EXHIBIT A

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department of Motor Vehicles and Berkeley County Sheriff's Office, Appellants, vs. Erika R. Willey, Respondent, of which South Carolina Department of Motor Vehicles is, Appellant, And Erika R. Willey, Respondent.	Docket No. 18-ALJ-21-0103-AP **ORDER**

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed on March 7, 2018, by the South Carolina Department of Motor Vehicles (Department). The Department seeks review of a Final Order and Decision issued on February 7, 2018, by the South Carolina Department of Motor Vehicle's Office of Motor Vehicle Hearings (OMVH), dismissing the matter and ordering that the Department rescind Erika R. Willey's (Respondent) suspension and reinstate her driving privileges. 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 those reasons below, OMVH's Final Order and Decision is affirmed.

BACKGROUND

On July 1, 2017, Respondent was arrested under suspicion of driving while under the influence. Respondent was asked to submit to a breath, blood, or urine test pursuant to Section 56-5-2950. S.C. Code Ann. § 56-5-2950 (2018). Upon her refusal, she was given an MV-65 Notice of Suspension by the Berkeley County Sheriff's Office. On October 9, 2017, the Department received notice of the incident from law enforcement. On October 10, 2017, the Department posted the suspension and issued a letter to Respondent advising of the suspension. On November 9, 2017,

Respondent requested a contested case hearing before the OMVH challenging the suspension of July 1, 2017.

On November 17, 2017, the Department filed a Motion to Dismiss the contested case hearing on the basis that Respondent's request for the hearing was untimely. On December 13, 2017, the OMVH hearing officer issued an order denying the Department's motion to dismiss and finding that Respondent's request was timely. The OMVH hearing officer concluded that based upon the circumstances in the case, the suspension notice was not issued to Respondent until the Department issued its notice of suspension on or after October 10, 2017. It was ordered that the contested case hearing proceed as scheduled.

A hearing was held on January 30, 2018. Respondent was present, but no representative from the Berkeley County Sheriff's Office appeared. Pursuant to Rule 13[1] of the Rules of Procedure for OMVH hearings, the hearing officer issued a decision on February 7, 2018, dismissing the matter. The hearing officer also ordered that the suspension of Respondent's driver's license be rescinded, and that her driving privileges be reinstated. On February 12, 2018, the Department filed a motion for reconsideration which was denied on March 1, 2018. This appeal followed.

On October 2, 2018, Appellant filed a motion to resolve the appeal adversely to Respondent based upon Respondent's failure to timely file and serve Respondent's Brief. ALC Rule 38 provides that "an administrative law judge may... resolve the appeal adversely to the offending party for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided in these rules or by order of the Court." Such a sanction is discretionary. The Court denies Appellant's motion.

ISSUE

Whether the OMVH hearing officer's decision finding that Respondent timely requested a contested case hearing is supported by substantial evidence, and/or 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

[1] Rule 13 provides in part that "A hearing officer may dismiss a contested case or dispose of a contested case adverse to a defaulting party. A default occurs when a party fails to plead or otherwise prosecute or defend, fails to appear at the hearing without the proper consent of the hearing officer ..."

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 Comm'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:
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> (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

Section 56-5-2951(B)(2) provides that a person may request an administrative hearing within thirty days after the issuance of the notice of suspension. S.C. Code Ann. § 56-5-2951 (2018). Rule 4(B) of the Rules of Procedure for the Office of Motor Vehicle Hearings provides:

> Unless otherwise provided by statute, a request for a contested case hearing must be filed within thirty days after actual notice of the Department of Motor Vehicles' determination.

The Department argues that the OMVH hearing officer erred in concluding that it had jurisdiction over Respondent's appeal. The Department submits that because Respondent was given a copy of the MV-65 Notice of Suspension on July 1, 2017, Respondent's request for a contested case hearing on November 9, 2017, was untimely. Here, there is substantial evidence in the record to support the OMVH hearing officer's factual finding that under the circumstances of this case, notice of suspension was not given until the Department issued its "Official Notice" of October 10, 2017, advising Respondent of the same.

Respondent asserted that in July of 2017, she contacted the Department in person and by telephone, and was advised that the Department did not have her implied consent suspension in its system. Respondent stated, "I was unable to apply for a temporary alcohol license or put in a request for the hearing until 10/10/17,"[2] which is when the Department posted the suspension. In response, the Department stated that it maintains customer contact records that reflect

[2] Moreover, Respondent and other drivers should not continue to be placed at a disadvantage and bear the consequences as a result of the Department's failure to timely and effectively carry out its responsibilities. See Hipp v. S.C. Dept. of Motor Vehicles, 381 S.C. 323, 673 S.E.2d 416 (2009) (imposition of suspension of driver's license for twelve-year old conviction for driving under the influence would be manifest denial of fundamental fairness and would violate driver's right to due process where driver bore no fault for delay by the Department); Wilson v. S.C. Dept. of Motor Vehicles, 419 S.C. 203, 419 S.E.2d 541 (Ct. App. 2017) (five-year delay between DUI conviction and the Department's suspension of driver's license violated due process standards of fundamental fairness).

Respondent's only contact with the Department was a visit made by Respondent on July 3, 2017 (although the Department speculates that it was for a different purpose), and a telephone call made on December 5, 2017. The hearing officer clearly placed more weight on Respondent's declarations, and it is not within the discretion of this Court to substitute its judgment for that of the hearing officer.

The hearing officer also noted that according to Respondent's driving record[3] submitted with her reply to the Department's motion to dismiss, Respondent still had a temporary alcohol license until August 9, 2017, at which time the Department issued Respondent a regular driver's license.[4] The Department maintains that Respondent was only able to get a license because it was unaware of the MV-65 Notice of Suspension dated July 1, 2017, and states that "Implied consent and BAC violations always have a delay between the date the MV-65 is actually issued to the driver and when that suspension is entered into the SCDMV's Phoenix system"[5] as law enforcement officers mail the MV-65 Notice of Suspension to the Department. Through no fault of Respondent, the delay in time between the incident and the Department's receipt and posting of it was approximately one-hundred days. The implied consent suspension was not entered until October 10, 2017, the same day on which it mailed Respondent "Official Notice" of her suspension. Upon receipt of the "Official Notice," Respondent timely filed her appeal. While another conclusion may have been drawn from the same facts, it does not mean that the hearing officer's findings were not supported by substantial evidence. Bilton v. Best W. Royal Motor Lodge, supra; Lark v. Bi-Lo, supra.

The remaining arguments raised in the Department's brief were raised to the hearing officer in the Department's motion for reconsideration. The hearing officer was unpersuaded by those arguments, as is this Court. The Department has failed to meet its burden of convincingly proving that the hearing officer's order was without evidentiary support, is arbitrary, capricious, or erroneous as a matter of law. Hamm v. S.C. Public Service Comm'n, 294 S.C. 320, 364 S.E.2d 455 (1988).

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[3] Respondent's ten-year driving record was not included in the record on appeal, but the Court acknowledges that it was part of the record in the contested hearing.

[4] The Department maintains that the only reason Respondent was able to secure a temporary alcohol license is because it was unaware of the MV-65 Notice of Suspension that was given to Respondent on July 3, 2017.

[5] Emphasis in original.

ORDER

Based on the foregoing,

IT IS HEREBY ORDERED that Appellant's motion to resolve the appeal adversely to Respondent is **DENIED**; and

IT IS ALSO ORDERED that the decision of the South Carolina Department of Motor Vehicles' Office of Motor Vehicle Hearings is **AFFIRMED**.

AND IT IS SO ORDERED.

Deborah Brooks Durden

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

November 6, 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

November 6, 2018
Columbia, South Carolina