

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Auto Wholesale,)
)
 Appellant.)
)
 vs.) **ORDER**
)
 South Carolina Department of Motor)
 Vehicles,)
)
 Respondent.)

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STATEMENT OF THE CASE

This matter is an appeal by Auto Wholesale (“Appellant”) from an Order of Dismissal of the South Carolina Office of Motor Vehicle Hearings (“OMVH”) dated April 26, 2017. In its decision, the OMVH Hearing Officer dismissed Appellant’s case regarding the revocation of his dealer’s license for lack of jurisdiction, pursuant to Rule 4(B) of the Rules of Procedure of the OMVH and S.C. Code Ann. § 56-5-2951.¹ The South Carolina Administrative Law Court (“ALC” or “the Court”) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 1-23-660 (Supp. 2017). After careful review of the matter, OMVH’s decision is affirmed.²

BACKGROUND

On February 22, 2017, an Official Notice of Revocation (“the Notice”) was issued to Appellant notifying him that his Dealer License, No. 37629, to operate as a motor vehicle dealer was being revoked, due to multiple instances of a wholesaler selling retail and multiple instances of selling while his dealer license was cancelled or suspended. Additionally, the Notice stated:

“As provided by the Administrative Procedures Act, you are entitled to contest this suspension with the Office of Motor Vehicle Hearings... Your written request must be received no later than ten (10) days after the date of this notification. If you fail to request a review as described above, the revocation will be effective and no other appeal will be available.”

Subsequently, on March 21, 2017, Appellant filed a written statement requesting a contested

¹ The Court notes that S.C. Code Ann. § 56-15-350 is the applicable statute in this matter regarding a dealer license revocation, as S.C. Code Ann. § 56-5-2951 regards the suspension of license for refusal to submit to testing or for certain level of alcohol concentration; temporary alcohol license; administrative hearing; restricted driver’s license; penalties.

² This case was decided without oral argument pursuant to ALC Rule 39.

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hearing with the OMVH and stating that he was late filing the request due to health matters. A notice of hearing was issued on March 23, 2017, and the Department filed a Notice of Motion and Motion to Dismiss for lack of jurisdiction with the OMVH on April 7, 2017.

The hearing was held before an OMVH Hearing Officer on April 25, 2017. Appellant testified on his behalf at the hearing. Attorney Phil Porter represented the Department and Zenda Leeks, Assistant Manager of the Department's Dealer License Unit, testified for the Department.³ Prior to testimony regarding the merits of the case, the Department's Motion to Dismiss was addressed. Ms. Leeks testified that she drafted the Notice, and prior to leaving the office, instructed an employee to issue the Notice. Ms. Leeks further testified that the Notice was issued on February 22, 2017 or February 23, 2017, depending on what time of day it was put in the mail. In support of the motion, the Department contended that while there is no certainty as to when Appellant received the notice, pursuant to the U.S. Mail Services Statistics, ninety-nine percent (99%) of mail issued anywhere in the state of South Carolina arrives at its destination within two days. Therefore, the Department contended, Appellant received the Notice on either February 24, 2017 or February 25, 2017, depending on which day it was issued.

Appellant testified that he is not certain when he received the Notice, but he did receive it via mail. Appellant also testified that he did not intend to file the hearing request late but he was at home dealing with health matters. The Hearing Officer determined that, utilizing February 24, 2017 as the date of receipt of the Notice, ten days after receipt of the Notice would have been March 4, 2017.⁴ Therefore, the Hearing Officer found that he lacked jurisdiction to hear the appeal as Appellant filed his hearing request approximately 15 days late, depending on the exact dates of issuance and receipt.

On April 26, 2017, OMVH issued an Order of Dismissal for lack of jurisdiction, and Appellant filed an appeal with this Court on May 8, 2017.

ISSUE ON APPEAL

Whether the OMVH Hearing Officer erred in dismissing Appellant's appeal for lack of jurisdiction?

³ Tameka Presley, the Department's Dealer Inspector, was present to testify for the Department, however, during the hearing, Ms. Presley only answered Appellant's questions regarding the disposition of his inventory, which is irrelevant to the matter before this Court.

⁴ The Court notes that if the Hearing Officer utilized February 25, 2017 as the date of receipt of the Notice instead of February 24, 2017, the Hearing Officer's outcome would still be the same.

STANDARD OF REVIEW

This Court has jurisdiction to hear this appeal in its appellate capacity under the Administrative Procedures Act (“APA”). S.C. Code Ann. § 1-23-600(D) (Supp. 2017). Under the appellate standard of the APA, the court’s review is confined to the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2017). Additionally, the court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. *Id.* at § 1-23-380(5) (Supp. 2017). Substantial rights of the appellant are prejudiced when the agency’s decision, including the agency’s findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Id.*

Substantial evidence is “not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached” *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (citation omitted).

DISCUSSION

S.C. Code Ann. § 56-15-350 states that “a licensee desiring a hearing shall file a request in writing with the Office of Motor Vehicle Hearings within ten days of receiving notice of the proposed denial, suspension, or revocation of his dealer’s or wholesaler’s license.” (Supp. 2015) (emphasis added). “Where notice is mailed to a claimant’s last known address and not returned by the postal authorities as undeliverable,” there is a presumption that the claimant received the notice “and is barred from attempting to appeal after the expiration of the appeal period...” *Mihelic v. Com., Unemployment Comp. Bd. of Review*, 41 Pa. Cmwlth. 546, 549, 399 A.2d 825, 827 (1979) (quoting *DeVito Unemployment Compensation Case*, 199 Pa.Super. 606, 186 A.2d 639 (1962)). Furthermore, South Carolina Courts have consistently held that “timely service of an appeal is a jurisdictional requirement that cannot be waived.” *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 214, 544 S.E.2d 38, 48 (Ct. App. 2001). See also *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (citation omitted) (“Service of the notice of intent

to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served.”).

The Order of Dismissal states:

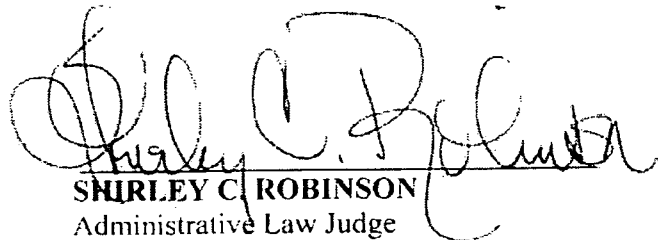
A revocation notice was issued to Respondent on February 22, 2017. The Notice of Suspension stated that an administrative hearing must be requested within ten [10] days. However, the Respondent did not file for a hearing until March 21, 2017 which was beyond the mandated ten [10] day limitation. Respondent admitted he did not file for a hearing within ten days after receiving the revocation notice.

In this instance, Appellant contends he was late filing his hearing request because he went to the hospital for treatment of his health matters. However, during the hearing, upon questioning by the Hearing Officer, Appellant stated that he stayed home and did not go to the hospital for his health matters. Furthermore, Appellant admitted that he received the notice and he just did not file a hearing request within the ten-day statutory limitation. The substantial evidence in the Record in this instance supports the OMVH Hearing Officer’s decision that Appellant failed to file an administrative hearing request within ten days of receipt of the Notice. Substantial evidence is present when reasonable minds can reach the same conclusions as the agency when the record, as a whole, is considered. Friends of Earth v. Pub. Serv. Comm’n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). Because the decision of the Hearing Officers is supported by substantial evidence in the Record, the decision is affirmed.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the OMVH Order of Dismissal for lack of jurisdiction is **AFFIRMED**.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
Administrative Law Judge

November 1, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the emergency Mail Service addressed to the party(ies) or their attorney(s).
This 1 day of November, 2017
By: Shirley C. Robinson
Judicial Clerk