

Pursuant to Section 56-1-1030, Respondent requested an OMVH hearing to contest his habitual offender suspension. On July 9, 2009, Respondent and his attorney appeared before OMVH hearing officer Robert Harley, who was substituting for hearing officer Tracey Holland. The Department did not appear, but it submitted a packed of documents containing Respondent's traffic tickets, the habitual offender warning letter, the habitual offender suspension letter, and the Department's 10-year driving record. R at 9.

The OMVH never issued a final order following the hearing and this oversight was not discovered until January of 2016, over 7 years later, when the Department contacted the OMVH after noticing that the appeal was still pending. An attempt was made to recover the original hearing transcript so that a decision could be made in the case. Unfortunately, the OMVH office discovered that the audio equipment had failed. As a result, on February 9, 2016, the OMVH issued an Order of Continuance and Notice of New Hearing to rehear Respondent's appeal of his habitual offender suspension.

Meanwhile, on December 17, 2009, the Department had reissued McMahan a new driver's license after he paid his motor vehicle property taxes and reinstatement fees. He has been driving lawfully ever since.

On May 19, 2016, Respondent and his attorney appeared before OMVH hearing officer Tracy Holland for the new hearing. The Department was not present but it submitted a new packet of documents for the record, which included the items that were previously submitted at the first hearing plus twelve pages of supplemental materials. During the hearing, Respondent raised numerous objections, namely to the OMVH conducting a new hearing; he also objected to the Department including additional documents that were not submitted at the first hearing, the lack of notice due to the Department's failure to mail the notices of the DUS violations to the McMahan's correct address, and the denial of due process based upon the fundamental unfairness of suspending Respondent's driver's license seven years later.

In further support of the due process argument, Respondent contended that he paid his property tax and reinstatement fees based upon the advice of the OMVH hearing officer after the first hearing, in 2009. Respondent alleged that the hearing officer informed him that the suspension would be rescinded and that he could proceed with taking the necessary steps to reinstate his driver's license.

On July 21, 2016, an Amended Final Order and Decision (“Decision”) was issued by the OMVH, rescinding Respondent’s habitual offender suspension. However, the rescission was not based upon any of Respondent’s objections. Instead, the OMVH hearing concluded *sua sponte* that “the State of South Carolina does not have a statute numbered § 56-1-520; therefore, the Petitioner cannot use the statute documented on ticket 64031DW to declare the Respondent a habitual offender”.

The Department now appeals the Decision.

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660 (Supp. 2010). Therefore, the OMVH is an “agency” under the Administrative Procedures Act (APA). See S.C. Code Ann. § 1-23-310(2) (2005 & Supp. 2016). As such, the APA’s standard of review governs appeals from decisions of the OMVH. See S.C. Code Ann. § 1-23-380 (Supp. 2016); see also Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm’n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5). See S.C. Code Ann. § 1-23-600(D) (Supp. 2016) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). This section provides:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision [of the agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- a) in violation of constitutional or statutory provisions;
- b) in excess of the statutory authority of the agency;
- c) made upon unlawful procedure;
- d) affected by other error of law;
- e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5). Thus, pursuant to the APA, this Court’s review is limited to deciding whether the OMVH’s Order of Dismissal is unsupported by substantial evidence or is

affected by an error of law. Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 581 (Ct. App. 2005).

The findings of the agency are presumed correct and must be affirmed if supported by substantial evidence. Substantial evidence is something less than the weight of the evidence. It is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995).

An abuse of discretion occurs when an administrative agency's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or, when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006). A decision is arbitrary if no rational basis for the conclusion exists, or when it is based on one's will and not upon any course of reasoning and exercise of judgment. A decision may also be arbitrary if it is made at pleasure without adequate determining principles or is governed by no fixed rules or standards. Converse Power Corp v. S.C. Dep't of Health and Env'tl. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002).

Therefore, the burden is on the Petitioner to show convincingly that the order of the agency is without evidentiary support or is arbitrary or capricious as a matter of law. Hamm v. South Carolina Public Service Commission, 294 S.C. 320, 364 S.E.2d 455 (1988).

ISSUES ON APPEAL

Did the OMVH Hearing Officer err in finding that Respondent was not charged with Driving Under suspension on March 18, 2007 and later convicted of that same offense?

The Department contends that it established a prima facie case against Respondent and that the OMVH hearing officer erred by making a final decision based on an issue that was raised *sponte*.

Section 56-1-1030 provides that when a person is convicted of one or more of the offenses outlined in Section 56-1-1020(a), the Department must review its records for that person. S.C. Code Ann. § 56-1-1030 (Supp. 2016). If the Department determines after a review of its records that the person is an habitual offender, as defined in Section 56-1-1020, the Department must revoke or suspend the person's driver's license. The suspension shall last five years. S.C. Code Ann. § 56-1-1090 (Supp. 2016). A person is a habitual offender if he or she is convicted of any three of the following offenses within a three-year period:

- (1) Voluntary manslaughter, involuntary manslaughter or reckless homicide resulting from the operation of a motor vehicle;
- (2) Operating or attempting to operate a motor vehicle while under the influence of intoxicating liquor, narcotics or drugs;
- (3) Driving or operating a motor vehicle in a reckless manner;
- (4) Driving a motor vehicle while his license, permit, or privilege to drive a motor vehicle has been suspended or revoked, except a conviction for driving under suspension for failure to file proof of financial responsibility;
- (5) Any offense punishable as a felony under the motor vehicle laws of this State or any felony in the commission of which a motor vehicle is used;
- (6) Failure of the driver of a motor vehicle involved in any accident resulting in the death or injury of any person to stop close to the scene of such accident and report his identify...

S.C. Code Ann. § 56-1-1020(a) (2006).

Rule 15(B) of the Rule of Procedure for the Office of Motor Vehicle Hearings states that in matters involving the suspension or revocation of a license that the Department shall have the burden of proof, which must be met by a preponderance of the evidence. OMVH Rule 15(B). Here, the Department entered copies of its records into the hearing record, which included Respondent's 10 Year Driver Record. These records evidence that, within a three-year period, Respondent was convicted of three distinct offenses arising out of separate acts pursuant to Section 56-1-1020(a). The Department's records established a *prima facie* case against Respondent, shifting the burden of proof to Respondent to present evidence in rebuttal. Daisy Outdoor Advertising Co., Inc. v. South Carolina Dep't of Transp., 352 S.C. 113, 118, 572 S.E.2d 462, 465 (Ct. App. 2002).

The record on appeal shows that Respondent raised several objections during the hearing, however none of the objections pertained to the driving under suspension violations contained in the Department's records or to the traffic tickets that precipitated the habitual offender suspension. The Court finds that the OMVH hearing officer committed error by ruling *sua sponte* on an issue that Respondent never raised. See SCDMV and SCDPS vs. Marshall Heyward, 07-ALJ-21-0171-AP (March 16, 2009). Furthermore, Respondent failed to present any evidence to overcome the presumption that was established after the Department's established a prima facie case for upholding the suspension. See Arkwright Mills v. Clearwater Mfg. Co., 217 S.C. 530, 539, 61 S.E.2d 165, 168-9 (1950) (stating that "It is the settled rule of law that once a party establishes a prima facie case, judgment will go in his favor unless the opposite party produces evidence sufficient to overcome the prima facie presumption.").

However, Respondent argues in his reply brief that he was not responsible for the delay and that the imposition of the license suspension more than seven years after the last conviction violates the principles of fairness and due process. For the following reasons, the Court agrees.

Generally, procedural due process and fundamental fairness issues pertaining to a driver's license suspensions have come before the South Carolina courts in the posture of whether there was a violation as a result of a lapse in time between the conviction and the notification of suspension by the Department. See *State v. Chavis*, 261 S.C. 408 (1973), see *Hipp, III v. SCDMV*, 381 S.C. 323 (2009), see *Wilson v. SCDMV*, 419 S.C. 203, 796 S.E.2d 541 (Ct. App. 2017), and see *Davis v. SCDMV*, 2017 WL 1717217 (2017).

In *Chavis*, the Supreme Court found that there was no evidence of prejudice shown by Chavis from a one year delay between the date of the conviction and the date the Department sent the notice of suspension. The Court found that Chavis remained quiet and continued to drive while hoping that the suspension would be overlooked and never be imposed. However, the Court noted that there might be an instance where one could successfully argue that the State would not have a right to suspend a license after a long delay, but this was not the case. *Chavis*, 261 S.C. at 411, 200 S.E.2d at 391.

The South Carolina Supreme Court revisited this issue again in *Hipp, supra*, but this time there had been a twelve-year delay between the date of the conviction and the date the Department sent its the notice of suspension to Hipp. The Court noted that "A person's interest in his driver's license is property that a state may not take away without satisfying the requirements of due

process”, and “Due process is violated when a party is denied fundamental unfairness. *Hipp*, 381 S.C. at 325, 673 S.E.2d at 714. The court found that the circumstances in *Hipp* were an example of the extreme situation that was contemplated in the *Chavis* decision. Without setting a bright line rule, the court found that “the imposition of a suspension after more than twelve-years delay, where the Respondent bears no fault for the delay, is manifestly a denial of fundamental fairness.” *Id.*

More recently, the South Carolina Court of Appeals addressed this issue again in its *Davis* decision, where there was more than a six-year delay between the conviction and the time the Department received notice of the violation and subsequently issued a notice of suspension. Davis surrendered his driver’s license on February 14, 2005 following a driving under suspension violation and it was not reinstated until April 26, 2010, after he paid all the fees and met all the requirements to reinstate his license. However, in May of 2005, Davis had received two driving under suspension violations that qualified him as an habitual offender. He was convicted of the third violation on October 20, 2006, but it was not fully reported to the Department until December 5, 2012, at which time the violations were posted to his record and the Department sent a notice of suspension to Davis. Davis argued that he did not have a license from 2005 to 2010 and that he had complied with all the requirements to reinstate his license in 2010.

Based upon the substantial evidence in the record, the Court of Appeals determined that Davis showed he would be prejudiced by the habitual offender suspension, because he had met all the license reinstatement requirements and his license had been reinstated for twenty months. The court also noted that the six-year delay exceeded the amount of time that Davis’s suspension would have run if it had been timely imposed. *Davis*, 2017 WL 1717217 at 4. Lastly, the Court found that neither Davis nor the Department was at fault for the delay and concluded that a suspension after such a lengthy delay would violate his due process rights.

The facts in *Davis* are akin to those of Respondent’s appeal, however this matter comes before the ALC in a posture that differs from the aforementioned South Carolina cases. In this instance, the delay resulted from an administrative error that occurred after the notice of suspension was issued but while Respondent’s appeal was pending before the OMVH. Despite the differences in the procedural posture, this Court finds that the same due process analysis applies.

In *Alvarez v. State*, 249 P.3d 286 (Alaska 2011), Alvarez filed an administrative appeal after she failed a breath test and her driver’s license was suspended. The hearing was scheduled for March 22, 2004, almost six months the appeal was filed. However, by that time, the arresting

officer had been deployed for military service overseas and was unavailable. The hearing was held as scheduled, but the hearing officer ultimately decided to continue the matter until March 10, 2006, almost two years later, at which time the arresting officer would be available. After another continuance, the hearing was finally held by telephone on April 27, 2006. The hearing officer upheld Alvarez's 90-day suspension, which she appealed.

Before the Alaska Supreme Court, Alvarez argued that the delay between her arrest and suspension was a denial of due process. The court looked to the framework set forth by the United States Supreme Court in *Mathews v. Eldridge*, 93 S.Ct. 893 (1976), to evaluate whether administrative proceedings satisfy due process. *Alvarez*, 249 P.3d at 292. The court considered the following three factors, (1) the private interest that the official action affects, (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional safeguards, and (3) the government's interest, including fiscal and administrative burdens, in implementing additional safeguards. *Id.*

Applying the first factor, the court considered that Alvarez had a property interest in the driver's license. For the second factor, the court determined that the delay did not increase the risk of erroneous deprivation, especially considering that Alvarez was driving with a temporary license while the appeal was pending. *Id.* at 293. With regard to the third factor, the court found that there is a high interest in removing unsafe drivers from the road. *Id.* Finally, the court considered whether Alvarez had been prejudiced and determined that any existence of it was slight. Alvarez had been driving with a temporary permit while the appeal was pending. Secondly, the arresting officer had an audio tape and partial video of the arrest, which the court found mitigated any prejudice due to a lapse in memory.

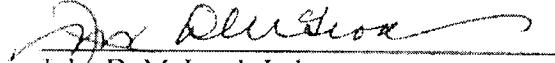
In applying the *Mathews v. Eldridge* analysis to Respondent's appeal, this Court finds that Respondent has a property interest in his driver's license. See also, *Hipp, supra*. Secondly, I find that there was no erroneous deprivation of that interest as a result of the delay, as Respondent had been driving since reinstating his license in 2009. As to the government's interests, the State of South Carolina has a fiscal interest in its citizens paying their property tax on their cars. See S.C. Code Ann. § 12-37-2740 (Setting forth that "The Department of Motor Vehicles shall suspend the driver's license and vehicle registration of a person who fails to pay personal property tax on a vehicle...").

However, the Court finds that the evidence in the record of the delay of Respondent's OMVH appeal shows that the imposition of the suspension, after a period of more than seven years, would be "manifestly a denial of fundamental fairness." *Hipp*, 673 S.E.2d at 417. Respondent paid his motor vehicle property tax and driver's license reinstatement fees in 2009, thus remediating the underlying issue that resulted in the suspension. Furthermore, Respondent did so under the belief that all the administrative issues pertaining to the suspension would be resolved.

THEREFORE, IT IS HEREBY ORDERED that the decision appealed from is **AFFIRMED AS MODIFIED.**

AND IT IS SO ORDERED.

June 26, 2017
Columbia, SC




John D. McLeod, Judge
South Carolina Administrative Law Court

CERTIFICATE OF SERVICE

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

June 26, 2017
Columbia, S.C.



Anthony R. Goldman
Judicial Law Clerk