

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Toyota of Greer,

Docket No. 18-ALJ-21-0011-AP

Appellant,

vs.

ORDER

South Carolina Department of Motor Vehicles,

Respondent.

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SC Court of Appeals

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed on January 11, 2018, by Toyota of Greer (Appellant). Appellant seeks review of a Final Order and Decision issued on December 12, 2017, by the South Carolina Department of Motor Vehicles' Office of Motor Vehicle Hearings¹ (Department), sustaining the Appellant's dealer license suspension. This Court has jurisdiction to hear this matter pursuant to Section 1-23-660(D) of the South Carolina Code. S.C. Code Ann. § 1-23-660(D) (Supp. 2017). For the reasons below, the Department's Final Order and Decision is affirmed.

BACKGROUND

Within ten months' time, three complaints relating to Appellant's failure to timely deliver title were submitted to the Department. On July 11, 2016, Scott Bocoock (Complainant No. 1) filed a complaint with the Department alleging that he purchased a vehicle at auction from Appellant on February 26, 2016, but had not received the title as of the date of the complaint (one-hundred and thirty-five days after the purchase). Complainant No. 1 was provided a Bill of Sale which contained false information. It indicated that the automobile was free of all liens and encumbrances, when it was not. One of Appellant's title clerks testified that she had a check prepared for the title lender the day before the sale, and that the signature on the Bill of Sale on behalf of Appellant was not authorized. Regardless, it was not corrected and allowed to become part of the Department's official records of the sale through the agency of the auction or otherwise. While Appellant ultimately issued the check to the title lender and delivered the title to the auction, it was not until one-hundred and forty-three days had passed since the vehicle's purchase and after

¹ The Office of Motor Vehicles is referenced herein as "OMVH," and is a division of the Department of Motor Vehicles.

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the complaint was filed. Rather than admit error, Appellant said that the vehicle was a “piece of junk” and had nominal value and that, if there was any fault, it fell on Complainant No. 1 who should have returned the vehicle through the rules of the auction rather than insisting on receipt of the title.

On April 26, 2017, Tonya McAllister (Complainant No. 2) filed a complaint with the Department stating that she purchased a vehicle from Appellant on February 10, 2017, and had not yet received the title. Records indicate that on January 3, 2017, an individual who traded in the vehicle signed a power of attorney authorizing Appellant to sell it. The individual represented that there was no lien on the vehicle and that he would provide a duplicate title which he did not do. In connection with the sale of the vehicle to Complainant No. 2, an Affidavit and Notification of Sale of Motor Vehicle was executed which contained a statement that the only lien holder was Wells Fargo Dealer Services, the lender that financed the vehicle to Complainant No. 2. No other lienholder was noted, although a lien of record existed. While it had been paid, the lien had not been released. During the Department’s investigation, Appellant’s title clerk advised that the Department’s Computerized Vehicle Registration (CVR) records indicated that someone else owned the vehicle other than the person who had traded it. The title clerk testified that she repeatedly tried to contact the person who traded in the vehicle without success until mid-April when she secured the assistance of a salesman. Appellant was ultimately able to get a release from the former lien holder and secure a duplicate title in North Carolina, but did not know the true status of the title until it enlisted the aid of a North Carolina dealership. Thus, when Appellant sold the vehicle to Ms. McAllister and the Affidavit & Notification of Sale of Motor Vehicle was signed, Appellant had no idea whether there was a lien on the vehicle.

On June 28, 2016, Sheila Gilliam (Complainant No. 3) filed a complaint with the Department stating that she purchased a vehicle from Appellant on March 29, 2016, and had not yet received the title. Unbeknownst to Complainant No. 3, there was a lien of record held by the finance company that financed the vehicle to its prior owners. Records indicate that on January 21, 2016, Appellant contracted with two individuals to trade in their vehicle. Appellant had those individuals execute a power of attorney authorizing Appellant to sell the vehicle. Appellant made a title inquiry on February 4, 2016, and was aware that a finance company had a lien on the vehicle. Appellant had forty-five days to clear the title before selling the vehicle to Complainant No. 3 but it did not. It sold the vehicle to Complainant No. 3 with knowledge of the lien. An Affidavit and

Notification of Sale of Motor Vehicle was executed in connection with the sale of the vehicle to Complainant No. 3 and the lienholder information was left blank despite Appellant's knowledge. Appellant ultimately cleared the title and delivered it to the Department on July 6, 2016, ninety-nine days after Complainant No. 3's purchase of the vehicle, and one-hundred fifty-three days after Appellant was aware of the existence of the lien.

On June 27, 2017, the Department issued an Official Notice of Dealer License Suspension (Notice of Suspension) to Appellant detailing three violations of "Engaging in any action which causes damage to any party or to the public. (Failure to deliver title within 45 days of date of sale)." Four points had been assessed against Appellant for each of three violations. The Department provides for a seven-day suspension upon a dealer's first accumulation of twelve points. See, SCDMV Procedure DE-002-Dealer Sanctions, Section III, G.4.

An evidentiary hearing was held on October 2, 2017. Both parties appeared with counsel and participated in the hearing. After considering the evidence and testimony presented, the hearing officer concluded that Appellant was aware of the requirement that a title or registration had to be delivered to the customer within forty-five days after the sale, yet it failed to do so. He further found that each of the complainants were damaged by Appellant's acts by being unable to legally drive or sell the vehicles. The hearing officer sustained the Department's suspension of Appellant's dealer license. This appeal followed.

ISSUE

Whether the decision of the Department is supported by substantial evidence, and/or whether the decision is affected by error of law.

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. S.C. Code Ann. § 1-23-600 (Supp. 2017). The ALC has jurisdiction to hear appeals of OMVH decisions pursuant to S.C. Code Ann. § 1-23-660(D) (Supp. 2017). As the OMVH is an "agency" under the South Carolina Administrative Procedures Act (APA), the APA's standard of review governs appeals from the decisions and orders of the APA. S.C. Code Ann. §§ 1-23-310(2) and 1-23-380 (Supp. 2017); See also Byerly Hosp. v. South Carolina State Health & Human Services Finance Com'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). Section 1-23-380(5) of the South Carolina Code provides the standard of review to be utilized by appellate bodies, including the ALC, when reviewing agency decisions:

(5) 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 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.

This section requires the ALC to apply the “substantial evidence” rule. See e.g., Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 467 S.E.2d 913 (1996); Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm’n, 282 S.C. 430, 319 S.E.2d 695 (1984). A decision is supported by “substantial evidence” when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best W. Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d 63 (Ct. App. 1984). The possibility of drawing two inconsistent conclusions from the evidence does not mean that the agency’s conclusion was unsupported by substantial evidence. Id. See also, Waters, 321 S.C. at 227, 467 S.E.2d at 917. The well-settled case law in this State has also interpreted the rule to mean that a decision will not be set aside simply because reasonable minds may differ on the judgment. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct and will be set aside only if unsupported by substantial evidence. Rodney v. Michelin Tire Co., 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996) (citing Kearse v. State Health and Human Serv. Fin. Comm’n, 318 S.C. 198, 456 S.E.2d 892 (1995)). Thus, the party challenging an agency action has the burden of proving convincingly that the agency’s decision is unsupported by substantial evidence. Waters, 321 S.C. at 226, 467 S.E.2d at 917 (citing Hamm v. AT&T, 302 S.C. 210, 394 S.E.2d 842 (1994)).

Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant, 319 S.C. at 353, 461 S.E.2d at 391 (citing Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984)). However, “[d]etermining the proper interpretation of a statute is a question of law, and [an

appellate court] reviews questions of law de novo.” Palmetto Co. v. McMahon, 395 S.C. 1, 3, 716 S.E.2d 329, 330 (Ct. App. 2011) (citation omitted).

DISCUSSION

Applicable Law

Several South Carolina Code provisions in Chapters 15 and 19 of Title 56 which pertain to the regulation of dealers, and the protection of titles and interests in motor vehicles are applicable in this case. Section 56-19-210 provides that except for dealers selling or offering a new vehicle for sale for which there is a manufacturer’s certificate of origin issued to the dealer, it is unlawful for any person to sell or offer for sale or mortgage in this State, a vehicle that is required to be registered and licensed in South Carolina unless a valid certificate of title has been issued. S.C. Code Ann. § 56-19-210 (2018). Section 56-19-240, which outlines the form and content for applications for certificates of title, states in part that “If the application refers to a vehicle purchased from a dealer, it **shall** contain the name and address of any lienholder holding a security interest created or reserved at the time of the sale and the date of his security agreement and be signed by the dealer as well as the owner, and the dealer promptly shall mail or deliver the application to the department...” S.C. Code Ann. § 56-19-240(C) (2018) (emphasis added).

Section 56-19-360 addresses the responsibilities of a transferor and transferee as to title upon the sale of a motor vehicle and provides:

If an owner, manufacturer or dealer transfers his interest in a vehicle other than by the creation of a security interest, he shall, at the time of the delivery of the vehicle, execute an assignment and warranty of title to transferee in the space provided therefor on the certificate or as the Department of Motor Vehicles prescribes and cause the certificate and assignment to be mailed or delivered to the transferee or to the Department.

Except as provided in Section 56-19-370, the transferee shall, promptly after delivery to him of the vehicle, execute the application for a new certificate of title in the space provided therefor on the certificate or as the Department prescribes and cause the certificate and application to be mailed or delivered to the Department.

Except as provided in Section 56-19-370, and as between the parties, a transfer by an owner is not effective until the provisions of this section have been complied with.

S.C. Code Ann. § 56-19-360 (2018).

Section 56-19-370 of the South Carolina Code provides as follows:

If a dealer buys a vehicle and holds it for resale and procures the certificate of title from the owner within forty-five days after delivery to him of the vehicle, he need not send the certificate to the Department of Motor Vehicles, but, upon transferring the vehicle to another person other than by the creation of a security interest, promptly **shall** execute the assignment and warranty of title by a dealer, showing the names and addresses of the transferee and of any lienholder holding a security interest created or reserved at the time of the resale and the date of his security agreement, in the spaces provided on the certificate or as the department prescribes, and mail or deliver the certificate to the department with the transferee's application for a new certificate.

S.C. Code Ann. § 56-19-370 (2018) (emphasis added).

When Sections 56-19-210, -240, -360, and -370 are read together, they lead to the inevitable conclusion that while private buyers and sellers must trade from a current title with near immediate transfer or assignment of title, dealers have limited relaxation of this requirement. Because dealers must arrange for the payment of liens and for the signatures of buyers and sellers on odometer statements, often by way of secured powers of attorney, they are allowed up to forty-five days for providing title and means of registration. There is no authorization for a dealer to exceed the forty-five days before title or registration is provided, which is also the maximum amount of time allowed for dealer issued temporary license plates under Section 56-3-210(C). If not registered after forty-five days after purchase, the buyer has no legal means of driving the vehicle he or she purchased. If it is driven, the drivers are subject to being arrested or ticketed if their temporary license plates have lapsed or been made to appear that they were valid beyond the forty-five days.

Section 56-15-30 provides that unfair methods of competition and unfair or deceptive practices as defined in Section 56-15-40 are unlawful.² S.C. Code Ann. § 56-15-30 (2018). Section 56-15-40(1) states that it is a violation of paragraph (a) of Section 56-15-30 for any motor vehicle

² Section 56-15-30 further provides that in construing whether an act or practice constitutes an unfair method of competition, or an unfair or deceptive act or practice, courts may be guided by the definitions in the Federal Trade Commission Act (15 U.S.C. A. § 45).

dealer to engage in any action which is arbitrary, in bad faith, or unconscionable, and which causes damage to any of the parties or the public. S.C. Code Ann. § 56-15-40 (2018).³

Finally, Section 56-15-350 provides that any license issued under Title 15 including those issued to dealers, may be denied, suspended, or revoked, if the applicant or licensee or any agency of the applicant or licensee acting for the applicant or licensee is determined to have committed any of the acts outlined in the paragraphs enumerated in Section 56-15-350. A license may be suspended for violating any provision of Chapter 15. S.C. Code Ann. § 56-15-30 (2018). Section 56-15-350 sets no statutory limit on the Department's decision regarding the sanction, be it denial, cancellation, suspension, or revocation if any of the statutory violations are established to exist. The Department has adopted Procedure DE-002 in an effort to standardize the implementation of sanctions.

Analysis

Appellant raises many theories and arguments which obfuscate the real issue, which is that in each of the three sales involved, Appellant failed to perform its most fundamental duty owed to its customers. It failed to timely provide its customers with title and registration. While Appellant claims that it did everything that it could to facilitate procurement of titles and registration for its customers, in none of these instances did those actions occur until after the customers had filed complaints with the Department and an investigation commenced. It was within the hearing officer's discretion to infer that Appellant should have taken additional prompt action.

During the hearing and in its appellate brief, Appellant expended an inordinate amount of time focusing on the argument that its actions in failing to timely deliver titles to its buyers were not willful and thus, are not sanctionable. Procedure DE-002 provides that the Department may assess a four-point violation for each willful failure to deliver title to a buyer or the Department within forty-five days of the date of sale. The Department's policy states:

“The failure to deliver title violation” is not considered “willful” if the dealer can provide a written statement, substantiated by a Dealer Licensing and Audit Unit

³ “Arbitrary conduct is readily definable and includes acts which are unreasonable, capricious or nonrational; not done according to reason or judgment; depending on will alone).” Brown v. Dick Smith Nissan, Inc., 414 S.C. 101, 105, 777 S.E.2d 208, 210-211 (2015) (quoting Taylor v. Nix, 307 S.C. 551, 555, 416 S.E.2d 619, 621 (1992)). Bad faith has been defined as the opposite of good faith. Brown v. Dick Smith Nissan, Inc. While it may include actual or constructive fraud or an intent to mislead, it also includes neglect or refusal to fulfill some duty or some contractual obligation. Id.

agent, identifying a prior seller or lien holder who has failed to deliver the title as required by law.

DE-002-Dealer Sanctions, Section III, C.2.

Here, “willfulness” does not appear to be the basis for the Department’s sanction, or an issue in this case. The word, “willful” was not used by the Department in its two sanctions letters⁴ nor in its Notice of Suspension. The Department specifically stated that Appellant’s license was being suspended for “Engaging in any action which causes damage to any party or to the public. (Failure to deliver title within 45 days of date of sale).” Also, testimony elicited from the Department evidences that its witnesses did not believe Appellant’s conduct to be willful, and that its investigating agent accepted at “face value” the dealer’s statements identifying prior sellers or lienholders who failed to deliver title by law. Appellant’s arguments as to willfulness are irrelevant.⁵

Appellant argues that the hearing officer improperly labeled Appellant’s violations. Procedure DE-002B’s Dealer Performance Violation Sanction Table contains an offense for “Engaging in any action which causes damage to any party or to the public” and provides for a sanction range of six points to revocation.⁶ It also includes a violation for “Willful failure to deliver title to buyer or department within 45 days of sale,” which carries a four-point violation. Appellant argues that the hearing officer’s order improperly suggests that “failure to deliver title” can be considered a lesser included violation even though it is delineated as a separate offense. The Court disagrees.

In short, Appellant’s position is that because the Department assessed fewer points against it for each of the three violations than what was specifically outlined in the sanction table, it should not be held accountable. While Appellant clearly failed to deliver title to the three complainants as required by law, its actions caused damage to the parties and the public which is what was charged in the Notice of Suspension. The hearing officer correctly held that Procedure DE-002 contains no

⁴ Appellant claims that the Department erred in only sending it two sanction letters, rather than three. This has no merit. Appellant was clearly on notice of three violations and the nature of those violations as outlined in the Notice of Suspension. It was afforded and fully availed itself of the opportunity to litigate their propriety. In fact, Appellant noted several times in the record that it was present at the hearing to defend against only the three incidents outlined in the notice.

⁵ In his findings of fact, the hearing officer concluded that Appellant acted willfully. In his conclusions of law however, he noted that the Department did not establish willfulness so as to allow for penalties pursuant to Procedure DE-002’s performance violation sanction table for “Willful failure to deliver title to buyer or department within 45 days of date of sale.”

⁶ The hearing officer’s order inadvertently stated that this offense provided for a sanction of up to six points.

provision that asserts that the Department is limited to any category. The Department's assistant manager and supervisor of its dealer and licensing audit unit testified that multiple violations could arise from a single complaint, and that a particular act could potentially be regarded as more than one violation listed on the sanction table depending upon the circumstances. Appellant was clearly not prejudiced by the Department assigning fewer sanction points per violation than those called for by the table for three violations for "Engaging in any action or which causes damage to any party or to the public."

Appellant also argues that the hearing officer improperly found that Procedure DE-002 was not mandatory. It does not appear to the Court that the hearing officer made this specific finding and the Court questions whether the issue is properly before it. Nevertheless, while Procedure DE-002 is a guideline used by the Department to facilitate uniformity of sanctions within the Department, it is not law. It has never been submitted to the General Assembly for promulgation as a regulation. It is an internal procedure referenced within its text as guidelines "To set forth guidelines for the application and administration of sanctions for dealers who are not in compliance with the minimum statutory requirements or who have willfully committed violations of the law." (emphasis added). Appellants have cited to no legal authority to suggest that any alleged deviation or failure by the Department to strictly observe an internal procedure invalidates an otherwise legal agency action. The Department's general practice is not tantamount to a legal requirement. See Joseph v. S.C. Dep't of Labor, Licensing & Regulation, 417 S.C. 436, 790 S.E.2d 763 (2016) (policy or guidance issued by agency other than in a regulation does not have the force or effect of law). The only laws involved in this matter are Sections 56-19-210; -240; -360; and -370, making the failure to title within forty-five days a clear violation of law; Section 56-15-350 which gives the Department discretion to sanction dealers for any violation listed therein; and Sections 56-15-30 and -40 declaring unfair or deceptive acts or practices within the scope of the chapter unlawful.

Substantial evidence supports the hearing officer's findings that the complainants and public were harmed by Appellant's actions, and that Appellant engaged in unfair or deceptive acts. In each of three instances, Appellant failed to timely deliver title as required by law. None of the titles were delivered until after complaints had been filed. All title deliveries far exceeded the forty-five-day period permitted by law; two of the delays exceeded twice the statutory minimum, and in another case, the wait was more than three times the maximum time permitted. In making his findings of fact and conclusions of law, it was within the hearing officer's discretion to consider

the length of the delays. Without titles, the complainants were not legally permitted to drive their vehicles beyond forty-five days, and could not sell them had they elected to do so. The record is devoid of evidence that Appellant offered any of these customers the opportunity to return their vehicles in exchange for the purchase price, a loaner or rental vehicle, or anything else to mitigate against the lack of title and registration. Complainants were left without recourse other than to file complaints with the Department.

In argument, Appellant's counsel suggested that the dealership offered to buy back the vehicle from Complainant No. 1. No testimony or actual evidence of this offer is otherwise found in the record and is contradicted by Complainant No. 1's testimony in which he stated that he never received any communication from Appellant, and that he personally tried to contact Appellant prior to filing his complaint and still did not receive a response.⁷ Complainant No. 1 testified that he ultimately had to sell the vehicle at a loss because he did not have the title.

While the Department's investigator accepted Appellant's explanations that other parties were to blame for its failure to timely secure titles, this only served to vindicate Appellant of a finding of willfulness. It did not absolve Appellant of its responsibility. Appellant's actions in repeatedly failing to timely deliver title resulted in damage to complainants and the public. It was within the hearing officer's discretion to draw the conclusion that Appellant's actions were arbitrary, unreasonable, capricious, or non-rational.

The hearing officer's finding that the three Bills of Sales and Affidavits and Notifications of Sale contained misleading statements regarding the existence of liens is also supported by the record. Evidence indicates that in those two instances, Appellant had some expectation that the liens would be satisfied based on near contemporaneous payment. In another instance, Appellant sold a vehicle when it was unsure of the status of any lien on the vehicle, and the identity and whereabouts of the true owner. Appellant had a myriad of excuses as to why these occurrences were not its fault. In one instance, Appellant cast blame on the auction house that sold the vehicle stating that it improperly completed the Bill of Sale, and the signature was not authorized. While Appellant tried to distance itself from the auction, the auction was not the seller. See Williams v. Toyota of Jefferson, Inc., 655 F.Supp. 1081 (E.D. La. 1987) (an auction was not the transferor of

⁷ It is appalling that Appellant blamed Complainant No. 1 for its failure to deliver title. The fact that Complainant No. 1 could have returned the vehicle to the auction pursuant to the auction rules, does not absolve Appellant of its responsibilities under State law.

a vehicle but merely provided the means – an auction services – by which the transferor of the vehicle); Indus. Indemnity v. Arena Auto Auction, 638 F.Supp. 1030 (D. Minn. 1986) (auction selling vehicle to a dealer on behalf of another dealer had no ownership interest and was not a transferor). The auction was Appellant’s agent on the sales document and as a merchant, Appellant still had a duty to warrant title under Section 36-2-312. S.C. Code Ann. § 36-2-312 (2003). Regardless of phraseology, the document clearly called for disclosure of known liens.

Appellant’s remaining arguments were either not properly preserved or are without merit. It is axiomatic that an issue cannot be raised for the first time on appeal and must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). If the non-prevailing party has raised an issue in the lower court which was not ruled upon, a party must successfully file and serve a motion to alter or amend judgment in order to preserve the issue for appellate review. I’on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Moreover, even without consideration of any of the hearsay which may truly be objectionable, there is ample other evidence to support the hearing officer’s conclusion. Id.; Rule 220(c), SCACR (an appellate court may affirm for any reason appearing in the record on appeal).

ORDER

Based on the foregoing,

IT IS HEREBY ORDERED that the decision of the South Carolina Department of Motor Vehicles is **AFFIRMED**.

AND IT IS SO ORDERED.



Deborah Brooks Durden, Judge
S.C. Administrative Law Court

July 31, 2018
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, 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).



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

July 31, 2018
Columbia, South Carolina

FILED

July 31, 2018

SC ADMIN. LAW COURT