THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
The Honorable Shirley C. Robinson, Administrative Law Judge

Case No. 2018-000023

John Michael Thomas . . . . . Respondent,

v.

South Carolina Department of Motor Vehicles and
Mount Pleasant Police Department . . . . . .Defendants.

Of Whom the South Carolina Department of Motor Vehicles is Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This matter comes before the Court of Appeals pursuant to the appeal of the South Carolina Department of Motor Vehicles (hereinafter, "SCDMV" or "DMV"), who seeks review of the December 15, 2017 Order from the Administrative Law Court (hereinafter, "ALC") which remanded this case for a second hearing on the merits before the Office of Motor Vehicles Hearings (hereinafter, "OMVH"). The Appellant, SCDMV seeks to have the ALC's Order overturned and the OMVH Order of Dismissal issued May 3, 2017 reinstated in full.

Respondent Thomas was arrested on October 28, 2016 for driving under the influence (ALC R. p. 62-63). Upon refusal to submit to a breath sample, Respondent was found to be in violation of S.C. Code §56-5-2950, and Officer Kyle Alexander of the Mount Pleasant Police Department, the DataMaster Operator in this case, issued a Notice of Suspension form pursuant to S.C. Code §56-5-2951. *Id.* Respondent timely requested a contested case hearing on November 25, 2016. *Id.*

On November 29, 2016, the OMVH e-mailed a Notice of Hearing to all parties for a hearing scheduled for February 13, 2017 (ALC R. p. 59-60). On Wednesday, December 28, 2016, Officer Alexander requested a continuance of the hearing scheduled

for February 13, 2017 (and two other hearings) due to conflicting training at the South Carolina Criminal Justice Academy (ALC R. p. 58). The South Carolina Criminal Justice Academy is located at 5400 Broad River Road, Columbia, South Carolina, approximately 1 ½ hours from Mount Pleasant. Respondent did not object to this continuance request. This continuance request was granted on January 6, 2017 and rescheduled the hearing to take place on March 6, 2017 (ALC R. p. 56-57). On February 22, 2017, Office Brandon Kittle of the Mount Pleasant Police Department, the arresting officer in this case, requested a continuance of the March 6, 2017 hearing because he was scheduled to be out of the state on March 6, 2017 (ALC R. p. 55). Respondent did not object to this continuance request. This continuance request was granted on February 22, 2017 and rescheduled the hearing to take place on April 25, 2017 at 9:30 a.m. (ALC R. p. 53-54).

On April 3, 2017, Respondent's counsel was notified via e-mail that he was scheduled to appear in the Charleston Non-Jury Court of Common Pleas on April 25, 2017 at 10:30 a.m. for the case *Bivens vs. State of South Carolina*, 2017-CP-10-00625 (ALC R. p. 51). Respondent's counsel failed to request a continuance of the conflicting OMVH hearing until April 24, 2017 at 4:07 p.m. (ALC R. p. 50). Respondent's counsel requested a continuance by forwarding the April 3, 2017 e-mail from the conflicting Non-Jury case to the OMVH and parties to this case stating "Good Afternoon, I have to be downtown tomorrow for a hearing in Common Pleas. Please continue tomorrow's hearing and let me know when a new date is set. Thanks!" *Id.* This e-mail was sent to the OMVH and all parties to this case, but did not include any information about which OMVH case Respondent's counsel was requesting a continuance for. *Id.* The OMVH hearing officer responded to the continuance request eleven minutes later and denied the

continuance request due to Respondent's counsel's failure to request this continuance in a timely manner. *Id.* Specifically, the OMVH hearing officer ruled that: 1) Rule 10(B), OMVH Rules requires motions for continuance to be made at least two business days prior to the scheduled hearing date; 2) that based on Respondent's counsel's e-mail is was apparent that he was aware of the conflicting court appearance since April 3, 2017 (three weeks earlier); and 3) Respondent's counsel provided no explanation for why the continuance was not requested earlier. *Id.*

On April 25, 2017, the hearing was held and Respondent and his counsel failed to appear for the hearing (ALC R. p. 5-8). Thereafter, on May 3, 2017, the OMVH hearing officer issued an Order of Dismissal sustaining Respondent's implied consent suspension due to Respondent's failure to appear at the hearing (ALC R. p. 17-19).

On May 15, 2017, Respondent filed a *Motion to Reconsider and for a Stay of the Final Order* (ALC R. p. 46-49). The OMVH denied Respondent's *Motion to Reconsider and for a Stay of the Final Order* on June 6, 2017 (ALC R. p. 20-23). This denial was based on Appellant's failure to request a continuance of the OMVH hearing "as soon as he became aware of the conflict without explanation for the delay in making the request and [due to counsel's failure to] appear for the hearing after he was notified that the continuance was denied." *Id.*

Thereafter, Respondent timely appealed to the Administrative Law Court (hereinafter, "ALC") (R. p. 11-16). After the parties briefed the case, the ALC issued an Order on December 15, 2017 holding that the OMVH hearing officer "abused her discretion in failing to grant [Respondent's continuance request]" and remanded the case for "a hearing on the merits."

On January 3, 2017, Appellant SCDMV timely filed a Notice of Appeal of the December 15, 2017 Order from the ALC.

STANDARD OF REVIEW

The scope of judicial review in cases such as this is limited by the Administrative Procedures Act, S.C. Code §1-23-380(A)(6).

> (A) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review....
>
> (6) The court shall not substitute its judgment for that 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 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.

In *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981), our Supreme Court set out the standard of evidentiary review under the South Carolina Administrative Procedure Act:

> [Section 1-23-380(g)(5)] specifically states: "The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact." In addition, the statute states the decision under appeal must be "clearly erroneous" in view of the substantial evidence on the whole record.
>
> We, therefore, caution the Bench and Bar as to the limitations upon the application of the "substantial evidence" rules in reviewing the decision of administrative agencies. As stated in *Dickinson-Tidewater, Inc. v.*

> *Supervisor of Assess.*, 273 Md. 245, 329 A.2d 18, 25, the substantial evidence test "need not and must not be either judicial fact-finding or substitution of judicial judgment for agency judgment"; and a judgment upon which reasonable men might differ will not be set aside.

The Court further noted that:

> The substantial evidence rule... means that we will not overturn a finding of fact by an administrative agency "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." (Citation omitted.)

See also *Schudel v. South Carolina Alcoholic Beverage Control Commission*, 276 S.C. 138, 276 S.E.2d 308 (1981); *Fast Stops, Inc. v. Ingram,* 276 S.C. 593, 281 S.E.2d 18 (1981).

An appeal from action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 211, 394 S.E.2d 842 (1990); *Lark v. Bi Lo, Inc., supra.* In *Lark*, our Supreme Court quoted *Consolo v. Federal Maritime Commission*, 383 U.S. 611, 16 L.Ed.2d 131, 86 S.Ct. 1118 (1966), to define substantial evidence:

> We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."... "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury..." This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark, 276 S.C. at 136, 276 S.E.2d at 311. *See, also, Dorman v. DHEC*, 565 S.E.2d 119, 350 S.C. 159 (Ct. App. 2002); *Hamm v. South Carolina Public Service Commission and Wild Dunes Utilities, Inc.*, 311 S.C. 295, 422 S.E.2d 118 (1992).

A court cannot weigh the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion.

Dorman v. DHEC, *supra*; Hamm *v. American Telephone & Telegraph Co.*, *supra*; *Chemical Leaman Tank Lines v. South Carolina Public Service Commission*, 258 S.C. 518, 189 S.E.2d 296 (1972). The limited substantial evidence standard of review is intended only to assure that the agency's action is properly supported and that, therefore, no abuse of delegated authority occurred. *See Fowler v. Lewis*, 260 S.C. 54, 194 S.E.2d 191 (1973).

On review of the acts or orders of administrative agencies, the courts will presume, among other things, that the agency action is regular and correct, and that the orders and decisions of the agency are valid and reasonable. 73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983). 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).

ARGUMENT

1) THE DECEMBER 1, 2015 FINAL ORDER AND ORDER OF REMAND ISSUED BY THE ADMINISTRATIVE LAW COURT IS IMMEDIATELY APPEALABLE TO THIS COURT.

S.C. Code §14-8-200. S.C. Code §14-8-200 states:

> ...[T]he court has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of... a **final decision** of an administrative law judge... This jurisdiction is appellate only, and the court shall apply the same scope of review that the Supreme Court would apply in a similar case...

(Emphasis added). In this case, the order issued by the ALC on December 15, 2017 is the final Order from the ALC in this case. This is evidenced by the fact that the ALC explicitly remanded this case to the OMVH for a "hearing on the merits." Therefore,

there is no doubt that the December 15, 2017 ALC Order is a "final decision of an administrative law judge" as it is clear that the ALC was taking no further action in this case and remanded the case back to the OMVH. For this reason alone, this case is immediately appealable to this Court.

Additionally, S.C. Code §14-3-330 sets forth those cases that may be considered by the appellate courts of South Carolina. One of the types of cases that may be considered by the appellate courts of this state are those where "An order affecting a substantial right made in an action when such order...(b) grants or refuses a new trial..." The order appealed in this case is just such an order. The Order issued by the ALC on December 15, 2017 explicitly remands this case back to the OMVH "for a hearing on the merits." This case was already scheduled for a hearing once before, a hearing was held, and neither Respondent nor his Counsel appeared at that hearing (R. p. 5-8). Therefore, the ALC's Order has, essentially, granted Respondent a new "trial" via the new hearing. As held in the recently decided case *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146, to prevent Appellant DMV "from appealing the order immediately would encourage piecemeal litigation and limit [DMV's] appellate remedies." The *Morrow* case was dismissed by the Court of Appeals as interlocutory. This dismissal was then appealed to the South Carolina Supreme Court, which decided the appeal was not interlocutory and decided the underlying issue that was original appealed to the Court of Appeals, specifically, whether several defendants in the lawsuit could be severed under the label "bifurcation." In the *Morrow* case the Supreme Court held the order of "bifurcation" went far beyond the Court's understanding of bifurcation, thereby affecting a substantial right of the petitioners. Thus, the Supreme

Court reversed the order of Dismissal issued by the Court of Appeals and the order of "bifurcation" issued by the trial court. While the discussion in the *Morrow* case focused on S.C. Code §14-3-330, the underlying principle, the order of "bifurcation" was immediately appealable (including being immediately appealable to the Court of Appeals), is still applicable here for all the reasons discussed in the *Morrow* case. Specifically, because the Order issued by the ALC on December 15, 2017 explicitly remands this case back to the OMVH "for a hearing on the merits" and because this case already had a hearing once before, the ALC's Order has, essentially, granted Respondent a new "trial" via the new hearing. As discussed in the *Morrow* case, to prevent Appellant DMV "from appealing the order immediately would encourage piecemeal litigation and limit [DMV's] appellate remedies." See also, *Knight v. Johnson*, 244 S.C. 70, 135 S.E.2d 372 (1964) (An order of the trial court granting or refusing a new trial, when based solely on an error of law, is subject to review by the Supreme Court); and *Daughty v. Northwestern R. Co. of South Carolina*, 92 S.C. 361, 75 S.E. 553 (1912) (This statute does not undertake to make an order granting a new trial appealable, when it is based upon questions of fact; but it can review orders granting new trials when based upon error of law.).[1] For these reasons, the ALC's Order issued on December 15, 2017 is immediately appealable.

[1] Both the *Knight* case and the *Daughty* cases were decided before the South Carolina Court of Appeals was created on September 1, 1983, therefore, they only make reference to the South Carolina Supreme Court. Application of the *Knight* and *Daughty* cases here, however, is still appropriate given the clear statement in the *Morrow* case that S.C. Code §14-3-330 deals with the jurisdiction of the appellate courts. If the *Morrow* decision was only discussing the appellate jurisdiction of the Supreme Court, it would not have referenced appellate courts.

2) THE HEARING OFFICER DID NOT ABUSE HER DISCRETION IN DENYING APPELLANT'S REQUEST FOR A CONTINUANCE THAT WAS SUBMITTED LESS THAN TWO BUSINESS HOURS PRIOR TO THE SCHEDULED HEARING.

A. Less Than Two Business Days Notice

Rule 10(B), OMVH Rules states that motions filed less than two business days prior to a scheduled hearing will only be granted for good cause shown. This motion for continuance was sent with less than two business hours notice. Thus, the request clearly violated Rule 10(B) OMVH Rules requirement of at least two business days notice and, as a result, the request could only be granted for "good cause shown." Rule 10(B) specifically states "Attorneys must notify the Office as soon as possible when a court conflict occurs." In this case, Respondent's counsel was notified of the conflicting court appearance on April 3, 2017. Despite this advanced notice, Respondent's counsel did not notify the OMVH of the conflicting court appearance until April 24, 2017, three weeks after receiving notice of the conflicting court appearance. The "good cause" standard "primarily considers the diligence of the party seeking the [continuance]." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). "If the party seeking the [continuance] was not diligent, the inquiry should end and the motion [for continuance] should not be granted." *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002). In this case, the entirety of the request for continuance stated "Good Afternoon, I have to be downtown tomorrow for a hearing in Common Pleas. Please continue tomorrow's hearing and let me know when a new date is set. Thanks!" (ALC R. p. 50-52). This e-mail was sent from an e-mail chain regarding the scheduling for the common pleas hearing, which is how the OMVH Hearing Officer knew when Appellant's Counsel became aware of the conflicting court appearance. *Id.*

Significantly, Appellant's Counsel provided no explanation why he had not notified the OMVH of this conflicting court appearance sooner. Thus, at the time the OMVH hearing officer ruled on the request for continuance, there was no evidence that Appellant had exhibited good cause, i.e. diligence, in seeking this continuance and in seeking to deconflict Counsel's court dates. For this reason alone, the OMVH hearing officer's decision does not demonstrate an abuse of discretion and the decision should be upheld.

Compounding the issues in this case, however, is the fact that the OMVH responded to Appellant's continuance request within eleven minutes and notified Respondent's counsel that the continuance request was denied due to the request not being made in a timely manner being made with no explanation as to why the request was not made sooner (ALC R. p. 50). Respondent's counsel did not respond to the OMVH's ruling in any manner, for example, with an explanation as to why the request for continuance was not made sooner. Rather, Respondent and Respondent's counsel simply did not appear for the hearing (ALC R. p. 5-8 and 17).

In fact, the first time Respondent's counsel attempted to provide any reason why the request for continuance was not made sooner was in Respondent's *Motion to Reconsider and for a Stay of the Final Order*, which was not filed until May 15, 2017, twenty days after the hearing. Although Respondent claims a "full and complete explanation was provided to the hearing officer," that explanation left something to be desired. Respondent's "full and complete explanation" merely stated this was a "scheduling oversight" (ALC R. p. 46, ¶9). No further explanation was provided. No description of the "scheduling oversight" was provided. No explanation of how the "scheduling oversight" occurred. No explanation was provided for how Respondent's

counsel would ensure such a "scheduling oversight" would be prevented in the future. Moreover, Appellant's explanation for why the continuance request was not filed sooner was inadequate, at best, and submitted long after the hearing had already taken place. For these reasons, the OMVH hearing officer did not abuse her discretion in denying the continuance request and refusing to reconsider this case.

The ALC relied on the case *Williams v. Bordon's, Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980) to determine that the OMVH hearing officer abused her discretion by denying Respondent's continuance request. The *Williams* case involved a request for continuance of a civil action for damages due to plaintiff's legislative duties. Moreover, the Court in the *Williams* case specifically found that the continuance was timely requested. Even the ALC conceded that Respondent's counsel in this case "notified the Court later than desired due to the scheduling oversight." SCDMV agrees that the *Williams* case generally stands for the proposition that a denial of a motion for continuance can be reversed if it clearly appears there was an abuse of discretion of the trial judge. There are, however, significant factually differences between this case and the *Williams* case that demonstrate the OMVH hearing officer did not abuse her discretion: namely, Respondent's request was not timely and the request was made due to a conflicting court appearance, not legislative duties. Lending credence to this analysis is the fact that numerous South Carolina cases have dealt with the issue of whether a court abused its discretion in denying a continuance request and it appears that only three times has a denial of a continuance been reversed on the basis of a court abusing its discretion

with regard to such a motion.[2] See *Holmes v. Hanysworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 639, 760 S.E.2d 399, 409 (2014) (requesting additional time to prepare and arrange for counsel to be present); *Jackson v. Speed*, 326 S.C. 289, 309, 486 S.E.2d 750, 760 (1997) (Defendant needed to obtain new counsel, but had already been granted a 6 month continuance to obtain new counsel and attorney of record appeared); *Townsend v. Townsend*, 323 S.C 309, 313, 474 S.E.2d 424, 427 (1996) (Father not prejudiced by denial of motion for continuance because replacement counsel had ample time to conduct discovery); *Speers Sand & Clay Works V. American Trust Co.*, 52 F.2d 831, 832 (4th Cir. 1931) (Denial of continuance based on illness of attorney was held to not an abuse of discretion); *Crouch v. Cudd*, 158 S.C. 1, 155 S.E. 136, 138 (1930) (Denial of continuance based on illness of one of defendant's counsel's mothers held not to be an abuse of discretion); *King v. Smith*, 148 S.C. 419, 146 S.E. 237, 237 (1929) (Denial of defendant's motion for continuance beyond term because of attorney's illness was held not to be an abuse of discretion where it appeared that plaintiff might not live beyond the term); *Brunson v. Hamilton Ridge Lumber Co.*, 122 S.C. 436, 115 S.E. 624, 624 (1923) (Denial of continuance request held to not be an abuse of discretion because defendant refused to pay his counsel and counsel stated he would not represent defendant until he had been paid); *Cutter v. Mallard Lumber Co., Limited*, 99 S.C. 231, 83 S.E. 595, 598 (1914) (Denial of continuance request held to not be an abuse of discretion where one of

[2] *Varn v. Geen*, 50 S.C. 403, 27 S.E. 862 (1897) (Error for judge to allow exercise of his discretion with regard to a continuance request to be controlled by the judge's custom to force the client to employ other counsel when their original counsel are too sick to conduct the case); *Hopkins v. Smathers*, 114 S.C. 488 (1920) (Error to not continue case on account of defendant's counsel being a witness and interested in the court of general session; the county court being inferior to the circuit court, whose terms are fixed by law); and the *Williams* case discussed previously.

defendant's attorneys was ill, but another attorney was present and prepared to represent defendant); *Montgomery v. United States Fidelity & Guaranty Co.*, 90 S.C. 283, 71 S.E. 1084, 1085 (1911) (Denial of continuance request held to not be an abuse of discretion where counsel in Georgia stated it was impossible for him to get to the trial because defendant was represented by capable local counsel); *Rice v. Lockhart Mills*, 75 S.C. 150, 55 S.E. 160, 161 (1906) (Denial of continuance request held to not be an abuse of discretion where lead counsel is at court in another county, but knew of the conflicting court appearance, another counsel is ill, but able to participate in the trial, and a third counsel is expected to be absent at the sickbed of his father, but arranges to assist in the trial); *Rhodes V. Southern Ry. Co.*, 68 S.C. 494, 47 S.E. 689, 689 (1904) (Denial of continuance request held to not be an abuse of discretion where one counsel is confined in the hospital and another counsel took part in the trial of the case); *Worth v. Norton*, 60 S.C. 293, 38 S.E. 605, 605 (1901) (Denial of continuance held not be an abuse of discretion where defendant's lead counsel was out of town, but the court agreed to keep the case open for further testimony).

Additionally, undermining the ALC's ruling is the fact that the ALC failed to provide any reasoning behind its' determination the OMVH hearing officer abused her discretion, other than to state that Respondent would be "prejudiced by the denial of his constitutional right of due process" and Respondent's counsel "could not have notified [the OMVH] earlier if he was not 'aware' of the conflict." First, Respondent's counsel did not provide the explanation regarding his "scheduling error" until twenty days after this hearing took place. The OMVH hearing officer, in denying the request for continuance, explicitly stated that "there is no explanation for the delay in requesting the

continuance." That statement was an implicit invitation for Respondent's counsel to explain why he did not request the continuance sooner than April 24, 2017. Despite this, Respondent's counsel did not provide any explanation until twenty days later, in Respondent's motion for reconsideration. Second, Respondent was provided with a hearing within which he could exercise his due process challenge to this implied consent suspension and he and his counsel failed to appear for that hearing despite Respondent's counsel being specifically advised that the hearing had not been continued. Thus, there was no denial of Respondent's right to due process. He was given the hearing he asked for and failed to appear for the same.

Following the ALC's logic in its' opinion in this case, any attorney could wait until literally one (1) minute prior to a scheduled hearing or trial to inform a court that he/she had an appearance in a court with a higher priority for the same date and time, due to a "scheduling error" did not realize they had that conflicting court appearance, and were, as a result, requesting a continuance.[3] Such a holding would essentially eviscerate Rule 601, SCARC, particularly section (C) of that rule. Some level of diligence is required for tracking court appearances to ensure conflicting court appearances are properly noticed to the court with the lessor priority under Rule 601, SCARC. Under the ALC's logic, no such diligence is required.

[3] For example, if an attorney had oral arguments scheduled for the same day and time before the South Carolina Supreme Court and the South Carolina Court of Appeals, he/she could wait until only minutes before the argument was scheduled to begin at the Court of Appeals to inform the Court of Appeals of the conflict, could simply state that he/she had a "scheduling error" causing him/her to not realize he/she had a conflicting court appearance, and, thus, should be entitled to a continuance of the Court of Appeals oral argument.

B. Delayed Notice to OMVH of Conflicting Court Appearance

As stated above, Respondent's counsel knew about this conflicting court appearance on April 3, 2017. At the time Respondent requested a continuance of the April 25, 2017 hearing, no explanation was provided to the OMVH to explain why the request for continuance was filed so late. As stated earlier, OMVH Rule 10(B) requires attorneys to notify the OMVH "as soon as possible when a court conflict occurs." (Emphasis added). Despite knowing about this conflicting court appearance since April 3, 2017, Respondent did not request a continuance in this case until April 24, 2017 at 4:07 p.m., which was not "as soon as possible" as required by Rule 10(B), OMVH Rules.

Additionally, Rule 601, SCACR explicitly states "An attorney who cannot make a scheduled appearance because of the priority established by paragraph (a) of this rule shall notify the affected tribunals **as soon as the conflict becomes apparent**." (Emphasis added). In this case Respondent's counsel did not notify the OMVH of the conflicting court appearance until three weeks after the conflict became apparent and less than 2 business hours prior to the OMVH hearing. Thus, Respondent's counsel did not comply with the requirements of Rule 601(c), SCACR and, as a result, the protection normally provided by Rule 601, SCACR was waived by Respondent's counsel's failure to timely notify the OMVH of the conflicting court appearance.

Moreover, Respondent's motion for continuance was filed late enough that it was a very real possibility that the arresting officer, DataMaster officer, and SCDMV would not receive notice that a continuance had been requested. Certainly, SCDMV did not receive notice of the continuance request until April 25, 2017 at approximately 12:30 p.m. (ALC R. p. 34-39). The fact that there was no response from the Mount Pleasant Police

Department in regard to this request for continuance and that Officers Kittle and Alexander both showed up for the hearing on April 25, 2017 indicates that they also did not receive notice of Respondent's request for a continuance until sometime after this hearing took place on April 25, 2017. It is common knowledge that most police officers do not work a normal 9-5 shift. Most police officers work rotating shifts that change every few weeks. Thus, sending a request for continuance so late prior to this hearing practically guaranteed that Officers Kittle and Alexander would not receive the request for continuance until after this hearing took place. In fact, the request for hearing was *almost* sent late enough that the OMVH offices would have already been closed for the day (the OMVH closes at 5:00 p.m.). Thus, submitting this request for continuance so late is patently unfair to the other parties in this case because it stripped the parties of the opportunity to respond to the continuance request and risked the parties showing up for a hearing that had the possibility of being continued. In this case, of course, the hearing was not continued and went forward as scheduled, but the fact that it was possible the hearing would be continued and the other parties might show up unnecessarily was a direct result and risk of submitting this continuance request so late.

Case law grants judges and hearing officers discretion when determining whether to grant or deny a request for continuance. A review of the case *Brockman v. South Carolina Dept. of Motor Vehicles and Mauldin Police Dept.*, 2014 WL 2895374, 13-ALJ-21-0049-AP (SCALC 2014) reveals that the ALC has considered the issue of continuances requested with less than two business days notice in the past. In the *Brockman* case, the ALC specifically rejected a claim of abuse of discretion for a request of continuance under Rule 601, SCACR because the request for continuance was filed

with less than two business days notice and Appellant was aware of the conflict well before he filed the Motion for Continuance. Thus, the *Brockman* case makes clear that the OMVH hearing officer in this case was well within her discretion to deny Respondent's request for continuance in this case. Also, instructive in this regard is the *Hiller* case, which stated "Nothing in Rule 601, SCACR mandates that one tribunal always be given priority over the other." (Emphasis added). *Joseph W. Hiller, Sr., v. S.C. Dept. of Labor, Licensing and Regulation*, 1999 WL 51899 (1999). Finally, another case which provides guidance on this matter is *S.C. Dept. of Revenue v. Edwin Alewine*, 1997 WL 816208 (1997). The *Alewine* case focused on:

a. the late notice to the ALC of a conflicting General Sessions court appearance (less than 24 hours);
b. the requirement of Rule 601, SCACR that "an attorney must give notice of a scheduling conflict as soon as it becomes apparent;"
c. that Counsel requesting the continuance did not state the date when he was noticed of the Circuit Court trial (notice of the ALC hearing was issued 45 days prior to the hearing);
d. there was no "explanation as to why the request was not made earlier;"
e. the number of prior requests for continuances and the reasons for those requests;
f. that Counsel stated he "did not have anyone in his firm that would be able to attend the hearing for him 'because of the short notice;'" and
g. the amount of delay the previous continuances had created in the case (six months in *Alewine*).

Emphasis in the original. This case shares many similarities to the *Alewine* case. The request for a continuance was sent with less than 24 hours notice, and, in fact, was sent with less than two business hours notice. Respondent's Counsel waited for three weeks after receiving notice of the conflicting court appearance before advising the OMVH of the conflict. No explanation was provided in the request for continuance to explain why the request was not made earlier. Furthermore, when prompted by the OMVH hearing officer to provide an explanation as to why the continuance was not requested sooner, Respondent's counsel failed to provide any response. Additionally, two prior continuances had already been granted in this case and the previous continuances had already caused a nearly 2 ½ month delay in this case. Thus, based on the factors set forth in *Alewine* case and the factual similarities in this case and the *Alewine* case, the OMVH hearing officer was justified in denying this request for continuance and did not abuse her discretion in doing so.

In South Carolina, the grant or denial of a continuance is within the sound discretion of the Hearing Officer and is reviewable on appeal only when an abuse of discretion appears from the record. *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) ("The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record."); *Newman v. Old West, Inc., et al.*, 286 S.C. 394, 334 S.E.2d 275 (1985) (The trial judge's decision to grant or deny a continuance is a matter within his sound discretion.); and *State v. Lytchfield*, 230 S.C. 405, 95 S.E.2d 857 (1957) ("The granting or refusal of a motion for continuance is within the discretion of the trial judge and his disposition of such a motion will not be reversed on appeal unless it is shown that there

was an abuse of discretion to the prejudice of appellant. A multitude of cases to this effect will be found in 7 S.C.Dig., Criminal Law, k586 et seq., p. 504 et seq. and supplement. Review of them shows that reversals of refusal of continuance are about as rare as the proverbial hens' teeth."). In this case, the OMVH Hearing Officer made it clear that she denied the request for continuance because "it appears that Mr. Amey has been aware of the scheduled hearing since April 3, and there is no explanation for the delay in requesting the continuance" (ALC R. p. 50). Thereafter, Appellant provided no explanation for the delay in requesting the continuance until long after the hearing had taken place. Moreover, the explanation provided in the motion for reconsideration was minimal, as explained in further detail above. For these reasons, Respondent failed to show that the OMVH hearing officer abused her discretion.

Respondent asserted in his ALC appeal that he was denied his "constitutional right to a hearing and of due process, as guaranteed by the Constitutions of South Carolina and the United States." This statement is patently false. Respondent requested a hearing to challenge his implied consent hearing. That hearing was scheduled for April 25, 2017. As outlined in detail above, Respondent's counsel waited until the very last moment to request a continuance of the April 25, 2017 hearing and, when that continuance request was denied Respondent and his Counsel failed to appear for the hearing. As seen in the record at pages 5-8, the hearing requested by Appellant took place, but Appellant and his Counsel failed to appear for that hearing. Thus, no due process rights were violated.

3) ADDITIONAL SUSTAINING GROUNDS.

The South Carolina Supreme Court has said, "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

A. Insufficient Call To Court

Respondent's request for continuance submitted on April 24, 2017 at 4:07 p.m. violated Rule 10(B), OMVH Rules because it did not include the presiding judge's name and telephone number. This failure meant that if the OMVH hearing officer wanted to speak with the presiding judge in the conflicting case, to make scheduling arrangements for example, the OMVH hearing officer was unable to do so. Because of Respondent's failure to provide all of the information required by Rule 10(B), OMVH Rules when making a continuance request due to a conflicting court appearance, the OMVH hearing officer was correct to deny the continuance request and did not abuse her discretion in doing so.

B. Motion Violated Rules in Such a Way the SCDMV Was Unable to Respond to the Motion in a Substantive Manner

Respondent's request for continuance submitted on April 24, 2017 at 4:07 p.m. violated Rule 6, OMVH Rules because it did not contain the caption of the OMVH case, a brief description of the document (for example, "Motion for Continuance"), or the docket number assigned to the case by the OMVH. This failure caused significant confusion on SCDMV's part because SCDMV was unable to determine which case Respondent was asking for a continuance of, as evidenced by SCDMV's e-mail on Tuesday, April 25, 2017 at 12:31 p.m. (ALC R. p. 34-36). Because SCDMV was unable

to determine which case Respondent was asking for a continuance in, SCDMV was unable to provide a substantive response to the request for continuance.[4] Thus, these violations of Rule 6, OMVH Rules stripped SCDMV of its' opportunity to provide a substantive response to Respondent's continuance request and when SCDMV sought clarification from Respondent's counsel about the continuance request, Respondent's counsel responded "I just replied from a previous email on this case. Sorry about that." Thus, no explanation was provided to explain to SCDMV that Respondent's counsel was seeking a continuance of an OMVH case due to a conflicting Common Pleas appearance.

C. Harm to the State

Further, the State would have been harmed if Respondent's motion for continuance or motion for reconsideration was granted in that:

a. Officers Kittle and Alexander of the Mount Pleasant Police Department would have to prepare for and appear a second time for a second hearing;

b. The OMVH would have to reschedule this case, taking up more court time; and

c. Both a and b above will cost the State of South Carolina and the Mount Pleasant Police Department additional funds and employee time.

All of these are consequences that could have been easily avoided if Respondent had submitted his request for a continuance shortly after receiving notice of the conflicting court appearance.

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[4] SCDMV acknowledges that due to the timing of Appellant's request for continuance, the time the hearing was scheduled to take place, and the time SCDMV actually received Appellant's request for continuance, any substantive response SCDMV would have sent regarding Appellant's continuance request would have come after the scheduled hearing in this case.

CONCLUSION

For the reasons set forth above, the order of the ALC is immediately appealable, should be overturned, and the OMVH Order of Dismissal issued May 3, 2017 reinstated in full.

Respectfully submitted,

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