) at the rate of $436.00 per hour in addition to the aforementioned heavy duty wrecker. A copy of the Notice is attached hereto as Exhibit "5."

12. On May 13, 2016, Mr. Corbett delivered a letter to the Department requesting a hearing.

13. On July 1, 2016, Wayne's provided the Department a document that appeared to be a revised invoice containing charges totaling $48,633.19 ("Second Invoice"), which was the sum paid by Premier in March 2016. The Second Invoice reduced the First Invoice's charge for

---

[1] See S.C. Code Ann. § 56-5-5635(F) (governing tows performed at the direction of law enforcement and providing that "[t]he proprietor, owner, or operator of [a] towing company, storage facility, garage, or repair shop must release any personal property that does not belong to the owner of the vehicle to the owner of the personal property").

heavy duty wrecker time to 12 hours (at $436/hour), but it left the $436/hour charges for rotator and tractor trailer times (21 hours and 13 hours, respectively) unchanged from the First Invoice. The Second Invoice also contained numerous other labor and equipment charges reflecting various rates and hours expended. This document is attached hereto as Exhibit "6."

14. A hearing at the Department's Blythewood, South Carolina headquarters occurred on August 8, 2016.

15. At the hearing, Wayne's raised a number of legal arguments and referred to certain documents that it had provided previously to SCDPS via e-mail. Wayne's maintained chiefly that (1) Mr. Watson lacked standing to submit the Complaint; (2) Wayne's was denied due process; (3) the issue giving rise to the Complaint was rendered moot; and (4) the Department did not comply with South Carolina Code of State Regulations § 38-600 ("Regulation" or "Reg."), the South Carolina Constitution, or the Administrative Procedures Act ("APA").

16. Counsel for Wayne's submitted e-mails before and after the hearing[2] in which legal challenges were made on several grounds to the disciplinary action contemplated by the Notice and to the Department's processes associated with Rotation List disciplinary action in general. Counsel for Wayne's also submitted requests under the South Carolina Freedom of Information Act seeking the Complaint and other records associated with the February 2016 tow, and such records were furnished to Wayne's before the hearing.

17. At no time did Wayne's provide SCDPS with (1) an invoice showing only the work performed by Wayne's in this matter or (2) separate invoices reflecting labor or equipment being provided by any other company in connection with the tow, despite Mr. Corbett's representation to Lt. King that two other companies were involved.

18. Wayne's previously received a 60-day suspension from the Rotation List in 2015 for failing to abide by the Regulation in several particulars. A copy of the Department's July 30, 2015 decision (issued by Cpt. C. T. Stephens) imposing the suspension is attached hereto as Exhibit "7," and SCHP Colonel M. R. Oliver's September 22, 2015 denial of the subsequent appeal is attached as Exhibit "8."

CONCLUSIONS OF LAW

19. The law governing wrecker services utilized by SCDPS is found in Section 38-600 of the Regulation. In particular, Regulation 38-600(F)(2) mandates that all fees charged by wrecker services for Rotation List calls "shall be reasonable and not in excess of those rates charged for similar services . . . ." Additionally, Regulation 38-600(F)(2)(b) states that the "Troop commander will determine the reasonableness of the fees . . . ." Furthermore, "[f]ailure of any wrecker service to comply" with the Regulation "will result in disciplinary action in accordance with the South Carolina Department of Public Safety Wrecker Rotation Disciplinary Policy." Reg. § 38-600(D)(3).

---

[2] E-mails were received by the Department on July 1 and 15, 2016, and August 5 and 12, 2016. The August 12th e-mail to the Department was after the August 8, 2016 hearing, but it was considered along with the others because the record was kept open for an additional five days following the hearing.

20. The maximum fees recoverable by wrecker services on the SCHP Rotation List for standard tows in each wrecker class are set annually, and each wrecker service must execute a corresponding fee schedule ("Fee Schedule") governing such fees for the upcoming calendar year. Fees for Rotation List tows cannot exceed the amounts shown on the Fee Schedule, and charging additional fees other than those shown on the Fee Schedule is prohibited.

21. Pursuant to the Fee Schedule executed by Wayne's in November 2015, Wayne's was permitted to charge $436.00 per hour for a Class "C" tow. The First Invoice reflected that Wayne's utilized a heavy duty wrecker for 21 hours at a rate of $436.00 per hour to complete the tow. However, Wayne's also billed for a rotator (21 hours) and a heavy duty tractor-trailer (13 hours) at the rate of $436.00 per hour. The Second Invoice reduced the charge for heavy duty wrecker time to 12 hours (at $436/hour), but it left the $436/hour charges for rotator and tractor trailer times (21 hours and 13 hours, respectively) unchanged. The hourly Class "C" rate set by the Fee Schedule is the maximum *total* hourly amount that may be charged for a wrecker service's performance of the tow/recovery itself—not a rate that can be charged for each vehicle or piece of equipment on the scene, as permitting charges to be stacked in such a manner would effectively negate the purpose of the Fee Schedule's "catch-all" rate.[3] Therefore, the charges for the rotator and heavy duty tractor-trailer on both the First Invoice and Second Invoice were improper.

22. The Fee Schedule does not set a separate Special Operations fee for a Class "C" tow, but it does allow a wrecker service to "recover the actual cost of rented/subcontracted equipment or labor necessary to accomplish the job." It goes on to add that "[p]roof of these actual costs in the form of an itemized invoice or receipt from the third party providing such equipment or labor **must accompany the tow bill**." (Emphasis added.)

23. Both the First Invoice and the Second Invoice contained numerous other itemized fees that Wayne's was not permitted by the Fee Schedule to charge. To the extent that some or all of the other itemized fees were purportedly for subcontracted labor or equipment, the Department has no record of them ever being separately invoiced by Wayne's as required. Hence, such charges were improper.

24. Wayne's has never disputed that the cargo was owned by an entity other than Premier, nor has it denied initially agreeing to release the cargo when first contacted by Lt. King. Wayne's later reneged on its commitment to release the cargo, and its behavior in this regard was manifestly unprofessional. Reg. 38-600(B)(8) (mandating that wrecker operators on the Rotation List "display professional behavior").

25. Wayne's argued that the Complaint should be disregarded because Mr. Watson allegedly (1) sought to use it as leverage in negotiating a reduction of the original amount Wayne's invoiced for the tow and (2) receives a commission based on how much of a reduction in tow bills he obtains on behalf of his clients. This argument is misplaced, as the Department's authority is limited to determining if a wrecker service has complied with applicable Rotation List requirements and, if not, imposing appropriate discipline. Therefore,

---

[3] The Department is exploring changes to the Fee Schedule to allow wrecker services performing Class "C" tows to bill for additional labor/equipment, but the present matter is governed by the Fee Schedule executed by Wayne's in November 2015.

whatever factors may or may not have motivated Mr. Watson to submit the Complaint have no bearing on whether Wayne's engaged in conduct for which it could be disciplined.

26. Wayne's asserted that it should not have been subject to the proposed discipline set forth in the April 2016 Notice because the dispute in this matter was settled by payment of Premier's check for $48,633.19 in early March 2016, thereby rendering the Complaint moot. The Department disagrees. First, the subsequent acceptance of a reduced sum by Wayne's as payment in full for the tow does not cure the impropriety of the charges at the time they were first invoiced. The fact that a party may later correct violations brought to its attention does not deprive a government entity of the ability to take administrative action for such violations. See, e.g., Garris v. Gov'ing Bd. of the S.C. Reins. Facility, 319 S.C. 388, 391, 461 S.E.2d 819, 821 (1995) (rejecting argument that a statute affording a party an opportunity to "show compliance" prior to "the institution of agency proceedings" meant the party first had to be "provid[ed] an opportunity to correct deficiencies," and concluding that "showing compliance mean[t] showing that *at the time of the alleged violation* [the party] was in full compliance with the law") (emphasis added). Moreover, the First Invoice's deficiencies cannot be accurately said to have been "corrected" by the Second Invoice, as the latter contained (1) improper charges for the rotator and heavy duty tractor-trailer, (2) itemized fees not specifically authorized by the Fee Schedule, and (3) charges for labor or equipment that were required to be shown by separate invoice(s). To the extent that Wayne's still has not demonstrated that it can adhere to proper billing practices associated with Rotation List tows, its conduct in this regard could continue unless the Department addresses it accordingly. Byrd v. Irmo High School, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (observing that an otherwise moot issue may be considered if "the issue raised is capable of repetition but evading review"). Thus, the Department's ability to administer disciplinary action in this matter was not rendered moot by Premier's March 2016 payment.

27. Wayne's contended that Mr. Watson's absence from the hearing constituted a denial of due process. The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. S.C. Const. art. 1, § 22. However, "[d]ue process does not require a trial-type hearing in every conceivable case of government impairment of a private interest." Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "Rather, due process is flexible and calls for such procedural protections as the particular situation demands." Kurschner, 376 S.C. at 172, 656 S.E.2d at 350. To the extent that Wayne's (1) availed itself of the opportunity to be heard on the merits pre-hearing (through submission of correspondence and other documents) and at the hearing following due notice thereof; (2) did not establish that it was substantially hindered in its ability to respond to the Notice as a result of Mr. Watson not being present; and (3) retains the right to seek judicial review in a court of competent jurisdiction once the Department's final disciplinary action is administered, Mr. Watson's absence from the hearing did not deny due process to Wayne's.

28. Furthermore, Wayne's offered no argument in support of how it maintained Mr. Watson could have been subpoenaed or otherwise compelled to travel to South Carolina to appear at the hearing. Information in the Department's records reflects that Mr. Watson does business at a North Carolina address, as acknowledged by Wayne's at the hearing. Moreover, public records available online from the North Carolina Secretary of State's Office (1) confirm that RRS is a North Carolina corporation; (2) identify Mr. Watson as the corporation's

president; and (3) list a North Carolina address for Mr. Watson individually.[4] Even if the Department's administrative hearing process for wrecker disciplinary matters purportedly authorized issuance of subpoenas, any such subpoena would not have been enforceable as to Mr. Watson. Vaught v. Nationwide Mut. Ins. Co., 250 S.C. 65, 74, 156 S.E.2d 627, 632 (1967) (recognizing that "a subpoena issued to an out of state witness would have been legally ineffective to compel the attendance of such witness at a trial in this State").

29. Wayne's contended that Mr. Watson lacked standing to initiate the Complaint and cited Youngblood v. S.C. Dep't of Soc. Servs., 402 S.C. 311, 741 S.E.2d 515 (2013), in support of its position. Standing is commonly understood as "a fundamental prerequisite to **instituting an action**" or a status that "confers a right **to sue** on a party." Youngblood, 402 S.C. at 317, 741 S.E.2d at 518 (emphasis added). In other words, standing requires a party *to a lawsuit* to show that it has a legally-recognized right to pursue *litigation*—not, as in this situation, to notify a state agency of a possible regulatory violation by a third party. Taken to its logical end, Wayne's seems to suggest that it can act with impunity so long as the person or entity reporting Wayne's for a possible regulatory violation would not have standing to initiate a lawsuit against it—even if, as in this matter, regulatory violations are uncovered by the Department as a result of the information received. Adopting the interpretation of standing put forth by Wayne's would lead to an absurd result, and the Department rejects it accordingly.

30. Wayne's maintained that Mr. Watson or "an owner of the property in question" was required to give it a copy of the Complaint under § 38-600(C)(6) of the Regulation. Section 38-600(C)(6) provides that if there is "a dispute between the vehicle owner or the vehicle owner's designee and the wrecker service regarding any *storage* fees or charges, the vehicle owner or the vehicle owner's designee must provide the wrecker service written notification of the dispute." (Emphasis added.) On its face, the cited provision is rather limited in scope—as confirmed by the wrecker service's obligation to "cease any *storage* charges that would otherwise accrue from the time the wrecker service receives written notification of the dispute until the dispute is settled." Reg. 38-600(C)(6) (emphasis added). Conversely, initiation of complaints and imposition of discipline are matters governed principally by another section of the Regulation. See Reg. 38-600(D) ("Complaints/Disciplinary Procedures"). Storage charges were not mentioned specifically in either the Complaint or the Notice. In any event, whether notice of a storage charge dispute was given by someone other than SCDPS does not prevent the Department from investigating and disciplining Wayne's for the regulatory violations identified herein.

31. Wayne's averred that the Department violated the South Carolina Constitution by serving as both the prosecutor and adjudicator in this matter. S.C. Const. art. 1, § 22 (prohibiting a person from being "finally bound by a judicial or quasi-judicial decision of an administrative agency" if "subject to the same person for both prosecution and adjudication"). However, the respective functions of the agency employees involved were not concentrated in any one person: Lt. King conducted the investigation, Cpt. Grice issued the Notice, and the undersigned issued the decision herein setting forth the discipline imposed. Additionally, a different SCDPS official—Col. M. R. Oliver—would rule on any appeal of this decision that Wayne's may wish to pursue, and his ruling would constitute the final agency action for purposes of administrative review. Thus, no constitutional concern is presented. See Baldwin

[4] See https://www.sosnc.gov/Search/profcorp/9894121.

v. S.C. Dep't of Hwys. and Pub. Transp., 297 S.C. 232, 234, 376 S.E.2d 259, 260 (1989) (acknowledging that due process does not prohibit an agency from both prosecuting and adjudicating when the adjudicatory role is performed by "other persons within the same agency who did not participate in investigation or prosecutorial capacities").

32. The Department's July 30, 2015 decision notifying Wayne's of its 60-day suspension from the Rotation List provided that "this disciplinary measure may be used to support subsequent disciplinary action." It follows that Wayne's was on notice based on its prior suspension that future regulatory violations could result in disciplinary action and that its disciplinary history could be considered by SCDPS in determining the discipline to be imposed in such matters.

DECISION

Having considered the arguments made by Wayne's and the entire record, I conclude the following disciplinary measure is warranted in accordance with Regulation 38-600 and SCDPS policy: Suspension and removal of Wayne's from the SCHP Wrecker Rotation List for a period of one hundred twenty (120) calendar days. In reaching this decision, the Department took into account that Wayne's was disciplined previously for its noncompliance with the Regulation in 2015.

The first part of the suspension shall begin on October 10, 2016 and run through December 31, 2016. Additionally, if Wayne's applies for and obtains approval for placement on the 2017 Rotation List, the suspension will extend until February 7, 2017. If Wayne's does not apply or receive approval for placement on the 2017 Rotation List, the suspension will extend into any subsequent calendar year in which Wayne's applies for and is approved to be on the Rotation List until all days of the suspension period are served.

Insofar as this suspension applies to all South Carolina locations operated by Wayne's, it will not receive any SCHP Rotation List calls in any county during this period. Per SCDPS policy, this disciplinary measure may be used to support subsequent disciplinary action and shall become a part of the permanent SCDPS file on Wayne's.

If you wish to appeal this decision, the Department must receive a written request containing the grounds for such an appeal no later than the tenth calendar day following your receipt of this letter. Such a request must be addressed to: Col. M. R. Oliver, South Carolina Highway Patrol, P.O. Box 1993, Blythewood, South Carolina 29016.

Capt. C. B. Hughes
Commander, SCHP Troop Ten
Administrative & Regulatory Compliance Unit

South Carolina Department of Public Safety

S.C. Highway Patrol

South Carolina Highway Patrol
2016 Wrecker Rotation Fee Schedule

In accordance with Section 38-600 of the South Carolina Code of State Regulations, the Department of Public Safety publishes a yearly Fee Schedule outlining the maximum allowable fees for each class of wrecker on the SCHP Wrecker Rotation List. The reasonableness of fees on the Fee Schedule is determined by the Highway Patrol on a comparative basis. The fees permitted for calendar year 2016 are listed below:

2016 MAXIMUM ALLOWABLE FEES FOR ROTATION LIST CALLS

CLASS	STANDARD TOW	SPECIAL OPERATIONS	STORAGE
A	$204.00 flat rate	$118.00 per hour	$30.00 per day
B	$279.00 flat rate	$174.00 per hour	$39.00 per day
C	$436.00 per hour	* no fee will be set	$53.00 per day

Standard Tow: A standard tow is defined as responding to the scene, hooking up the vehicle, performing a general clean up if the call involves responding to a collision scene and providing responsible assistance to the vehicle occupants. In the absence of special operations as defined below, the maximum fee for a Class A or B tow is the flat rate listed above. Fees for Class C tows are billed at an hourly rate.

Special Operations: Special operations are operations involving the process of uprighting an overturned vehicle or returning a vehicle to a normal position on the roadway which requires the use of auxiliary equipment due to the size or location of the vehicle and/or the recovery of a load which has spilled, or the off-loading and reloading of a load from an overturned vehicle performed to right the vehicle. A wrecker service must receive confirmation on-scene at the time of the tow from the investigating Trooper or an SCHP supervisor that special operations are required to perform the tow in order to recover such fees.

* Although no Special Operations fee is set for Class C tows, a wrecker service may recover the actual cost of rented/subcontracted equipment or labor necessary to accomplish the job. Proof of these actual costs in the form of an itemized invoice or receipt from the third party providing such equipment or labor must accompany the tow bill.

If services beyond those for which the wrecker was dispatched are performed (e.g., hazardous waste cleanup; transportation of vehicle, cargo, or occupants(s) to an agreed upon location other than the one required by the Regulation), those services must be billed on a separate invoice.

Storage: Fees begin 12 hours after a vehicle is secured on the wrecker service premises and terminate when the vehicle owner or owner's designee offers to pick up the vehicle and pay the legitimate accrued charges.

A COPY OF THIS FEE SCHEDULE SHALL BE KEPT IN EACH WRECKER AT ALL TIMES AND MUST BE PRESENTED UPON REQUEST TO ANY PERSON FOR WHOM TOW SERVICES ARE PROVIDED, HIS OR HER AGENT, OR ANY DEPARTMENT OF PUBLIC SAFETY EMPLOYEE. ANY COMPLAINTS MUST BE IN WRITING AND FORWARDED TO THE SCHP TROOP COMMANDER.

NOTE: This fee schedule lists the maximum fee that may be charged for each class of wrecker. A lesser fee may be charged at any time in the wrecker service's discretion.

Courtesy - Efficiency - Service

POST OFFICE BOX 1993, 10311 WILSON BLVD., BLYTHEWOOD, SOUTH CAROLINA 29016

EXHIBIT

tabbies

South Carolina Highway Patrol

Wrecker Rotation Inspection

Approved Fees:

Class	Standard Towing	Special Operations	Storage (per day)
[X] A	$ 204.00	$ 118.00	$ 30.00
[X] B	$ 277.00	$ 174.00	$ 37.00
[X] C	$ 436.00	$ None / No Fee Set	$ 53.00

Inspector's Comments:

After my inspection, I find this service to be:

[X] **Approved** – Business is in compliance with Wrecker Regulations and is being **recommended** for the rotation list.

[ ] **Not Approved** – Business is not in compliance with Wrecker Regulations and is **NOT recommended** for the rotation list. Service was notified in writing as to what deficiencies were identified.

Inspector's Signature: _____ Date: 11/25/15

Wrecker Owner's Acknowledgment of Receipt and Compliance if approved:

I do hereby affirm that I have a copy of South Carolina Code of Regulations 38-600 governing rotation list wreckers. I am familiar with its contents and do hereby agree to fully comply with it in order to remain on the rotation list. I understand that any violation of the Wrecker Regulations may result in disciplinary action pursuant to S.C. Code of Regulations 38-600(D) and SCDPS Policy 200.19 Wrecker Rotation Disciplinary Policy. I further agree that if I relocate or change equipment, insurance carriers, telephone numbers or employees, or for any reason become unavailable for service for an extended period of time, I will notify the appropriate Troop Commander in writing. The information I have furnished is true and correct to the best of my knowledge. My business has been inspected and approved this 25th day of NOVEMBER, 20 15.

Print Name Pamela Beltran Signature: _____

Key to Inspection Codes:

C = Compliant **NC = Not in Compliance** **NA = Not Applicable**

Form SCHP-A-007 revised July 2014

South Carolina Department of Public Safety

S.C. Highway Patrol

On behalf of the wrecker service named below, I acknowledge that I have received and agree to be bound by the South Carolina Highway Patrol 2016 Wrecker Rotation Fee Schedule and the Department of Public Safety's Wrecker Rotation Disciplinary Policy. Further, I certify that I am authorized to bind the wrecker service named below to the terms of this Fee Schedule and the Department of Public Safety's Wrecker Rotation Disciplinary Policy.

Pamela P. Beltran — Pamela P. Beltran — 11/25/15

Owner/Representative Name (Printed) | Owner/Representative Signature | Date

Wagner Automotive Center Inc

Name of Wrecker Service

Wayne's Automotive and Towing Center

SCIM
Spill Containment Incident Management
1997 Richland Avenue East
Aiken. SC 29801

Invoice

Date	Invoice #
2/10/2016	504462

Bill To
J. H. O. C., INC. Premier Transportation 323 CASH MEMORIAL BOULEVARD FOREST PARK GA 30297 282577

P.O. No.	Terms	Project
	Due Upon Receipt	

Description	Qty	Rate	Amount
60 Ton Rotator HD4 used for upright winching both tractor and trailer	21	436.00	9,156.00
Class C Heavy Duty Truck HD5 used for upright winching both tractor and trailer	21	436.00	9,156.00
Class C Heavy Duty Tractor with Trailer used for Transfering Cargo and storing HD3/RECOVERY TRAILER	13	436.00	5,668.00
Recovery Supervisor JC	21	175.00	3,675.00
Recovery Technician BH	21	175.00	3,675.00
Recovery Technician KJ	21	150.00	3,150.00
Recovery Technician JH	13	150.00	1,950.00
Recovery Technician BR	8	85.00	680.00
Recovery Technician WB	10	150.00	1,500.00
Response Unit used for transporting supplies, snatch blocks, oil dry, absorbents, booms, back deck blower, brooms, shovels, etc.	20	175.00	3,500.00
Air Cushion Recovery	2	4,000.00	8,000.00
Transfer Cargo from scene to loading dock Containment Unit (this includes reloading an offsite facility)	1	750.00	750.00
Labor Hours for transferring from the scene and repackaging WB	9	90.00	810.00
Labor Hours for transferring from the scene and repackaging JH	7	50.00	350.00
Labor Hours for transferring from the scene and repackaging WRH	1.5	50.00	75.00
Labor Hours for transferring from the scene and repackaging JS	7	50.00	350.00
Labor Hours for transferring from the scene and repackaging PW	3.5	50.00	175.00
Labor Hours for transferring from the scene and repackaging MR	7	50.00	350.00
Labor Hours for transferring from the scene and repackaging KS	3.5	50.00	175.00
Labor Sublet from Verns (3 Guys used for transferring and repacking)	1	1,000.00	1,000.00

5% Interest Accrual for non payment in 5 days.	**Total**
	Payments/Credits
	Balance Due

Phone #
803-226-0025

E-mail
sherry@waynesautomotivecenter.com

EXHIBIT
tabbies
2

Wayne's Automotive and Towing Center

SCIM
Spill Containment Incident Management
1997 Richland Avenue East
Aiken, SC 29801

Invoice

Date	Invoice #
2/10/2016	504462

Bill To

J. H. O. C., INC.
Premier Transportation
323 CASH MEMORIAL BOULEVARD
FOREST PARK GA 30297
282577

P.O. No.	Terms	Project
	Due Upon Receipt	

Description	Qty	Rate	Amount
Repacking Fee and Reloading from Loading Dock onto Trailer 2nd Load	1	750.00	750.00
Backhoe 420D and Transport and Heavy Operator	11.5	350.00	4,025.00
Skid Steer Track Loader and Transport	1	600.00	600.00
Back Deck Blower used for cleaning highway on bridge	1	275.00	275.00
Restocking and Reload Cargo	1	500.00	500.00
OSHA Certified Incident Communication Equipment	1	1,795.00	1,795.00
Emergency Digital Signage I-20 W Message Board exit 6 Detour	20	75.00	1,500.00
Traffic with Cones			
Emergency Digital Signage I-20 E Digital Arrow Board	20	75.00	1,500.00
Light Tower	8	75.00	600.00
Traffic Control High Intensity Sign 36x36 used a total of 4 on both	20	50.00	1,000.00
East and West lanes			
26 In. Traffic Cones total of 48	20	50.00	1,000.00
Pallats for Restocking	3	22.95	68.85
PIG MAT240	25	7.50	187.50
Containment Booms used for containment preventing release into	1	85.00	85.00
Savannah River below site			
Containment Liner	1	175.00	175.00
	1	210.84	210.84
Storage Per Unit as of 02/15/2016	6	50.00	300.00
Storage Per Unit as of 02/15/2016	6	50.00	300.00

5% Interest Accrual for non payment in 5 days.

Total	$69,017.19
Payments/Credits	$0.00
Balance Due	$69,017.19

Phone #
803-226-0025

E-mail
sherry@waynesautomotivecenter.com

King, Nicklous W.

From: Bob Watson [towinsurance@gmail.com]
Sent: Friday, February 19, 2016 11:33 AM
To: King, Nicklous W.; Karen Coppolino; Lucas Sentry; Haz Mat; Hughes, Clifton B.
Subject: Official complaint on Waynes towing Claim 61a169404 Premier Transporation

Officer King, I have called the tow company for 2 days and the owner (Jeff is the only one that is to talk with me) has not called me back.
I cannot get an answer on the cargo trying to get it pickup today.

After reviewing the tow bill I have several problems.

1. The tractor trailer recovery 21 hours. After the units where up righted it appears the HD recovery trucks just sat. Why where the units not towed to the yard. Waynes won't answer the question but states 21 hours.
2. I was told a lot of the equipment was sub contracted so they can charge extra money. Need a list of sub contracted equipment.
3. Air bags for $8,000.00. The tow company did not know how to use air bags, straps, angle iron to protect the corners which tore the trailer into 3 pieces. I have done over 150 air bag recoveries and was a trainer in CA and I have NEVER destroyed a trailer. I sent to other tow companies and they all agree with my assessment of the recovery. The tow company destroyed the trailer and wasted a lot of time.
4. Labor rates $150.00 per hour is about double the going rate. Then they lower the rate to $50.00 which is about correct.
5. Transfer cargo $750.00. They are already charging labor. What the $750.00 for? Then on page 2 there is another $750.00 charge.
6. Need a copy of the sublet bill for $1,000.00 additional labor 7. Tract hoe can be rented for about $350.00 a day.
8. Why did the tow co bring all the signs and cones out. Doesn't DOT or the state police cover this?
9. Cones $50.00 each. They cost between $13.00 and $19.00.
10. OSHA Certifies radio equipment. $1795.00 11. Called yesterday and today to get the cargo and I have to talk with Jeff only. No return call.

I have transportation spill solution working with me on the haz mat portion of the bill with I have concerns with. .

--
Robert Watson
President, Recovery Resolution Specialists

704-807-1733 www.recoveryresolutionspecialists.com

EXHIBIT 3

J.H.O.C., INC.
D/B/A PREMIER TRANSPORTATION

5224302

504462 03/04/16 Invoice 504462 48633.19

ORIGINAL CHECK HAS A COLORED BACKGROUND PRINTED ON CHEMICAL REACTIVE PAPER

PREMIER TRANSPORTATION

J.H.O.C., INC. D/B/A
PREMIER TRANSPORTATION
P.O. BOX 665
FOREST PARK, GA 30298

BB&T
BRANCH BANKING AND TRUST COMPANY
1-800 BANK BBT BBT.COM
64-1341/611
BRANCH 17115

5224302

DATE
03/04/16

AMOUNT
48,633.19

PAY Forty-Eight Thousand Six Hundred Thirty-Three and 19/100

TO THE ORDER OF
Wayne's Automotive Towing Chr
1997 Richland Avenue East
Aiken, SC 29801

AUTHORIZED SIGNATURE

⑈5224302⑈

EXHIBIT
tabbies
4

South Carolina Department of Public Safety
S.C. Highway Patrol

April 25, 2016

Mr. Walter Jeffery Corbett
Wayne's Automotive Center, Inc.
1997 Richland Avenue East
Aiken, South Carolina 29801

RE: Notice of Proposed Disciplinary Action

Dear Mr. Corbett:

The South Carolina Highway Patrol ("SCHP") has concluded an investigation of Wayne's Automotive Center, Inc. ("Wayne's") arising out of a tow performed by Wayne's on February 9, 2016. As a result of this investigation, it has been determined that Wayne's violated the applicable South Carolina Department of Public Safety ("SCDPS" or "Department") wrecker regulations as outlined below.

On February 9, 2016, Wayne's received a routine rotation call from SCHP requesting a Class "C" wrecker to tow a tractor trailer belonging to Premier Transportation ("Premier") that had overturned on I-20 near the South Carolina/Georgia border.

On February 10, 2016, Wayne's issued an invoice to Premier for the tow and clean-up totaling $69,017.19. Premier subsequently asked Robert Watson of Recovery Resolution Specialists to assist with payment of the appropriate charges and release of the cargo on behalf of the cargo's owner, Tractor Supply Company ("Tractor Supply"). When Mr. Watson encountered difficulty securing a reduction in the charges and the release of the cargo from Wayne's, he contacted SCHP to seek assistance.

SCHP Lieutenant N. W. King reviewed the invoice and contacted you on February 17, 2016, to discuss the fees and release of the cargo. You advised in response to questioning about the labor and equipment used to complete the tow and clean-up that some of the equipment and labor was furnished by two companies other than Wayne's, one of which was owned by your wife. Lieutenant King then advised you that labor and equipment provided by a third party needed to be billed on a separate invoice. You agreed to issue a revised invoice showing only those services performed by Wayne's and to submit the separate invoice(s) for subcontracted labor and equipment provided by third parties. Lieutenant King also explained that Wayne's was obligated to release the cargo pursuant to S.C. Code § 56-5-5635, and you agreed to release the cargo to Tractor Supply.

EXHIBIT
5

After Wayne's subsequently failed to issue an amended invoice or release the cargo, Mr. Watson filed a written complaint with SCHP on February 19, 2016. Lieutenant King then called you to discuss why Wayne's was refusing to take the actions that had been discussed during the February 17th conversation. You confirmed to Lieutenant King that Wayne's would not issue an amended invoice or release the cargo and advised that Wayne's would accept whatever consequences might result from such refusal.

The law governing wrecker services utilized by SCDPS is found in Section 38-600 of the South Carolina Code of State Regulations ("Regulation"). In particular, Regulation 38-600(F)(2) mandates that all fees charged by wrecker services for rotation list calls "shall be reasonable and not in excess of those rates charged for similar services . . . ." Additionally, Regulation 38-600(F)(2)(b) states that the "Troop commander will determine the reasonableness of the fees . . . ." As part of the rotation list qualification criteria, Regulation 38-600(B)(8) mandates that wrecker operators "display professional behavior when conducting business at the request of the South Carolina Department of Public Safety."

The maximum fees recoverable by wrecker services on the SCHP Rotation List for standard tows in each wrecker class are set annually, and each wrecker service must execute a corresponding fee schedule ("Fee Schedule") governing such fees for the upcoming calendar year. On November 25, 2015, Pamela Belton signed the SCHP Wrecker Rotation Fee Schedule on behalf of Wayne's establishing the Troop Six wrecker rotation fees for 2016. Fees for rotation list tows cannot exceed the amounts shown on the Fee Schedule, and charging additional fees other than those shown on the Fee Schedule is prohibited.

Pursuant to the Fee Schedule, Wayne's was permitted to charge $436.00 per hour for a standard Class "C" tow. The invoice reflects that Wayne's utilized a heavy duty wrecker for 21 hours at a rate of $436.00 per hour to complete the tow. However, Wayne's also billed for a rotator (21 hours) and a heavy duty tractor-trailer (13 hours) at the rate of $436.00 per hour. The hourly Class "C" rate set by the Fee Schedule is the maximum total hourly amount that may be charged for a wrecker service's performance of the tow/recovery itself. Therefore, the charges for the rotator and heavy duty tractor-trailer were not permitted by the Fee Schedule.

The Fee Schedule does not set a Specials Operations fee for a Class "C" tow but does allow a wrecker service to "recover the actual cost of rental or subcontract equipment or labor, or an out-of-pocket incidental expense that is necessary to accomplish the job." It goes on to add that "[p]roof of these actual costs in the form of an invoice or receipt must accompany the tow bill."

In your February 17th conversation with Lieutenant King, you represented that at least some of the equipment and labor involved in the tow and clean-up were subcontracted from one or more separate companies. However, Wayne's has refused to provide invoices showing which charges from the invoice constituted rented/subcontracted equipment or labor. Based on that refusal, SCHP has no record of the labor and equipment used in the February 9th tow/recovery belonging to any company other than Wayne's. Insofar as these charges have never been properly substantiated, they are improper.

South Carolina Code § 56-5-5635 governs tows performed on behalf of law enforcement. In particular, subsection (F) provides that "[t]he proprietor, owner, or operator of [a] towing company, storage facility, garage, or repair shop **must release any personal property that does not belong to the owner of the vehicle** to the owner of the personal property." S.C. Code § 56-5-5635(F) (emphasis added). Here, it is clear that the cargo belonged to Tractor Supply. Insofar as the cargo was not owned by Premier, Wayne's was obligated to release the cargo on demand. The refusal by Wayne's to release the cargo constitutes a statutory violation and is manifestly unprofessional.

DECISION

Having reviewed the entire record and determined that Wayne's committed the foregoing regulatory violations, I conclude the following disciplinary measure is warranted in accordance with Regulation 38-600 and SCDPS policy: Definite suspension of Wayne's from the SCHP Wrecker Rotation List for one hundred and twenty (120) days.

Should a suspension be imposed, Wayne's will not receive any rotation calls during the applicable period for any county. In considering the suspension to be imposed in this matter, the Department has taken into account the fact that Wayne's received a 60-day suspension in 2015 for prior regulatory violations.

Wayne's has ten calendar days from the receipt of this notice to (1) submit a written reply and show cause why this disciplinary action should not be taken or (2) make a written request for a hearing. You may forward your reply or request for a hearing to my attention at SCHP Troop Seven Headquarters, 139 Middleton Street, Orangeburg, SC 29115.

The Department must receive your reply or hearing request within ten days of your receipt of this letter or you will be deemed to have waived your right to challenge the proposed disciplinary action. If a hearing is timely requested, you will be provided written notice of the date, time, and location that the hearing will be held. A written decision will be issued to you regardless of whether you submit a reply or request a hearing.

Sincerely,

Captain A. K. Grice
South Carolina Highway Patrol

Wayne's Automotive and Towing Center

SCIM
Spill Containment Incident Management
1997 Richland Avenue East
Aiken, SC 29801

Invoice

Date	Invoice #
2/10/2016	504462

Bill To
J. H. O. C., INC. Premier Transportation 323 CASH MEMORIAL BOULEVARD FOREST PARK GA 30297 282577

P.O. No.	Terms	Project
	Due Upon Receipt	

Description	Qty	Rate	Amount
Recovery			
60 Ton Rotator HD4 used for upright winching both tractor during first part of recovery and trailer last part of recovery and towing damaged trailer to storage yard 2:00 am-23:00 Per GPS Tracking Report	21	436.00	9,156.00
Class C Heavy Duty Truck HD5 used for upright winching both tractor and trailer and towing of the tractor to the yard for storage	12	436.00	5,232.00
Labor and Equipment			
Tractor Trailer 53ft used for transferring the cargo [redacted]	13	436.00	5,668.00
Recovery Supervisor JC	21	175.00	3,675.00
Recovery Technician BH	21	150.00	3,150.00
Recovery Technician KJ	21	85.00	1,785.00
Recovery Technician JH	21	85.00	1,785.00
Recovery Technician BR	8	85.00	680.00
Recovery Technician WR	19	85.00	1,615.00
Response Unit used for transporting supplies, snatch blocks, oil dry, absorbents, booms, back deck blower, brooms, shovels, etc.	20	175.00	3,500.00
Labor Hours for WRH	1.5	50.00	75.00
Labor Hours JS	7	50.00	350.00
Labor Hours PW	3.5	50.00	175.00
Labor Hours MR	7	50.00	350.00
Labor Hours KS	3.5	50.00	175.00
Labor Sublet from Verns Towing	1	1,000.00	1,000.00
Loading Dock Rental	1	750.00	750.00
Backhoe 420D and Transport and Heavy Operator	1	600.00	600.00
Skid Steer Track Loader and Transport	1	600.00	600.00

All QTY is per hours of usage.

Total	
Payments/Credits	
Balance Due	

Phone #	E-mail
803-226-0025	sherry@waynesautomotivecenter.com

EXHIBIT
tabbies 6

Wayne's Automotive and Towing Center

SCIM
Spill Containment Incident Management
1997 Richland Avenue East
Aiken, SC 29801

Invoice

Date	Invoice #
2/10/2016	504462

Bill To

J. H. O. C., INC.
Premier Transportation
323 CASH MEMORIAL BOULEVARD
FOREST PARK GA 30297
282577

P.O. No.	Terms	Project
	Due Upon Receipt	

Description	Qty	Rate	Amount
2 trips to the loading dock with cargo	2	250.00	500.00
OSHA Certified Incident Communication Equipment charge hourly	21	85.00	1,785.00
Emergency Digital Signage I-20 W Message Board exit 6 Detour Traffic with Cones	20	75.00	1,500.00
Emergency Digital Signage I-20 E Digital Arrow Board	20	75.00	1,500.00
Light Tower	8	75.00	600.00
Traffic Control High Intensity Sign 36x36 used a total of 4 on both East and West lanes for recovery and cargo and recovery	20	50.00	1,000.00
26 In. Traffic Cones total of 48 cones for recovery and cargo and recovery per hour	20	35.00	700.00
Pallats for Restocking the cargo	3	22.95	68.85
PIG MAT240 used to clean waste of fluids on the bridge	25	7.50	187.50
Containment Booms used for containment preventing release of chemicals and fluids into Savannah River below site	1	85.00	85.00
Containment Liner for storage of waste oil dry	1	175.00	175.00
Cargo Wrap	1	210.84	210.84

This price is with A lot of Item used Not Charged Out For and This price is only IF we Agree To Settlement

All QTY is per hours of usage.

OR I will Give the Total price Of all Equipment, Manpower, Ect. For The Insurance Company To Review

Total	$48,633.19
Payments/Credits	$0.00
Balance Due	$48,633.19

Phone #	E-mail
803-226-0025	sherry@waynesautomotivecenter.com

South Carolina Department of Public Safety
S.C. Highway Patrol

July 30, 2015

Mr. Walter Jeffery Corbett
Wayne's Automotive Center, Inc.
1997 Richland Avenue East
Aiken, South Carolina 29801

RE: Notice of Disciplinary Action Decision

Dear Mr. Corbett:

By letter dated June 1, 2015, the South Carolina Highway Patrol ("SCHP") notified Wayne's Automotive Center, Inc. ("Wayne's") of proposed disciplinary action stemming from an investigation into Wayne's failure to maintain its wrecker business in accordance with the applicable South Carolina Department of Public Safety ("SCDPS" or "Department") wrecker regulations. The Department's decision in this matter is set forth below.

FINDINGS OF FACT

1. In October 2014, Captain C. B. Hughes observed that Wayne's Lexington location did not appear to be open during normal business hours. Specifically, Captain Hughes noted that Wayne's was closed on October 9, October 14, and October 16. Additionally, Captain Hughes saw that the fence surrounding Wayne's storage yard was pushed down. Captain Hughes shared his concerns with the Troop 1 command staff, and an investigation was undertaken.

2. On October 16, 2014, Sergeant G. D. Rothell went to Wayne's to assess the concerns observed by Captain Hughes. He found the gate to Wayne's locked and the location unmanned. Sergeant Rothell then called the phone number posted on Wayne's fence. His call was answered by an employee at Wayne's Aiken location who advised him that the employee working at Wayne's Lexington location must have been at lunch. Sergeant Rothell was then transferred to someone named "Wendy" who advised that the Lexington employee was out making a bank deposit. While at the location, Sergeant Rothell confirmed that approximately 72 feet of the fence surrounding the storage yard was pushed over and that some portions of the fence were only four feet high.

3. On October 20, 2014, Lieutenant W. L. Herrington contacted you to discuss the lack of an employee at Wayne's Lexington location during normal business hours and the downed fence. You conceded during the conversation that the lone employee assigned to the Lexington location left the business every day to go to lunch, thereby leaving the location unmanned. You advised that you would ensure that an employee was present during business hours in the future and that you would address the issues with the damaged fence.

EXHIBIT
7

4. Captain Hughes continued to periodically monitor the situation at Wayne's Lexington location. On November 19, 2014, he observed that the gate was closed and locked. Cpt. Hughes further noted on November 25, 2014, that Wayne's had no vehicles and very little equipment at the Lexington location. On November 26, 2014, he again saw the gates to Wayne's closed and locked. Despite the fact that Wayne's Lexington location apparently was not operational during this time period, Wayne's continued to accept SCHP rotation calls for Lexington County.

5. On December 5, 2014, Lt. Herrington again contacted you to discuss the status of the Lexington location. You admitted to him that you were closing the location and intended to vacate the premises by the end of 2014.

6. On June 4, 2015, a Notice of Proposed Disciplinary Action ("Notice") was delivered to you (1) outlining the violations substantiated by the Department and advising that SCHP was contemplating suspending Wayne's from the rotation list for a period of sixty (60) days as a result; and (2) informing you that Wayne's had ten calendar days from receipt thereof to show cause why the proposed disciplinary action should not be taken, either by submitting a written reply or making a written request for a hearing.

7. No written reply or written request for a hearing was received by the Department within the specified time frame. Consequently, Wayne's waived its right to challenge the proposed disciplinary action.

CONCLUSIONS OF LAW

8. The law governing wrecker services utilized by SCDPS is found in Section 38-600 of the South Carolina Code of State Regulations ("Regulation"). Regulation 38-600(C)(1) provides that SCHP "will establish zones for towing" and requires wrecker services on a particular zone's rotation list to "physically have a business within that zone."

9. Regulation 38-600(C)(6) states that a wrecker service "shall have an agent present during business hours," which is defined by subsection (C)(1) as running "at least from 8:30 a.m. to 5:00 p.m., Monday through Friday."

10. Regulation 38-600(C)(14)(a) requires an outside storage facility to be sufficiently fenced for the protection of vehicles and property, and Regulation 38-600(C)(14)(b) requires such fencing to be not less than six feet in height.

11. Regulation 38-600(C)(1) obligates a wrecker service to immediately notify the Highway Patrol upon a change of address.

12. SCHP personnel repeatedly observed Wayne's Lexington location closed in October 2014, and Captain Hughes' observations indicated that Wayne's ceased operating a fully-functioning business by the end of November 2014. Wayne's never advised SCHP that it had effectively closed the Lexington location around this time. This closure left Wayne's without a physical location or agent in Lexington County, and it is undisputed that Wayne's fencing around the storage yard had been inadequate for an extended period of time.

DECISION

Having reviewed the entire record and determined that Wayne's committed the foregoing regulatory violations, I conclude the following disciplinary measure is warranted in accordance with Regulation 38-600 and SCDPS policy: Definite suspension of Wayne's Automotive Center, Inc., from the SCHP Wrecker Rotation List for sixty (60) days.

The suspension shall begin on Sunday, August 23, 2015 and run through October 21, 2015. Insofar as this suspension applies to all South Carolina locations operated by Wayne's, it will not receive any SCHP Rotation List calls in any county during this period. Per SCDPS policy, this disciplinary measure may be used to support subsequent disciplinary action and shall become a part of the permanent SCDPS file on Wayne's Automotive Center, Inc.

You have ten (10) days from the date you receive this decision to appeal to the SCHP commander by sending a written request containing the grounds for such appeal to: Col. Michael R. Oliver, South Carolina Highway Patrol, P. O. Box 1993, Blythewood, South Carolina 29016.

Sincerely,

Captain C. T. Stephens
South Carolina Highway Patrol

South Carolina Department of Public Safety
S.C. Highway Patrol

September 22, 2015

Mr. Walter Jeffery Corbett
Wayne's Automotive Center, Inc.
1997 Richland Avenue East
Aiken, South Carolina 29801

RE: Notice of Disciplinary Action Decision

Dear Mr. Corbett:

I have reviewed your appeal of Captain Stephens' July 30, 2015 Disciplinary Action Decision that you submitted on behalf of Wayne's Automotive Center, Inc. ("Wayne's") by letter dated August 3, 2015. After having carefully considered the grounds raised in your appeal, I concur with the findings and conclusions made by Captain Stephens and affirm his decision to suspend and remove Wayne's from the South Carolina Highway Patrol's Wrecker Rotation List for a 60-day period, which shall begin on October 4, 2015, and run through December 3, 2015. During this period, Wayne's will not receive any Rotation List calls in any county.

Your appeal also "request[s] a hearing of the advisory committee." The advisory committee referenced in Section 38-600(D)(5) of the South Carolina Code of State Regulations reviews issues raised in a complaint or appeal only "upon [a] request by the Department [of Public Safety]." The Department of Public Safety declines to convene such a committee in connection with your appeal.

This is the final agency action for purposes of administrative review. Should you wish to pursue an appeal of this matter, you may seek judicial review in a court of competent jurisdiction.

Michael R. Oliver

Colonel Michael R. Oliver
South Carolina Highway Patrol

EXHIBIT 8

Austin & Rogers, P.A.
ATTORNEYS AND COUNSELORS AT LA

WILLIAM FREDERICK AUSTIN
(1930-2016)

TIMOTHY F. ROGERS
RAYMON E. LARK, JR.
RICHARD L. WHITT
EDWARD L. EUBANKS
W. MICHAEL DUNCAN*

* ALSO ADMITTED IN N.C.

COLUMBIA OFFICE
CONGAREE BUILDING
508 HAMPTON STREET, SUITE 300
POST OFFICE BOX 11716 (29211)
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 256-4000
FACSIMILE: (803) 252-3679
WWW.AUSTINROGERSPA.COM

OF COUNSEL:
ON D. GRIFFITH, III

EXHIBIT
tabbies
C

recd 10/21/16
by Monishia L. Davis,
Paralegal, Office of
General Counsel.

October 21, 2016

VIA HAND DELIVERY
Colonel M.R. Oliver
South Carolina Highway Patrol
P.O. Box 1993
Blythewood, SC 29016

Re: Notice Of Appeal Of Disciplinary Action Decision-Wayne's Automotive Center, Inc., Our File No. 16145

Dear Colonel Oliver:

Please be advised this letter constitutes the appeal by Wayne's Automotive Center, Inc. of the above Decision, received by certified mail by me for Wayne's and Jeff Corbett on September 29, 2016, following the hearing on this matter on August 8th. SCDPS counsel kindly extended the deadline for appeal for 10 days until October 21th upon my request due to my workload and extenuating circumstances. Our grounds for this appeal follow, and we would be glad to meet with you to assist further in just and fair resolution of this matter with no suspension imposed rather than having to pursue it further.

Near the conclusion of the hearing on August 8th we provided the written complaint by Robert Watson after we received it in responses to our FOIA Requests. As mentioned during the hearing, we had not received it earlier. Aside from having no standing to file a complaint, since he was not the owner of any property damaged or lost, the failure of Mr. Watson—or anyone an owner of the property in question—to provide Wayne's Automotive/Jeff Corbett with a copy of any complaint (legitimate or otherwise) violated S.C. Reg. 38-600 (C) (6). **In support of our position, we had provided to SCDPS counsel via email on July 1st, the attached message and attachments, wherein we pointed out:**

> **First**, the written complaint has been brought by Robert E. Watson (*Notice* @ 1). We have sought documentation for the Notice, including this written complaint, as expressly referenced in my email message to Ms. Schmidt re our 3d FOIA Request, dated June 24th, with copy to you. **Mr. Watson is not a real party in interest; therefore, he has no standing to bring such complaint.** ***See*** **attached West Virginia PSC Letter and Staff Legal Memo**, regarding him and his status there. As you can further see by viewing **Case No. 13-0431-MC-FC** and the link **http://www.psc.state.wv.us/Orders/default.htm**

online, Staff expressed its opinion, Sentry Insurance Co. became the Complainant, Watson's motion was granted eliminating him as the Complainant; and the case was ultimately settled at mediation.

Second, whereas in the West Virginia matter, the transportation carrier and insurance carrier, Sentry, had a material controversy against the Defendant tow company, in the current matter, there is no underlying transportation carrier or insurance carrier with any issue to step in. ***See* attached full settlement payment from Premier to Wayne's Automotive for $48,633.19, made in early March 2016**—over a month before the SCHP/SCDPS issued its *Notice* on April 25, 2016. Unfortunately, it appears the parties stopped conversing among each other following Mr. Watson's written complaint, filed February 19 2016, according to the *Notice* @ 2.

Third, SCDPS/SCHP should withdraw/dismiss the current matter following your review and consideration of the facts herein, because it is moot and there are no exceptions warranting its continuation. ***See, e.g.*, attached Youngblood v. S.C. Dep't of Soc. Serv., 402 SC 311, 741 S.E. 2d 515 (2013), Curtis v. State, 549 S.E.2d 591, 345 S.C. 557 (2001), and S.C. Pub. Interest Found. v. S.C. Dep't of Transp. 412 S.C. 18, 770 S.E.2d 399 (Ct. App. 2015).**[1]

Next, by email on July 15th to SCDPS/HP counsel, we addressed noncompliance with evidentiary standards in the disciplinary hearing process utilized whereby the SCDPS/HP is improperly functioning as both prosecutor and adjudicator and violating our clients' rights to Due Process herein in violation of S.C. Const. Art. I, §22,. And in further violation of §22, SCDPS/HP has shifted the burden of proof to our clients to prove their innocence rather than there being any legitimate complaint or complainant to carry that burden of proof to show their guilt.

Then on July 20th via email we sought withdrawal/dismissal as to the Notice and in support advised SCDPS/HP counsel and staff:

---

[1] As parts of this Appeal, we are attaching the (a) West Virginia PSC determination that Watson had no standing in bringing his complaint there, since he had no required, underlying property interest and the (b) *Youngblood* decision in which the South Carolina Supreme Court held standing to bring an action requires having an underlying property interest. *Accord*, the full settlement check paid by the property owner, Premier, which filed no complaint herein, in **Exhibit** 4 to the Decision, and the *Youngblood* case principles. **Applying the West Virginia authority or the *Youngblood* principles ied to the instant case, Watson has no standing herein due to no property interest rendering the complaint against Wayne's Automotive improper. You should not, therefore, even reach the mootness question or whether this case mat constitute an exception to application of the mootness doctrine, as the Decision improperly does not even reach the hearing defect issues raised in our July 20th email and at the hearing**. The discussion as to "storage fees or charges" in Conclusion Of Law ¶ 30 disregards the reference in Watson's complaint (**Exhibit 3**) that he "cannot get an answer on the cargo trying to get it pickup (sic) today." We also invite you, Colonel Oliver, to go to the West Virginia PSC website link above as we did Captain Grice, Captain Hughes, and SCDPS counsel previously in further support of our position in this appeal.

The hearing process utilized by SCDPS/SCHP is defective in several respects, including but not necessarily limited to the following:

(a) it is inconsistent with Reg. 38-600, S.C. Code Ann. §23-6-20 (B), which is the statutory basis for that regulation as well as provisions of the SC Administrative Procedures Act cited therein as well as evidentiary standards with the result being utilization by the SCDPS/SCHP of an unlawful binding norm;

(b) it is inconsistent with substantive and procedural due process provisions in SC Const. Art. I, § 3; and

(c) it is inconsistent with SC Const Art. I, §§22 and 23, which state:

SECTION 22. Procedure before administrative agencies; judicial review.

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review. (1970 (56) 2684; 1971 (57) 315.)

SECTION 23. Provisions of Constitution mandatory.

The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissory by its own terms. (1970 (56) 2684; 1971 (57) 315.)

At the hearing on August 8th, we handed up the written emailed complaint by Watson, who was not at the hearing. It is attached as **Exhibit 3** to the Decision.

Thereafter, following the August 8th hearing on 12th via email, we provided supplemental information within the 5-day period allowed to seek withdrawal/dismissal of the instant Notice, based on the following developments:

SCDPS/HP raised a new matter in connection with the pending Notice regarding another alleged violation subject to disciplinary action, concerning a winch tow dispute between Wanda Herron and Wayne's Automotive in May of this year in an improper attempt to extract agreement by Wayne's to settle the pending and this other matter by global consent order without admitting guilt. Moreover, as shown by the attached email from Ms. Herron to Lt. King and copied to Jeff Corbett, dated August 9th, 2016, there is no pending complaint from her (i.e. complainant) upon which to base another notice of proposed disciplinary action and she--not Mr. Herron--is shown as the owner of the vehicle in the information in the second attachment. Therefore, she is the person with standing to complain.

Regardless, however, such action and attempted enforcement is also improper, based on the first 2 additional points above. That is, SCDPS/HP has no right to threaten to issue or issue a notice as to it, there is another violation of S.C. Reg. 38-600 (C) (6), and SCDPS/HP cannot function as both prosecutor and adjudicator, again violating our clients' rights to Due Process and impermissibly shifting the burden of proof to our clients to prove their innocence rather than there being any legitimate complaint or complainant to carry that burden of proof to show their guilt under S.C. Const. Art. I, §22;

Furthermore, as to the attached email from Ms. Herron to Lt. King, she has represented she was the complainant—not Mr. Herron--as stated in the August 9th Notice. Mr. Corbett reduced the amount owed and initially paid by $148 as a gesture of goodwill—not because he overcharged her. The total amount initially charged and paid was proper. The vehicle was locked, in the middle of the road, could not be put into neutral, and was without a front wheel and hub, as shown in the attached notes by Wayne's tow driver, John Herring, dispatch and log entries, and photo of the vehicle in the storage yard. Contrary to the Notice of Proposed Disciplinary Action, dated August 9th and received today by Wayne's Automotive, the attached notes and related entries confirm (a) Wanda Herron is the owner of the vehicle, (b) it had to be winched to be towed, and (c) the trooper on the scene authorized the winching, thereby justifying at least the additional $118 winching fee to get it on the bed of the tow truck and it also had to be winched to get it off the bed. Any videotape referenced obviously does not show the vehicle being in the actual condition it was in the middle of the road. Lt. King misunderstood what Mr. Corbett advised him about "winching was not required", as John Herring's notes also indicate. In addition, as to the Wayne's representative, referenced on p. 1 of the new Notice in 3, it was unreasonable for pickup on Sunday morning. The refunded amount nevertheless included both $118 for the winching and $30 dollars for overnight storage, totaling $148.00. NOTE: Mr. Corbett for Wayne's Automotive Center, Inc. through undersigned counsel hereby submits this email transmission with attachments as the written request for a consolidated or separate hearing, concerning this new matter, absent withdrawal/dismissal of it, as hereby requested, or, alternatively, as suggested below.

Finally, in light of the previous points raised and documentation provided, including the redacted full settlement payment with detailed invoice to Wayne's Automotive by Premier Transportation, the owner of the property at issue, dated March 4, 2016, we respectfully renew our request that you please (a) withdraw/dismiss the Notice regarding this matter and (b) retract the Notice as to the Herron matter, based on the above and on denial by Jeff Corbett and Wayne's Automotive of the allegations in that new Notice. Otherwise, alternatively, please reverse the ruling on the instant Decision, consolidate this Notice it with the August 9th Notice, allow a reasonable time for any additional FOIA Requests to be propounded, and extend the current 5-day period to allow additional time to keep the record open to allow submission of additional documents and information in it for further consideration in a consolidated hearing and supplemental hearing concerning both Notices.

After a review of the decision herein, we respectfully re-allege the above points and disagree with all of the Conclusions Of Law.[2] Conclusions Of Law ¶s 19-30 basically endeavor to address the improper complaint-related issues and ¶s 31-32 endeavor, respectively, to address the Constitutional dual prosecutor-adjudicator Due Process prohibitions and to justify a 120-day suspension, based on a prior 60-day suspension.

The Decision ignores the patent violation of the Regulation, as asserted, by no copy of the complaint having been provided to Wayne's Automotive, Inc., as required. When there is no viable complaint for consideration, no disciplinary action is appropriate. After my clients and I were shown the door, SCDPS counsel advised me outside of it of the Herron matter and I subsequently shared that information with my clients after counsel returned to the hearing room to confer *ex parte* with the SCDPS/HP personnel in attendance, which included Lieutenant King, Captain Grice, and Captain Hughes. Reliance on the *Baldwin* case cited is misplaced. The Due Process violations alleged are supported by the facts and rationale in *Garris v. Governing Board of the SC Reinsurance Facility*, 333 S.C. 432, 441-448, 511 S.E. 2d 48 (1998), wherein the Court concluded:

> In sum, we conclude Facility is an administrative agency, the same persons served as both prosecutors and adjudicators in violation of Article I, Section 22, and the process was so inherently flawed that it is not subject to harmless error analysis.

Id. at 333 S.C. 448. We are also attaching (c) a copy of *Garris, supra,* for your convenience.

---

[2] Even assuming the Findings Of Fact are accurate, they do not support the Conclusions Of Law reached in the Decision herein. From our perspective, however, the following Findings Of Fact are incorrect:

(2) the call received was not a "routine rotation call";

(3) through (17) fail to reference the context that concerned storage fees for the cargo and internal work on invoice revisions that were halted upon Watson's written complaint (sic) not sent to Mr. Corbett or Wayne's Automotive and subsequent direct communications between Mr. Corbett and the owner of Premier—the party with underlying property interests—that had led to resolution of the matter by March 4th through payment in full, as shown in **Exhibits 4** and **6** to the Decision, as provided by Wayne's Automotive in advance of the hearing. This matter, therefore, was resolved almost a month and a half prior to SCPDS's issuance of its Notice of Proposed Disciplinary Action, dated April 25, 2016, in **Exhibit 5** to the Decision; and

(18) the prior 60-day suspension of Wayne's Automotive and unsuccessful appeal in 2015 in **Exhibits 7** and **8** to the Decision related to a closed location in Lexington and were not included as bases for issuance of the Notice in **Exhibit 5** herein.

As to Finding of Fact (18), therefore, the reference in Conclusion Of Law ¶ 32 to that "this disciplinary measure may be used to support subsequent disciplinary action" is misplaced and is an additional improper basis for any disciplinary action, concerning the case now before the Department.

Thanks in advance, Colonel Oliver, for your review, reconsideration, and reversal of the 120-day suspension from the SCHP Wrecker Rotation currently to be imposed in the Decision and dismissal of the matter.

Sincerely,

AUSTIN & ROGERS, P.A.

Raymon E. Lark, Jr.

Enclosures
cc: Warren Ganjehsani (w/Enclosures)
Marc Gore (w/Enclosures)

Ray Lark — **Enclosures With Appeal By Wayne's Automotive Of SCDPS Decision**

From: Ray Lark
Sent: Friday, August 05, 2016 5:17 PM
To: 'AnthonyGrice@SCDPS.GOV'; 'CliftonHughes@SCDPS.GOV'
Cc: Warren V. Ganjehsani; Marc Gore; Meg K. Duncan
Subject: FW: Requests For Review Of This Message & Attachments & Withdrawal/Dismissal Of Notice Of Proposed Disciplinary Action Against Wayne's Automotive Center, Inc./Walter Jeffrey Corbett (Notice)--Important
Attachments: WVA PSC Legal Staff R. Watson no standing dck20130624162841.pdf; Settlement In Full Payment ($48,633.19) (AC#redacted) .pdf; Youngblood v. S.C. Dep't of Soc. Serv., 402 SC 311, 741 SE 2d 515 (2013) no standing.docx; Curtis v. State, 549 S.E.2d 591, 345 S.C. 557 (S.C., 2001).docx; S.C. Pub. Interest Found. v. S.C. Dep't of Transp. 412 S.C. 18, 770 S.E.2d 399 (Ct. App., 2015) no standing & moot.docx
Importance: High

Tracking:

Recipient	Delivery	Read
'AnthonyGrice@SCDPS.GOV'		
'CliftonHughes@SCDPS.GOV'		
Warren V. Ganjehsani		
Marc Gore		
Meg K. Duncan	Delivered: 8/5/2016 5:17 PM	Read: 8/9/2016 11:02 AM

Captain Grice and Captain Hughes,

Warren has provided me with your email addresses so I could forward 2 emails with an Internet link and attachments for your review and consideration prior to the hearing in the above matter scheduled for this coming Monday at 10 am at the Blythewood office. Thanks in advance for reviewing the messages, link, and attachments prior to the hearing.

Below is the first email previously sent to them on July 1st. I did not realize until today counsel had not already forwarded them to you, since we have requested the hearing and notice be withdrawn or dismissed, since Robert Watson has no standing to bring it and/or since the matter was resolved by Premier's payment to Wayne's in early March—well before the April 25th notice was sent.

IN PARTICULAR, PLEASE NOTE: The link below is to the West Virginia PSC in a towing case in which PSC staff took the position Robert Watson, who filed a complaint, had no standing to bring the case, since he had no personal interest in the underlying property damages at issue. Subsequently, Sentry Insurance Company was named Complainant and Watson's motion was granted to delete him.

Regards. Raymon Lark for Austin & Rogers, P.A.

Attorneys for Wayne's Automotive and Jeff Corbett

Raymon E. Lark, Jr.
Shareholder & Vice President
Austin & Rogers, P.A.
508 Hampton Street, 3rd Floor
Columbia, SC 29201
803/256-4000
803/252-3679 (fax)
email: relark@austinrogerspa.com

CONFIDENTIAL & PRIVILEGED

Unless otherwise indicated or obvious from the nature of the foregoing communication, the information contained herein is attorney-client privileged and confidential information/work product. This communication is intended for the use of the individual or entity named above. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies, electronic, paper or otherwise, which you may have of this communication.

From: Ray Lark
Sent: Friday, July 01, 2016 3:29 PM
To: Warren V. Ganjehsani; Marc Gore
Cc: Meg K. Duncan
Subject: Requests For Review Of This Message & Attachments & Withdrawal/Dismissal Of Notice Of Proposed Disciplinary Action Against Wayne's Automotive Center, Inc./Walter Jeffrey Corbett (Notice)--Important
Importance: High

Good afternoon, Warren and Marc. As I indicated yesterday when I spoke with Marc, we would reach out today to you to request the above matter be withdrawn and/or dismissed and the hearing cancelled, based on several factors.

First, the written complaint has been brought by Robert E. Watson (*Notice* @ 1). We have sought documentation for the Notice, including this written complaint, as expressly referenced in my email message to Ms. Schmidt re our 3d FOIA Request, dated June 24th, with copy to you. Mr. Watson is not a real party in interest; therefore, he has no standing to bring such complaint. ***See* attached West Virginia PSC Letter and Staff Legal Memo**, regarding him and his status there. As you can further see by viewing **Case No. 13-0431-MC-FC** and the link **http://www.psc.state.wv.us/Orders/default.htm** online, Staff expressed its opinion, Sentry Insurance Co. became the Complainant, Watson's motion was granted eliminating him as the Complainant; and the case was ultimately settled at mediation.

Second, whereas in the West Virginia matter, the transportation carrier and insurance carrier, Sentry, had a material controversy against the Defendant tow company, in the current matter, there is no underlying transportation carrier or insurance carrier with any issue to step in. ***See* attached full settlement payment from Premier to Wayne's Automotive for $48,633.19, made in early March 2016**—over a month before the SCHP/SCDPS issued its *Notice* on April 25, 2016. Unfortunately, it appears the parties stopped conversing among each other following Mr. Watson's written complaint, filed February 19 2016, according to the *Notice* @ 2.

Third, SCDPS/SCHP should withdraw/dismiss the current matter following your review and consideration of the facts herein, because it is moot and there are no exceptions warranting its continuation. ***See, e.g.*, attached Youngblood v. S.C. Dep't of Soc. Serv., 402 SC 311, 741 S.E. 2d 515 (2013), Curtis v. State, 549 S.E.2d 591, 345 S.C. 557 (2001), and S.C. Pub. Interest Found. v. S.C. Dep't of Transp. 412 S.C. 18, 770 S.E.2d 399 (Ct. App. 2015).**

Under these circumstances, we respectfully request your review and consideration and withdrawal/dismissal of the Notice; however, we would still like Responses to our 3d FOIA Requests in order to proceed to work together regarding potential wrecker rotation list modifications and advisory committee development and implementation over the next several months.

Thanks and have a happy Fourth of July weekend!

Ray

Raymon E. Lark, Jr.
Shareholder & Vice President
Austin & Rogers, P.A.
508 Hampton Street, 3rd Floor
Columbia, SC 29201
803/256-4000
803/252-3679 (fax)
email: relark@austinrogerspa.com
CONFIDENTIAL & PRIVILEGED

Public Service Commission
Of West Virginia

201 Brooks Street, P. O. Box 812
Charleston, WV 25323

Phone: (304) 340-0300
FAX: (304) 340-0325

June 24, 2013

Robert E. Watson
Recovery Resolution Specialists, Inc.
PO Box 969
Cornelius, NC 28031

Scott H. Kaminski, Esq.
Counsel, Sentry Select Insurance Company
Balgo & Kaminski, L. C.
PO Box 3548
Charleston, WV 25335-3548

Jerry Adkins
JB's Towing Service
344 Sherwood Drive
Huntington, WV 25704

RE: Case No. 13-0431-MC-FC
Robert E. Watson
v.
Jerry Adkins, dba JB's Towing Service

Gentlemen:

Pursuant to Rule 2 of the Commission's Rules of Practice and Procedure, we are enclosing a copy of the Staff memorandum in this matter. If you wish to respond to the enclosed Staff memorandum, you may do so in writing, **within ten days**, unless directed otherwise, of this date.

Your failure to respond in writing to the utility's answer, Staff's recommendations, or other documents may result in a decision in your case based on your original filing and the other documents in the case file, without further hearing or notice.

If you have provided an email address you will automatically receive notifications as documents are filed in this proceeding. The email notifications allow recipients to view a document within an hour from the time the filing is processed. If you have not provided your email address, please send an email to caseinfo@psc.state.wv.us and state the case number in the email subject field.

Sincerely,

Sandra Squire, Director
Executive Secretary Division

SS/jn
Enclosure: Memo

FINAL JOINT STAFF MEMORANDUM

TO: SANDRA SQUIRE
Executive Secretary

DATE: June 24, 2013

FROM: LINDA S. BOUVETTE
Staff Attorney

RE: CASE NO. 13-0431-MC-FC
ROBERT E. WATSON
v.
JB'S TOWING

03:53 PM JUN 24 2013 PSC EXEC SEC DIV

On March 26, 2013, Robert E. Watson (Complainant) filed a verified formal complaint against JB's Towing (Defendant) alleging an overcharge for removing a trailer wedged in an underpass at the 20th Street Viaduct, Huntington, West Virginia. JB's removed the trailer, unloaded the material, reloaded it into another trailer and delivered it to the customer's warehouse.

On April 3, 2013, JBs' Towing (Defendant) filed its unverified response to the formal complaint. The Defendant took the position that the tow was not a third party tow since it spoke with the driver, the owner of the truck, the owner of the material loaded on the truck and the insurance company and advised them of the cost to do the work. According to the Defendant the parties agreed to pay the bill.

The Defendant acknowledged that some overbilling occurred in the labor charges but revised billing for each invoice was submitted that corresponds to JB's PSC-approved tariff. JB's claims it is owed $1,799.00 for storage on the trailer, which amount increases each day.

Utilities Division Final Recommendation

In the attached Staff Final Memorandum received by the Legal Division on June 24, 2013, Jennifer Moore, Utilities Analyst with the Commission's Utilities Division, stated she was unable to ascertain what costs were associated with the original tow, the request to cover and protect the cargo and the reloading of the cargo for delivery to the customer. In addition Ms. Moore noted that several pieces of equipment used during the tow and subsequent activities were not registered with the Commission and labor charges could not be verified. Based on the lack of documentation and uncertainty of information provided by both parties, Ms. Moore recommended this matter be set for hearing.

Legal Division Final Recommendation

Legal Staff has reviewed Utilities Division Final Staff Memorandum and agrees that neither Complainant nor Defendant have been forthcoming with the necessary information to adequately investigate the allegations contained in the complaint and therefore a hearing is needed to determine the facts. Legal Staff remains concerned that the real party in interest is not a party to this action and that the Complainant, Robert Watson, has no standing to pursue this claim since he did not pay the money to the Defendant for which he is seeking reimbursement nor is he responsible for the money claimed owed by the Defendant.

LSB/cs
Attachment

CWS
H:\LBouvette\CASES\2013\13-0431-MC-FC Final Joint Staff Memo.doc

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
UTILITIES DIVISION, STAFF FINAL MEMORANDUM

FROM: Jennifer Moore, Utilities Analyst I
Utilities Division

DATE: June 24, 2013

SUBJECT: **CASE NO. 13-0431-MC-FC**
Robert E. Watson
v.
Jerry Adkins, dba JB's Towing Service

On March 26, 2013, Robert E. Watson (Complainant) filed a Formal Complaint before the Public Service Commission of West Virginia (PSC) against Jerry Adkins, dba JB's Towing Service (JB's - Defendant). The Complainant stated that JB's is overcharging him on rates, hours, equipment and laborers associated with a vehicle being towed on February 17, 2013. Complainant asked that invoices be reviewed and that any amount overcharged be returned to him. He estimated the amount to be at least $10,000.00

On Sunday February 17, 2013 at approximately 7:15 pm a tractor-trailer owned and operated by Miguel Moreno was involved in a single vehicle accident at the 20th Street Viaduct in Huntington, West Virginia. The tractor-trailer became wedged in the viaduct and the cargo (Carbon) had to be unloaded and transferred to another trailer before the removal of the tractor-trailer could begin. Per JB's representative, this process took approximately twelve (12) hours.

On the second day, February 18, 2013, which was also President's Day, a request was made for JB's to tarp the load to insure that it did not come into contact with any sunlight or moisture. This was done and pictures were sent as proof. Later that day, at the owner's request, JB's was asked to deliver the load. This would include placing freight back on pallets, and loading it into a trailer. The freight was delivered on February 20, 2013 and an additional 10 hours of labor and equipment was incurred.

In reviewing invoices and information submitted by the Defendant, Utility Staff has not been able to determine what costs are associated with the original Sunday night tow, the request to tarp the load and the reloading for delivery. Also several pieces of equipment that were used are not registered with PSC and the labor charges could not be verified. Defendant stated that the equipment and the labor were supplied from friends and family and that they were paid in cash after the cargo was redelivered.

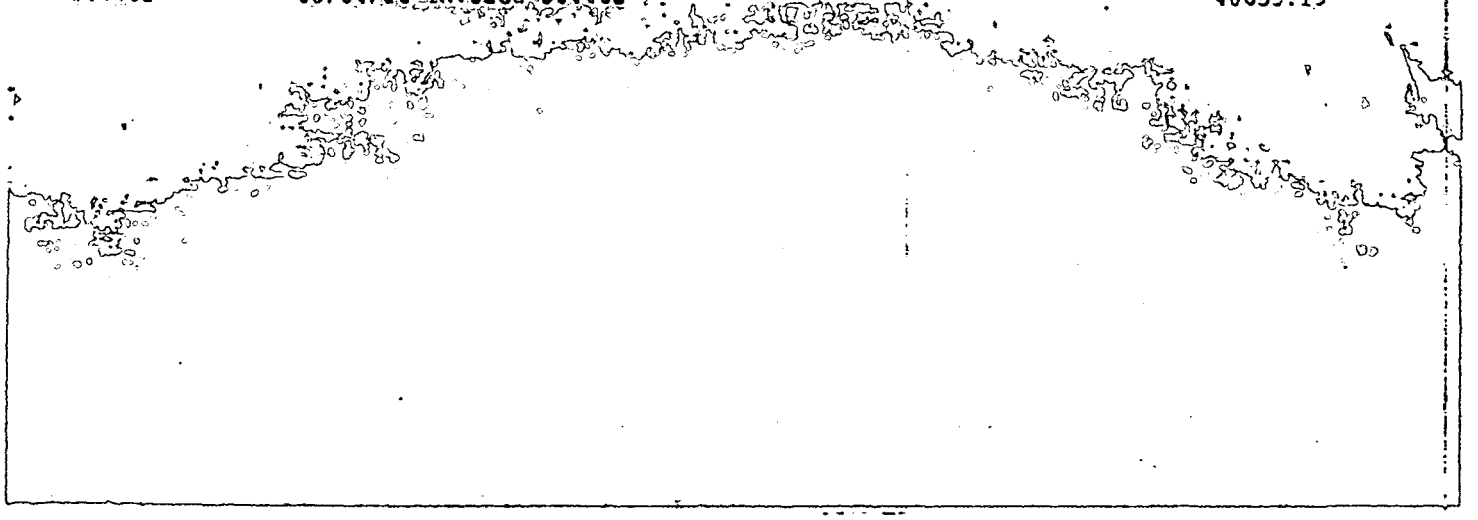
Based on the lack of supporting documentation and the uncertainty of information provided by both parties, Staff recommends that this matter be scheduled for a hearing.

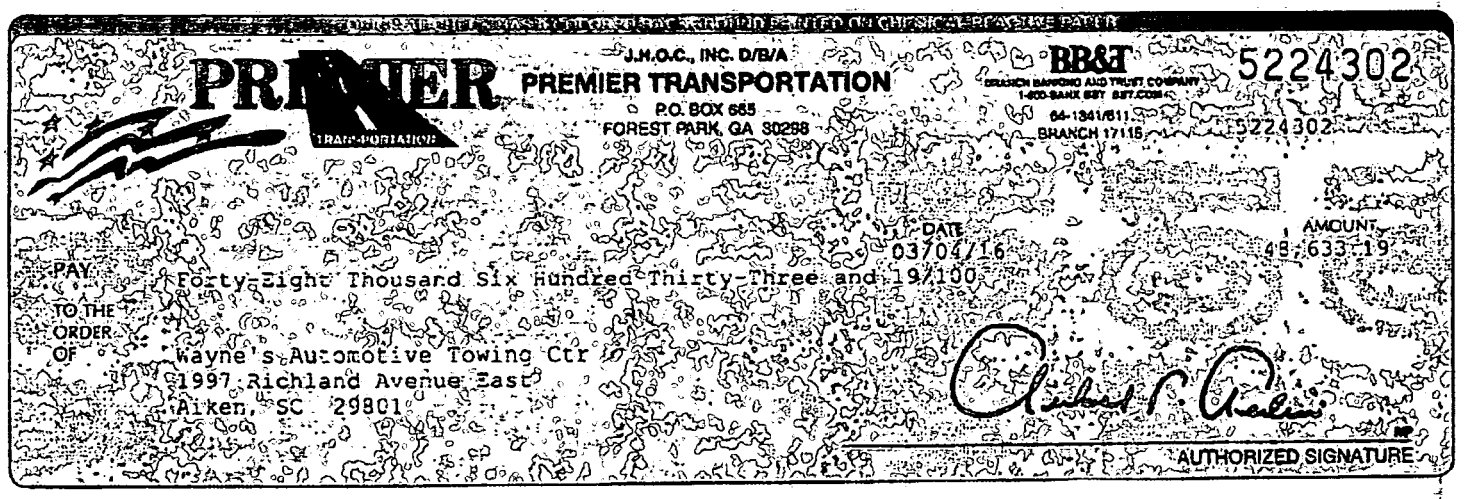
SK

J.H.O.C., INC.
D/B/A PREMIER TRANSPORTATION

5224302

504462	03/04/16 Invoice 504462	48633.19





⑈5224302⑈ [redacted]

Wayne's Automotive and Towing Center

SCIM
Spill Containment Incident Management
1997 Richland Avenue East
Aiken, SC 29801

Invoice

Date	Invoice #
2/10/2016	504462

Bill To
J. H. O. C., INC. Premier Transportation 323 CASH MEMORIAL BOULEVARD FOREST PARK GA 30297 282577

P.O. No.	Terms	Project
	Due Upon Receipt	

Description	Qty	Rate	Amount
Recovery 60 Ton Rotator HD4 used for upright winching both tractor during first part of recovery and trailer last part of recovery and towing damaged trailer to storage yard 2:00 am-23:00 Per GPS Tracking Report	21	436.00	9,156.00
Class C Heavy Duty Truck HD5 used for upright winching both tractor and trailer and towing of the tractor to the yard for storage	12	436.00	5,232.00
Labor and Equipment Tractor Trailer 53ft used for transferring the cargo [redacted]	13	436.00	5,668.00
Recovery Supervisor JC	21	175.00	3,675.00
Recovery Technician BH	21	150.00	3,150.00
Recovery Technician KJ	21	85.00	1,785.00
Recovery Technician JH	21	85.00	1,785.00
Recovery Technician BR	8	85.00	680.00
Recovery Technician WB	19	85.00	1,615.00
Response Unit used for transporting supplies, snatch blocks, oil dry, absorbents, booms, back deck blower, brooms, shovels, etc.	20	175.00	3,500.00
Labor Hours for WRH	1.5	50.00	75.00
Labor Hours JS	7	50.00	350.00
Labor Hours PW	3.5	50.00	175.00
Labor Hours MR	7	50.00	350.00
Labor Hours KS	3.5	50.00	175.00
Labor Sublet from Verns Towing	1	1,000.00	1,000.00
Loading Dock Rental	1	750.00	750.00
Backhoe 420D and Transport and Heavy Operator	1	600.00	600.00
Skid Steer Track Loader and Transport	1	600.00	600.00

All QTY is per hours of usage.

Total	
Payments/Credits	
Balance Due	

Phone #	E-mail
803-226-0025	sherry@waynesautomotivecenter.com

Wayne's Automotive and Towing Center

SCIM
Spill Containment Incident Management
1997 Richland Avenue East
Aiken, SC 29801

Invoice

Date	Invoice #
2/10/2016	504462

Bill To
I. H. O. C., INC. Premier Transportation 323 CASH MEMORIAL BOULEVARD FOREST PARK GA 30297 383577

P.O. No.	Terms	Project
	Due Upon Receipt	

Description	Qty	Rate	Amount
2 trips to the loading dock with cargo	2	250.00	500.00
OSHA Certified Incident Communication Equipment charge hourly	21	85.00	1,785.00
Emergency Digital Signage I-20 W Message Board exit 6 Detour Traffic with Cones	20	75.00	1,500.00
Emergency Digital Signage I-20 E Digital Arrow Board	20	75.00	1,500.00
Light Tower	8	75.00	600.00
Traffic Conurol High Incensity Sign 36x36 used a total of 4 on both East and West lanes for recovery and cargo and recovery	20	50.00	1,000.00
26 In. Traffic Cones total of 48 cones for recovery and cargo and recovery per hour	20	35.00	700.00
Pallets for Restocking the cargo	3	22.95	68.85
PIG MAT240 used to clean waste of fluids on the bridge	25	7.50	187.50
Containment Booms used for containment preventing release of chemicals and fluids into Savannah River below site	1	85.00	85.00
Containment Liner for storage of waste oil dry	1	175.00	175.00
Cargo Wrap	1	210.84	210.84

This price is with A lot of Item used NOT Not Charged Out For And This price is only IF we Agree To Settlement

All QTY is per hours of usage.
OR I will Give the Total price Of all Equipment, Manpower, Ect. For The Insurance Company to Review

Total	$48,633.19
Payments/Credits	$0.00
Balance Due	$48,633.19

Phone #	E-mail
803-226-0025	sherry@waynesautomotivecenter.com

James and Diane Youngblood, Respondents,
v.
South Carolina Department of Social Services, Defendant,
v.
Jane and John Doe, Intervenors, of whom, Jane and John Doe are the Petitioners.

Appellate Case No. 2012-212047
Opinion No. 27232

STATE OF SOUTH CAROLINA In The Supreme Court

Heard January 8, 2013
Filed March 8, 2013

Summaries:

Source: Justia

The issue before the Supreme Court in this case was whether former foster parents had standing to petition to adopt a child placed for adoption by the Department of Social Services (DSS) with a different family. Upon review of the trial court record in this case, the Supreme Court concluded that the former foster parents possessed neither statutory or constitutional standing, and therefore vacated the order that granted the parents' petition, and remanded custody of the child to DSS for adoptive placement. "[R]ecognizing that children develop rapidly, and that stability and attachment are important components in their growth and development, [the Court directed] DSS to consider [the] child's present best interests in placing her for adoption."

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Pickens County
W. Marsh Robertson, Family Court Judge

REVERSED

Vanessa H. Kormylo, of Greenville, for Petitioners.
Sarah G. Drawdy, of The Drawdy Law Firm, LLC, of Anderson, for Respondents.

Page 2

JUSTICE HEARN: In this case we must decide whether former foster parents have standing to petition to adopt a child placed for adoption by the Department of Social Services (DSS) with a different family. We hold the former foster parents possess neither statutory nor constitutional standing, and reverse.

FACTUAL/PROCEDURAL BACKGROUND

Child was born in 2006 and is the youngest of five siblings. On August 28, 2007, the children were removed from their biological parents by DSS. Thereafter, on October 12, 2007, Child was placed for foster care with the Youngbloods and Child's siblings were placed with other foster care providers.[1] Child remained with the Youngbloods continuously, although with regular sibling visitation, until June 24, 2009.

DSS informed the Youngbloods by mail on April 27, 2008, that adoption was Child's permanent care plan and advised them as to what actions they needed to take in order to be considered as adoptive parents for Child. The letter went on to state that "if the child in your home has a sibling or siblings placed in a different foster home, it will be the first priority of this agency to reunite and place these siblings together for the purpose of adoption." The Youngbloods applied to adopt Child and completed the required home study, but they did not apply to adopt her siblings.

On March 17, 2009, DSS informed the Youngbloods that they had not been selected as Child's adoptive parents and she had been

placed with another family.[2] Specifically, the letter stated:

> Your adoptive home study has been received and approved. Please note that you had applied originally for the placement of [Child]. However, this sibling group of five has been placed together. Given these circumstances, your approved home study will be placed in our

Page 3

> state office files for consideration when a child with the characteristics in which you are interested in parenting become available for adoption.

The adoptive family selected by DSS was the Does. Subsequently, DSS gave the Youngbloods the requisite ten days' written notice of Child's removal from their foster care. From this point on, four separate, overlapping actions were filed: DSS's termination of parental rights suit, the Youngbloods' administrative appeal of Child's removal, the Youngbloods' adoption action, and the Does' adoption action.

First, on January 30, 2009, DSS filed an action seeking to terminate the parental rights of Child's parents. On May 8, 2009, the Youngbloods filed an administrative appeal with DSS's Fair Hearing Committee concerning the impending removal of Child from their home. Child was removed from the Youngbloods' home on June 24, 2009, and placed, along with her siblings, with the Does. Then, on July 6, 2009, the Youngbloods filed the instant adoption action in family court for the adoption of Child, naming DSS as defendant. On July 29, 2009, the Does filed an action petitioning the family court to permit them to adopt Child and her four siblings.

On July 30, 2009, the Fair Hearing Committee issued a final administrative order denying the Youngbloods' administrative appeal. The Committee stated the issues before it were whether DSS followed the requisite procedure in removing Child and whether DSS afforded the Youngbloods due process. The Committee found DSS followed the required procedure by giving the Youngbloods ten days' notice of the removal and afforded them procedural and substantive due process because it provided notice and a rational explanation—placement with her siblings—for the removal. The Youngbloods did not appeal the Committee's decision.

In the Youngblood's adoption action, the family court entered an expedited temporary order on August 4, 2009, granting them custody of Child. The court also granted a motion to intervene by the Does, found that visitation between Child and her siblings would be in her best interests, and directed the parties, Child's therapist, and the guardian *ad litem* to formulate a visitation schedule.

On August 24, 2009, the family court entered a final order in DSS's termination of parental rights action granting the requested termination. Additionally, the order provided: "Custody of the Defendant children shall be

Page 4

granted to the South Carolina Department of Social Services, with all rights of Guardian ad Litemship, placement, care and supervision, including the sole authority to consent to any adoption . . . ."

On May 4, 2010, the family court entered a final adoption order for Child's four siblings declaring the Does to be the legal parents of those four children. However, the family court took no action regarding Child due to the Youngbloods' pending adoption action.

In the Youngbloods' adoption action, both the Does and DSS moved to dismiss on the grounds the Youngbloods lacked standing and were statutorily barred from adopting Child because DSS had not consented to the adoption. The family court found the Youngbloods had standing pursuant to Section 63-9-60 of the South Carolina Code (2012). The court distinguished *Michael P. v. Greenville County Department of Social Services*, 385 S.C. 407, 684 S.E.2d 211 (Ct. App. 2009), in which the court of appeals held that former foster parents did not have standing to seek adoption of a child in DSS's custody, on the basis that here, the Youngbloods informed DSS of their desire to adopt Child, obtained DSS's approval to serve as adoptive parents prior to removal of Child,[3] and timely pursued an administrative appeal of the removal of Child. The family court then considered Child's best interests and granted the Youngbloods' petition to adopt Child, subject to sibling visitation.

The Does and the Youngbloods filed cross-appeals with the court of appeals. Relevant to our writ of certiorari, the Does asserted that the family court erred in finding the Youngbloods had standing to adopt, granting the Youngbloods' adoption petition without the consent of DSS, and finding adoption of Child by the Youngbloods was in Child's best interests. [4] *Youngblood v. DSS*, Op. No. 2012-UP-172 (S.C. Ct. App. filed March 8, 2012).

In a per curiam, unpublished opinion, the court of appeals ruled against the Does on all grounds. The court acknowledged the holding in *Michael P.* that former foster parents do not have standing under section 63-9-60 to seek adoption of a child placed in an adoptive home by DSS, and noted that the Youngbloods'

Page 5

"broad window to petition the family court under section 63-9-60(A)(1) had closed." However, the court of appeals, apparently sua sponte, held that Section 63-9-310(D) of the South Carolina Code (2010) provided standing to the Youngbloods. According to that section, when DSS denies consent to adopt to a person eligible under section 63-9-60, it has "an affirmative duty to inform the person who is denied consent of all of his rights for judicial review of the denial." S.C. Code Ann. § 63-9-310(D). Based on that provision, the court of appeals held:

> any person who is initially eligible to adopt under section 63-9-60 and who is aggrieved by a child-placing agency's decision to deny them consent to adopt a specific child may petition the family court to review the child-placing agency's decision in order to determine whether it was in the child's best interests.

Finally, the court affirmed the family court's finding that placement with the Youngbloods was in Child's best interests, holding the Does failed to present sufficient evidence to meet their burden on this issue.

ISSUES

I. Did the court of appeals err in holding the Youngbloods had standing to petition to adopt Child?

II. Did the court of appeals err in affirming the family court's grant of the Youngbloods' petition to adopt despite the lack of consent by DSS?

LAW/ANALYSIS

I. STANDING

Standing, a fundamental prerequisite to instituting an action, may exist by statute, through the principles of constitutional standing, or through the public importance

exception. *Freemantle v. Preston,* 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation. *See id.* at 194-95, 728 S.E.2d at 44-45; *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 97 n.2 (1998) (stating the issue of statutory standing as "whether this plaintiff has a cause of action under the statute"). When no statute confers standing, the elements of constitutional standing

Page 6

must be met.[5] To possess constitutional standing, first, a party must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. *ATC South, Inc. v. Charleston Cnty,* 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)). Second, a causal connection must exist between the injury and the challenged conduct. *Id.* Finally, it must be likely that a favorable decision will redress the injury. *Id.*

First, while the family court found statutory standing pursuant to section 63-9-60, we hold that statute does not give the Youngbloods standing; instead, it specifically deprives them of standing. Section 63-9-60 provides:

> (A)(1) Any South Carolina resident may petition the court to adopt a child.
> ....
> (B) This section does not apply to a child placed by the State Department of Social Services or any agency under contract with the department for purposes of placing that child for adoption.

Thus, while section 63-9-60(A) broadly grants standing to "any South Carolina resident," section 63-9-60(B) makes that grant of standing inapplicable to a child placed for adoption by DSS. *See Michael P.,* 385 S.C. at 415, 684 S.E.2d at 215 (holding former foster parents did not have standing to adopt under section 63-9-60 because the child had been placed by DSS for adoption).

The court of appeals dealt with the interplay of 63-9-60(A) and (B) in *Michael P.,* where a child was removed from his mother by DSS and placed in foster care. *Id.* at 410, 684 S.E.2d at 212. When DSS approached the foster parents about adopting the child, they declined. *Id.* DSS then removed the child from the foster home and placed him for adoption. *Id.* Unhappy with the placement, the former foster parents petitioned to adopt the child. *Id.* The prospective adoptive parent selected by DSS intervened and moved to dismiss the action on the ground the foster parents lacked standing. *Id.* at 411, 684 S.E.2d at 213. The foster parents asserted they had standing both under section 63-9-60 and because they were foster parents. *Id.* at 412, 684 S.E.2d at 213. The family court granted the motion to dismiss, and the foster parents appealed. *Id.* at 412-13, 684

Page 7

S.E.2d at 213-14. The court of appeals first dismissed the foster parents' argument that subsection (B) does not apply to section 63-9-60 in its entirety. *Id.* at 415, 684 S.E.2d at 215. Relying on subsection (B), the court of appeals held that "not just any 'South Carolina resident' can petition to adopt a child when the child has been placed by DSS in another home for the purposes of adoption," and therefore, concluded the foster parents did not have standing under section 63-9-60(A) because the child had been placed by DSS in another home for adoption. *Id.*

Here, the family court distinguished the *Michael P.* decision, finding that under the

facts of this case, section 63-9-60 created standing because the Youngbloods informed DSS of their desire to adopt Child, received DSS's approval to adopt prior to the placement of Child, had their foster care contract terminated, and pursued an administrative challenge to Child's removal. It is important to note that while the Youngbloods received DSS's approval to serve as adoptive parents generally, they did not receive approval to adopt Child. While both couples were approved for adoption, only the Does had DSS's consent to adopt Child. Because the statute does not permit any exceptions and plainly states that the section 63-9-60(A) grant of standing does not apply to children placed by DSS, the family court erred in grounding standing on section 63-9-60.

The court of appeals, as an alternative to section 63-9-60, held, based on DSS's denial of consent for the Youngbloods to adopt Child, that section 63-9-310(D) created standing. In short, the court of appeals held that under section 63-9-310, a person denied consent to adopt by DSS has a statutory right to petition the family court for judicial review of that denial. We disagree.

Section 63-9-310 provides:

> (B) Consent or relinquishment for the purpose of adoption is required of the legal guardian, child placing agency, or legal custodian of the child if authority to execute a consent or relinquishment has been vested legally in the agency or person and:
>
> > (1) both the parents of the child are deceased; or (2) the parental rights of both the parents have been judicially terminated.
>
> ....
>
> Page 8
>
> (D) If the consent of a child placing agency required by this subsection is not provided to any person eligible under Section 63-9-60, the agency has an affirmative duty to inform the person who is denied consent of all of his rights for judicial review of the denial.

S.C. Code Ann. § 63-9-310. The statute defines consent as: "the informed and voluntary release in writing of all custodial or guardianship rights, or both, with respect to a child by the child placing agency . . . ." S.C. Code Ann. § 63-9-30(6) (2010).[6]

First, section 63-9-310(D) does not apply to the Youngbloods because they were not persons eligible under section 63-9-60. They were denied consent to adopt Child in DSS's March 17, 2009 letter, and Child had already been placed with the Youngbloods as of that date. Therefore, under section 63-9-60(B), the Youngbloods were not persons eligible to adopt Child when they were denied consent.

Furthermore, section 63-9-310(D) does not provide a right to judicial review. While it does direct DSS to inform a person denied consent of "all of his rights to judicial review," a statutory directive to inform persons of their rights does not in itself create rights. Although it is curious that the General Assembly would direct DSS to inform persons of their rights to judicial review if no such rights exist, where the plain language of a statute is unambiguous we are charged with implementing it. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Here, the statute unambiguously does nothing more

than direct DSS to inform persons of any rights they may have.

Therefore, we must look elsewhere to determine whether a right to judicial review and standing exist. The parties did not direct us to a statute providing a right to judicial review and reviewing the entirety of the South Carolina Children's Code as well as the applicable regulations, we found no mention of judicial review for the denial of consent to adopt, other than section 63-9-310(D). To the contrary, DSS's regulations provide:

> A. Application to Become Adoptive Parent - Right to Appeal
>
> Page 9
>
> (1) A person is entitled to appeal the Department's decision to deny or terminate its approval of that person to become an adoptive parent.
> (2) A person is not entitled to appeal the Department's decision to deny its consent or refuse approval of the applicant for adoption of a specific child . . .
> . . .

10 S.C. Code Ann. Regs. § 114-150 (2012).

Lacking a statutory right to judicial review, we must determine whether the denial of consent implicates a legal interest held by the Youngbloods, and thus whether due process requires judicial review and they possess constitutional standing. *See ATC South*, 380 S.C. at 195, 669 S.E.2d at 339 (constitutional standing requires an injury to a legally protected interest); *Sullivan v. S.C. Dept. of Corr.*, 355 S.C. 437, 444-45, 586 S.E.2d 124, 127-28 (2003) (a prisoner was not entitled to judicial review of the denial of his application to participate in a treatment program because he did not have a protected interest in participation in the program); *Al-Shabazz v. State*, 338 S.C. 354, 368-72, 527 S.E.2d 742, 749-52 (1999) (holding that because a prisoner's good-time credits are a protected liberty interest under the Fourteenth Amendment, procedural due process requires judicial review when they are taken as punishment).

First, the court of appeals' holding that any person denied consent to adopt has standing to seek review of the agency's decision is erroneous because there is no general legal interest in the adoption of any child. Rather, any protected interest a person may have in a child must arise from some legally recognized connection between the child and the adult. *See Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 841-47 (1977) (indicating that only some relationships between an adult and a child are legally protected).

However, the Youngbloods were not just any persons—they were Child's foster parents. While the foster care relationship undoubtedly often results in emotional attachments between the foster parent and foster child, the relationship is only a temporary, contractual relationship created by the State. *See Smith*, 431 U.S. at 845-46 (recognizing the foster care relationship as derived from state law and contractual arrangements); *Michael P.*, 385 S.C. at 416, 684 S.E.2d at 216 (same); 10 S.C. Code Regs. 114-550(A)(1) (2012) (defining foster care as "a temporary living arrangement within the structure and atmosphere of a private family home, [which] is utilized while permanent placement plans are being formulated for the involved children"). Accordingly, the foster parent relationship,

Page 10

absent statutory law to the contrary, is insufficient to create a legally protected interest in a child and therefore, does not create standing to petition to adopt.

While these conclusions necessarily flow from the South Carolina Children's Code and our standing and due process jurisprudence, they are also supported by the policy behind the Children's Code. The General Assembly has entrusted DSS with the care and placement of children removed from their homes. *See* S.C. Code Ann. § 63-7-660 (2010) (DSS may remove a child from his or her home and has legal custody of the child thereafter if there is probable cause to believe abuse or neglect has occurred); § 63-9-310(B) (DSS must consent to the adoption of any child in DSS's custody); § 63-9-1810 (2010) (DSS has authority to promulgate regulations governing the adoption of children); § 63-11-60 (2010) (DSS may place children in foster homes and remove them when it believes a child's welfare so requires). Furthermore, the Child Protection and Permanency Chapter of the Children's Code, Section 63-7-10, *et seq.*, under which the termination of parental rights provisions are found, states that its purpose is to "ensure permanency on a timely basis for children when removal from their homes is necessary." S.C. Code Ann. § 63-7-10-(B)(3) (2010). Permitting any person, or even just foster parents, to petition to adopt a child placed elsewhere for adoption by DSS directly contradicts the power and discretion given to DSS and undermines the goal of rapidity in permanently resolving children's placement issues.

The Youngbloods argue that denying them standing to petition to adopt will result in Child's best interest never being considered and give DSS unfettered power to make decisions affecting the welfare of children. However, those fears are unfounded. In administering its adoption program, DSS is statutorily charged with serving the best interests of the child. S.C. Code Ann. § 63-9-1310 (2010) ("It is the purpose of this article to achieve the objective of the best interests of the child, as the primary client. Adoption programs must be structured so that all questions of interpretation are resolved with that objective in mind."). Additionally, the Children's Code requires that at the adoption hearing, the family court must consider whether "the best interests of the adoptee are served by the adoption," before deciding to grant or deny DSS's proposed adoption. S.C. Code Ann. § 63-9-750(B)(6) (2010). Furthermore, in every adoption proceeding the child must have a guardian *ad litem* and also, if necessary, an attorney, representing his or her best interests. *See* S.C. Code Ann. § 63-7-2560(B) (2010). Therefore, while DSS may make the initial adoption placement decision for a child in its custody, DSS's decision is subject to judicial review and will be denied if not in the child's best interests.

Page 11

II. CONSENT

Because the Youngbloods' lack of standing is dispositive, we need not reach the issue of DSS's consent. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address the remaining issues where a prior issue was dispositive).

CONCLUSION

In order to ensure that our State resolves the permanent placement of children in its custody promptly, the General Assembly has entrusted DSS with discretion in making the initial decision as to the adoption of such children, and the rights of others to petition to adopt have been limited. If any person could petition to adopt a child in DSS's custody despite DSS having placed the child with another, the placement of such children would become protracted contests, like the instant case, in which the vital interests of stability, permanency, and attachment would be irretrievably lost to the passage of time. Nonetheless, we are deeply troubled by the notion of again uprooting and moving Child.

Accordingly, we vacate the order granting the Youngbloods' petition to adopt Child, and

we remand the custody of Child to DSS for adoptive placement. However, recognizing that children develop rapidly, and that stability and attachment are important components in their growth and development, we direct DSS to consider Child's present best interests in placing her for adoption.

TOAL, C.J., PLEICONES, BEATTY, and KITTREDGE, JJ., concur.

Notes:

1. Initially, one of Child's brothers was placed with the Youngbloods as well, but due to his behavioral problems, he was moved to a different placement after only a few weeks.

2. Rather than its ordinary meaning connoting a change in physical location, the verb "place" is used by the statutory language and DSS to mean the selection of an adoptive family. While Child had been placed with another family as of March 17, 2009, she physically remained in the care of the Youngbloods at that time.

3. Presumably, this refers to the approval of the Youngbloods' home study and thus, to their approval to adopt *a* child. The Youngbloods never received DSS approval to adopt Child.

4. The Does did not seek certiorari on the issue of Child's best interests, and the Youngbloods did not seek certiorari on any of the issues presented in their appeal.

5. While the public importance exception may provide standing where the elements of constitutional standing are not met, the exception was not raised in this action.

6. Additionally, the South Carolina Children's Code requires that a consent be a sworn document containing specific information. S.C. Code Ann. § 63-9-330 (2010).

---

333 S.C. 432
511 S.E.2d 48

D. Carroll GARRIS, Respondent/Appellant,
v.
The GOVERNING BOARD OF the SOUTH CAROLINA REINSURANCE FACILITY and the South Carolina Reinsurance Facility, Appellants/Respondents.

No. 24871.

Supreme Court of South Carolina.

Heard November 4, 1998.

Decided December 29, 1998.

Rehearing Denied March 5, 1999.

[333 S.C. 436]

Thomas C. Salane of Turner, Padget, Graham & Laney, P.A., Columbia, for Appellants/Respondents.

Thornwell F. Sowell of Sowell, Todd, Laffitte, Beard & Watson, L.L.C., Columbia; and Jeffrey A. Jacobs of Nelson Mullins Riley & Scarborough, L.L.P., Columbia, for Respondent/Appellant.

WALLER, Justice:

This appeal follows the circuit court's reversal of the decision of the Board of Governors (the Governing Board) of the South Carolina Reinsurance Facility (Facility) to revoke D. Carroll Garris's (Garris) status as a designated agent. We affirm in part, reverse in part, and remand for further proceedings.

FACTS

Garris, a licensed insurance agent, is a designated agent of

[333 S.C. 437]

Facility.[1] Prompted by an audit performed by one of Facility's servicing carriers, Facility began investigating allegations of underwriting irregularities at Garris's agency in mid-1993. Facility issued a notice of hearing and rule to show cause seeking to revoke Garris's status as a designated agent in December 1993. Facility alleged Garris had improperly classified private risks as commercial risks (which have lower premiums that are not subject to recoupment fees), insured "phantom" vehicles, wrote duplicate coverages, endorsed policies to insure additional vehicles after a policy had been canceled, and violated trust accounting procedures.

The Governing Board voted in November 1994 to revoke Garris's status as a designated agent. Garris petitioned the circuit court for review. The circuit court, following additional discovery, reversed the Governing Board's decision in November 1997. Both parties now appeal the circuit court's decision.

ISSUES

1. Did the circuit court err in ruling that Governing Board members who voted to revoke Garris's status as a designated agent acted as prosecutor and adjudicator in violation of Article I, Section 22 of the state constitution?

2. Did the circuit court err in ruling that the doctrine of res judicata bars Garris's argument about the composition of the Governing Board?

3. If res judicata does not bar Garris's argument, did the circuit court err in ruling that the composition of the

[333 S.C. 438]

Governing Board violates Article III, Section 1 of the state constitution?

4. Did the circuit court err in ruling that proxies were properly exercised and a quorum was present at Garris's hearing before the Governing Board?

1. ARTICLE I, SECTION 22

The circuit court reversed the Governing Board's decision to revoke Garris's status as a designated agent, finding the procedure followed by Facility unconstitutional. Under the state constitution, a person shall not "be subject to the same person for both prosecution and adjudication." S.C. Const. art. I, § 22.[2] Facility now argues the circuit court erred for three reasons.

A. FACILITY IS AN ADMINISTRATIVE AGENCY

Facility contends it is a private organization that merely acts as a statutory agent for the automobile insurance industry. Facility argues it receives no state funding, has no rule-making authority, and is subject to regulation by a state agency, the South Carolina Department of Insurance. Consequently, Facility argues it is not an "administrative agency" for purposes of Article I, Section 22 under the statute creating it or the Administrative Procedure Act (APA), S.C.Code Ann. §§ 1-23-10 to -660 (1986 & Supp.1997). We disagree.

An agency "means each state board, commission, department, executive department or officer, other than the legislature or the courts, authorized by law to make regulations or to determine contested cases." S.C.Code Ann. § 1-23-10(1) (1986) (emphasis added); *accord* S.C.Code Ann. § 1-23-310(1) (Supp.1997) (agency "means each state board, commission, department or officer, other than the legislature or the courts,

[333 S.C. 439]

but to include the Administrative Law Judge Division, authorized by law to determine contested cases"). It is true that Facility, a statutory creature, "is subject to regulations and orders promulgated by the director [of the Department of Insurance] or his designee." S.C.Code Ann. §§ 38-1-20(16) and XX-XX-XXX (Supp.1997).

Facility clearly possesses rule-making authority in the area of automobile insurance, a subject that touches the life of most South Carolinians. *See* S.C.Code Ann. § 38-77-520 (Supp. 1997) (every automobile insurer in South Carolina is bound by Facility's plan of operation as approved by the director of the Department of Insurance and by rules lawfully prescribed by Facility's Governing Board); S.C.Code Ann. § 38-77-596 to -610 (Supp.1997) (Facility must calculate and file recoupment fees that are assessed on all automobile insurance policies in South Carolina, and changes in rates are subject to public hearing pursuant to APA). *See also Garris v. Governing Board of South Carolina Reinsurance Facility*, 319 S.C. 388, 461 S.E.2d 819 (1995) (applying APA to remand case for failure to exhaust administrative remedies); *Moore v. South Carolina Reinsurance Facility*, 297 S.C. 276, 376 S.E.2d 510 (1989) (applying APA in deciding whether Facility properly refused to certify each of designated agent's existing locations); *Grain Dealers Mut. Ins. Co. v. Lindsay*, 279 S.C. 355, 306 S.E.2d 860 (1983) (upholding Facility's power to enact rules regarding the distribution of Facility losses); *Mungo v. Smith*, 289 S.C. 560, 347 S.E.2d 514 (Ct.App.1986) (applying APA to decide that designated agent's status may not be revoked arbitrarily, but must be based upon substantial evidence); S.C.Code Ann. § 38-77-

510 (Supp.1997) (designating Facility as a "using agency," which is defined as "any governmental body of the State which utilizes any supplies, services, or construction purchased" under state Procurement Code).

Facility has the authority to assign the status of designated agent to an individual, as well as the authority to revoke that designation. S.C.Code Ann. §§ 38-77-590 to -595 (Supp. 1997). Facility argues it does not decide "contested cases" as such cases are defined in the APA. *See* S.C.Code Ann. § 1-23-310(2) (Supp.1997) (contested case "means a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a

[333 S.C. 440]

party are required by law to be determined by an agency after an opportunity for hearing"). Nevertheless, Facility assured Garris during the course of its investigation that "a full contested type hearing will be offered to you at which time your response can be as full and complete as you deem appropriate." Facility concedes in its brief that, while it does not believe it is an administrative agency, it "has no objection to following due process standards applicable under the APA in all hearings before the Board."

We have interpreted Section 1-23-310(2) to mean that a "contested case"is one in which an agency is required by law to determine a party's rights after an opportunity for a hearing. *League of Women Voters of Georgetown County v. Litchfield-by-the-Sea,* 305 S.C. 424, 426, 409 S.E.2d 378, 380 (1991); *Triska v. Dep't of Health and Envtl. Control,* 292 S.C. 190, 196, 355 S.E.2d 531, 534 (1987). No statute explicitly requires Facility to hold a hearing before revoking an agent's status as a designated agent; therefore, Garris's case is not a "contested case" as defined in the APA.

However, we also have held that Article I, Section 22 requires an administrative agency to give procedural due process to parties that come before it even though a matter may not be a "contested case" as defined in the APA. *See League of Women Voters of Georgetown County, supra* (finding that certification process as outlined in then prevailing statutes and regulations was not a "contested case" as defined in APA, which meant League was not entitled to a hearing under APA; but concluding League was entitled to notice, a hearing, and judicial review under Article I, Section 22); *Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health and Envtl. Control,* 305 S.C. 90, 93, 406 S.E.2d 340, 342 (1991) (stating same principle).

We affirm the circuit court's ruling and hold that Facility is an administrative agency because it meets the rule-making component of the APA definition. *See Mungo v. Smith, supra* (where a statute contains two clauses which prescribe its applicability and the clauses are connected by the disjunctive "or," application of the statute is not limited to cases falling within both clauses, but applies to cases falling within either). Accordingly, Facility must comply with the procedural due

[333 S.C. 441]

process protections established in Article I, Section 22 even though Garris's case is not a "contested case" as defined in the APA.

B. SAME PERSONS AS PROSECUTOR AND ADJUDCATOR

Facility argues the "same persons" were not engaged in both the prosecution and adjudication of Garris's case. We disagree.

The Governing Board oversees Facility operations by considering matters in various committees, which make recommendations to other committees and the Governing Board. Governing Board member James Lingle was present as a member at an Audit Committee

meeting October 20, 1993. Governing Board members Jim Thompson, Clark Hobbie, Thomas Kepley, C.M. Dinwiddie, and Frank Lee were present as observers at the meeting. Larry Griner, who is not a Governing Board member but ultimately exercised another member's proxy and voted on the Garris matter, also was present as an observer. Garris was not present or represented at the meeting.

At that meeting, a Facility auditor who had examined Garris's records and practices reported her findings in detail. The Audit Committee, following a "lengthy discussion," unanimously voted to refer the matter the Designated Agent Committee, the Operating Committee, and the state Department of Insurance.

Governing Board members Jim Thompson, Robert Herlong, Phillip Love, Thomas Reichard, and Arthur Ivey were present as members at an Operating Committee meeting October 29, 1993. Governing Board members Steve Dennis, Hobbie, Randall Thompson, and Lee were present as observers at the meeting. Non-member Griner again was present as an observer. Garris was not present or represented at the meeting.

At that meeting, a Facility official discussed the auditor's report on Garris, called members' attention to the auditor's written report that was attached as an exhibit to the agenda, and described the Audit Committee's earlier motion. Committee members discussed the Garris matter in executive session.

[333 S.C. 442]

Governing Board members Hobbie, Kepley, and Lee were present as members at a Designated Agent Committee meeting December 13, 1993. Non-member Griner again was present as an observer. Garris appeared and answered the committee's questions.

At that meeting, the committee discussed the matter in executive session, then had a "lengthy discussion" about it in open session. The committee voted unanimously to recommend that the Governing Board revoke Garris's status as a designated agent. The committee further recommended that the Governing Board hold a special meeting to consider the matter. Facility served a notice and rule to show cause upon Garris on December 20, 1993, requiring him to appear before the Governing Board.

Of the members named above, Dennis, Jim Thompson, Herlong, Hobbie, and Love attended the three-day hearing on the Garris matter in August 1994. All voted in favor of revoking Garris's status as a designated agent on November 21, 1994. Non-member Griner also attended the hearing as the holder of Randall Thompson's proxy. Griner exercised the proxy to vote in favor of revoking Garris's status. The Governing Board voted 8-2 to revoke Garris's status.

Reichard and Lee also attended the entire hearing. Reichard did not vote because Garris was a designated agent of his company. *See* S.C.Code Ann. § 38-77-585 (Supp.1997) (prohibiting member from voting on any issue materially affecting the member's employer). Lee recused himself because he had considered the matter in committee. Lee also was chairman of the Designated Agent Committee at the time, and had referred the Garris matter for investigation as early as May 1993 after hearing reports of underwriting irregularities at Garris's agency. Lee testified the purpose of the Designated Agent Committee meeting was to gather information about Garris's case.

Kepley did not attend the hearing but gave his proxy to Love, instructing him before the hearing to vote to revoke Garris's status.

Love refused to accept the proxy in that fashion, so Kepley gave him an unconditional proxy.[3]

[333 S.C. 443]

The bottom line is that five Governing board members and one non-member attended, as a member or observer, one or more committee meetings at which the Garris matter was discussed extensively in open and executive sessions. All six voted to revoke Garris's status as a designated agent. Of those six, four (Jim Thompson, Herlong, Hobbie, and Love) were members of the committees which considered the Garris matter. In addition, two other Governing Board members attended one or more committee meetings and the entire hearing, but did not vote.

Facility now contends the circuit court erred in finding the procedure unconstitutional because none of the committee *members* —except Hobbie—voted or participated in the hearing. The Governing Board would have revoked Garris's status even without Hobbie's vote, Facility argues. Facility addresses only the Audit and Designated Agent Committee meetings in its brief. At oral argument, Facility dismissed the Operating Committee meeting as irrelevant because no vote was taken.

The court may reverse or modify the decision of an administrative agency when an appellant's substantial rights have been prejudiced because the agency's findings, inferences, conclusions, or decisions are, among other things, in violation of constitutional or statutory provisions, or made upon unlawful procedure. S.C.Code Ann. § 1-23-380(A)(6) (Supp.1997).

"[A] fair trial in a fair tribunal is a basic requirement of due process, [and] [t]his applies to administrative agencies which adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975) (upholding process in which state medical board suspended physician's license after investigating and hearing the case). The fact that investigative, prosecutorial, and adjudicative functions are performed within the same agency, or even performed by the same persons within an agency, does not, without more, constitute a violation of due process. "That is not to say that there is nothing to the argument that those

[333 S.C. 444]

who have investigated should not then adjudicate," and a court facing special facts and circumstances in a particular case may determine that dual roles are impermissible. *Id.* at 51-58, 95 S.Ct. at 1466-70, 43 L.Ed.2d at 726-29. Agency officials or members who adjudicate a matter are presumed to be honest, fair, and unbiased. A party challenging the combination of investigative and adjudicative functions must convince the court that, under a realistic appraisal of psychological tendencies and human weakness, conferring both functions on the same individuals poses such a risk that it is likely to violate due process. *Id.* at 47, 95 S.Ct. at 1464, 43 L.Ed.2d at 724.

While *Withrow v. Larkin* established the parameters of due process safeguards in administrative proceedings under the federal constitution, Article I, Section 22 of our constitution explicitly addresses procedural due process in such proceedings. Section 22 provides for notice, an opportunity to be heard, an impartial adjudicator, and judicial review. We have recognized that Section 22 is an additional guarantee of important due process rights, enacted in 1970 as legislators and judges noticed the increasing prevalence and influence of administrative agencies in daily life. *See Ross v. Medical Univ. of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997).

In *Ross*, we found the purpose of Section 22 "is to ensure adjudications are conducted by impartial administrative bodies. Partiality exists where, among others, an adjudicator has *ex parte* information as a result of prior investigation or has developed, by prior involvement in the case, a 'will to win.'" *Id.* at 69, 492 S.E.2d at 72. We did not find a violation of Section 22 where the university's president investigated a tenured professor's conduct, terminated the professor, and then testified against him at a committee hearing. The president did not later participate as an adjudicator, and he did not improperly consider *ex parte* information. *Id.* However, we did find a violation of Section 22 where a university vice-president investigated the professor's case, testified as an adverse witness at a committee hearing, and sat as the intermediate judge in a three-step disciplinary procedure. *Id.* at 70, 492 S.E.2d at 72.

We hold that Facility violated Article I, Section 22 because the same persons served as prosecutor and adjudicator. We

[333 S.C. 445]

disagree with Facility's effort to ignore the Operating Committee meeting, which obviously was part of the investigative and prosecutorial processes because the Garris matter was referred to it. When all three committee meetings are considered, it is clear that five Governing Board members and one non-member attended, as a member or observer, one or more committee meetings at which the Garris matter was discussed extensively in open and executive sessions. At only one of those committee meetings was Garris given a chance to respond. All five members and the one non-member later sat as adjudicators and voted to revoke Garris's status as a designated agent.

We also disagree with Facility's effort to describe the process as one in which Governing Board members were "merely exposed" to the charges and facts of the case. Kepley's attempt to give a fellow board member his proxy to vote in favor of revoking Garris's status plainly shows that at least one member had formed an opinion before the hearing. But Kepley's action, while relevant and revealing, is not primarily what leads us to conclude that Garris did not receive procedural due process because members or officials of an agency who adjudicate a matter are presumed to be honest, fair, and unbiased. *See Withrow v. Larkin, supra; City of Alma v. United States*, 744 F.Supp. 1546, 1561 (S.D.Ga.1990) (an agency official is not deemed unfit to perform her statutory duty merely because she previously has taken a position on issues related to the case before her, even if she expressed her opinion publicly).

Instead, what leads us to conclude that Garris did not receive procedural due process is the inherently flawed structure of the investigative and prosecutorial processes that placed future adjudicators in situations where they had the opportunity to form such premature opinions. Although Hobbie may have been the only committee member who actually *voted* both for the investigation to continue *and* to revoke Garris's status as a designated agent, the other five members heard and engaged in extensive debate about Garris's case in committee meetings before the hearing. We agree with the circuit court that Governing Board members were intimately involved in the investigative and prosecutorial processes as committee members.

[333 S.C. 446]

We further agree with the circuit court's decision to reject as incredible the testimony of Governing Board members who insisted they either could not remember committee discussions or based their decision solely on evidence presented at the hearing. Allowing

an agency official or board member to sidestep Article I, Section 22 merely by stating, in rote fashion, that he or she based a decision only on evidence presented at the hearing would render the constitutional prohibition a nullity.

In short, under a realistic appraisal of psychological tendencies and human weakness, we conclude that Governing Board members who participate in the investigation or prosecution of a designated agent as a member or observer at a committee meeting may not participate as adjudicators of that agent's case at a subsequent hearing. Members who participate in the investigation or prosecution of a case must distance themselves from the adjudicatory process, and should refrain from even discussing that case with future adjudicators. *See Withrow v. Larkin, supra.* Such a rule will reduce or eliminate adjudicators' exposure to *ex parte* information, as well as the inevitable human tendency to develop a will to win. *See Ross v. Medical Univ. of South Carolina, supra.*

Our view is consistent with the approach taken by most courts today. Courts generally discourage agency staff and members from simultaneously acting as investigator, prosecutor, and judge.[4] "It is proper to have some blend of judicial and prosecutorial functions in an 'administrative proceeding, provided that the person performing the quasi-prosecutorial function is not a member of the decision-making body." *Waste Mgt. v. Pollution Control Bd.*, 175 Ill.App.3d 1023, 125 Ill.Dec. 524, 530 N.E.2d 682, 694 (1988). *Accord Babcock Center, Inc. v. Office of Audits*, 286 S.C. 398, 334 S.E.2d 112 (1985) (holding that administrative agency may adjudicate appeals by panels composed of other persons within the same

[333 S.C. 447]

agency who did not participate in investigative or prosecutorial capacities); 4 Stein, Mitchell, and Mezines, *Administrative Law*, § 33.02[1] to [4] (1998) (discussing separation of functions and stating that such conflicts can easily be avoided by isolating agency personnel or board members into investigatory, prosecution, and adjudicatory positions).[5]

C. HARMLESS ERROR

Facility contends any error in the handling of Garris's case, including bias by persons not serving as adjudicators and exposure by adjudicators to committee activities, is harmless error and provides no basis for reversing the board's decision. We disagree.

In *Ross v. Medical Univ. of South Carolina, supra,* we found the vice-president's participation as an investigator, witness, and intermediate judge to be harmless error because the university's board independently reviewed the record of the committee hearing, heard oral arguments from the parties, and conducted its own deliberations. *Id.*, 328 S.C. at 70, 492 S.E.2d at 72.

In this case, the Governing Board acted as the final adjudicator in Garris's case. Five members and one-non member participated as members or observers in prior committee meetings where Garris's case was extensively discussed. Those six persons sat in judgment of Garris at the hearing and cast six of the eight votes to revoke his status as a designated agent. We conclude the structure of the proceeding in this case was so inherently flawed that it is not subject to harmless

[333 S.C. 448]

error analysis. *Cf. Arizona v. Fulminante*, 499 U.S. 279, 307-09, 111 S.Ct. 1246, 1263-64, 113 L.Ed.2d 302, 329-31 (1991) (dividing constitutional errors into "trial errors" and "structural defects," with the latter defying analysis by harmless error standards because

they affect the framework within which a trial proceeds, rather than simply an error in the trial process itself); *State v. Byrd*, 318 S.C. 247, 456 S.E.2d 922 (Ct.App. 1995) (same).

In sum, we conclude Facility is an administrative agency, the same persons served as both prosecutors and adjudicators in violation of Article I, Section 22, and the process was so inherently flawed that it is not subject to harmless error analysis.

2. RES JUDICATA

Garris, in a declaratory judgment action brought after Facility filed the notice and rule to show cause, sought to enjoin Facility from proceeding against him. Garris filed a notice of appeal and a petition for supersedeas after the circuit court denied relief. We declined to stay the proceeding before the Governing Board, but stayed review of any disciplinary action which adversely affected Garris's status as a designated agent pending judicial review of the Governing Board's decision. We ultimately affirmed the circuit court, holding that Garris must first exhaust his administrative remedies. We also addressed Garris's argument, holding that the APA does not require Facility to give him time to correct any deficiencies, but only requires Facility to give him an opportunity to show he had complied with the law. *Garris v. Governing Board of South Carolina Reinsurance Facility*, 319 S.C. 388, 461 S.E.2d 819 (1995) *(Garris I)*.

In his petition to the circuit court following the Governing Board's decision to revoke his status as a designated agent, Garris argued the composition of the board is unconstitutional under Article III, Section 1 of the state constitution.[6] The

[333 S.C. 449]

circuit court ruled the argument was barred by the doctrine of res judicata. Garris contends the circuit court erred because res judicata does not bar his argument. We agree.

"Res judicata bars a subsequent suit by the same parties on the same issues. Res judicata is shown if (1) the identities of the parties is the same as a prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction." *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 250, 452 S.E.2d 832, 833 (1994) (citations omitted). "A litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Hilton Head Center of South Carolina, Inc. v. Pub. Service Comm'n of South Carolina*, 294 S.C. 9, 11, 362 S.E.2d 176, 177, (1987); *see also* James F. Flanagan, *South Carolina Civil Procedure* 649-55 (1996) (explaining three basic tests used in res judicata analyses). The primary purposes of the doctrine, commonly known today as claim preclusion, are to bring an end to litigation and prevent a defendant from being forced to defend the same action repeatedly. *See* 50 C.J.S. *Judgment* §§ 697, 702 (1997).

Res judicata or claim preclusion, however, is not always an ironclad bar to a later lawsuit.

> A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or after the precondition has been satisfied, unless a second action is precluded by operation of the substantive law.

Restatement (Second) of Judgments § 20(2) (1982). *Accord Allen v. Southern Ry. Co.*, 218 S.C. 291, 62 S.E.2d 507 (1950)

(plaintiffs voluntary dismissal of first action leaves situation as though no suit had ever been brought; subsequent, nearly identical action is not barred by res judicata even though plaintiff appealed first action to Supreme Court, which held that voluntary dismissal was inappropriate and premature); *Gault v. Spoon,* 168 S.C. 160, 167 S.E. 229 (1932) (where first action did not proceed to a conclusion because it was dismissed for failure to execute a proper bond, res judicata did not bar

[333 S.C. 450]

subsequent action on same transaction). *See also Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 396, 110 S.Ct. 2447, 2456, 110 L.Ed.2d 359, 376 (1990) (a dismissal without prejudice is not an adjudication upon the merits and does not have res judicata effect); *McEachern v. Black,* 329 S.C. 642, 496 S.E.2d 659 (Ct.App.1998) (same).

Furthermore, dismissal of a prior lawsuit without prejudice, on the ground that a party failed to exhaust administrative remedies, does not mandate dismissal of an identical cause of action in a subsequent suit. *Bowden v. United States,* 106 F.3d 433, 441 (D.C.Cir.1997); Wright, Miller, & Cooper, *Federal Practice and Procedure,* § 4437 (1981). "When applying res judicata to causes of action that were not before the court in the prior action, due process of law and the interest of justice require cautious restraint. Restraint is particularly warranted when the prior action was dismissed on procedural grounds." *Kearns, v. General Motors Corp.,* 94 F.3d 1553, 1556 (Fed.Cir.1996) (concluding res judicata did not bar patent infringement claims that were not before court in earlier case dismissed by court).

The doctrine of res judicata does not bar Garris's argument raising Article III, Section 1 because he could not properly have raised it or any other arguments before exhausting his administrative remedies. The fact the Court chose to address one of his arguments in a premature appeal does not mean he now should be penalized for not raising every purely legal challenge in that premature appeal. The purposes of res judicata—bringing an end to litigation and preventing a defendant from being forced to defend the same action repeatedly— are not met by applying the rule in this case. We remanded the matter in *Garris I,* which meant the proceedings against Garris continued and Facility had to continue its involvement in the matter. Accordingly, we reverse the circuit court's ruling on this issue.

3. ARTICLE III, SECTION 1

The circuit court, in the interest of finality, ruled on the merits of Garris's argument and found that the statute establishing the composition of the Governing Board unconstitutionally delegates legislative appointment power to private

[333 S.C. 451]

organizations. Facility contends the circuit court erred. We disagree.

The director of the Department of Insurance must appoint six of the insurance industry representatives on the Governing Board from lists of nominees prepared by and drawn from the American Insurance Association (two members), the American Mutual Insurance Alliance (two members), and the National Association of Independent Insurers (two members). *See* S.C.Code Ann. § 38-77-580 (Supp.1997).

We affirm the circuit court's ruling and hold that the delegation in Section 38-77-580 of the Legislature's appointive powers to private organizations violates Article III, Section 1. *See Toussaint v. State Bd. of Medical Examiners,* 285 S.C. 266, 329 S.E.2d 433 (1985) (striking down statute which required Governor to select board members from list of nominees submitted by private

association, where those nominees by statute had to belong to the private association); *Gold v. South Carolina Bd. of Chiropractic Examiners*, 271 S.C. 74, 245 S.E.2d 117 (1978) (same); *see also Hartzell v. State Bd. of Examiners in Psychology*, 274 S.C. 502, 265 S.E.2d 265 (1980) (upholding a statute which required Governor to select board members from a list of nominees submitted by private association, where statute did *not* require those nominees to belong to the private association).

Facility, attempting to distinguish *Toussaint* and *Gold*, argues the *entire* Governing Board is not drawn from the membership of private associations that include only a portion of a particular type of professionals. It is true that Governing Board includes other members, including four consumer representatives, two insurer representatives who are not association members, four producer representatives, and two designated agent representatives. However, that does not change the fact that, in establishing a method to choose six of the insurer representatives, the Legislature unconstitutionally delegated its appointive powers to private organizations.

4. EXERCISE OF PROXIES

Facility's plan of operation requires that a quorum of eleven members be present for a vote, and an action is binding when approved by the majority of those present. The director

[333 S.C. 452]

of the Department of Insurance may provide for voting by proxy at meetings. S.C.Code Ann. § 38-77-580 (Supp.1997). Governing Board Chairman John Richards initially counted proxies in determining whether a quorum was present at the Garris hearing. Richards ruled that only those members and proxy holders who had been physically present for the entire three-day hearing could vote on the matter. He later applied that same rule in determining whether a quorum was present.

Nine board members[7] and two proxy holders[8] were eligible to vote under the rule, i.e., they were present in person during the entire hearing. In addition, two other nonvoting board members[9] were present during the entire hearing. Five other board members were present only by proxy.[10]

The circuit court ruled that a quorum was present either in person or by proxy during the entire hearing, the nonvoting members could be counted for purposes of a quorum, and the proxies held by Larry Griner and Nancy Coombs were properly exercised.

Garris contends the circuit court erred because allowing proxy holders Griner and Coombs, who were not board members, to vote violated Garris's due process rights and was inherently unfair. While proxy holders may vote at "routine" meetings, the Court should not allow them to vote in important cases such as this one which have constitutional implications, he argues. Under that reasoning, every member could have given his or her proxy to a file clerk, who could then have decided his case, Garris argues. Furthermore, because Griner and Coombs could not vote, they also could not be counted for purposes of a quorum, Garris asserts. That means there was no quorum of eleven, he contends. We disagree.

[333 S.C. 453]

The persons legally responsible for an administrative agency's decision must be informed and unbiased, must hear the case, and must in fact make the decision. *Flav-O-Rich, Inc. v. NLRB*, 531 F.2d 358, 362 (6th Cir.1976); *KFC Nat'l Mgt. Corp. v. NLRB*, 497 F.2d 298, 304 (2d Cir.1974). Due process requires an administrative board, when acting in a quasi-judicial capacity, to consider all the

evidence before deciding a particular question. This does not mean, however, that the administrative board must itself hear the evidence. Staff or assistants may prepare and present the evidence, which the administrative board must consider when rendering its decision. *Pettiford v. South Carolina State Board of Educ.*, 218 S.C. 322, 346, 62 S.E.2d 780, 791 (1950) (approving procedure in which two board members heard testimony and reported it to full board, which decided the matter). It is important, of course, that decision makers attend the hearing if possible. *See McCoy v. Easley Cotton Mills*, 218 S.C. 350, 357, 62 S.E.2d 772, 775 (1950) (stating in workers' compensation case that "[o]rdinarily oral argument is of much aid to any judicial or quasi-judicial body in reaching a proper conclusion, [and] [o]nly circumstances of the most urgent nature are sufficient to excuse a member's absence").

In the absence of any statutory or other controlling provision, the common-law rule that a majority of a whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum. *Prosser v. Seaboard Air Line R. Co.*, 216 S.C. 33, 44, 56 S.E.2d 591, 595 (1949); *Gaskin v. Jones*, 198 S.C. 508, 513, 18 S.E.2d 454, 456 (1942). A member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter. *Talbot v. James*, 259 S.C. 73, 82, 190 S.E.2d 759, 764 (1972); *King v. New Jersey Racing Comm'n*, 103 N.J. 412, 511 A.2d 615, 618 (N.J.1986).

We affirm the circuit court's ruling and hold that proxy holders Griner and Coombs appropriately participated in the Garris matter. Griner was employed by same insurer who employed Randall Thompson, the board member whose proxy he held. Coombs, a staff attorney at the Department of

[333 S.C. 454]

Consumer Affairs, held the proxy of Consumer Advocate Philip Porter. Due process does not require that only Governing Board members hear a designated agent's case. *See Pettiford, supra.*[11]

Garris's reliance upon *Flav-O-Rich, supra,* and *KFC National Management, supra,* is misplaced because those cases are easily distinguished on the facts. In *Flav-O-Rich,* the court held the National Labor Relations Board could not delegate its authority to decide motions to the board's chief counsel. In *KFC National Management,* the court held that allowing one board member and two attorney assistants, who held the general proxies of the other two board members, to decide petitions for review violated the National Labor Relations Act and administrative due process. Drawing upon those cases, Garris presents a hypothetical about all Governing Board members handing over their proxy to a clerk. While his hypothetical might present due process problems, that is not what happened in this case.

We further conclude the circuit court correctly ruled that a quorum was present. The record shows that eleven members, including Griner and Coombs, were present in person for the entire hearing. Enough members were present in person to form a quorum without even considering the five other board members who had given their proxy to fellow board members.

CONCLUSION

We affirm the circuit court's ruling on Issue 1 that the procedure employed by Facility in this case violated Article I, Section 22 of the state constitution. We reverse the circuit court's ruling on Issue 2 that the doctrine of res judicata barred Garris's argument about the composition of the Governing Board. We affirm the circuit

court's ruling on Issue 3 that the statute establishing the composition of the Governing Board violates Article III, Section 1 of the state constitution. We affirm the circuit court's ruling on Issue 4 that proxies

[333 S.C. 455]

were properly exercised and a quorum was present at Garris's hearing before the Governing Board.

We remand this case to Facility for further proceedings consistent with this opinion. Our disposition of the issues renders it unnecessary to address Garris's remaining arguments.

FINNEY, C.J., TOAL, MOORE and BURNETT, JJ., concur.

Notes:

1. Facility is an unincorporated, nonprofit entity created by statute in 1974 to provide high-risk drivers with automobile insurance not available through the voluntary market. Facility imposes recoupment charges, based upon a person's driving record, upon all drivers to recover its losses. In addition to high-risk drivers ceded to Facility by voluntary insurers, Facility authorizes designated agents such as Garris to sell policies offered by servicing carriers to high-risk drivers.

Facility will cease to operate in its present form by 2006 under the new system of automobile insurance the Legislature enacted in 1997. *See* S.C.Code Ann. §§ 38-77-510 to -630 (1989 & Supp.1997). Facility on March 1, 1999, will stop accepting new policies written by designated agents. Designated agents may continue to earn commissions on renewals of existing policies until 2002. S.C.Code Ann. §§ 38-77-590 to -595 (Supp.1997).

2. Section 22 states, in full:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

3. Kepley's proxy was not exercised because Governing Board Chairman John Richards did not allow any board member to exercise the proxy of another member who was not present for the entire hearing. Richards did allow non-board members (Griner and Nancy Coombs) to exercise their proxies in the vote because they represented their respective board members and were present for the entire hearing.

4. The United States Supreme Court in *Withrow v. Larkin* and other courts have noted that the federal Administrative Procedures Act prohibits agency staff from serving in dual roles, but specifically exempts agency board members from that prohibition. *E.g., Blinder, Robinson and Co. v. SEC*, 837 F.2d 1099, 1104-07 (D.C.Cir.1988) (citing 5 U.S.C.A. § 554(d) (1996)). Article I, Section 22, of our constitution contains no such distinction between agency staff and board members.

5. *See also Pope v. Mississippi Real Estate Comm'n*, 695 F.Supp. 253, 285 (N.D.Miss.1988) (finding no due process violation where staff investigated a real estate agent, a commissioner from outside the agent's district decided whether the case should go forward, and the commissioners who heard and decided the case did not participate in the investigation), *aff'd*, 872 F.2d 127 (5th Cir.1989); *Ridgewood*

Properties, Inc. v. Dep't of Community Affairs, 562 So.2d 322 (Fla.1990) (finding violation of state and federal due process where department head testified in an administrative hearing and later reviewed the hearing officer's order); *Manka v. Tipton*, 805 P.2d 1203, 1206 (Colo. Ct.App.1991) (upholding decision in tax case decided by deputy director in administrative hearing where taxpayer presented no evidence that director investigated the case); 73A C.J.S. *Public Administrative Law and Procedure* § 138(c) (1983); 2 *Administrative Law* § 313 (1994); West's Digests, *Administrative Law*, Key No 445

6. Article III, Section 1, states:

The legislative power of this state shall be vested in two distinct branches, the one to be styled the "Senate" and the other the "House of Representatives," and both together the "General Assembly of South Carolina."

7. Steve Dennis, Jim Thompson, Robert Herlong, Clark Hobbie, Phillip Love, Gerry Huckaby, Chairman John Richards, David Rowell, and W.R. Braddy.

8. Larry Griner, who exercised the proxy of board member Randall Thompson; and Nancy Coombs, who exercised the proxy of board member Philip Porter.

9. Thomas Reichard and Frank Lee.

10. Thomas Kepley, C.M. Dinwiddie, James Lingle, Arthur Ivey, and Bob Taylor.

11. Griner's participation as a proxy holder was appropriate. His participation as an observer at the three committee meetings and as an adjudicator at the hearing was not appropriate, as explained in Issue 1. Neither Coombs nor Porter attended the committee meetings.
