

EXHIBITS

The following exhibits were introduced and made part of the record:

Petitioner: (No documentation was offered as evidence).

Respondent: (No documentation was offered as evidence).

FINDINGS OF FACT

Having observed the witness at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion by the parties, I make the following findings of fact by a preponderance of the evidence:

1. Notice of the date, time, place and subject matter of the hearing was timely given to the parties - Respondent, Corey Arness McCluney, and the Petitioner's, South Carolina Department, Trooper R.B. Thornton and the South Carolina Department of Motor Vehicles.
2. Respondent's driver's license is 008672372.
3. On May 23, 2016, Trooper Thornton was called to an accident on I85 near the 82-mile marker. Trooper Thornton arrived on the scene and there was a Nissan 4-door in a ditch on the shoulder of the road. The Respondent was standing outside of his vehicle talking with a bystander, who had pulled over to make sure everything was okay.
4. Respondent stated that he ran into the ditch.
5. Trooper Thornton noticed the odor of alcohol coming from the Respondent as the Respondent was speaking to him. Trooper Thornton asked the Respondent to step to his patrol vehicle.
6. Trooper Thornton administered the HGN (Horizontal Gaze Nystagmus) test to the Respondent. Trooper Thornton observed clues of Nystagmus in the Respondent's eyes.
7. Trooper Thornton did not administer the normal field sobriety test due to being so close to the lanes of traffic on the interstate.
8. Trooper Thornton asked the Respondent to recite the alphabets from E to X. The Respondent refused to recite from E to X but instead recited the alphabets from A to Z.
9. Respondent refused to comply with other request from Trooper Thornton.

10. Trooper Thornton placed the Respondent under arrest for DUI (driving under the influence) and transported him to the County Jail for a DataMaster breath test.
11. At the DataMaster breath test site, Trooper Thornton waited the twenty-minutes and offered the Respondent a breath test.
12. Respondent stated at the start of the test that he was not going to take the breath test. At the end of the twenty-minutes, the Respondent advised he was not going to take the breath test.
13. Respondent was given a copy of the Advisement of Implied Consent Rights prior to refusing to take the breath test.
14. On May 23, 2016, Respondent was given a written Notice of Suspension of his driver's license for refusing to give a breath sample.
15. Respondent was charged with a violation of S.C. Code Ann. §56-5-2950 for refusing to give a breath sample.

The Respondent was not present to offer testimony.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude as a matter of law the following:

General

1. In S. C. Code Ann. §1-23-660 (Supp. 2015), the General Assembly provided for the creation of the South Carolina Department of Motor Vehicle Hearings (DMVH). Effective January 1, 2006, the DMVH was authorized to employ Hearing Officers to preside over contested case hearings involving suspensions, cancellations, or revocations of driver's licenses. Effective October 1, 2008, the General Assembly changed the name to the Office of Motor Vehicle Hearings (OMVH).
2. All hearings presided over by Hearing Officers of OMVH must be conducted in accordance with the Administrative Procedures Act (APA) and the rules of procedure of the South Carolina Office of Motor Vehicle Hearings (SCOMVH).

3. Petitioner is an administrative agency of the State of South Carolina which is charged with administering its motor vehicle laws and delivering accurate and secure credentials and transaction documents to the citizens of this state. S. C. Code Ann. §56-1-5 (2006).

4. Basic administrative law principles establish that an agency bears the burden of proof in an enforcement action. *See Peabody Coal Co. v. Ralston*, 578 N.E.2d 751 (Ind. Ct. App. 1991); Randy R. Lowell and Stephen P. Bates, South Carolina Administrative Practice and Procedure, 200-201 (2004). Since Petitioner asserts the affirmative of an issue, i.e., the enforcement of a driver's license suspension, and since it will be subject to an adverse ruling if no evidence is introduced, Petitioner bears the burden of proof in this enforcement action. *See Alex Sanders and John S. Nichols, Trial Handbook for South Carolina Lawyers*, Second Edition, 2001, § 9:3, p. 366.

Unlawful to drive while under the influence-

5. Pursuant to S. C. Code Ann. §56-5-2930, it is unlawful for a person to drive a motor vehicle within this State while:

- a. under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciable impaired;
- b. under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciable impaired; or
- c. under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciable impaired.

Implied consent to submit to testing

6. S.C. Code Ann. § 56-5-2950(A) (Supp.2015) provides:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of the law enforcement officer who arrested [the] person....

Furthermore, the breath test must be administered by a person trained and certified by South Carolina Department of Public Safety (SCDPS), pursuant to State Law Enforcement Division (SLED) policies. S.C. Code Ann. §56-5-2950(A)(Supp. 2015).

7. S.C. Code Ann. § 56-5-2950(B) (Supp. 2015) further provides:

No tests may be administered or samples obtained unless upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:

- (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court;
- (2) his privilege to drive must be suspended for at least one month if he takes the tests or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
- (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;
- (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
- (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

8. Upon motion by any party, the OMVH Hearing Officer may review the application of the policies, procedures, and regulations promulgated by SLED. If the Hearing Officer finds that the failure to follow any of the policies, procedures, regulations or other provisions of S.C. Code Ann. § 56-5-2950 materially affected the accuracy or reliability of the test results or the fairness of the testing procedure, the test results shall be excluded from evidence. The hearing officer must rule specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure, See S.C. Code Ann. § 56-5-2950(J) (Supp.2015).

9. If a person drives a motor vehicle and refuses to submit to a test provided for in Section 56-5-2950 or as an alcohol concentration of fifteen one-hundredths of one percent or more, Petitioner must suspend the person's driver's license, permit or nonresident operating privilege or deny the issuance of a license or permit to that individual. The arresting officer issues a notice of suspension, which is effective beginning on the date of the alleged violation. See S.C. Code Ann. § 56-5-

2951(A) (Supp. 2015)

10. A person may request an administrative hearing within thirty (30) days of the issuance of the notice of suspension. S.C. Code Ann. § 56-5-2951(B) (Supp.2015). Section 56-5-2951(F) (Supp. 2015) requires that the scope of the hearing be limited to whether the person:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950;
- (3) refused to submit to a test pursuant to Section 56-5-2950; or
- (4) consented to taking a test pursuant to Section 56-5-2950, and the:
 - (a) reported alcohol concentration at the time of testing was fifteen one-hundredths of one percent or more;
 - (b) individual who administered the test or took samples was qualified pursuant to Section 56-5-2950;
 - (c) tests administered and samples obtained were conducted pursuant to Section 56-5-2950; and
 - (d) the machine was working properly.

Nothing in this section prohibits the introduction of evidence at the administrative hearing on the issue of the accuracy of the breath test result.

11. After reviewing the facts of this case and the applicable law, I find and conclude that the Respondent was lawfully arrested for driving under the influence. On May 23, 2016, the trooper was called to an accident on I85 near the 82-mile marker. The trooper arrived on the accident scene and observed the Respondent standing outside of his vehicle talking with a bystander. The Respondent stated that he ran into the ditch. The trooper noticed the odor of alcohol coming from the Respondent as the Respondent was speaking to him. The trooper asked the Respondent to step over to his patrol vehicle. The trooper did not administer the normal field sobriety tests due to being so close to the lanes of traffic on the interstate. The trooper administered the HGN (Horizontal Gaze Nystagmus) test to the Respondent and observed clues of Nystagmus in the Respondent's eyes. The trooper asked the Respondent to recite the alphabets from E to X and the Respondent refused to recite them from E to X but instead recited them from A to Z. The Respondent refused to comply with other request from the trooper. The trooper placed the Respondent under arrest for DUI (driving under the influence) and transported him to the County Jail for a DataMaster breath test.

12. Further, I conclude that at the DataMaster breath test site, the trooper advised the Respondent of his Advisement of Implied Consent Rights (“Advisement”, “Implied Consent Rights”) and waited the twenty-minutes and offered the Respondent a breath test. The Respondent stated at the start of the test that he was not going to take the breath test. At the end of the twenty-minutes, the Respondent advised he was not going to take the breath test.

13. During the hearing, after the trooper offered his testimony and no cross-examination was conducted, counsel for the Respondent moved to dismiss the Respondent’s suspension based on the following grounds: that there is no evidence that the Respondent was the driver of the vehicle and that there is no probable cause that the Respondent was under the influence, only the smell of alcohol and a positive HGN (Horizontal Gaze Nystagmus) test. Lastly, he argued there was no testimony that the Respondent was advised of his Advisement as required by the statute. The trooper was afforded an opportunity to reply and he stated that the Respondent was given his Implied Consent Rights prior to offering him the test. Thereafter, Counsel objected stating that the trooper cannot offer more testimony once the record is closed.

The Respondent’s objection was overruled in that the record was not closed, as well as, the hearing was not adjourned. All parties were afforded the opportunity to respond and present evidence and arguments on all the issues. Once counsel for the Respondent stated he had no cross examination, he made his motion. I had not closed the Petitioners’ case. Therefore, I allowed the testimony of the Advisement at that point in the hearing. Nonetheless, the Respondent offered no evidence to the contrary that he was prejudiced in any way, specifically whether the Advisement was or was not given. *See Taylor vs. S.C. Dep’t of Motor Vehicles*, 382 S.C. 567, 677 S.E.2d 588 (2009). Furthermore, I find that the motion to dismiss is denied and Section 56-5-2950 was complied with; therefore, the refusal of the offered breath test was valid.


I therefore conclude as a matter of law that the Petitioner met its burden of proof. Accordingly, the relief requested by the Respondent must be denied.

ORDER

Based upon the above findings of facts and conclusions of law, it is hereby:

ORDERED that the suspension of Respondent, Corey Arness McCluney, driver's license or driving privilege must be sustained.

AND IT IS SO ORDERED.



Tracy G. Holland
OMVH Hearing Officer

October 18, 2016
Greer, South Carolina

CERTIFICATE OF SERVICE

I, Yolanda P. Williams, hereby certify that I have this date served this Order upon all parties to this caused by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Yolanda P. Williams

Yolanda P. Williams

October 18, 2016
Columbia, South Carolina

NOTICE

Motion of Reconsideration

A party may file a written motion with the OMVH within ten (10) days after notice of this order requesting the Hearing Officer reconsider this final decision. However, the filing of a Motion of Reconsideration does not stay the provisions of this final decision nor excuse compliance with its provisions. See OMVH Rule 15 (D). A stay must be requested specifically by motion. See OMVH Rule 15 (E). The filing of a motion for reconsideration does stay the time for an appeal until an order is issued; however, if the hearing officer does not issue a written order on the motion for reconsideration, it is deemed denied thirty days after it is filed.

Only original documents are accepted. Documents must be filed via hand-delivery or by depositing the document in the U.S. Mail, properly addressed, with sufficient first class postage attached. Facsimiles sent to the OMVH and the South Carolina Administrative Law Court do not comply with filing requirements and are not authorized. See ALC Rules 4(B).

The Rules of the Administrative Law Court are found at: www.scalc.net

The Rules of the Office of Motor Vehicle Hearings are found at: www.scomvh.net

Appeal

A party may appeal this final decision by filing written notice with the South Carolina Administrative Law Court within thirty (30) days of receipt of the order to the following address:

Attn: Clerk
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

The notice must be accompanied by proof of service of the notice on all parties and a filing fee in the amount of \$150.00 made payable to the South Carolina Administrative Law Court. See ALC Rules 3(A), 4(B), 31(A), 33 and 71(A). A copy of the notice must also be sent to the OMVH and a copy of the transcript shall be ordered within ten days after service of the notice. The transcript must be ordered by the Appellant and the Appellant is responsible for the cost thereof.